The Style of a Skeptic: The Opinions of Chief Justice Roberts

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INTRODUCTION

President George W. Bush's nomination of John G. Roberts, Jr. to fill retiring Justice Sandra Day O'Connor's Supreme Court seat unleashed a storm of speculation about the likely substance of his jurisprudence. That storm intensified when, following the death of Chief Justice William Rehnquist, Roberts was designated to fill the center seat instead. Although Roberts's résumé, including his experience as a White House counsel and Deputy Solicitor General in two Republican administrations, clearly marked him as a conservative,[1] it was generally agreed that his opinions as a circuit court judge provided few clues to his positions on the most divisive issues likely to come before the Supreme Court.[2] Overlooked,

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1. Roberts served as Special Assistant to the Attorney General and as Associate Counsel to the President in President Ronald Reagan's administration and as Principal Deputy Solicitor General in President George H.W. Bush's administration. Biographies of Current Members of the Supreme Court, *available at* www.supremecourtus.gov [hereinafter Supreme Court Biographies].

2. According to a story that appeared in the Washington Post shortly after his nomination, "Roberts's short time on the bench, coupled with the relative paucity of his writings, has left critics and potential supporters with little by which to judge how he will vote on the Supreme Court." R. Jeffrey Smith & Jo Becker, *Record of Accomplishment—And Some Contradictions,* WASH. POST, July 20, 2005, at A1. A story published the same day in USA Today made the same point: "Roberts' limited experience as a federal appeals judge—scarcely two years and about 40 largely noncontroversial opinions—gives few clues to his legal philosophy." *Does Roberts Represent Mainstream Law, Values?*, USA TODAY, July 20,

however, in the speculation about the direction of the nominee's future jurisprudence was another aspect of his performance on the bench, one on which his lower court record would have been surprisingly illuminating: Roberts's judicial personality.

As I have elsewhere used the term,[3] a judicial personality is the voice that a judge crafts from a range of rhetorical choices including—among numerous other elements—diction, metaphor, syntax, allusion, and tone. In this era of opinion drafting by multiple law clerks, it is far rarer than it once was for a judge to develop a distinctive voice that expresses a consistent attitude toward the business of decision making. Roberts, however, is one of those infrequent exceptions. From his first opinion on the Court of Appeals for the District of Columbia Circuit, Roberts has emerged as a confident stylist who deliberately selects the word, the image, the tone that will convey not just a legal position but a personal perspective as well.

In his court of appeals opinions, most of them unanimous rulings on relatively narrow issues of statutory interpretation, Roberts favors informal diction and a lightly ironic tone that tend to humanize otherwise dry institutional issues. He engages the reader through a range of strategies, from figurative language to syntactical asides, suggesting that even the technical subject of administrative law is rooted in human experience as well as regulatory doctrine. The Supreme Court docket has provided Roberts with a richer and more varied set of legal problems, and in his first term he seems at times to be feeling his way toward a voice that retains some of the conversational qualities of his earlier opinions while acknowledging the added dignity of the high court. It is principally in his dissents and concurrences that Roberts has expressed most fully his judicial personality, countering the majority's abstract theories with his own perspective on law as a reflection of the realities of human experience.

This Article will analyze Roberts's rhetorical choices, first in his court of appeals opinions and then in the opinions from his first Supreme Court term. That analysis reveals the new Chief Justice as a careful and detached stylist who favors experience over theory in his opinions and who locates himself as the heir to a distinguished tradition of judicial skepticism.

I. SHAPING A JUDICIAL PERSONALITY: ROBERTS AS CIRCUIT COURT JUDGE

When Roberts joined the Supreme Court as its seventeenth Chief Justice on September 29, 2005, he brought with him slightly more than two years of judicial experience as a member of the Court of Appeals for the District of Columbia Circuit.[4] In that brief tenure, Roberts authored forty-eight opinions: forty-three for his court, two concurrences, two dissents, and one hybrid—an opinion both concurring and dissenting in part. Most of those opinions were relatively brief, and many involved narrow issues of administrative law under specialized statutes. All but four of Roberts's majority opinions were written for unanimous panels,[5] and

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2005, at A11.

3. Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193 (2002).

4. Roberts received his commission for his circuit court seat on June 2, 2003. He took his seat on the Supreme Court two years and almost four months later. *Biographical Directory of Federal Judges*, *available at* http://www.fjc.gov.

5. Brady v. Fed. Energy Regulatory Comm'n, 416 F.3d 1, 11 (D.C. Cir. 2005)

one of his two dissents was a brief rejection of the majority's denial of a rehearing en banc.[6] His judicial record thus provided little ideological sustenance for either his supporters or his detractors as they prepared for his confirmation hearing, and Roberts subsequently faced few questions about the substance of his appellate jurisprudence.

Despite this seemingly unpromising paper trail, Roberts's circuit court opinions do provide some intriguing clues to his approach to the business of writing appellate opinions. In fact, the absence of strong ideological content, reflected in Roberts's almost invariable agreement with his judicial colleagues, illuminates his craftsmanship. These are, in many instances, opinions rejecting litigants' arguments for further review that are more hopeful than compelling. In each case, however, Roberts provides clear, detailed, and orderly responses to those arguments, giving each petitioner his full—and fully informed—attention. This may reflect Roberts's experience of seventeen years as a Washington appellate attorney who himself argued thirty-nine cases before the Supreme Court.[7] He knows what counsel and client want to see from the court reviewing their claims, even if they have only limited expectations of success, and he seems to regard it as part of his judicial duty to take all arguments seriously, if only in the moment before he rejects them, and to provide an explanation accessible to attorneys and often to lay persons as well.

Read together, Roberts's circuit court opinions hint at the emergence of a judicial personality, a recognizable voice that consistently expresses a distinctive attitude. Although these early opinions lack the heft to establish definitively the elements of Roberts's jurisprudence, they do contain stylistic tendencies that point the way toward the future evolution of an identifiable voice that "draw[s] on emotion and experience, as well as intellect, in shaping . . . judicial responses."[8] As a stylist, Roberts already seems intent on finding ways to leaven his utilitarian prose with personalized elements of diction, metaphor, allusion, syntax, and tone. It is these elements that convey to the reader a particular judicial persona, someone whose legal conclusions are informed not only by his mastery of the law but also by his reading, his interest in the expressive capacity of language, and his perceptions of human behavior.

A. The Right Word

Explaining his skepticism toward the majority's use of the canons of statutory interpretation, Roberts announced in one of his few concurrences that "at the end of

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(Williams, J., concurring); Taucher v. Brown-Hruska, 396 F.3d 1168, 1178 (D.C. Cir. 2005) (Edwards, J., dissenting); United States v. Mellen, 393 F.3d 175, 188 (D.C. Cir. 2004) (Henderson, J., dissenting in part); U.S. *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 502 (D.C. Cir. 2004) (Garland J., dissenting).

6. Rancho Viejo, L.L.C. v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc).

7. According to the Supreme Court Web site's biographical summary, Roberts was in private practice from 1986 to 1989 and again from 1993 to 2003. During the interval from 1989 to 1993, he served as Principal Deputy Solicitor General. Supreme Court Biographies, *supra* note 1. As a practitioner, he argued thirty-nine cases before the Supreme Court. Adam Liptak, *Court in Transition: The Record; A Career Largely on One Side of the Bench and Involving a Wide Variety of Issues*, N.Y. TIMES, July 20, 2005, at A17.

8. Ray, *supra* note 3, at 195.

the day I find greater solace in the words themselves."[9] His choice of diction makes clear that he is drawn to "words themselves" for more than solace.[10] From his earliest opinions, Roberts has shown an affinity for the *mot juste*, the single word that will sharpen a sentence by identifying precisely how someone has acted or what is at stake, often in surprising ways. His use of adverbs is illustrative. A challenge to the court's jurisdiction need only be "meekly noted" in order to be taken seriously.[11] A relevant precedent "establishes (unremarkably)" a litigant's right to appeal on an issue.[12] Congress would have acted "quite elliptically" if the appellants' strained reading of its intent were accurate.[13] And a car theft victim might remain "blissfully unaware" of his loss until the next morning.[14]

As a deliberate stylist, Roberts appreciates the power of adjectives to both illuminate and conceal. Comparing district court and magistrate judge opinions in the same case, he finds that "[t]he former's opinion lacks the adjectives that populate the latter's," and thus the first judge acknowledges the difficulty of the issue at hand while the second attempts to evade it.[15] In his own choice of adjectives, Roberts likes to use an unexpectedly literary modifier—sometimes in contrast to less elevated diction—to underscore a point. Thus, a litigant claims that it made "herculean efforts" but nonetheless "could not come up with the goods" in time.[16] The Supreme Court "observed, with blithe understatement," that "'[c]ompetition among utilities was not prevalent.'"[17] There is an "exquisite variety of academic institutions across the country," requiring the National Labor Relations Board to develop a substantial body of case law applying a single Supreme Court precedent.[18] And, choosing to concur rather than join the majority's unnecessarily broad holding, he "cannot go along for that gratuitous ride."[19] Such usages, planted in the middle of otherwise conventional legal prose, have the effect of expanding the reader's perspective on the case. The "gratuitous ride," for example, plays off

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9. Acree v. Republic of Iraq, 370 F.3d 41, 64 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment).

10. According to those who have worked with him, Roberts's interest in language manifests itself in several ways. As a White House attorney, he apparently chose to answer a routine letter because, he wrote to his superior, "'[a]nyone who can quote inspiring passages from Plato and Webster, however, and use a word like "slumgullion," deserves a reply.'" Anne E. Kornblut, *In Re Grammar, Roberts's Stance is Crystal Clear*, N.Y. TIMES, Aug. 29, 2005, at A1. Sources describe Roberts as both a dedicated grammarian and a lover of the unusual word: "A cheerfully ruthless copy editor over the years, Judge Roberts has demanded verbal rigor from his colleagues and subordinates, refusing to tolerate the slightest grammatical slip, and boasting an exceptional vocabulary and command of literature himself." *Id.*

11. Consumer Elecs. Ass'n v. FCC, 347 F.3d 291, 296 (D.C. Cir. 2003).

12. United States v. Stanfield, 360 F.3d 1346, 1357 (D.C. Cir. 2004).

13. U.S. *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 496 (D.C. Cir. 2004).

14. United States v. Jackson, 415 F.3d 88, 104 (D.C. Cir. 2005) (Roberts, J., dissenting).

15. Taucher v. Brown-Hruska, 396 F.3d 1168, 1176 (D.C. Cir. 2005).

16. BDPCS, Inc. v. FCC, 351 F.3d 1177, 1179 (D.C. Cir. 2003).

17. Midwest ISO Transmission Owners v. Fed. Energy Regulatory Comm'n, 373 F.3d 1361, 1363 (D.C. Cir. 2004) (quoting New York v. FERC, 535 U.S. 1, 5 (2002)).

18. Lemoyne-Owen Coll. v. NLRB, 357 F.3d 55, 57 (D.C. Cir. 2004).

19. PDK Labs. Inc. v. U.S. Drug Enforcement Admin., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment).

the Latin root of the adjective ("gratuit," meaning free) to suggest a dual meaning: the majority's broad holding is not only "assumed without any good ground or reason" but also, in the primary definition, "[f]reely bestowed or obtained," the proverbial free ride that allows the court to take advantage of this case to make an unearned point.[20]

B. The Right Comparison

"Gratuitous ride" is also a figurative use of language, in this instance a metaphor masked by the rejection of the usual adjective "free" in favor of the more formal "gratuitous." That deliberate change suggests what Roberts's other opinions confirm: his serious interest in the possibilities of figurative language as a stylistic tool. Many of his metaphors are drawn from common usage and add a comfortably familiar note to his legal prose. In his first published circuit court opinion, Roberts produced his first judicial metaphor, his observation that "diligence . . . should begin as soon as the ball is in the FAA's court."[21] In other opinions, the reader finds "jurisdictional speed bumps,"[22] "a rhetorical sleight of hand,"[23] "an obvious end-run around" a rule,[24] and "the backbone of software programs."[25] Roberts is also fond of invoking homely adages to clarify or emphasize a complicated point. Thus, the FCC is "not crying wolf" in anticipating a technical problem;[26] it is a "fundamental precept of Anglo-American jurisprudence that you cannot have your cake and eat it, too" by suing an individual government official and simultaneously treating him as a nation state;[27] a jurisdictional requirement must be upheld "because it is easy enough to spin out 'for want of a nail' scenarios from any set of facts that could eventually lead to this court";[28] and, in a highly technical case dealing with the sale of power transmissions, "OPG thus would be cutting off its nose to spite its face by congesting an intertie out of Ontario."[29] Occasionally, Roberts explicates an adage to sharpen his focus. Rejecting the argument of a fired government employee that he is protected by a whistle-blower statute, Roberts makes extended use of a common expression to explain the flaw in the appellant's position:

> This reasoning fails to take into account the cumulative effect of Koszola's misconduct. The adage about the straw breaking the camel's back is familiar

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20. 6 THE OXFORD ENGLISH DICTIONARY 779 (2d ed. 1989). I am indebted for this reading of "gratuitous" to Philip Ray.

21. Ramaprakash v. FAA, 346 F.3d 1121, 1128 (D.C. Cir. 2003).

22. *Midwest ISO*, 373 F.3d at 1368.

23. U.S. *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 493 (D.C. Cir. 2004).

24. AT&T Corp. v. FCC, 394 F.3d 933, 938 (D.C. Cir. 2005).

25. Taucher v. Brown-Hruska, 396 F.3d 1168, 1171 (D.C. Cir. 2005).

26. Consumer Elecs. Ass'n v. FCC, 347 F.3d 291, 300 (D.C.Cir. 2003).

27. I.T. Consultants, Inc. v. Islamic Republic of Pak., 351 F.3d. 1184, 1191 (D.C. Cir. 2003).

28. *In re* Tennant, 359 F.3d 523, 529 (D.C. Cir. 2004).

29. Consumers Energy Co. v. Fed. Energy Regulatory Comm'n, 367 F.3d 915, 925 (D.C. Cir. 2004). *See also* United States v. Mellen, 393 F.3d 175, 183 (D.C. Cir. 2005) (rejecting "the dissent's contrary 'in for a penny, in for a pound' approach").

> because of the truth it conveys. Koszola was fired not simply because of the misreporting episode, which in any event was no mere straw. That episode was simply the latest in an accumulation of incidents that exhausted the patience of Koszola's supervisors and left them with no confidence in him.[30]

The visual image of a supervisory camel increasingly burdened by the employee's transgressions until it collapses under the weight of misconduct renders the appellant's position both untenable and absurd.

Roberts does on occasion go beyond the familiar in his use of figurative language. He twice employs a submerged religious metaphor to suggest the majority's skeptical but open-minded avoidance of an unnecessary issue. Thus, he insists that "we can remain agnostic on the question whether Congress intentionally left the presentment requirement in Section 3729(a)(1) or simply forgot to take it out."[31] Speaking again in the first person, he sidesteps another unresolved issue: "We persist in our agnosticism on the appropriate standard of review in this case" because the parties failed to brief and argue the point.[32] Roberts can also take pleasure in the perfect aptness of a particular metaphor, as when he describes the San Juan Basin as "a prolific source of natural gas, connected by pipeline to southern California and literally helping to fuel the dramatic growth of that region."[33] That pleasure in metaphoric possibilities can lead Roberts astray, as when he mixes knitting and botanical images in a single sentence: "The district court did not unravel 'a highly integrated' complex of interlocking illegal provisions . . . but rather removed a punitive damages bar that appears to have been grafted onto an intact and functioning framework . . . ."[34] Most often, however, he is adept at finding and developing his own metaphors. When, writing in concurrence, he wants to pursue one but not all of the implications of the majority's holding, he introduces his analysis with an amusingly apt image: "Not to chase down every rabbit spooked by the majority's alternative holding . . . ."[35]

The recurrence of figurative language suggests something more than Roberts's literary taste. It also suggests that he tends to think and write in analogical terms when confronting a complex case. The clearest example of this tendency appears in

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30. Koszola v. FDIC, 393 F.3d 1294, 1301 (D.C. Cir. 2005).

31. U.S. *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 496 (D.C. Cir. 2004).

32. United States v. Toms, 396 F.3d 427, 433 (D.C. Cir. 2005).

33. Amoco Prod. Co. v. Watson, 410 F.3d 722, 724 (D.C. Cir. 2005).

34. Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 85 (D.C. Cir. 2005). In another mixed metaphor, Roberts shifts from "a logjam . . . blocking the development of DTV" to "evidence of this diagnosis." Consumer Elecs. Ass'n v. FCC, 347 F.3d 291, 300 (D.C. Cir. 2003). Roberts is, however, perfectly capable of extending a metaphor without mixing it. Faced with the issue of the severability of an arbitration agreement provision, he observes that "[i]f illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, . . . the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Booker*, 413 F.3d at 84–85. *See also* Bloch v. Powell, 348 F.3d 1060, 1069 (D.C. Cir. 2003) ("Bloch's argument runs headlong, however, into a line of precedent."); United States v. Stanfield, 360 F.3d 1345,1353 (D.C. Cir. 2004) ("[W]e need more solid footing before deciding where we stand.").

35. PDK Labs. Inc. v. U.S. Drug Enforcement Admin., 362 F.3d 786, 803 n.3 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment).

Midwest ISO Transmission Owners v. Federal Energy Regulatory Commission, a case dealing with the complicated rules governing access to power transmission facilities. Twice in his majority opinion Roberts resorts to analogies to untangle the issues before the court. The first analogy briskly disposes of FERC's argument that the petitioners lacked standing because they failed to show that they could not eventually recoup their challenged losses. Roberts once more finds a domestic comparison to underscore the weakness of FERC's position: "FERC's argument is tantamount to contending that a homeowner whose house is destroyed by arson has not been injured by the arsonist, if the house was adequately insured."[36] Having found standing, Roberts goes on to reject one of the petitioners' arguments—that they should not have to pay the costs of an administrative system that they are not using—by an extended analogy demonstrating that they nonetheless benefit from the existence of the system:

> In this sense, MISO is somewhat like the federal court system. It costs a considerable amount to set up and maintain a court system, and these costs—the costs of *having* a court system—are borne by the taxpayers, even though the vast majority of them will have no contact with that system (will not *use* that system) in any given year. The public nevertheless benefits from *having* a system for the prompt adjudication of criminal offenses and the orderly resolution of civil disputes. Litigants bear some of the costs of *using* this system through the payment of filing fees and court costs. They, like utilities transmitting power under the MISO open access tariff who pay according to Schedule 1, are paying for the specific benefit of *using* the court system. The MISO Owners' position is tantamount to saying that if they are not a litigant, they should not be made to pay for any of the costs of *having* a court system. Since the MISO Owners do, in fact, draw benefits from being a part of the MISO regional transmission system, FERC correctly determined that they should share the cost of *having* an ISO.[37]

The comparison is of particular relevance to those involved in the government regulatory process, but it also has a commonsensical quality that makes it accessible to outsiders as well.[38] Roberts's characteristic use of italics to emphasize the key elements of his analogy—the difference between having and using a system—seems specifically designed to reach lay readers as well as those well versed in administrative processes. Although the opinion of necessity uses a great deal of technical jargon in resolving the case, this passage suggests what his other

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36. Midwest ISO Transmission Owners v. Fed. Energy Regulatory Comm'n, 373 F.3d 1361, 1367 (D.C. Cir. 2004).

37. *Id.* at 1371 (emphasis in original).

38. In a case dealing with the National Transportation Safety Board's random drug testing policy, Roberts used another analogy for a structure of legal rules: a sport such as golf can have a system of rules grounded on the assumption

> that participants will in good faith call penalties on themselves, but such an approach seems ill-advised when it comes to designing regulations to protect the public from drug use by those in safety-sensitive positions–and in fact that is not the approach reflected in these regulations.

Duchek v. Nat'l Transp. Safety Bd., 364 F.3d 311, 316 (D.C. Cir. 2004).

opinions illustrate: that Roberts prizes a clear and simple explanation even when the subject matter at issue is dense and technical.

Roberts employs his metaphors and analogies for two related purposes. Rhetorically, these devices invoke a familiarly rational world in which the losing litigant's argument, however artfully disguised in abstruse legal terminology, simply makes no sense. Furthermore, the familiarity of the comparisons makes the opinion accessible to attorneys and lay readers—including the losing litigant—alike. For Roberts, clarity seems important not just as a matter of judicial craftsmanship but as a matter of communication as well. By his choice of imagery, he suggests that the audience for judicial opinions should include not only professionals but also the broader universe of people who may, like the *MISO* petitioners, someday need to use and understand the legal system.

C. The Colloquial Voice

Roberts's interest in the communicative aspect of his opinions emerges even more distinctly in his use of diction and syntax to strike an occasionally colloquial tone. Embedded throughout his opinions, majority as well as concurring and dissenting, are informal words and structures that speak directly to his audience. In this respect Roberts's prose is similar to that of Justice Scalia, though in a much less aggressive and confrontational manner. Where Scalia grabs his readers by the lapels to give them an earful on the absurdities of the opposing side's position, Roberts converses equably with his readers, pointing out to them the bases for the logical conclusions that a calm and fair-minded judge has reached. Where Scalia rhetorically engages in "indignant conversation,"[39] Roberts prefers an explanatory chat which is designed to win the listeners' confidence rather than elicit their angry agreement.

Like his metaphors and analogies, Roberts's colloquial voice speaks directly to nonlawyers. At his confirmation hearing, the nominee made clear his belief that Supreme Court opinions should be broadly accessible: "I hope we haven't gotten to the point where the Supreme Court's opinions are so abstruse that the educated lay person can't pick them up and read them and understand them. You shouldn't have to be a lawyer to understand what the Supreme Court opinions mean."[40] Roberts's position differs somewhat from that of Justice Black, who believed that "[w]riting in language that people cannot understand is one of the judicial sins of our times."[41]

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39. Ray, *supra* note 3, at 226. *See also id.* at 226–29 (discussing Scalia's rhetorical strategy).

40. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. (2005) (statement of Judge John G. Roberts, Jr.) [hereinafter *Confirmation Hearing*]. Roberts singled out the opinions of Justice Jackson, whom he described as "one of the best writers the court has ever had," as admirable in this respect:

> They are not written in jargon or legalese, but an educated person whose life, after all, is being affected by these decisions can pick them up and read them, and you don't have to hire a lawyer to tell you what it means. I hope we haven't gotten to a point where that is an unattainable ideal.

Id.

41. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 325 (2d Ed. 1997). *See* Ray, *supra*

According to his biographer, Roger Newman, "Black wanted litigants, people in barber shops, 'your momma,' he once told a clerk, to understand his opinions."[42] Roberts, in contrast, seeks only to be accessible to "the educated lay person," a reader presumably capable of appreciating his more sophisticated stylistic elements as well as his colloquial diction.

As part of his rhetorical strategy for reaching his target audience, Roberts uses informal locutions seldom found in legal prose. The operator of a helicopter service had to decide "when to spring the drug test" required by law on his employees[43] and "was somewhat in a bind" because he was himself subject to the test.[44] In a *qui tam* action under the False Claims Act, "the Government and the relator divvy up" statutory damages.[45] The federal government "finally caught on to" an employee's elaborate fraud scheme,[46] and her husband could not claim perfect ignorance because "[i]t would not take a rocket scientist to deduce that the electronic equipment Luther was himself using was stolen."[47] In a challenge to FERC's order permitting expansion of a marina, "[i]t was obvious from the get-go" that the plan contained no limits on development.[48] Roberts also uses informal diction of another kind, the interjection "whatever," more common in speech than in prose, to round off a list and indicate that no variant can change the legal outcome. Thus, petitioners "readily concede that all transmission customers—bundled, unbundled, grandfathered, whatever—benefit from" regulation of the grid.[49] In another case, even issues that are "identical, intertwined, closely related, whatever" cannot provide the basis for a stay.[50] The deliberate imprecision of "whatever," usually avoided in judicial opinions, here strikes another commonsensical note, indicating the futility of any more inventive alternatives.

Roberts employs one additional strategy of engagement, addressing questions, instructions, and observations directly to the reader. When he admits that an EPA letter is, as petitioner claims, "a statement of 'general or particular applicability,'" he follows up that concession with a rhetorical question—"what isn't?"—before concluding that the point is irrelevant.[51] Concurring in part, he restates a section of the majority's opinion and accepts its accuracy—"Fair enough."[52]—before going on to identify his point of disagreement. In a stop and frisk case, he asks the reader to "[r]ecollect what Officer Phillip knew as he began to frisk Holmes,"[53] and in a case involving a search of a suspected stolen car he asks "Why the trunk?" before

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note 3, at 198–201 (discussing Black's rhetorical strategies to make his opinions understandable to a broad lay readership).

42. NEWMAN, *supra* note 41, at 325.

43. *Duchek*, 364 F.3d at 312.

44. *Id.* at 313.

45. U.S. *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488 at 496 (D.C. Cir. 2004).

46. United States v. Mellen, 393 F.3d 175, 178 (D.C. Cir. 2004).

47. *Id.* at 181.

48. Brady v. Fed. Energy Regulatory Comm'n, 416 F.3d 1, 9 (D.C. Cir. 2005).

49. Midwest ISO Transmission Owners v. Fed. Energy Regulatory Comm'n , 373 F.3d 1361, 1369 (D.C. Cir. 2004).

50. DSMC Inc. v. Convera Corp., 349 F.3d 679, 684 (D.C. Cir. 2003).

51. Indep. Equip. Dealers Ass'n v. EPA, 372 F.3d 420, 428 (D.C. Cir. 2004).

52. PDK Labs. Inc. v. U.S. Drug Enforcement Admin., 362 F.3d 786, 800 (D.C. Cir. 2004).

53. United States v. Holmes, 385 F.3d 786, 790 (D.C. Cir. 2004).

answering his own question ("[T]he trunk is certainly a convenient place to stash the real tags once they have been removed from the back of the vehicle.").[54] Sympathizing with the patient reader after a long analysis of the appealability of a judgment, he announces that "we turn (at last) to the merits of Outlaw's appeal."[55] Such moments involve the reader in the opinion's argument, anticipating concerns and meeting them as part of the process of persuasive argument.

Perhaps the most informal and engaging moment in Roberts's opinions appears in a dissent, where he exercises the greatest latitude in writing style. The defendant, convicted of being a felon in possession of a firearm, challenged on appeal the police officers' decision to arrest him without further investigating his claim that the car he was driving—in which the firearm was found—was in fact borrowed from his girlfriend. Roberts chooses to reject that challenge by invoking an excuse that has attained legendary status in American popular culture: "Sometimes a car being driven by an unlicensed driver, with no registration and stolen tags, really does belong to the driver's friend, and sometimes dogs do eat homework, but in neither case is it reasonable to insist on checking out the story before taking other appropriate action."[56] It would presumably have been possible to identify precedents in which police officers faced with similar claims also prevailed on appeal. Roberts's decision to invoke instead the most celebrated childhood excuse once again roots his jurisprudential style in the shared universe of legal doctrine and human experience. Judges, he implies, ground their decision making in the same reality that teachers and parents do, and their conclusions are not confined to a realm of rarefied abstractions.

D. Repetition and Balance

Although such use of domestic metaphors and informal diction may seem like the artless choices of a relatively unsophisticated writer, in Roberts's case that assumption is proven inaccurate by several of his other stylistic choices. He displays his ear for language in his penchant for the occasional alliterative phrase: "subpoena spat,"[57] "crabbed construction,"[58] "careful caveat,"[59] and—most exuberantly—"reticulated remedial regime."[60] He also likes the sound of deliberate repetition as a means of emphasis, as when he resolves a jurisdictional claim by concluding that "as a constitutional matter, there is no constitutional matter."[61] The same device recurs, sometimes in shorter form (when he refers to a model "for

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54. United States v. Jackson, 415 F.3d 88, 102 (D.C. Cir. 2005) (Roberts, J., dissenting).

55. Outlaw v. Airtech Air Conditioning and Heating, Inc., 412 F.3d 156, 163 (D.C. Cir. 2005).

56. *Jackson*, 415 F.3d at 105 (Roberts, J., dissenting).

57. Koszola v. FDIC, 393 F.3d 1294, 1301 (D.C. Cir. 2005).

58. PDK Labs. Inc. v. U.S. Drug Enforcement Admin., 362 F.3d 786, 801 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment).

59. Acree v. Republic of Iraq, 370 F.3d 41, 61 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment).

60. Fornaro v. James, 416 F.3d 63, 66 (D.C. Cir. 2005).

61. I.T. Consultants, Inc. v. Islamic Republic of Pak., 351 F.3d. 1184, 1191 (D.C. Cir. 2003).

determining when some skew becomes too much skew"[62]), and sometimes at greater length (when he observes that "an officer cruising the streets cannot readily identify a particular Mercury Marquis as the *stolen* Mercury Marquis"[63]). Roberts's most elaborate use of repetition comes when he dismisses a district court opinion that relied on two concurrences: "Well reasoned, to be sure, and perhaps ultimately persuasive, but—to paraphrase the Supreme Court's dismissal of nonmajority views in another case—the comments in the concurring opinions are just that: comments in concurring opinions."[64] The case paraphrased is *United States Railroad Retirement Board v. Fritz*,[65] with a majority opinion written by then Associate Justice Rehnquist, for whom Roberts was clerking at the time.[66] *Fritz* was argued on October 6, 1980, at the very beginning of Roberts's clerkship year, and it might even have been the first case assigned to him by Rehnquist, whose clerks prepared first drafts of his assigned cases.[67] If so, we might be seeing a rare phenomenon: a circuit court judge citing a Supreme Court opinion drafted almost a quarter century earlier by himself.

Whether *Fritz* is a precursor of Roberts's later style or a mentor's model, it reflects his penchant for carefully shaped sentences that aim at balance by repeating or pairing words or concepts. Thus, he finds "good sense" in the court's "reopening doctrine" for administrative regulations: "Just as it would be folly to allow parties to challenge a regulation anew each year upon the annual re-publication of the Code of Federal Regulations, so too it is silly to permit parties to challenge an established regulatory interpretation each time it is repeated."[68] The paired terms, "folly" and "silly," also echo one another, further reinforcing the parallel. Roberts makes clear his awareness of the shape of his opinions when, in two instances, he claims a circular structure as well as a victory over the dissent. In the first, he compares his opinion for the court with his misguided colleague's effort: "The dissent literally begins and ends with legislative history. . . . [W]e will end as we began, too, but with the statutory language."[69] In the second instance, he opens his concurrence with an elegantly varied repetition worthy of Justice Jackson by citing "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more,"[70] a formulation he liked well enough to use again

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62. Pub. Serv. Comm'n of the Commonwealth of Ky. v. Fed. Energy Regulatory Comm'n, 397 F.3d 1004, 1011 (D.C. Cir. 2005).

63. United States v. Jackson, 415 F.3d 88, 101 (D.C. Cir. 2005) (Roberts, J., dissenting). (emphasis in original).

64. Taucher v. Brown-Hruska, 396 F.3d 1168, 1175 (D.C. Cir. 2005).

65. 449 U.S. 166 (1980).

66. Rehnquist was referring to the dissenting opinions cited by Justice Brennan in his own dissent from the Court's announced rational basis standard for equal protection review. *Id.* at 177 n.10.

67. WILLIAM H. REHNQUIST, THE SUPREME COURT 260 (rev. ed. 2001).

68. Indep. Equip. Dealers Ass'n v. EPA, 372 F.3d 420, 428 (D.C. Cir. 2004).

69. U.S. *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 502 (D.C. Cir. 2004).

70. PDK Labs. Inc. v. U.S. Drug Enforcement Admin., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment). Jackson's prose was characterized by the use of repetition in the form of inversions; the best known is his observation about the Supreme Court that "[w]e are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953)

in his commencement address to students at Georgetown University.[71] Roberts then concludes with an emphasis on the inevitable shape of his opinion: "I end where I began—with regret that the majority feels compelled to address far-reaching questions on which we disagree, when they are wholly unnecessary to the disposition of the case."[72]

E. Allusions and Role Models

These carefully shaped sentences are not the only reflection of Roberts's literary sensibility. His brief body of opinions contains only a handful of direct literary allusions, but that handful is sufficient to suggest the range of his reading. In an early opinion, he endorses the FCC's denial of a waiver with a bilingual flourish: "Enforcement of the default penalty rule was appropriate, to borrow from Voltaire, '*pour encourager les autres.*'"[73] No specific work is cited, and no translation is provided.[74] Instead, the reference suggests that his readers are either familiar with the quotation or sufficiently conversant with French to translate for themselves, a reasonable assumption in light of the passage's cognates. Roberts has no difficulty turning from a rationalist to a transcendentalist source when it serves his purpose. Chastising a lower court for ignoring cases in which it had decided a similar issue differently, Roberts cites Emerson to explain the court's remand for clarification: "Emerson's advice to preachers—'emphasize your choice by utter ignoring of all that you reject,' RALPH WALDO EMERSON, *The Preacher*, *reprinted in* 10 LECTURES AND BIOGRAPHICAL SKETCHES 215, 235 (1904)—will not do for administrative agencies."[75] This time, however, the source is part of the problem, not part of the solution, and Roberts's inclusion of the title of Emerson's work—*The Preacher*—in the text obliquely underscores the difference between legal and inspirational rhetoric.

(Jackson, J., concurring). For a discussion of Jackson's prose style, including his use of inversions, see Ray, *supra* note 3, at 208–11.

71. *Chief Justice Says His Goal is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at A16. The passage in the speech varied slightly from the original version in the opinion: "If it is not necessary to decide more to a case, then in my view it is necessary not to decide more to a case." *Id.*

72. *PDK Labs. Inc.*, 362 F.3d at 809 (Roberts, J., concurring in part and in the judgment).

73. BDPCS, Inc. v. FCC, 351 F.3d 1177, 1182 (D.C. Cir. 2003) (emphasis in original).

74. The passage is from Voltaire's *Candide*, and its original use suggests that Roberts has deliberately omitted the citation. When the traveler Candide sees a man executed on the deck of a warship and asks for an explanation, he learns that the victim is an admiral who failed to draw close enough to engage a French admiral's ship in combat:

> "But," said Candide, "the French admiral was just as far from the English Admiral as the English Admiral was from him!" "Of course," someone said. "But in this country it's a good thing to kill an admiral, from time to time, to spur on the others."

VOLTAIRE, CANDIDE OR OPTIMISM 95 (Burton Raffel trans., 2005). Roberts's shortened version of Voltaire's joke suggests that the FCC's denial of the penalty waiver will similarly encourage greater compliance without referring to the steep price paid for that encouragement in the original text.

75. Lemoyne-Owen Coll. v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004).

Even when Roberts employs a familiar literary source, he tends to give the allusion a surprising spin. Dickens' *Bleak House* is often invoked for the novel's depiction of an endless and destructive estate matter, and Roberts makes a similar reference in resolving a probate case: "The roots of this real-life *Bleak House* saga doubtless stretch further back in time, but the precipitating event was the death of Lew Gin Gee Jung (Mother Jung) in January 1995."[76] A page later, after describing the family dispute and the probate court's decision, he updates the novel in a footnote: "Even Dickens would have been impressed by the modern twist in this chapter of the Jung family's *Bleak House*: the Probate Division ordered the exhumation of Mother Jung's body for DNA testing to settle the heirship dispute."[77] Roberts uses another classic work, this time *The Odyssey*, as a foil for an opinion's outcome. Reviewing the appellant's conspiracy conviction for involvement in his wife's theft of government property, Roberts distinguishes between Homer's celebration of marriage and the more skeptical attitude of the law:

> Homer thought there was "nothing greater and better than this—when a husband and wife keep a household in oneness of mind," THE ODYSSEY, bk. VI, *l.* 180, but there is no evidence that the drafters of the Sentencing Guidelines assumed such an ideal could substitute for proof of an agreement to participate in a conspiracy.[78]

The Homeric ideal is rejected in favor of a close reading of the record, which shows no consultation of husband and wife. Roberts concludes with a simple statement of the marital situation in this case: "The fact that he knew what she was doing does not mean he agreed to it."[79]

Even Roberts's less complicated literary references contain some surprises. He invokes *Macbeth* not in the context of a criminal appeal but instead in a challenge by film studios to the denial of royalties by the Copyright Office. Upholding the regulatory requirement of a postmark to establish timeliness, he explains that "[t]he express exclusion of the sort of evidence most likely to be submitted in lieu of a receipt—far from opening the door to other evidentiary submissions—was simply a way to 'make assurance doubly sure.' WILLIAM SHAKESPEARE, MACBETH act 4, sc. 1."[80] Granting a petition for review of an FCC order concerning resales of telephone service, Roberts quotes from George Eliot's celebrated novel as he rejects the Commission's proposed analogy as unpersuasive:

> George Eliot has written that "the world is full of hopeful analogies," MIDDLEMARCH 83 (Penguin Classics 1994) (1872), and this must be one of them, but likening the transfer at issue to a different arrangement, and then analyzing how *that* arrangement would fare under Section 2.1.8, does not advance the FCC's position very far.[81]

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76. Jung v. Mundy, Holt & Mance P.C., 372 F.3d 429, 430 (D.C. Cir. 2004).
77. *Id.* at 431 n.1.
78. United States v. Mellen, 393 F.3d 175, 185 (D.C. Cir. 2005).
79. *Id.*
80. Universal City Studios LLP v. Peters, 402 F.3d 1238, 1241–42 (D.C. Cir. 2005).
81. AT&T Corp. v. FCC, 394 F.3d 933, 938 (D.C. Cir. 2005) (emphasis in original).

The quotation is apt, but a reader may be forgiven for wondering if its appearance reflects as well a fondness for a novel never before or since cited in any federal court opinion.[82] A common thread in many of these literary allusions is the negative use of the source to illustrate the wrong way to address the issue at hand. The right way turns out to be simple, commonsensical, and rooted in the particularities of the case rather than in complicated idealized approaches. Roberts presents Eliot's "hopeful analogies," with their appealing optimism, only to reject them in favor of the realities before the court.

There is a second set of allusions in Roberts's opinions that sheds even more light on his sense of himself as an appellate judge—allusions to the writings of other judges. It is surely no coincidence that the first words of his first judicial opinion were "Learned Hand,"[83] widely considered to be among the greatest American judges and probably the greatest of those judges never to sit on the Supreme Court.[84] The case, *Ramaprakash v. Federal Aviation Administration*, was a routine challenge to a National Transportation Safety Board order on the grounds of inconsistency, but Roberts's first appellate sentence was scarcely routine:

> Learned Hand once remarked that agencies tend to "fall into grooves, . . . and when they get into grooves, then God save you to get them out." Judge Hand never met the National Transportation Safety Board. In this case, we grant the petition for review because the Board has failed adequately to explain its departures from its own precedent in no fewer than three significant respects.[85]

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82. Perhaps the least surprising of Roberts's literary allusions appears in a quotation from a Supreme Court opinion, *Harrison v. PPG Industries*, rejecting an argument based on the absence of legislative history: "In ascertaining the meaning of a statute," the Court stated, "a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." 446 U.S. 578, 592 (1980). The reference by Justice Stewart is to Arthur Conan Doyle's short story, *The Silver Blaze*, in which Holmes deduces from the dog's failure to bark that the culprit in the theft of a valuable horse was known to the dog and was in fact the horse's trainer. ARTHUR CONAN DOYLE, *Silver Blaze*, *in* THE MEMOIRS OF SHERLOCK HOLMES 3, 27 (Christopher Roden ed.,1993). *Harrison* was decided in May 1980, shortly before Roberts began his clerkship with Rehnquist, who also alluded to the story in his *Harrison* dissent. 446 U.S. at 596 (Rehnquist, J., dissenting). As a former Rehnquist clerk as well as a reader of Supreme Court opinions, Roberts would have had reason to be familiar with the allusion and its usefulness in debates over statutory interpretation. *See also* Acree v. Republic of Iraq, 370 F.3d 41, 42 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment) (including Roberts's quotation from *Harrison*).

83. Ramaprakash v. FAA, 346 F.3d 1121, 1122 (D.C. Cir. 2003).

84. Gerald Gunther opens his biography of Hand by placing him in the pantheon of American judges:

> Learned Hand is numbered among a small group of truly great American judges of the twentieth century, a group that includes Oliver Wendell Holmes, Jr., Louis Brandeis, and Benjamin Cardozo. Yet among these judges, only Hand never sat on the Supreme Court.

GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE xv (1994).

85. *Ramaprakash*, 346 F.3d at 1122 (footnote omitted).

This passage, his only cite to Hand, nonetheless suggests Roberts's invocation of the Second Circuit Judge as both role model and muse. Hand's style anticipates Roberts's own preference for figurative language ("fall into grooves") and a colloquial tone ("God save you to get them out"), just as Hand's insistence on judicial restraint finds echoes in Roberts's jurisprudence. But Hand turns out to be only one in a line of great American judges that Roberts invokes. Just as *Ramaprakash* opens with a quote from Hand, it closes with a quote from one of Hand's admirers, Oliver Wendell Holmes: "We have it on high authority that 'the tendency of the law must always be to narrow the field of uncertainty.' O.W. Holmes, *The Common Law* 127 (1881). The Board's unexplained departures from precedent do the opposite."[86] As Roberts himself might say, he ends as he began, with a quote from another great judge, one whose epigrammatic style influences Roberts's later opinions.[87]

Roberts's connection to Hand and Holmes turns out to be mediated by his connection with another distinguished federal appellate judge, Henry J. Friendly, who sat on the Court of Appeals for the Second Circuit from 1959 to 1986[88] and for whom Roberts clerked from 1979 to 1980.[89] Friendly published a volume of essays, *Benchmarks*,[90] in 1967, and Roberts quotes from it six times in the course of his opinions. Some of these references are secondary. The Hand quote, for example, appears in a Friendly essay, *More Definite Standards of Administrative Action: The Need*, although Roberts cites to *Benchmarks* rather than to the specific essay.[91]

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86. *Id.* at 1130. According to Gunther, "Holmes had hoped that Hand would be named to the Supreme Court, and Holmes continued to sing his praises, telling visitors that he considered Hand's judicial work 'the *real thing*.'" GUNTHER, *supra* note 84, at 346 (emphasis in original).

87. Roberts quotes Holmes a second time in a dissenting opinion that rejects the criminal defendant's argument that the police lacked a basis for believing that he was driving a stolen car:

> The majority doubts the rationale for replacing a stolen vehicle's real tags with stolen tags and therefore discounts the inference that the car might have been stolen. . . . But lawyers learn early on that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 . . . (1921) (Holmes, J.). Officer Garboe's history with stolen tags had confirmed that they, more often than not, led to real tags in the trunk. The reported cases confirm that criminals often use stolen tags on stolen cars. This history is enough to support the officers' inferring from the stolen tags *and* the lack of any registration (current or expired) linking Jackson to the car that the car might well have been stolen.

United States v. Jackson, 415 F.3d 88, 103 (D.C. Cir. 2005) (Roberts, J., dissenting) (emphasis in original). Although Holmes wrote for the Court and the use of his name was unnecessary, Roberts includes it. For examples of Holmes' epigrams, see *infra* note 112.

88. Henry Jacob Friendly, http://www.fjc.gov/history/home.nsf (follow "Judges of the United States Courts" hyperlink; then in search field type "friendly"; then follow "Friendly, Henry Jacob" hyperlink).

89. Supreme Court Biographies, *supra* note 1.

90. HENRY J. FRIENDLY, BENCHMARKS (1967).

91. *Ramaprakash*, 346 F.3d at 1122 n.1 (explaining that the material was "quoted in Henry J. Friendly, *Benchmarks* 106 (1967)"). Although Roberts omits part of the quotation, Friendly notes that administrative agencies "fall into grooves just as the judges are so apt to

When Roberts quotes Felix Frankfurter's celebrated advice on statutory interpretation, he also does so by way of Friendly, who was Frankfurter's student at Harvard Law School: "This calls to mind what Judge Friendly described as Felix Frankfurter's 'threefold imperative to law students' in his landmark statutory interpretation course: '(1) Read the statute; (2) read the statute; (3) read the statute!' Henry J. Friendly, *Benchmarks* 202 (1967)."[92] Roberts cites appreciatively to two other Supreme Court Justices, Brandeis and Cardozo. The reference to Brandeis, for whom Friendly clerked, is a quotation from another *Benchmarks* essay, *Mr. Justice Brandeis—The Quest for Reason*:

> Not all opinions can aspire to what was said of those of Justice Brandeis—that in them "the right doctrine emerges in heavenly glory and the wrong view is consigned to the lower circle of hell," HENRY J. FRIENDLY, *Mr. Justice Brandeis—The Quest for Reason*, *in* BENCHMARKS 291, 294 (1967).[93]

Even though Roberts quotes directly from Cardozo on the subject of judicial style ("Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it"[94]), it is worth noting that the first words of Friendly's first *Benchmarks* essay, entitled *Reactions of a Lawyer-Newly-Become-Judge*, are "Judge Cardozo."[95] And Holmes, too, is the subject of a *Benchmarks* essay, *Mr. Justice Holmes and the Common Law*, discussing the monumental Holmes book that Roberts cites.[96]

It is thus hard to sidestep the notion that Roberts's true judicial mentor was Judge Friendly, who is connected through his law school experience, his clerkship, and his scholarship to the line of judges that runs from Holmes through Brandeis, Cardozo, and Hand, to Frankfurter. And it also seems evident that what Roberts has drawn from a subset of these judges—Holmes, Frankfurter, and Friendly himself—is an affinity for a core of judicial principles that includes clear standards and close textual readings. Roberts's direct citations to Friendly illustrate the lessons learned. On the subject of statutory interpretation grounded in the text, Roberts quotes Friendly for the proposition that "whatever degree of confidence about congressional purpose one derives from the legislative history, that purpose must find expression 'within the permissible limits of the language' before it can be given effect."[97] And, faced with an argument for a totality of the circumstances test

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do." *Id.*

92. *In re* England, 375 F.3d 1169, 1181–82 (D.C. Cir. 2004). Roberts also quotes Frankfurter directly to conclude a concurrence in another case: "As Justice Frankfurter once put it: 'These are perplexing questions. Their difficulty admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case.' *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, 372–73, 75 S. Ct. 845, 850, 99 L.Ed. 1155 (1955)." PDK Labs. Inc. v. U.S. Drug Enforcement Admin., 362 F.3d 786, 809–810 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment).

93. Taucher v. Brown-Hruska, 396 F.3d 1168, 1173–74 (D.C. Cir. 2005).

94. Nat'l Council of Resistance of Iran v. Dep't of State, 373 F.3d 152, 157 (D.C. Cir. 2004) (quoting Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.)).

95. *Reactions of a Lawyer-Newly-Become-Judge*, *in* FRIENDLY, *supra* note 90, at 1.

96. *Mr. Justice Holmes and the Common Law*, *in* FRIENDLY, *supra* note 90, at 285.

97. U.S. *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 495 (D.C. Cir. 2004) (quoting FRIENDLY, *supra* note 90, at 216).

for agency decisions, Roberts quotes Friendly's analogy for the need to define standards more precisely: "'Lack of definite standards creates a void into which attempts to influence are bound to rush; legal vacuums are quite like physical ones in that respect.'"[98] In a case on a related issue, Roberts again finds in Friendly a useful image for restraining agency discretion: the need "to canalize the broad stream into a number of narrower ones."[99] *Benchmarks* seems to have served as a steady source of judicial guidance for Roberts as he made the transition from appellate attorney to appellate judge, linking him not just to Judge Friendly himself but also to the like-minded judges who preceded him on the federal bench.[100]

F. Tone: The Skeptic Speaks

As these assorted rhetorical strategies demonstrate, Roberts is a deliberate and self-conscious stylist who takes pleasure in the expressive possibilities of language even in his briefest and most routine opinions. Roberts as stylist, however, also cultivates a distinctive tone that tends to unify his brief body of work. That tone is genial, never harsh or venomous. But it is also markedly detached, often commenting ironically on the behavior of litigants and decision makers alike. That skepticism is another quality that links Roberts to three of his admired predecessors, Hand, Holmes, and, to a lesser extent, Friendly. Like those judges, Roberts avoids sweeping pronouncements of ideological certitude.[101] Instead, he

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98. Lemoyne-Owen Coll. v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004) (quoting FRIENDLY, *supra* note 90, at 104).

99. PDK Labs. Inc. v. U.S. Drug Enforcement Admin., 362 F.3d 786, 802 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment) (quoting FRIENDLY, *supra* note 90, at 97).

100. *See* Daniel Breen, *Avoiding "Wild Blue Yonders": The Prudentialism of Henry J. Friendly and John Roberts*, S.D. L. REV. 73 (2007) (examining Friendly's jurisprudence and its potential influence on Roberts).

101. According to biographer G. Edward White, "Holmes had repeatedly declared himself to be a philosophical skeptic, one who was unsure about the meaning of truth, which he once defined as 'the sum of my intellectual limitations.'" G. EDWARD WHITE, OLIVER WENDELL HOLMES, JR. 135 (2006); *see also* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 481–82 (1993) (discussing Holmes's skepticism). White also notes that Holmes "pioneered in the development of 'deferential' judging in a majoritarian constitutional democracy." *Id.* at 487. Similarly, Hand's biographer, Gerald Gunther, finds that "Hand's dominant theme was his claim that the spirit of liberty was skeptical." GUNTHER, *supra* note 84, at 552. Gunther underscores that skepticism when he cites from Hand's celebrated 1944 speech delivered on "I Am an American Day" in Central Park—"the most memorable words of his address, certainly the most widely quoted he ever spoke"—where Hand says "The spirit of liberty is *the spirit which is not too sure that it is right*." *Id.* at 549 (emphasis added). Like Holmes, Hand displayed an "awareness of his limited role as a judge enforcing the legislature's purposes." *Id.* at 304. In several respects Friendly followed in the skeptical tradition of Holmes and Hand. Wilfred Feinberg, who served for almost twenty years with Friendly on the Second Circuit, has called him "the preeminent appellate judge of his generation, as Learned Hand had been of the generation before." Wilfred Feinberg, *in In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709, 1713 (1986). As Paul Freund elaborates, "[h]e combined massive documentation and sharply critical, often astringent, analysis with invariably constructive, or reconstructive, proposals."

repeatedly identifies two basic principles that shape his jurisprudence: common sense rooted in human experience and a straightforward reading of statutory language. Together, these principles link his style to the substance of his opinions.

Roberts's reliance on both principles surfaces early in his judicial career. In his third opinion, he criticizes an earlier decision of his own circuit for an interpretation that is "contrary not only to common sense, but to the text of Rule 1.4 as well"[102] and then goes on to reject the petitioner's challenge to a literal reading of another provision as "not the most damning criticism when it comes to statutory interpretation."[103] In a later case, he is skeptical of an NLRB holding, willing to believe that the board "may have an adequate explanation" for its result but requiring more: "We cannot, however, assume that such an explanation exists until we see it."[104] Roberts is equally open-minded and skeptical toward a litigant's argument: "Totten offers no reason, and we can think of none."[105] The court has done its best for Totten, but he has failed to provide it with what it needs to accept his position. Roberts extends his skepticism more broadly to arguments based on the canons of statutory interpretation, noting parenthetically of opposing canons that "there always seems to be one."[106] Elsewhere, he sums up his approach succinctly: "Give me English words over Latin maxims."[107] This is the voice of the man of reason faced with ingenious but unduly subtle constructs.

In assessing factual contentions, Roberts brings a comparable skepticism to bear on human behavior. Faced with the FAA's curious claim that the operator of a small air service should be required under the regulations to schedule his own random drug test, Roberts pinpoints the psychological absurdity of that position: "The regulations foreclose any assumption that a DER [designated employer representative] who is already using illegal drugs will nonetheless handle his own selection notice with impeccable scrupulousness and truthfulness—to his inevitable and substantial detriment."[108] A defendant arguing in support of a sentence shorter than required by the Sentencing Guidelines has "gamely attempted to rationalize" the district court's decision but fails because the court "was not attempting to apply the Guidelines in this case; it instead seemed intent on defying them—and 18 U.S.C. § 3553(c) to boot."[109] When film studios are unable to produce the receipt needed to secure royalties from the Copyright Office, Roberts notes that "[e]ven at this remove, we can sense the intensity of the searches"[110] for the missing papers but spares little sympathy for the litigants; quite simply, under the regulations "the studios are out of luck."[111] Such passages combine a realistic perception of the

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Paul Freund, *in id.* at 1719. Todd Rakoff, a former clerk to Friendly, concludes that "[w]hat counted with him, always, were legal arguments. Sentiment had no appeal." Todd Rakoff, *in id.* at 1726.

102. Consumer Elecs. Ass'n v. FCC, 347 F.3d 291, 297 (D.C. Cir. 2003).

103. *Id.*

104. Lemoyne-Owen Coll. v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004).

105. U.S. *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 492 (D.C. Cir. 2004).

106. Amoco Prod. Co. v. Watson, 410 F.3d 722, 734 (D.C. Cir. 2005).

107. Acree v. Republic of Iraq, 370 F.3d 41, 64 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment).

108. Duchek v. Nat'l Transp. Safety Bd., 364 F.3d 311, 316 (D.C. Cir. 2004).

109. United States v. Tucker, 386 F.3d 273, 278 (D.C. Cir. 2004).

110. Universal City Studios LLP v. Peters, 402 F.3d 1238, 1240 (D.C. Cir. 2005).

111. *Id.* at 1244.

human situation with the judicial detachment to separate that situation from its legal consequences.

That element of detachment sometimes produces epigrammatic statements reminiscent of Holmes.[112] Assessing the amount of time provided by the trial court for a defendant's review of Jencks Act materials, Roberts finds that "a prompt proceeding is good but a fair one is necessary."[113] When a less than diligent employee paraphrases his former employer as objecting that he "had been less than slavish in his attention to the details of some of his duties," Roberts finds that "this simply gives euphemism a bad name."[114] As a dissenter, Roberts "wholeheartedly subscribe[s] to the sentiments expressed in the concurring opinion about the Fourth Amendment's place among our most prized freedoms."[115] He nonetheless finds no Fourth Amendment violation on the facts before the court and concludes with what might be the distillation of his jurisprudence: "But sentiments do not decide cases; facts and the law do."[116]

Not all of Roberts's ironies are targeted at litigants and decision makers. Occasionally he responds with a whimsical playfulness to some aspect of the case before him. Thus, dissenting from the denial of an en banc hearing for a successful Commerce Clause challenge, Roberts dryly characterizes the issue: "The panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce . . . among the several States.'"[117] The toad, hitherto an innocent pawn in the litigation, assumes a sympathetic identity as the inadvertent instigator of serious constitutional litigation. Faced with yet another power transmission case, this one involving regulation of sales by Canadian utilities to customers in the United States, Roberts opens his opinion with a brief meditation on what has brought the case before him:

> It was a close thing, but Benedict Arnold's bold plan to capture Canada for the Revolution fell short at the Battle of Quebec in early 1776. As a result, the Federal Energy Regulatory Commission must now decide when affiliates of Canadian utilities—utilities not subject to FERC jurisdiction—may sell power at market-based rates in the United States.[118]

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112. Holmes' celebrated epigrams include "[g]reat cases, like hard cases, make bad law," *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting); "the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); and "[g]reat Constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine," *Mo., Kan. and Tenn. R. Co. v. May*, 194 U.S. 267, 270 (1904).

113. United States v. Stanfield, 360 F.3d 1345, 1358 (D.C. Cir. 2004) ("[W]e need more solid footing before deciding where we stand.").

114. Koszola v. FDIC, 393 F.3d 1294, 1302 (D.C. Cir. 2005).

115. United States v. Jackson, 415 F.3d 88, 105 (D.C. Cir. 2005) (Roberts, J., dissenting).

116. *Id.*

117. Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003).

118. Consumers Energy Co. v. Fed. Energy Regulatory Comm'n, 367 F.3d 915, 917 (D.C. Cir. 2004).

This return to first principles serves as an ironic reminder that even highly technical regulatory matters are connected to the sweep of history and that the outcome of a single battle has placed this perhaps unwelcome case on the court's docket.

G. Case Study: The Crying Child

The case that best illustrates Roberts's use of rhetorical strategies, *Hedgepeth v. Washington Metropolitan Area Transit Authority*,[119] is unusual among his opinions in its subject matter: two serious constitutional claims arising from a mundane incident. The opening paragraph of Roberts's opinion bears quotation in full for its presentation of the legal and factual aspects of the case in distinct styles:

> No one is very happy about the events that led to this litigation. A twelve-year-old girl was arrested, searched, and handcuffed. Her shoelaces were removed, and she was transported in the windowless rear compartment of a police vehicle to a juvenile processing center, where she was booked, fingerprinted, and detained until released to her mother some three hours later—all for eating a single french fry in a Metrorail station. The child was frightened, embarrassed, and crying throughout the ordeal. The district court described the policies that led to her arrest as "foolish," and indeed the policies were changed after those responsible endured the sort of publicity reserved for adults who make young girls cry. The question before us, however, is not whether these policies were a bad idea, but whether they violated the Fourth and Fifth Amendments to the Constitution. Like the district court, we conclude that they did not, and accordingly we affirm.[120]

Roberts's first sentence establishes consensus on the undisputed facts of the case, the arrest of a twelve-year-old for eating her french fry while her friend purchased a fare card at the Metro station. There will clearly be no effort to mitigate or underplay the event. Roberts is unsparing in detailing the unpleasant consequences of that arrest—the "ordeal"—and makes no attempt to present the plaintiff as an adolescent rather than a "child." It is also worth noting that he does not use the plaintiff's first name, a choice that has the effect of distancing the court and the reader somewhat from Ansche Hedgepeth's experience. Nonetheless, Roberts also carefully highlights the disproportion between offense and consequence: the ordeal is "all for eating a single french fry."

Thus far, the facts seem to point toward a victory for Ansche, as does the next sentence, which reports that the district court considered the policies authorizing her arrest "foolish" and that the public reaction prompted their swift reversal. But Roberts's tone now shifts from sympathy to irony, as he points out that "those responsible endured the sort of publicity reserved for adults who make young girls cry." Ansche is no longer a child or even a solitary victim ("young girls"), and government officials are also suffering some consequences. The tone shifts again in the final two sentences of the paragraph as Roberts turns from facts to law. The paragraph turns on "however," the pivot between policy and law, and Roberts defines the issue presented as one of constitutional law in a straightforward

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119. 386 F.3d 1148 (D.C. Cir. 2004).
120. *Id.* at 1150.

sentence lacking any rhetorical flourishes. Allying his court with the lower court in finding no constitutional violation, he ends the paragraph with a conventional judicial summary: "and accordingly we affirm." With the uncomfortable facts of the case acknowledged and now out of the way, Roberts can turn to the legal analysis that is the sole basis for the decision.

Although the next section of the opinion has a narrative introduction ("It was the start of another school year . . . ."[121]), Ansche is no longer the heroine, and Roberts can resume his detached attitude toward the episode. The Metro's "zero-tolerance" policy for food on its premises "had more fateful consequences for children than for adults," since under controlling law adults merely received a citation on the spot while minors were instead taken into custody.[122] Ansche's mother, suing as her next friend, argues that this difference in treatment violated her daughter's rights to equal protection under the Fifth Amendment and to freedom from physical restraint under the Fourth Amendment. On the equal protection issue, Roberts rejects the claim that classifications based on youth rather than age merit heightened scrutiny:

> Nor are the characteristics that define the young markedly more obvious or distinguishing than those than define the old. In fact, the characteristics are simply opposite sides of the same coin—age. Youth is also far less "immutable" than old age: minors mature to majority and literally outgrow their prior status; the old can but grow more so.[123]

The passage has many of his stylistic signatures: the familiar adage, the triple alliteration of "minors mature to majority," and the opposition of youth and age that ends with a wistful epigram. Responding to the argument that the young, unlike the old, lack political power, he finds that children do "attract the attention of the legislature."[124] He concludes with another of his carefully crafted repetitions, again reminiscent of Justice Jackson: "We are rightly skeptical of paternalistic arguments when it comes to classifications addressing adults, . . . but the concern that the state not treat adults like children surely does not prevent it from treating children like children."[125]

Having determined that rational basis is the standard of review, Roberts has little difficulty in finding "that the no-citation policy for minors is rationally related to the legitimate goal of promoting parental awareness and involvement with children who commit delinquent acts."[126] That conclusion is supported by empirical observations about youthful veracity:

> A child often will not be carrying a form of identification, and there is nothing to stop one from giving an officer a false name—an entirely fanciful one or, better yet, the name of the miscreant who pushed them on the playground that

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121. *Id.*
122. *Id.*
123. *Id.* at 1154.
124. *Id.* at 1155.
125. *Id.* (citation omitted).
126. *Id.* at 1156.

> morning. In this situation parents would be none the wiser concerning the behavior of their children.[127]

After rooting his analysis in his perception of childhood reality, Roberts returns to the question of policy versus law already resolved in the opening paragraph: "The district court had and we too may have thoughts on the wisdom of this policy choice—it is far from clear that the gains in certainty of notification are worth the youthful trauma and tears—but it is not our place to second-guess such legislative judgments."[128] The alliterative reference to "trauma and tears" alludes briefly, with mild irony, to the compelling human aspect of the case, but only to reaffirm the limits of the judicial role.[129]

Although Roberts avoids mention of Ansche's first name in his opening paragraph, throughout the rest of the opinion he attributes all the legal arguments to her, ignoring the fact that her mother is the named plaintiff. Thus, for example, Ansche "first contends,"[130] "alternatively argues,"[131] "reasons,"[132] and finally "has not made the case that her arrest was unconstitutional."[133] The convention of attributing counsel's legal arguments to the client in this case contradicts Roberts's earlier reliance on the unreliability of children. By transforming the frightened, crying Ansche, a child likely to mislead a police officer about her name, into the nominal source of serious constitutional arguments, Roberts completes the rhetorical transition from sympathy to legal detachment. The opinion is a rhetorically skillful example, in one of Roberts's adages, of having your cake and eating it too: demonstrating both the compassion of the court for Ansche's painful experience and the judicial obligation to treat Ansche with the same detached professionalism as a litigant twice her age.

II. REFINING A JUDICIAL PERSONALITY: ROBERTS AS CHIEF JUSTICE

A single term on the Supreme Court, less than half the length of his brief service on the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals"), is scarcely sufficient to define the style or substance of the new Chief Justice's jurisprudence. Nonetheless, the first Roberts opinions—eight for the Court, two concurrences, one dissent, and two opinions concurring in part and dissenting in part—show a noticeable continuity with his earlier work, especially in the judicial voice that he employs. Virtually all of his favorite stylistic devices appear in some form, and the perspective on human behavior reflected in *Hedgepeth* informs several Supreme Court opinions as well. Observers noted that Chief Justice Roberts showed no hesitation in assuming the leadership of the Court

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127. *Id.*

128. *Id.* at 1156–57.

129. *Id.* at 1157. The Fourth Amendment issue gives Roberts less difficulty. He finds that a recent precedent, *Atwater v. City of Lago Vista*, permits a police officer who has witnessed a criminal offense to arrest the offender without being subjected to a reasonableness test. *Id.* at 1157–59 (citing Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001)).

130. *Id.* at 1153.

131. *Id.* at 1155.

132. *Id.* at 1157.

133. *Id.* at 1159.

from his first day in the center chair,[134] and his earliest opinions show a similar confidence in his distinctive execution of the opinion form.

A. Diction and Metaphor

Although Roberts's diction is somewhat more restrained than in his work on the Court of Appeals, particularly in his first opinions for a unanimous Supreme Court, by the spring of 2006 his pleasure in unexpected language reemerged. Writing for an almost unanimous Court in a case that hinges on a struggle between several adults and a juvenile,[135] Roberts offers an assortment of synonyms for the main event: "melee,"[136] "tumult,"[137] and "fracas."[138] He enhances his vivid diction with a narrative in the present tense: "A juvenile, fists clenched, was being held back by several adults. As the officers watch, he breaks free and strikes one of the adults in the face, sending the adult to the sink spitting blood."[139] The immediacy of the scene, with its bloody conclusion, provides rhetorical support for the position that the police have both a right and a duty to intervene.[140] In another almost unanimous opinion issued a week earlier, Roberts refers to "[t]he animating principle" of several cases "announced in their progenitor"[141] and the "hollow rhetoric"[142] of standing doctrine that would result from the extension of jurisdiction to the plaintiffs' case. In an echo of his earlier fondness for unusual adverbs, he observes in dissent that "[t]he majority aphoristically states that '[w]hen identity is in question, motive is key.'"[143]

Roberts's taste for metaphor and analogy also reappears. Some of these usages are drawn from familiar expressions: a weak government presentation "cannot carry the day";[144] a court exercising its discretion is not "writing on an entirely clean slate";[145] and a statute's discretionary fee provision places "no heavy

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134. Linda Greenhouse has observed of Roberts that "there is no doubt that he is in charge of the courtroom." Linda Greenhouse, *Supreme Court Memo: In the Roberts Court, More Room for Argument*, N.Y. TIMES, May 3, 2006, at A19.

135. Brigham City v. Stuart, 547 U.S. 398, 398 (2006). The case was argued on April 24 and decided on May 22. *Id.* Justice Stevens wrote a brief concurring opinion calling this "an odd flyspeck of a case" to which the Court should not have granted certiorari. *Id.* at 407–408 (Stevens, J., concurring). Nevertheless, Stevens did not quarrel with the substance of Roberts's majority opinion. *See id.* at 407–409.

136. *Id.* at 400.

137. *Id.* at 401, 406.

138. *Id.* at 406.

139. *Id.*

140. *Id.*

141. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343 (2006). The case was decided on May 15. *Id.* at 332. Justice Ginsburg concurred in part and in the judgment. *Id.* at 354 (Ginsburg, J., concurring).

142. *Id.* at 353.

143. House v. Bell, 547 U.S. 518, 571 (2006) (Roberts, C.J., concurring in part and dissenting in part) (quoting *id.* at 540 (majority opinion)).

144. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432 (2006).

145. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring).

congressional thumb on either side of the scales."[146] Occasionally, Roberts chooses a more original and resonant metaphor, as when he rejects the majority's application of the actual innocence exception to the usual procedural bar for habeas claims. After painstakingly reviewing the evidence introduced at trial, he observes ironically that "[a]ccording to the majority, House has picked the trifecta of evidence that places conviction outside the realm of choices *any* juror, acting reasonably, would make."[147] Under the majority's analysis, he suggests, the judicial factfinding process has become instead a lucky bet.

Roberts also seems intrigued by the comparison of the legal system with athletic competitions. Endorsing the right of police officers to enter a home when they see a potentially injurious fight in progress, he chooses a simile to distinguish law enforcement from sport: "The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."[148] The parenthetical reference to hockey is a characteristically playful touch that expands the image to include the accepted pervasiveness of violence in that sport, suggesting that such tolerance is not appropriate in law enforcement. The image also evokes another sports simile Roberts employed in his opening statement at his confirmation hearing, this time linking judges to umpires: "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire."[149] This time the comparison is one of constraint rather than empowerment; where police officers may intervene in events on the ground, judges must remain on the sidelines with only the authority provided by the rules. The second image is less effective than the first—judges do in fact have more latitude in their courtrooms than umpires on the field of play—but both reflect Roberts's affinity for metaphoric modes of thought.

That same affinity appears when Roberts constructs elaborate analogies to make his point. Finding insufficient notice to satisfy due process in a state's reliance on tax notices sent by certified mail and returned unopened, he offers a striking visual image:

> If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again.[150]

The analogy exaggerates the challenged policy just enough to clarify why the state's refusal to make additional efforts to contact delinquent homeowners ignores the potential contingencies of the postal service.[151] When he dissents from the

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146. Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005).

147. *House*, 547 U.S.. at 566 (Roberts, C.J., concurring in part and dissenting in part) (emphasis in original).

148. Brigham City v. Stuart, 547 U.S. 398, 406 (2006).

149. *Confirmation Hearing*, *supra* note 40, at 55 (opening statement of nominee).

150. *Id.* at 229.

151. Roberts provides another less exaggerated analogy to make the same point: "It

Court's holding in *Georgia v. Randolph* that one resident of a shared dwelling may withhold consent to a warrantless search, Roberts again translates doctrine into ordinary experience, explaining that the majority position "simply leads to the common stalemate of two gentlemen insisting that the other enter a room first."[152] The visual image places the two residents—one willing to permit a search, the other resistant—on equal footing, with equal rights to control the situation.

Roberts's dissent in *Georgia v. Randolph* also contains his most elaborate—and playful—use of figurative language as he rings changes on the familiar adage that a man's home is his castle, first introduced in Justice Souter's majority opinion,[153] to build the counter argument. The majority's position, Roberts argues, protects only an objecting resident who has the good fortune to be at the door when the police arrive, and "[i]t seems a bit overwrought to characterize [the majority's] approach as affording great protection to a man in his castle."[154] Roberts then reminds the majority that its rule will have possibly threatening or dislocating practical consequences for the consenting resident, especially, as in this case, when it is the wife who wishes to admit the police to find evidence of her husband's criminal activity:[155] "The majority would afford the now quite vulnerable consenting co-occupant sufficient time to gather her belongings and leave, apparently putting to one side the fact that it is her castle, too."[156] In his final paragraph, Roberts returns to what he sees as the majority's flawed assumption that its holding will protect privacy in spite of the practical realities of such situations:

> The majority reminds us, in high tones, that a man's home is his castle, but even under the majority's rule, it is not his castle if he happens to be absent, asleep in the keep, or otherwise engaged when the constable arrives at the gate. Then it is his co-owner's castle. And, of course, it is not his castle if he wants to consent to entry, but his co-owner objects.[157]

The recurrent image, with its overtones of sovereign rights, is steadily eroded by the contrast between those abstract rights and the humbler realities of shared domestic life.

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would not be inconsistent with the approach the Court has taken in notice cases to ask, with respect to a procedure under which telephone calls were placed to owners, what the State did when no one answered." *Id.* at 231.

152. 547 U.S. 103, 129 (Roberts, C.J., dissenting). Roberts later offers a second analogy to support his point: "If two friends share a locker and one keeps contraband inside, he might trust that his friend will not let others look inside. But by sharing private space, privacy has 'already been frustrated' with respect to the lockermate." *Id.* at 131 (Roberts, C.J., dissenting) (quoting United States v. Jacobsen, 466 U.S. 109, 117 (1984)).

153. According to Souter, "[w]e have, after all, lived our whole national history with an understanding of 'the ancient adage that a man's home is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown.'" *Id.* at 115 (quoting Miller v. United States, 357 U.S. 301, 307 (1958)).

154. *Id.* at 135 n.1.

155. *See id.* at 138.

156. *Id.* at 139 n.2 (citation omitted).

157. *Id.* at 142 (citation omitted).

B. The Judicial Voice

Although Roberts continues to ground his opinions in the daily reality of human experience, he has not to date written with the same degree of informality as in his Court of Appeals opinions. The highly colloquial diction has largely vanished, and he seems much less likely to use conversational syntactical structures or asides to engage the reader. Nonetheless, there are flashes of his earlier style which suggest that he has not entirely abandoned these practices. In his first opinion, one written for a unanimous Court, he observes that the complaint in a removal case was not clear as to the amount in controversy and adds breezily, between dashes, "no reason it should be, since the complaint had been filed in state court."[158] In other opinions, he begins one sentence with "[w]orse yet,"[159] inserts "of course" in three others,[160] and points out in dissent that the majority has provided "a complete lack of practical guidance for the police in the field, let alone for the lower courts."[161] In the same dissent, he also notes that the majority "has taken a great deal of pain in altering Fourth Amendment doctrine, for precious little (if any) gain in privacy."[162] And in *Jones* he concedes that "Mr. Jones should have been more diligent with respect to his property, no question."[163] There are also a few instances of informal diction. A previously unresolved due process issue concerning notice is "a new wrinkle,"[164] the majority's opinion is "quite a leap" from Justice Jackson's examples,[165] and "proposed rulemaking went nowhere."[166] Most of the cited examples come from Roberts's earlier opinions on the Court, including one dissent. On balance, Roberts's first term opinions have a noticeably less conversational tone than their Court of Appeals counterparts, and Roberts seems, at the moment, to be hesitant to employ his strategies of informal engagement.

One strategy that Roberts is not hesitant about, particularly in his dissents, is the use of repetition and balance to emphasize a point, a practice sometimes enhanced by the addition of italics to highlight the paired concepts or terms. In *Georgia v.*

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158. Martin v. Franklin Capital Corp., 546 U.S. 132, 134 (2005). Akhil Amar has commented appreciatively on Roberts's use of the dash. Linda Greenhouse, *Term One: His Hipness, John G. Roberts*, N.Y. TIMES, July 9, 2006, § 4, at 5. One example Amar notes is Roberts's majority opinion in *Jones v. Flowers* finding inadequate notice to satisfy due process: "In response to the returned form suggesting that Jones had not received notice that he was about to lose his property, the State did—nothing." 547 U.S. 220, 234 (2006). According to Amar, "That little dash is brilliant. . . . Every ordinary citizen can understand the frustration of dealing with government stupidity." Greenhouse, *supra*.

159. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 57 (2006).

160. *Id.* at 58; *Martin*, 546 U.S. at 139; Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2687 (2006).

161. Georgia v. Randolph, 547 U.S. 103, 142 (2006) (Roberts, C.J., dissenting).

162. *Id.* at 141.

163. Jones v. Flowers, 547 U.S. 220, 234 (2006).

164. *Id.* at 227.

165. *Id.* at 233.

166. Rapanos v. United States, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring). Roberts uses the same phrase in another opinion: "But this fundamental predicate to the majority's analysis gets us nowhere." *Randolph*, 547 U.S. at 129 (Roberts, C.J., dissenting).

Randolph, for example, he begins his critique of the majority by pointing out that its assumption about the consequences of sharing a residence may be just as easily viewed from the opposite perspective: "Does the objecting cotenant accede to the consenting cotenant's wishes, or the other way around?"[167] He then counters the majority's criticism of his dissent by reworking its language to his own advantage:

> The majority also mischaracterizes this dissent as assuming that "privacy shared with another individual is privacy waived for all purposes including warrantless searches by the police." The point, of course, is not that a person waives his privacy by sharing space with others such that police may enter at will, but that sharing space necessarily entails a limited yielding of privacy *to the person with whom the space is shared*, such that the other person shares authority to consent to a search of the shared space.[168]

The alliterative phrase "shared space" appears, with variations, four times, redirecting the emphasis from the majority's abstract "privacy shared" to the concrete reality of a physical dwelling shared with someone else.

In his later dissent in *House v. Bell*, Roberts elaborates the technique even further. Rejecting the Court's detailed review of the evidence from a murder trial, he insists that "[t]he District Court did not painstakingly conduct an evidentiary hearing to compile a record for us to sort through transcript by transcript and photograph by photograph."[169] He then goes on to underscore his skepticism about the defendant's veracity through the same device, repeating the word "lie" four times in two sentences:

> House retold this story to the District Court, saying that he initially lied to police because he was on parole and did not want to draw attention to himself. In other words, having nothing to hide and facing a murder charge, House lied—and when he was caught in the lie, he said he lied not to escape the murder charge, but solely to avoid unexplained difficulties with his parole officer.[170]

Continuing his assault on the defendant's credibility, Roberts combines repetition with syntactical variations to challenge the majority's focus on motive:

> The majority aphoristically states that "[w]hen identity is in question, motive is key." Not at all. Sometimes, when identity is in question, alibi is key. Here, House came up with one—and it fell apart, later admitted to be fabricated when his girlfriend would not lie to protect him. Scratches from a cat, indeed.[171]

The fragment "Not at all" emphatically contradicts the quotation from the majority before reformulating the majority's quotation to shift the focus to the defendant's

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167. *Randolph*, 547 U.S. at 129 (Roberts, C.J., dissenting) (emphasis in original).

168. *Id.* at 134 n.1 (citation omitted) (Roberts, C.J., dissenting) (quoting *id.* at 115 n.4 (majority opinion)).

169. 547 U.S. 518, 561 (2006) (Roberts, C.J., concurring in part and dissenting in part).

170. *Id.* at 567–68 (citation omitted) (Roberts, C.J., concurring in part and dissenting in part).

171. *Id.* at 571 (citation omitted) (quoting *id.* at 540 (majority opinion)).

fabricated alibi. The final comment, another sentence fragment, invokes a detail of that abandoned alibi with sarcastic economy before concluding with a single word of scornful rejection. The dismissive tone covers both the mendacious defendant and a majority willing to reject the district court's conclusions. Common sense, Roberts suggests, tells us that the key issue is the discredited alibi and that the majority is misguided to ignore it.

C. Mentors and Masters

In his first Supreme Court term Roberts made only a handful of allusions to sources other than case law, including, as Linda Greenhouse has pointed out, only one law review article.[172] Numbers, however, tell only part of the story. It is surely noteworthy—and not coincidental—that in his first opinion for the Court, *Martin v. Franklin Capital Corporation*, Roberts contrived to cite both the judges for whom he clerked. The issue in the case—whether plaintiffs could recover attorney's fees under a federal statute when their case was first removed by the defendants to federal court and subsequently remanded back to state court—scarcely provides much scope for citation.[173] Roberts solves the problem by citing Chief Justice Rehnquist for a basic proposition in statutory construction: "As Chief Justice Rehnquist explained for the Court in *Fogerty v. Fantasy Inc.*, '[t]he word "may" clearly connotes discretion.'"[174] A vast number of sources were available in support of that proposition, but Roberts chooses to cite Rehnquist in a gesture of respect for his late predecessor. Judge Friendly is also cited for a broad legal tenet, though in a less direct manner. Roberts first provides his own epigrammatic statement: "Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike."[175] He then supports that statement with an indirect citation: "See Friendly, Indiscretion about Discretion, 31 Emory L.J. 747, 758 (1982)." The cited page discusses the need for consistency among not only like but also strongly similar cases, although Roberts is not interested in that refinement.[176] The basis for the citation is less focused on its content than its author, and Roberts makes his second gesture of respect to a judge who is, as Roberts's Court of Appeals opinions reveal, a revered mentor. In his inaugural opinion, Roberts thus locates himself as the successor to both Rehnquist and Friendly.

In the first of his two concurrences, issued in *eBay Inc. v. MercExchange, L.L.C.*, Roberts again uses citations to locate himself within the community of judges, this time within the more exclusive company of Supreme Court Justices. When a unanimous Court held general principles for permanent injunctive relief applicable under the Patent Act, Roberts, joined by Justices Scalia and Ginsburg, concurred.[177] The brief concurrence adds a single point to the majority opinion, the value of history as a guide to the application of those principles. Roberts cites two

172. *See* Greenhouse, *supra* note 158.

173. *Id.* at 134–36.

174. *Id.* at 136 (citation omitted) (quoting 510 U.S. 517, 533 (1994)).

175. *Id.* at 139.

176. Henry Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982).

177. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394 (2006) (Roberts, C.J., concurring).

sources in the concurrence, both of which are cases and both highly revealing. The first source is, remarkably, his own first Supreme Court opinion in *Martin* issued five months earlier. More specifically, he cites the sentence quoted above that begins with the statement "[d]iscretion is not whim."[178] The second source is a 1921 Supreme Court opinion by Justice Holmes that contains one of his most celebrated aphorisms: "When it comes to discerning and applying those standards, in this area as others, 'a page of history is worth a volume of logic.'"[179] The citation for the quoted passage includes the parenthetical information, not usually contained in such references, indicating that it was an opinion of the Court by Justice Holmes.[180] Together, the two citations stake out Roberts's place in the line of Supreme Court Justices. By citing his own first opinion, Roberts suggests that, however brief his service on the Court, he is now as authoritative as his colleagues present and past. And by citing Holmes—as he did twice in his Court of Appeals opinions, including another use of the same passage—he also suggests that he is now linked to the great Justice not only as a disciple but also as a colleague. It is no coincidence that Roberts's own aphorism about the restraint of judicial discretion is followed by what is arguably Holmes's best-known aphorism. Although Roberts was a clerk to Friendly and Rehnquist, he asserts a stylistic and substantive bond with Holmes as well.

The final set of revealing references appears in *DaimlerChrysler Corp. v. Cuno*, where the Court found that taxpayers lacked standing to challenge local tax abatements and credits.[181] Writing for the majority, Roberts turns first to principles, citing Chief Justice Marshall's opinion in *Marbury v. Madison*[182] for the Court's authority to determine whether a true case or controversy is before it.[183] Roberts then cites a passage from a speech by Marshall to the House of Representatives asserting the limits on the judicial power,[184] and also cites James Madison's remark to the Constitutional Convention that a case or controversy must be "of a Judiciary Nature."[185] Finally, Roberts cites Madison a second time for the distinction between the plaintiffs's rights under the Commerce Clause and the Establishment Clause.[186] *Marbury* is the classic cite for issues of judicial power, but Roberts's interest in going outside the case law to include Marshall's speech and Madison's views reinforces his commitment to history as well as judicial precedent as sources for constitutional interpretation. After twice quoting Holmes on the value of history, Roberts suits his actions to his cites, invoking both Marshall as legislator and Madison as a drafter of the Constitution.

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178. Martin v. Franklin Capital Corp., 546 U.S. 132, 134 (2005), *cited with approval in eBay*, 547 U.S. at 395.

179. *eBay*, 547 U.S. at 395.

180. *Id.*

181. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 337 (2006).

182. *Id.* at 340.

183. *Id*. at 340–41.

184. *Id.* at 341 (citing 4 PAPERS OF JOHN MARSHALL 95 (C. Cullen ed. 1984)).

185. *Id.* at 342 (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 430 (M. Farrand ed. 1966)).

186. *Id.* at 347–48 (citing 2 WRITINGS OF JAMES MADISON 186 (G. Hunt ed. 1901)).

D. Tone: The Skeptic Returns

Roberts's first term opinions for the Supreme Court show some subtle but intriguing differences in tone from his Court of Appeals opinions. The Chief Justice is clearly a deliberate stylist with an appreciation for the expressive nuances of language, and the continuities of his opinions transcend the basic legal prose characteristic of law clerks on both courts. Whatever the drafting procedures of his chambers, it seems a fair assumption that Roberts, at the least, edits with a sharp pen and decides when to give an opinion a particular edge. The fact that his Supreme Court opinions are somewhat less conversational and playful in style than his earlier work suggests that he still is in the process of shaping his judicial voice to the demands of his new position. And it should come as no surprise that Roberts's most striking rhetorical moments tend to come in his separate opinions, both concurring and dissenting. That said, it is also clear that the distinctive tone of his Court of Appeals opinions—skeptical, detached, good-natured but coolly rational—has moved with him to the Supreme Court.

The Roberts edge appears in his first opinion, where he notes dryly, "[w]e have it on good authority that 'a motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'"[187] That "good authority" turns out to be Chief Justice Marshall in *United States v. Burr*, and the passage is typical of Roberts: mildly ironic and at the same time respectful of Marshall without giving overt praise.[188] Also typical of Roberts is his note of candor in discussing the processes of government. In a Religious Freedom Restoration Act (RFRA) case, he observes, "[w]e have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one."[189] He extends the same candor to the executive branch, finding that "[t]he Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exception."[190] The criticism, though softened by the conversational voice of the bureaucrat, nonetheless supports the Court's decision to grant an exception on the facts of this case. When he writes for a unanimous Court to uphold the constitutionality of the Solomon Amendment, which requires law schools receiving federal funding to provide the same campus access for military and non-military recruiters, Roberts reminds the law schools challenging the Amendment that law students are not easily misled. Noting that the Court has previously "held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so," he takes a mild jab at the protective argument of the law schools: "Surely students have not lost that ability by the time they get to law school."[191]

That note of skepticism toward easy generalizations is characteristic of Roberts's voice. His dissent in *Georgia v. Randolph*, which is also his first separate

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187. Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005).

188. *See* United States v. Burr, 25 F. Cas. 30, 35 (C.C. Va. 1807), *cited with approval in Martin*, 546 U.S. at 139.

189. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006).

190. *Id.* at 1223.

191. Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 65 (2006).

opinion, makes clear from its opening sentence his resistance to the broad assumption he sees as underlying the majority's position: "The Court creates constitutional law by surmising what is typical when a social guest encounters an entirely atypical situation."[192] The carefully chosen word "surmising," while not quite so harsh as "speculating" or "guessing" would have been, nonetheless accuses the Court of operating at a remove from the realities of the situation, just as the play on "typical" and "atypical" points out the potential limits of the Court's vision. Roberts develops his point by painting a brief picture of the majority's surmise in action: "Nevertheless, the majority is confident in assuming—confident enough to incorporate its assumption into the Constitution—that an invited social guest who arrives at the door of a shared residence, and is greeted by a disagreeable co-occupant shouting 'stay out,' would simply go away."[193] His repetition of "confident" as well as "assuming" and "assumption" prepares the ground for Roberts's counterposition, a reliance instead on particular circumstances: "The fact is that a wide variety of differing social situations can readily be imagined, giving rise to quite different social expectations."[194] He then spins out a series of differing situations—a guest arriving for a birthday party, a traveler coming from a great distance, a dwelling with a single room or one with common areas—to establish that "[t]he possible scenarios are limitless."[195] In an elegant echo of his opening sentence, Roberts now demotes the Court's surmise to no more than "a hunch about how people would typically act in an atypical situation."[196] The entire passage showcases a number of elements of Roberts's stylistic repertoire, including the use of skepticism rather than blunt attack; the careful modulation of diction; the deliberate repetition of key terms; and the circular resolution that, as in some of his lower court opinions, ends where it began, after making its point. The passage also illustrates a repeated theme in Roberts's jurisprudence, the preference for specific facts over broad abstractions to resolve a case. Where the majority relies on its assumption, Roberts insists that he will rely only on the particular circumstances of the case before him. Style and substance merge in a preference for the particular over the general.

The same preference, expressed by a similar rhetorical strategy, appears in another of Roberts's separate opinions, this time a partial dissent from the majority's application of the actual innocence exception to the procedural bar rule in *House v. Bell.* Rejecting the majority's reading of the evidence submitted at the petitioner's murder trial, Roberts distinguishes between theory and fact:

> I suppose it is theoretically possible that the jeans were contaminated by spillage before arriving at the FBI, that Agent Bigbee either failed to note or lied about such spillage, and that the FBI then transferred the jeans into a plastic bag and put them back inside the evidence container with the spilled blood still sloshing around sufficiently to contaminate the outside of the plastic bag as extensively as it did. This sort of unbridled speculation can theoretically defeat any inconvenient fact, but does not suffice to convince me that the

192. Georgia v. Randolph, 547 U.S. 103, 127 (2006) (Roberts, C.J., dissenting).
193. *Id.* at 129.
194. *Id.*
195. *Id.* at 130.
196. *Id.*

> District Court's factual finding—that the blood spilled *after* FBI testing—was clearly erroneous.[197]

The passage opens with what seems to be a concession to the majority: its position is "theoretically possible." The description of the facts necessary to support that possibility then shifts abruptly from a neutral account of events to the likelihood of "blood still sloshing around sufficiently" to create the evidence presented. The choice of the word "sloshing"—a colloquial term of deliberate imprecision—makes clear immediately Roberts's belief that such contamination is not even remotely supported by the evidence. The repetition of "theoretically," this time linked to "unbridled speculation," produces another of Roberts's circular effects—the return to the same language that has now been transformed from a possibility to an absurdity. Theory has come up against an "inconvenient fact" and lost.[198]

E. A Case Study: The "Sordid Business"[199] of Texas Redistricting

League of United Latin American Citizens v. Perry, the highest profile case of the 2005 term in which Roberts participated,[200] contains his most impassioned rhetoric. This seems, on the face of it, a curious outcome, since Roberts joined three of the four parts of Justice Kennedy's opinion, all upholding the Texas redistricting plan, and dissented only from Part III, in which the Court found a violation of section 2 of the Voting Rights Act. The dissent, however, argues strenuously that the Court has erred in reaching what Roberts calls "its surprising result" by holding that the creation of a new minority opportunity district dilutes the voting strength of Latinos.[201] In challenging the result, Roberts departs from his usual detached stance and makes his strongest attack on some of his new colleagues.

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197. House v. Bell, 547 U.S. 518, 563 (2006) (Roberts, C.J., concurring in part and dissenting in part).

198. Roberts uses another rhetorical strategy to achieve the same end, the deflation of a theoretical possibility. In the final paragraph of his dissent, he inserts parenthetical qualifications to indicate the remote likelihood that the petitioner can prevail at a new hearing:

> The majority's conclusion is that given the sisters' testimony (if believed), and Dr. Blake's rebutted testimony about how to interpret Agent Bigbee's enzyme marker analysis summary (if accepted), combined with the revelation that the semen on Mrs. Muncey's clothing was deposited by her husband (which the jurors knew was just as likely as the semen having been deposited by House), no reasonable juror would vote to convict.

Id. at 571–72.

199. League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2663 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

200. Roberts did not participate in the Court's most closely watched case, *Hamdan v. Rumsfeld*, because he had been a member of the D.C. Circuit panel that heard the case. Hamdan v. Rumsfeld, 415 F.3d 33 (2005).

201. *League of United Latin American Citizens*, 126 S. Ct. at 2653 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

Roberts's basic argument is that the majority has improperly rejected the District Court's factual finding that the new District 25 satisfies the standards for a Latino opportunity district:

> Unable to escape the District Court's factfinding, the majority is left in the awkward position of maintaining that its *theory* about compactness is more important under § 2 than the actual prospects of electoral success for Latino-preferred candidates under a State's apportionment plan. And that theory is a novel one to boot. Never before has this or any other court struck down a State's redistricting plan under § 2, on the ground that the plan achieves the maximum number of possible majority-minority districts, but loses on style points, in that the minority voters in one of those districts are not as "compact" as the minority voters would be in another district were the lines differently drawn.[202]

Roberts returns to his favorite dichotomy of theory and fact, this time italicizing "theory" to emphasize the weakness of a position founded exclusively on that basis. The majority position is even weaker, he notes, because the theory is "a novel one to boot," and to further underscore the point he adds a colloquial emphatic to the typographic one. Finally, Roberts recasts the dichotomy as one between style and substance. He insists that the only argument available to the majority is that, although District 25 satisfies the legal standard, it "loses on style points" by failing to produce a compact community of Latinos. The fundamental dispute between the majority and the dissent therefore rests precisely on the nature of the Latino majority in the new district. According to Kennedy, the grouping together of two disparate Latino communities, separated by "enormous geographical distance" and "disparate needs and interests,"[203] violates the standard of compactness and thus is "about more than 'style points.'"[204] According to Roberts, however, statistical analysis demonstrates that those communities would favor, and have the numbers to elect, the same candidates. He is, however, particularly harsh in responding to the majority view that the District Court relied on "the prohibited assumption" that voters of the same race would necessarily think and vote alike:[205]

> It is important to be perfectly clear about the following, out of fairness to the District Court if for no other reason: No one has made any "assumptions" about how voters in District 25 will vote based on their ethnic background. Not the District Court; not this dissent. There was a trial. At trials assumptions give way to facts.[206]

The syntactical rhythm of two fragments followed by a four word sentence hammers home the point that the majority is relying on theory while the dissent sticks to facts.

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202. *Id.* at 2653.

203. *Id.* at 2619 (majority opinion).

204. *Id.*

205. *Id.* at 2656 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

206. *Id.* at 2656–57.

The opinion is a compendium of Roberts's favorite stylistic devices, all devoted to a steady assault on the majority. He employs one of his unusual adverbs to reveal that "[w]hat is blushingly ironic" in the Kennedy opinion is the fact that the previous opportunity district "suffers from the same 'flaw' the majority ascribes to District 25, except to a greater degree," the flaw being significant geographical separation of two distinct minority communities.[207] The majority, he implies, should be ashamed to make that argument. After spelling out the precise distances involved, he concludes tartly by turning the majority's language against it in another calculated syntactical fragment: "So much for the significance of 'enormous geographical distance.'"[208] He finds a metaphor evocative of shame—"[t]he majority's fig leaf"[209]—for its asserted reliance on both distance and lack of common interests to distinguish the new district from the old. He also invokes expert evidence relied on by the District Court to find that the new district "would likely perform impeccably for Latino voters."[210] Finally, he confesses to bewilderment at the majority's conclusion, since "[i]t baffles me how this could be vote dilution, let alone how the District Court's contrary conclusion could be clearly erroneous."[211] The passage combines a verb expressive more of sorrow than anger with the emphasis of alliteration to support once again the blameless District Court against the majority's unreasonable attack.

Roberts opens the second part of his opinion with another use of repetition: "The majority arrives at the wrong resolution because it begins its analysis in the wrong place."[212] The Court, Roberts insists, should focus not on District 25 in isolation, but on the combined effect of all the districts in the relevant area of the state. Since the new map contains the greatest possible number of majority-minority districts, "the majority's intrusion into line-drawing . . . suggests that all this is just so much hollow rhetoric,"[213] a phrase he has used before[214] and uses here to distinguish once again between theory and fact. The earlier tone of bafflement gives way to a sharper sarcasm as Roberts turns his focus from the majority's lack of deference to the lower court to the majority's lack of deference to the states. It is, he suggests, improperly requiring Texas to draw a district containing a compact minority population. That requirement is clearly misguided, since "Section 2 is, after all, part of the Voting Rights Act, not the Compactness Rights Act."[215] He dismisses "[t]he majority's squeamishness about the supposed challenge facing a Latino-preferred candidate in District 25" as misplaced, since such a contest would be a routine "part of a healthy political process."[216] The submerged physical metaphor—the majority is too fastidious to appreciate the robust nature of that "healthy" process—reinforces the idea that the Court is out of touch with the realities of the political system. In a final jab, Roberts accuses the majority's demand for a compact and

207. *Id.* at 2657.
208. *Id.*
209. *Id.* at 2657 n.*.
210. *Id.* at 2658.
211. *Id.*
212. *Id*.
213. *Id.* at 2660.
214. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353 (2006).
215. *League of United Latin American Citizens*, 126 S. Ct. at 2660.
216. *Id.* at 2661.

unified Latino community of "giv[ing] an unfamiliar meaning to the word 'opportunity.'"[217]

In the final part of his opinion, Roberts argues that, under the new map, Latino opportunity districts (six out of thirty-two districts, or nineteen percent) are appropriately proportional to the Latino population of the state, which comprises twenty-two percent of the total population.[218] He accuses the majority of distortion by counting all Latino voters for purposes of tallying the total population while excluding those Latino voters added to the new district for purposes of the proportionality analysis. This, he suggests, is a deliberately misleading strategy: "Heads the plaintiffs win; tails the State loses."[219] The familiar formula, the paradigm of a crooked method of resolving a dispute, casts the majority as not only misguided but also deliberately manipulative.

Roberts concludes his opinion by expanding the focus of his criticism from the Texas redistricting map to the larger question of racial identity in the political process. The passage is unusually striking in its language:

> It is a sordid business, this divvying us up by race. When a State's plan already provides the maximum possible number of majority-minority opportunity districts, and the minority enjoys effective political power in the area well in *excess* of its proportion of the population, I would conclude that the courts have no further role to play in rejiggering the district lines under § 2.[220]

Although he has not argued in his opinion for the overruling of any of the Court's cited precedents, he seems here to be rejecting the use of race in the redistricting process. "Sordid" is a powerful word to attach, even by implication, to a Court decision. The use of two highly colloquial terms, "divvying" and "rejiggering," suggests that the entire redistricting process is a political game rather than a constitutionally necessary or even valid procedure. And the syntax of the first sentence, itself rarely seen in legal prose, sounds an elegiac note. He has done his best, Roberts suggests, to identify and correct the Court's specific errors, but to his sorrow and regret the larger problem, the sordid business of race in politics, remains.

CONCLUSION

After Chief Justice Roberts's first term on the Supreme Court, the familiar elements of his judicial personality are at least provisionally in place. He continues to write with skillfully crafted clarity to reach a lay as well as a legal audience. The typical Roberts opinion contains a minimum of legal jargon and an absence of law review citations, relying instead on an assortment of rhetorical strategies to engage and persuade his readers.[221] The voice is conversational, sometimes colloquial, in

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217. *Id.*

218. *Id.* at 2662.

219. *Id*.

220. *Id*. at 2663 (emphasis in original).

221. Linda Greenhouse also notes these elements of Roberts's opinion style and ties it to his years of private practice: "It is direct, straightforward, free of legal jargon, the voice of a lawyer who made a living selling complicated ideas to busy appellate judges under tight time

its diction and syntax. It uses conventional adages to reassure. Occasionally it uses unconventional metaphors or analogies to startle; it may at times be playful in its language or erudite in its allusions. The voice remains detached but genial, more likely to profess itself baffled than angered by opposing views, although Roberts's final dissent suggests that, when provoked, he is capable of a harsher response. It is, in short, the voice of a usually good-humored, coolly rational judge who views the task of decision making as rooted in human experience and largely explicable in human terms.

Roberts's preference for grounding his legal conclusions in the realities of experience reflects his broader preference for fact over theory, a position that has led him to disavow any "overarching judicial philosophy" of his own.[222] The commonsensical tone of his opinions repeatedly insists that legal problems, even problems of constitutional interpretation, can best be approached through an understanding of how people or institutions behave under specific circumstances: how, for example, a visitor to a shared dwelling decides whether to enter when one resident refuses access or how likely a property owner is to receive a tax notice sent by certified mail. Roberts's insistence on the particular rather than the general also underlies his view of narrow decisions as a means of fostering consensus on the Court, a connection he made clear in a recent speech: "Division should not be artificially suppressed, but the rule of law benefits from a broader agreement. The broader the agreement among the justices, the more likely it is a decision on the narrowest possible grounds."[223] The new Chief Justice's goal for the Court and his preferred approach to decision making suggest that his future opinions may well continue to be focused on factual context rather than on expansive theories.[224]

There is one further, though more tentative, aspect of Roberts's judicial personality that may have important implications for the development of his jurisprudence: his location of himself as the heir to a line of distinguished judges—Oliver Wendell Holmes, Learned Hand, Henry Friendly—who, among them, represent traditions of skepticism, judicial restraint, and legal craftsmanship. In his opening statement at his confirmation hearing, Roberts observed that "[m]y

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constraints." Greenhouse, *supra* note 158, at 5.

222. In response to a question from Senator Schumer, Roberts made a similar point in defending his judicial record: "I don't think you can read these opinions and say that these are the opinions of an ideologue. . . . But I think if you look at what I've done since I took the judicial oath, that should convince you that I'm not an ideologue. And you and I agree that that's not the sort of person we want on the Supreme Court." *Confirmation Hearing, supra* note 40, at 27. In an exchange with Senator Hatch, Roberts was even more explicit: "Well, I have said I do not have an overarching judicial philosophy that I bring to every case. And I think that's true. I tend to look at cases from the bottom up rather than the top down and, like I think all good judges, focus a lot on the facts." *Id.* at 159.

223. The speech was his commencement address at Georgetown University's law school. *Chief Justice Says His Goal Is More Consensus on Court*, *supra* note 71, at A16.

224. At his confirmation hearing, Roberts emphasized the value of consensus: "I do think the Chief Justice has a particular obligation to try to achieve consensus consistent with everyone's individual oath to uphold the Constitution, and that would certainly be a priority for me if I were confirmed." *Confirmation Hearing*, *supra* note 40, at 303. The concern for consensus based on narrowly-drawn opinions might also contribute to another of Roberts's stated goals for the Court, the expansion of its docket. He testified that the Court currently hears half the cases it heard twenty years ago and added, "I think the capability to address more issues is there in the court." *Id.* at 309.

personal appreciation that I owe a great deal to others reinforces my view that a certain humility should characterize the judicial role."[225] And, in a recent interview, he added another judicial figure to his pantheon, John Marshall, the Chief Justice whom he hopes to emulate in leading a unified Court that will relinquish "the personalization of judicial politics" and "the jurisprudence of the individual" in favor of "a jurisprudence of the Court."[226] These comments, like the rhetoric of his opinions, suggest that there are jurisprudential values he places above ideological purity.[227] They suggest as well that, in performing his dual roles of opinion writer and Chief Justice, Roberts may prove to be that *rara avis* on the Supreme Court bench, both an artful voice of judicial skepticism and a forger of judicial consensus.

The recent end of Roberts's second Court term, one that produced a number of controversial cases, suggests a somewhat different picture. In a series of high-profile decisions involving such divisive issues as abortion, [228] the First Amendment,[229] and the use of race in pupil assignment policies,[230] Roberts joined Justices Scalia, Kennedy, Thomas, and Alito in upholding conservative positions. Those decisions tended to undermine, though not expressly overrule, Court precedents. In *Gonzales v. Carhart*,[231] for example, the majority upheld the federal Partial-Birth Abortion Ban without reversing *Stenberg v. Carhart*,[232] which struck

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225. *Confirmation Hearing*, *supra* note 40, at 55. At his confirmation hearing Roberts also described himself as "a modest judge":

> Like most people, I resist the labels. I have told people, when pressed, that I prefer to be known as a modest judge. And to me that means some of the things you talked about in those other labels. It means an appreciation that the role of a judge is limited; that a judge is to decide cases before them; they're not to legislate, they're not to execute the laws.

Id. at 158.

226. Jeffrey Rosen, *Roberts's Rules*, ATLANTIC MONTHLY, Jan./Feb. 2007, at 104, 106 (quoting John Roberts).

227. Rosen states,

> Roberts praised justices who were willing to put the good of the Court above their own ideological agendas. "A justice is not like a law professor, who might say, 'This is my theory . . . and this is what I'm going to be faithful to and consistent with'. . . ." Instead of nine justices moving in nine separate directions, Roberts said, "it would be good to have a commitment on the part of the Court to acting as a Court, rather than being more concerned about the consistency and coherency of an individual judicial record."

Id.

228. *See* Gonzales v. Carhart, 127 S. Ct. 1610 (2007) (upholding the federal Partial-Birth Abortion Ban Act of 2003).

229. *See* FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007) (holding application of Bipartisan Campaign Reform Act to issue-advocacy ads a violation of First Amendment free speech rights); Morse v. Frederick, 127 S. Ct. 2618 (2007) (finding no violation of student's First Amendment free speech rights in high school principal's confiscation of banner that could reasonably be read as advocating drug use).

230. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (finding pupil assignment plans relying on racial classifications an equal protection violation).

231. 1275 S. Ct. 1610 (2007).

232. 530 U.S. 914 (2000).

down a comparable Nebraska statute.[233] And Roberts's own positions were sometimes even more nuanced than the Court's holdings. In *Gonzales*, he did not join the Thomas concurrence declaring the Court's major abortion precedents unconstitutional,[234] and, in *Hein v. Freedom from Religion Foundation*,[235] he joined the majority opinion dismissing the case on standing grounds under *Flast v. Cohen*[236] but declined to join Scalia's concurrence calling for *Flast's* reversal.[237] Such refinements led Scalia to denounce what he called "faux judicial restraint"[238] and caused Jeffrey Toobin, in his recent study of the Court, to charge that "Roberts had engaged in the pretense of minimalism—that is, of respecting the Court's precedents—without actually doing so."[239] In the term's most prominent case, Roberts chose to write for the Court in striking down pupil assignment policies that used racial classifications, ending his opinion with a characteristically artful repetition: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[240] Yet he also chose to invoke both of the Court's opinions in *Brown v. Board of Education*[241] as authority for his position, seeming at once to honor and reinterpret those iconic cases.[242]

What should we make of all this? Is Roberts, as Toobin argues, driven exclusively by his ideological convictions in spite of his public embrace of consensus and judicial minimalism as his goals for the Court?[243] Or should his nuanced positions be read as the early efforts of a conservative Justice who recognizes such non-ideological constraints as *stare decisis* and the institutional claims of the Court on his jurisprudence? Two terms provide insufficient evidence to answer such questions, just as they provide insufficient time for a new Justice to emerge with clarity. As Roberts himself might say, reaching for one of the homely adages he favors to underscore a point, the proof will be in the pudding.

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233. *Id.*

234. *Gonzales*, 127 S. Ct. at 1639. Only Scalia joined the concurrence. *Id.*

235. 127 S. Ct. 2553 (2007).

236. 392 U.S. 83 (1968).

237. *Hein*, 127 S. Ct. at 2584 (Scalia, J., concurring in judgment). Only Thomas joined the concurrence. *Id.*

238. FEC v. Wisconsin Right to Life, 127 S. Ct. 2652, 2864 n.7 (2007) (Scalia, J., concurring in part and in judgment).

239. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 332 (2007). Scalia offered a more acerbic critique of the majority's refusal to strike down *Flast*: "Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future." *Hein*, 127 S. Ct. at 2582 (Scalia, J., concurring in judgment).

240. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007). Justice Kennedy did not join the section of the opinion, rendering it a plurality view. *Id.* at 2788.

241. 346 U.S. 483 (1954) (Brown I); 349 U.S. 294 (1955) (Brown II).

242. *Parents Involved in Community Schools,* 127 S. Ct. at 2767–68.

243. TOOBIN, *supra* note 239, at 338–39.

Insuring Corporate Crime

MIRIAM HECHLER BAER*

Corporate criminal liability has become an important and much-talked about topic. This Article argues that entity-based liability—particularly the manner in which it is currently applied by the federal government—creates social costs in excess of its benefits. To help companies better deter employee crime, the Article suggests the abolition of entity-wide criminal liability, and in its place, the adoption of an insurance system, whereby carriers would examine corporate compliance programs, estimate the risk that a corporation's employees would commit crimes, and then charge companies for insuring those risks. The insurance would cover civil penalties associated with the entity's employee-related criminal conduct. Part I begins with a discussion of corporate criminal liability and the costs that accrue from the manner in which it has been implemented by the Department of Justice. Part II examines several proposals to change corporate criminal liability, and explains why most of these proposals would barely alter the current structure. Part III lays out the proposal for an insurance system in lieu of entity-based criminal liability and explains, in rough form, how corporate entities might contract for insurance, how claims might be filed, and how damages might be measured. Part III also addresses a number of arguments that others might raise against the proposal.

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INTRODUCTION

Since 1909, federal courts have widely accepted the maxim that corporate organizations may be held vicariously liable for their employees' crimes.[1] There is far less consensus, however, that corporate liability deters crime.[2]This Article suggests that corporate criminal liability inherently encourages entities to overpay for their employees' actual and feared criminal conduct. Because the current corporate criminal liability standard is so broad and the collateral consequences of a criminal indictment are so devastating, entities will attempt to avoid formal charges *ex ante* by investing in "compliance" products intended to impress prosecutors in the future, even if these programs are more costly than effective.[3] Risk averse corporate managers may further attempt to avoid entity-based criminal liability by declining otherwise beneficial investments simply because they seem too risky.[4]

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1. N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 493–94 (1909) (explaining that it is "well established" that in actions for tort, corporations are responsible for the actions of their agents).

2. *See, e.g.*, Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933 (2005) (embracing deterrence rationale and proposing a "three strikes" death penalty approach towards corporations whose employees violate the law); Michael L. Seigel, *Corporate America Fights Back: The Battle over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 10–11 (2008) ("corporate culpability achieves significant additional deterrence, specific and general, beyond that achieved solely by the prosecution of individuals"). *But see* Preet Bharara, *Corporations Cry Uncle and their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 113 (2007) (accepting general premise that corporate criminal liability deters wrongdoing but arguing for narrower standard of liability); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996) (questioning theoretical necessity of criminal liability as means of achieving deterrence); Gilbert Geis & Joseph F. C. DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AM J. CRIM. L. 341 (2002) (calling for empirical testing of efficacy of corporate criminal liability); Vikamaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1478 & n.2 (1996) (criticizing analysis of corporate criminal liability and citing earlier critiques and defenses).

3. *See* Julie O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. AND CRIMINOLOGY 643, 668 (2006) ("it is difficult to find a case in which a corporation cannot be tagged for the activities of its agents"); Andrew Weissman, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1320–21 (2007) (observing that even minimal employee conduct will trigger corporate-level liability). For a discussion of the collateral consequences of corporate indictment, see discussion *infra* at 28-29 n.144-49, and Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 NYU L. REV. 1434, 1453–54 (2007). For a discussion of costs and inefficiencies encountered in compliance programs, see *infra* at 23-26.

4. *Cf.* Seigel, *supra* note 2, at 12–13 (observing—without apparent criticism—that uncertainty inherent in corporate criminal law "undoubtedly makes corporate officers much

Once the government learns that a corporation's employee has violated the law, companies will "pay" far more than investing in showy compliance products to avoid a corporate indictment.[5] This is so because the costs of a criminal indictment to a corporate entity are so great and because the corporation's legal liability for its employees' crimes is so broad.[6] Indeed, as a legal matter, the government may convict the entity for nearly any employee crime, provided the employee was acting within the "scope of his authority" and acted with "an" intention to help the company, even if the employee was violating express directions or corporate policies.[7] As a result, the company whose employee (or even some unidentified group of employees) commits a crime will have few *legal* defenses to protect it from an indictment, much less a conviction.[8]

This reality creates a massive bargaining imbalance between corporations and prosecutors, which in turn generates numerous inefficiencies. On one hand, depending on the industry in which the corporation operates, the return of an indictment from a grand jury will wreak serious havoc on the organization, and cause massive dislocations up to and including its death.[9] Therefore, any corporation who comes within the purview of a federal investigation will do just about anything to avoid a criminal indictment.

On the other hand, the federal prosecutors who administer the corporate criminal justice system have lots of leverage, but little incentive to reach an efficient arrangement with corporate entities. Instead, prosecutors who lack the information and expertise to efficiently identify and correct compliance risks within corporations will nevertheless demand monitoring and reporting regimes (and sometimes ancillary payments that have little or no connection[10] to the underlying crime) without critically evaluating the costs and benefits of those regimes or their effect on the integrity of the corporation.[11]

Prosecutors will extract even greater concessions when they consider the corporation's *ex post* cooperation in identifying and assisting in the prosecution of its current and former employees. Because the prosecutor operates in a culture that pushes for maximum indictments and penalties, she will demand that the entity become a surrogate policeman for the government in exchange for leniency.[12] As a result,

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more risk averse"). For a more negative view of liability-fueled risk aversion, see Assaf Hamdani, *Rewarding Outside Directors*, 105 MICH. L. REV. 1677, 1679 (2007) (arguing that liability imposed on lawyers, accountants, and directors for failing to prevent misconduct may cause risk aversion "particularly since they act on behalf of third parties and therefore do not bear the full costs of taking precautionary measures or making conservative decisions").

5. *See* discussion *infra* at 33–34 (discussing costs of corporate cooperation).

6. *See supra* note 4.

7. *See* discussion *infra* at 15 and notes 81-85.

8. *Id. See also* Weissman, *supra* note 3, at 1320 (observing that "minimal" employee conduct will trigger entity liability).

9. "[A]n indictment—especially of a financial services firm—threatens to destroy the business regardless of whether the firm ultimately is convicted or acquitted." United States v. Stein, 440 F. Supp. 2d 315, 337 (S.D.N.Y. 2006); *see also* Weissman, *supra* note 3, at 1321.

10. *See* Brandon L. Garrett, *Structural Reform Prosecutions*, 93 VA. L. REV. 853, 916 (2007) (describing four recent agreements that required the corporate defendant to make payments to entities that were unconnected to the underlying harm).

11. For a discussion of monitoring regimes, see *infra* at 35-38.

12. *See* Garrett, *supra* note 10, at 899.

corporations—both those suspected of wrongdoing and those who adopt measures ostensibly to avoid similar wrongdoing—are likely to adopt measures that undermine employee trust and loyalty.

The end result of this process (assuming the corporation successfully avoids indictment) is the government's provision of either a deferred or non-prosecution agreement (collectively referred to as DPAs in this Article) that will likely require it to pay fines, provide extensive assistance in the prosecution of individual employees, and agree to costly monitoring and reporting provisions.[13]

DPAs (and the process that precedes their implementation) affect not only individual corporate signatories, but also those *other* corporations in similar industries or otherwise similar circumstances to adopt programs that they think will please prosecutors should they ever become the subject of a criminal investigation.[14] The actual number of corporate prosecutions and DPAs may appear small (and the number of indictments even smaller), but their corresponding effect on onlooker corporations is far more significant.[15]

Despite the government's increasingly aggressive threats of corporate prosecution over the last decade, along with its extraction of numerous concessions through DPAs, there is little evidence that employee compliance across firms has increased.[16] Although DPAs may soften the most visible costs of indictment, they may in fact exact many other costs on corporate shareholders, yet in a far less visible manner.[17]

Although complaints about the corporate criminal justice system have been building over the last decade[18] (particularly, the government's practice[19] of requiring corporate

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13. *See infra* at 29-38.

14. As of July 31, 2006, the Department of Justice had announced twelve deferred prosecution agreements for the year. Sue Reisinger, *Deal-Making by DOJ Is on the Rise*, NAT'L L.J., July 31, 2006, at 8. Since 1992, over forty pre-trial agreements have been documented and reported by either the Department of Justice or individual United States Attorneys' Offices. Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 2 fig.1 (2006). Whereas DPAs prior to 1999 were fairly simple settlements that called for fines and limited corporate reforms, today's DPAs require, among other things: outside monitors and extensive reporting; the corporate defendant's promise to prohibit its employees from contradicting factual statements contained in the DPA; and waiver of the attorney-client privilege. *See* Garrett, *supra* note 10, at 853 (discussing increase in corporate prosecutions that seek far-reaching "structural reforms" in lieu of indictments); Finder & McConnell, *supra*, at 5–7, 17–19.

15. *See infra* at 31-32.

16. Despite the federal government's increased prosecution of corporate entities and defendants, corporate crime (particularly, corporate fraud, which is one of the key forms of criminal conduct in the white collar context) remains a significant problem across thousands of organizations. *See* KPMG FORENSIC, KPMG FORENSIC FRAUD SURVEY 2003 at 2, *available at* http://www.us.kpmg.com/RutUS_prod/Documents/9/FINALFraudSur.pdf (reports of employee fraud increasing even though organizations are "responding with anti-fraud" measures); PRICEWATERHOUSECOOPERS, 2005 GLOBAL ECONOMIC CRIME STUDY: US AND NORTH AMERICA 4, *available at* http://www.pwc.com (follow "publications" hyperlink) [hereinafter PWC 2005 REPORT] (economic crime is "pervasive" throughout North American companies despite increased reliance on internal controls and audits).

17. *See infra* at 35.

18. *See, e.g.*, JOHN HASNAS, TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW (2006) (corporate criminal liability results in unethical conduct); Elizabeth K. Ainslie, *Indicting*

entities to waive the attorney-client privilege over communications between employees and corporate counsel in exchange for leniency), the frustration with the corporate criminal process appeared to reach a boiling point in 2006. This occurred when the Honorable Lewis Kaplan, a district judge in the Southern District of New York, concluded in *United States v. Stein* that the United States Attorney's Office in Manhattan had violated the Fifth and Sixth Amendment rights of several KPMG employees. The government did this by threatening KPMG, the huge accounting firm, with indictment unless it reversed its former policy of advancing attorneys fees to current and former employee-targets of the government's criminal investigation of abusive tax shelters[20] that KPMG had widely implemented and marketed.[21] By forcing

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Corporations Revisited: Lessons of the Arthur Andersen Prosecution, 43 AM. CRIM. L. REV. 107 (2006) (arguing that costs of corporate prosecutions often outweigh benefits); Fischel & Sykes, *supra* note 2, at 319 (arguing that civil liability more efficiently deters corporate conduct than criminal liability); Khanna, *supra* note 2, at 1477 (same); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343 (1999) (criticizing liability scheme's emphasis on compliance programs); Shayne Kennedy, Note, *Probation and the Failure to Optimally Deter Corporate Misconduct*, 71 S. CAL. L. REV. 1075 (1998) (arguing that civil fines would more effectively deter misconduct than probationary sentences envisioned by the Organizational Sentencing Guidelines).

19. For criticism of the waiver issue generally, see AMERICAN BAR ASSOCIATION, REPORT OF ABA TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE 1 (2006), *available at* http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_report_adopted.pdf [hereinafter ABA TASK FORCE REPORT] (emphasizing unanimous support for Resolution 111 opposing further erosion of attorney-client privilege); Elkan Abramowitz & Barry A. Bohrer, *Waiver of Corporate Attorney-Client and Work Product Protection*, N.Y. L.J. Nov. 1, 2005, at 3 (pointing out efforts by the ABA and SEC to prevent the erosion of corporate attorney-client privilege); Lynnley Browning, *Ex-Officials of Justice Dept. Oppose Prosecutors' Tactic in Corporate Criminal Cases*, N.Y. TIMES, Sept. 7, 2006, at C1 (describing letter from Kenneth Starr and Richard Thornburgh to the Justice Department criticizing government's request for privilege waivers in corporate prosecutions). On December 11, 2006, in response to threatened legislation and criticism of prosecutorial practices, the Department of Justice promulgated new guidelines for prosecutors. Memorandum from Paul J. McNulty, Deputy Attorney General, to United States Attorneys, Principles of Federal Prosecution of Business Organizations, *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf [hereinafter McNulty Memo]. The McNulty Memo requires prosecutors to classify potentially privileged material into two categories and then seek approval from the Department of Justice prior to seeking the material. For a defense of the government's procedure of obtaining waivers, see George M. Cohen, *Of Coerced Waiver, Government Leverage, and Corporate Loyalty: The Holder, Thompson and McNulty Memos and Their Critics*, 93 VA. L. REV. (IN BRIEF) 137 (2007) (contending that unwillingness to waive privilege is simply a manifestation of corporate management's attempt at "saving their own necks").

20. As described by the court, the scheme:

> allegedly involved at least four separate tax shelter vehicles, called FLIP, OPIS, BLIPS, and SOS, designed to generate phony tax losses through a series of sham transactions. The conspirators allegedly sought to protect their clients from potential IRS penalties by paying co-defendant Raymond Ruble, a New York tax attorney, to issue opinion letters falsely representing that the tax shelters were likely to survive IRS review.

United States v. Stein, 488 F. Supp. 2d 350, 354 (S.D.N.Y. 2007).

21. United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006). Pursuant to revised prosecutorial guidelines contained in the memorandum issued in the McNulty Memo of

KPMG to withdraw financial support for its employees' defenses, the government effectively reduced the individual defendants' ability to defend what had been characterized as the largest tax prosecution in history.

In a separate opinion, Judge Kaplan found that the prosecution also had pressured KPMG to coerce its employees to speak with government agents during the course of their investigation.[22] Under a policy that KPMG drafted (and the government approved), employees who cooperated with government agents and provided adequate assistance would have the benefit of private attorneys representing them, paid for by KPMG.[23] Those who declined to speak by exercising their Fifth Amendment right against self-incrimination or who provided less than complete information, however, would risk termination and be solely responsible for their legal representation.[24] In July of 2006, Judge Kaplan found that this agreement violated the individual employees' constitutional rights and suppressed several employee statements.[25] One year later, on July 17, 2007, the court dismissed the indictment against thirteen of the sixteen individual KPMG defendants, concluding that the government had used its overall leverage over KPMG to interfere not only with the individual defendants' constitutional privilege against self-incrimination, but also their rights to be defended by the counsel of their choice.[26]

Many will wonder if the KPMG episode is a singular example of one court punishing what it perceived as prosecutorial overreaching, or in fact is the harbinger of a sea change in the way prosecutors and corporate defendants do business. The former option seems more likely. Since Judge Kaplan laid out his initial criticisms in *Stein I* and *II*, the Department of Justice (DOJ) has revised its internal prosecutorial guidelines in a manner that is marginally more pro-defendant.[27] However, neither Judge Kaplan's

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December 2006, prosecutors may no longer consider the payment of an employee's attorney fees as reason for an indictment except in extraordinary circumstances. *See* McNulty Memo, *supra* note 19, at 11 (stating that "[p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment").

22. Kaplan suppressed several of the KPMG employees' statements. United States v. Stein (*Stein II*), 440 F. Supp. 2d 315, 319 (S.D.N.Y. 2006).

23. *Stein I*, 435 F. Supp. at 345–47.

24. "In other words, KPMG told its personnel that it would cut off payment of legal expenses of any employee who refused to talk to the government or who invoked the Fifth Amendment." *Stein II*, 440 F. Supp. at 318.

25. *Stein II*, 440 F. Supp. at 319.

26. United States v. Stein (*Stein III*), 495 F. Supp. 2d 390, 414 (S.D.N.Y. 2007) (criticizing the government's "willingness . . . to use their life and death power over KPMG to induce KPMG to coerce its personnel to bend to the government's wishes notwithstanding the fact that the Constitution barred the government from doing directly what it forced KPMG to do for it"). Previously, the court had attempted to remedy the situation by suppressing the coerced employee statements and by authorizing and taking ancillary jurisdiction over a civil suit between the former employees and KPMG over the attorney fee payments. United States v. Stein, 452 F. Supp. 2d 230, 242–43 (2006), *vacated*, Stein v. KPMG, 486 F.3d 753 (2d Cir. 2007) (holding that the district court had no jurisdiction).

27. *See* McNulty Memo, *supra* note 19. The McNulty Memo in part arose in response to proposed legislation authored by Arlen Specter that would make it illegal for prosecutors to request a waiver of the attorney-client privilege. Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. (2006), *available at* http://online.wsj.com/public/resources/documents/WSJ_thompsonmemoleg.pdf.

decision nor the revised Department policy significantly changes the status quo.[28] The revised policy increases the administrative hurdle of requesting privileged material from corporate targets and discourages prosecutors from blatantly punishing corporations for advancing attorneys fees to employee-targets.[29] The new internal policy does not, however, alter the *respondeat superior* rule that has thrived in the organizational criminal context. Nor does it eliminate the collateral consequences of indictment. Accordingly, corporate entities will continue to enact compliance programs of questionable value and cut agreements with prosecutors that threaten to impose unnecessary costs on shareholders and society.[30] Federal prosecutors, meanwhile, will continue to use their power to regulate and rely on corporate entities to leverage their prosecutions of individual employees.

Instead of tweaking the current system of corporate criminal liability, this Article sets forth a more far-reaching proposal. In place of entity-based criminal liability, I propose a system of civil liability paired with "compliance insurance." In place of prosecutors, insurance carriers would encourage organizations to monitor and police their employees through privately negotiated insurance policies. Carriers would set yearly premiums that would reflect the carriers' assessment of the risk that a given company's employees would violate the law in the course of their employment, and corporations would pay and disclose these premiums to their shareholders. Prosecutors would continue to prosecute individual employees aggressively for criminal conduct. On the entity level, however, employee crime would ordinarily trigger a civil pay-out to either private or government victims.[31] This system would maintain incentives for businesses to monitor and deter employee misconduct; preserve funds for restitution; remove uncertainty and waste from corporate monitoring efforts; and reduce inefficiencies caused by excess prosecutorial discretion.[32] This Article argues that even if it is politically impossible to achieve, its benefit—and its stark contrast to the system currently in place—suggests that scholars and policymakers may be unnecessarily overlooking the value of insurance-based incentives in deterring corporate crime.

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28. Judge Kaplan's attempts at reform were made moot when the Second Circuit found a lack of ancillary jurisdiction over the KPMG attorneys' fees dispute. The Second Circuit took no position on Kaplan's previous conclusion that the DOJ had violated the employees' rights to counsel by placing pressure on KPMG to withhold payments for attorneys fees. *See KPMG*, 486 F.3d at 753. Another court criticized the attorneys fees policy as "unquestionably obnoxious." United States v. Rosen, 487 F. Supp. 2d 721, 737 (E.D. Va. 2007).

29. *See* McNulty Memo, *supra* note 19, at 11.

30. According to several studies, corporate crime has increased in the last five years. PWC 2005 REPORT, *supra* note 16, at 4 (explaining that "[e]conomic crime is a pervasive and growing threat to US and North American businesses of all types"). According to the PWC Report, internal controls fail to detect economic crime approximately sixty percent of the time. *Id.* at 16.

31. To the extent entities were already the subject of civil lawsuits, the system simply would ensure that the entity's insurance paid for the costs of its employees' wrongdoing, regardless of whether that wrongdoing was labeled "criminal."

32. This Article focuses primarily on federal criminal prosecutions. I intend the term "corporate criminal liability" to encompass prosecutions of all legitimate business entities (corporations, partnerships, associations, and other unincorporated organizations). The concerns discussed in this Article do not apply to entities created solely for the purpose of masking criminal conduct.

Part I of this Article explains how the practice of corporate criminal liability causes corporate entities to overpay for leniency and compliance. Entity-based criminal liability is administered by federal prosecutors empowered by their investigatory authority, their charging discretion, and the broad standard of corporate criminal liability.[33] Corporate liability is often described as a composite system because it combines elements of strict and negligence-based liability.[34] On one hand, virtually all business organizations can be held vicariously liable for crimes committed by their employees in the course of their employment.[35] Organizations, however, can avoid liability or reduce their punishment significantly by demonstrating to prosecutors that they meet certain compliance and cooperation standards set forth by the DOJ.[36] Because the "cost" of indictment is so high, most corporate defendants will seek mitigation. Moreover, corporations who have yet to be accused of any type of wrongdoing will adopt methods and programs believed to be useful in avoiding corporate crime and favored by DOJ prosecutors, in the event criminal conduct is later detected.[37]

The problem with the composite system is that its mitigation rules are too vague and are administered and drafted by persons who lack the requisite information and incentives to set compliance and cooperation at efficient levels. As Part I explains, corporate organizations adopt internal policies that may or may not justify their costs.[38] To the extent organizations spend money on programs whose costs exceed their productivity, society is harmed.

Part II explores and analyzes several groups of reforms, including proposals to alter the liability standard,[39] place greater evidentiary burdens on prosecutors during the

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33. Stolt-Nielsen S.A. v. United States, 442 F.3d 177, 183 (3d Cir. 2006) ("[T]he executive branch 'has exclusive authority and absolute discretion to decide whether to prosecute a case . . . .'" (quoting United States v. Nixon, 418 U.S. 683, 693 (1974))); *see also* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 688 (1997) (explaining that the corporate liability standard is "far reaching").

34. *See, e.g.*, Arlen & Kraakman, *supra* note 33, at 688; Vikamaditya S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239 (2000); Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 581–83 (2005).

35. *See* discussion *infra* at 15.

36. *See* discussion *infra* at 22–27.

37. *See* Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with the Law*, 2002 COLUM. BUS. L. REV. 71, 72 (2002).

38. *See* Howard W. Goldstein, *When the Government Ends a Deferred Prosecution Pact*, N.Y. L. J., May 4, 2006, at 5 (explaining that from the point of view of "the corporate target, a deferred prosecution agreement—no matter how harsh and intrusive the terms—is frequently an offer the company simply cannot refuse when the alternative is possibly death or less drastic, but nonetheless severe, consequences"); Langevoort, *supra* note 37, at 74 (concluding that overestimates of the reliability of in-house monitoring combined with underestimates of the costs of third-party audits "biases the legal response towards insisting on too much auditing, forcing unnecessarily costly compliance initiatives").

39. *See* Ainslie, *supra* note 18, at 110 (listing four suggested reforms); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 530–32 (2006) (suggesting that the criminal prosecution of corporations should be limited to situations where the agent's

investigation stage,[40] monitor prosecutors,[41] and eliminate corporate criminal liability altogether.[42] With the exception of the final category, none of these reforms are likely to achieve significant gains in efficiency.

Part III therefore proposes a different type of solution to the overpayment problem. In place of corporate criminal liability, I propose "compliance insurance," a new insurance product that would return much of entity-based liability to the realm of tort, where it belongs.[43] This idea also builds on a growing body of literature that has begun to explore the link between insurance and corporate governance.[44]

As set forth in this Article, this would be an opt-in program whereby the private insurance market would sell "compliance insurance" to business organizations wishing to escape the current corporate criminal rules of *respondeat superior*. Insurance would cover losses stemming from employees' violations of federal and state laws and regulations. Although current state laws prohibit insurance policies from covering intentional misconduct, compliance insurance would cover the entity's *vicarious* risk, subject to certain exceptions discussed *infra*.

Compliance insurance would not replace Director and Officer (D&O) insurance. Nor would it replace or alter individual criminal prosecutions. Officers, directors, and employees would remain civilly and criminally liable for monetary penalties arising from their criminal misconduct. Organizations, however, would not be subject to criminal liability, so long as they obtained a minimum level of insurance, paid their premiums, and complied with their policies.

In this idealized world, insurance carriers would play a role similar to auditors, analysts, and lawyers and other corporate "gatekeepers."[45] However, rather than

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action is the result of institutional influence).

40. Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L. J. 1743, 1758 (2005).

41. Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1896–1904 (2005).

42. Fischel & Sykes, *supra* note 2, at 319.

43. Even in the tort context, the wisdom of corporate vicarious liability has been questioned. *See, e.g.*, Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1749–1754 (1996) (criticizing fairness-based explanations for vicarious liability).

44. Professors Ronen and Cunningham have proposed and elaborated on an insurance scheme that would replace auditor liability for misstatements or omissions later found in public companies' financial statements. *See* Lawrence A. Cunningham, *Choosing Gatekeepers: The Financial Statement Insurance Alternative to Auditor Liability*, 52 UCLA L. REV. 413 (2004); Joshua Ronen, *Post-Enron Reform: Financial Statement Insurance, and GAAP Re-Visited*, 8 STAN. J.L. BUS. & FIN. 39 (2002). Professor Griffith has also argued for mandatory disclosure of directors' and officers' policies as a market signal. Sean J. Griffith, *Uncovering a Gatekeeper: Why the SEC Should Mandate Disclosure of Details Concerning Directors' and Officers' Liability Insurance Policies*, 154 U. PA. L. REV. 1147 (2006) (calling for mandatory disclosure of officers' and directors' policies because policies can signal market on strength of corporation's internal governance mechanisms).

45. Gatekeepers have been described as persons who use their reputation capital to bridge the gap between investors and corporate managers. *See* John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 308 (2004) [hereinafter Coffee, *Gatekeeper Reform*]; John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid*," 57 BUS. LAW. 1403, 1405 (2002) (describing gatekeepers as

placing their reputations at risk, carriers would place their *actual* capital at risk and would be less susceptible to capture.

I. HOW BUSINESSES OVERPAY FOR CORPORATE CRIME

The following Part examines how public corporations have come to occupy a position whereby they overpay, in terms of compliance costs and over-deterrence, for the prosecutorial leniency necessary for smoothing the potentially huge disruptions caused by entity-based criminal liability.

Entities were not always subject to criminal liability. Until the 1800s, courts agreed that corporate criminal liability could not exist because corporations lacked the requisite intent to be held morally culpable for their employees' conduct.[46] The watershed case that established criminal *respondeat superior* liability for intent-based crimes was *New York Central*.[47] In *New York Central*, the Supreme Court upheld the provision of the Elkins Act that held that corporations could be prosecuted for their employees' failure to comply with the tariffs set by the Interstate Commerce Commission (ICC).[48] Although the Supreme Court acknowledged that common law did not recognize corporate criminal liability, it nevertheless reasoned that, "we go only a step farther," by extending vicarious tort liability to criminal violations.[49] Otherwise, the Court reasoned, "many offenses might go unpunished and acts be committed in violation of law . . . ."[50]

The fear that offenses "might go unpunished" absent criminal liability is obsolete.[51] State and federal governments now possess tremendous regulatory and purchasing power over much of the business world.[52] Nevertheless, over the years, most

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"reputational intermediates"). Sean J. Griffith has referred to insurance carriers as "accidental gatekeepers," since their primary intent is to assess risk and not to provide information to investors. Griffith, *supra* note 44, at 1150.

46. By the mid-1800s, some courts permitted criminal prosecution of municipal corporations for failing to maintain public bridges or highways. *See* Ainslie, *supra* note 18, at 110–11; Laufer, *supra* note 18, at 1361. Under English common law:

> well into the 1800s—the corporation could not be indicted at all unless it created a nuisance by failing to perform a public duty. "Prosecution" in such instances was not viewed as a criminal proceeding, but as a means of ensuring that duties imposed by charter or statute were carried out. Most cases involved a failure to repair highways or bridges, or to keep navigable waterways clear. Not until the 1840s—just as the corporation was becoming intertwined in the daily lives of ordinary men and women—was it held that corporations could be prosecuted criminally for malfeasance, at least when nonviolent misdemeanors were charged.

Lawrence Mitchell Rothman, *Life After Doe? Self-Incrimination and Business Documents*, 56 U. CIN. L. REV. 387, 403 n.82 (1987) (citations omitted).

47. N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909).

48. *Id.* at 494. The railroad company was charged with payment of an illegal rebate. *Id.* at 489.

49. *Id.* at 494.

50. *Id.* at 495.

51. *See* Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L.Q. 329, 340 (1993) (describing the Court's reasoning as "flawed and outdated").

52. *See* Greenblum, *supra* note 41, at 1885–89 (explaining that the government may seek civil fines or forfeiture; freeze the offender's assets; obtain cease and desist orders; withdraw

legislators have reacted to well-publicized instances of corporate fraud (e.g. Enron and Worldcom) and inadequate monitoring (e.g. Arthur Andersen) by increasing criminal sanctions in the wake of each new wave of scandals.[53] Over the last hundred years, individual federal criminal liability for individuals[54] and corporate criminal liability in general have significantly expanded to include misconduct that previously had fallen either within the realm of tort law or under state or local control.[55] Accordingly, as the field of criminal law expands, all organizations must contend with the consequences of criminal liability.

In addition to expanded federal criminal liability, the last three decades have produced a systemic proliferation in corporate compliance programs tasked with monitoring organizational compliance in an expanding regulatory field.[56] Compliance programs in turn, have generated and sustained an entire new industry of so-called experts: lawyers, accountants, and other consultants who draft corporate codes, staff corporate ethics offices and whistleblower hotlines, create corporate-wide training programs, and assist corporate security officers in increasingly complex internal investigations.[57] At their best, corporate compliance programs can reduce and identify, but not necessarily eliminate, employee crime.

A. The Powers of the Federal Prosecutor

As a result of the trend in federal criminalization of previously civil and regulatory misconduct, business entities are particularly prone to prosecution by federal prosecutors.[58] Federal prosecutors, in turn, possess significantly broader powers than

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necessary licenses or permits; and/or cancel government contracts and debar or disqualify the offender from contracting to supply future business to government agencies).

53. Vikamaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95, 95 (2004) ("[M]ost corporate crime legislation arises when there is a large public outcry over a series of corporate scandals during or around a downturn in the economy.").

54. *See* Robert A. Creamer, *Criminal Law Concerns for Civil Lawyers*, FED. LAW., May 2005, at 34, 35 (citing the thirteen federal criminal statutes that are most often invoked against individuals in white-collar cases). Unlike common law fraud, which required a showing of loss caused by a particular false statement, the federal mail and wire fraud statutes require only the use of the mails or interstate wires and a scheme to defraud a person of property or the intangible right to another person's honest services. HASNAS, *supra* note 18, at 12 (concluding that the federal fraud statutes "authorize the punishment of almost any kind of dishonest or deceptive behavior, even when no other party has suffered any harm").

55. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 202 (1991).

56. *See generally* Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 J. CORP. L. 267, 280 (2004) (noting the recent increase in corporate compliance programs).

57. *See* Tanina Rostain, *The Emergence of "Law Consultants,"* 75 FORD. L. REV. 1397 (2006). Compliance programs first surfaced in response to the Federal Corrupt Practices Act (FCPA), which required compliance officers to educate corporate employees on the illegality of bribing foreign officers. Rebecca Walker, *The Evolution of the Law of Corporate Compliance in the United States: A Brief Overview*, 1561 PLI/CORP 13 (2006). Later scandals in the defense contracting, health care, and securities industries prompted further rounds of internal controls. *Id.*

58. *See* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law*

their civil and local counterparts.[59] They may serve grand jury subpoenas on any entity within the United States for documents.[60] The "grand jury's" document requests (which in reality are guided substantially by the prosecutor) are restrained by few rules of relevancy or evidence.[61]

Prosecutors also may compel witnesses to testify at trial or before a grand jury.[62] If those witnesses refuse to speak, prosecutors may immunize those witnesses and seek contempt orders and imprisonment if the witnesses persist in their silence.[63] If the prosecutor fears that a business entity will destroy evidence of criminal wrongdoing, she may obtain a search warrant, instruct federal agents to seize that evidence, and, if necessary, investigate and prosecute the entity and its employees for obstruction of justice.[64]

While federal prosecutors have great powers to compel others to produce evidence, they have relatively few disclosure obligations of their own.[65] The grand jury need not identify the purpose for which the document or testimony is sought.[66] The affidavit

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Models—And What Can Be Done About It, 101 YALE L.J. 1875, 1880 (1992) (explaining the vulnerability of corporations to be a result of "the common statutory pattern in the United States for a statute establishing an administrative agency to provide that any willful violation of the rules adopted by the agency constitutes a federal felony"). For a more general discussion of over-criminalization and legislators' political incentives to err on the side of greater criminal liability than necessary, see William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 802–07 (2006).

59. *See* Pamela H. Bucy, *Moral Messengers: Delegating Prosecutorial Power*, 59 SMU L. REV. 321, 327 (2006) (noting that states have lagged behind the federal government in passing aggressive laws).

60. *Id.* at 321 (discussing broad prosecutorial subpoena power). Unless protected by the attorney-client privilege or work product doctrines, entities must produce the documents specified in the grand jury subpoena. *See id.* They may not rely on the Fifth Amendment privilege against self-incrimination. *See* Hale v. Henkel, 201 U.S. 43, 74 (1906); HASNAS, *supra* note 18, at 27.

61. United States v. R. Enters., 498 U.S. 292, 298 (1991) (emphasizing that rules and restrictions that apply at trial do not apply to grand jury proceedings); *see also* Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 3 (2004) (criticizing pretense that grand jury is independent from federal prosecutor).

62. Chavez v. Martinez, 538 U.S. 760, 767–68 (2003) ("It is well established that the government may compel witnesses to testify at trial or before a grand jury, on pain of contempt, so long as the witness is not the target of the criminal case in which he testifies.").

63. *See id.* at 768 ("Even for persons who have a legitimate fear that their statements may subject them to criminal prosecution, we have long permitted the compulsion of incriminating testimony so long as those statements (or evidence derived from those statements) cannot be used against the speaker in any criminal case."); Bucy, *supra* note 51, at 341 (discussing broad prosecutorial power to grant immunity).

64. *See* Fed. R. Crim. P. 41 (authorizing search warrants); 18 U.S.C. § 1505 (2000) (criminalizing obstruction of justice in federal investigations); 18 U.S.C. § 1511 (2000) (criminalizing obstruction of state or local investigations); 18 U.S.C. § 1519 (Supp. V 2005) (criminalizing destruction or alteration of records with the intent to impede or obstruct federal investigations).

65. *See* Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2043–45 (2006). *Compare* FED. R. CRIM. P. 16, *with* FED. R. CRIM. P. 26.

66. *R. Enters.*, 498 U.S. at 301 (limiting quashing of grand jury subpoenas to situations in which there is no reasonable possibility of uncovering relevant information).

supporting the search warrant may be sealed by a district judge and remain under seal while the government completes its investigation.[67] Discovery, which is significantly more limited in criminal than in civil cases, will not be ordered until after the prosecutor has obtained an indictment from the grand jury.[68] Even then, the prosecutor need not produce every page of her file; rather, she need only produce the defendant's own statements and any evidence she intends to offer at trial.[69] As a result, in any corporate prosecution, informational asymmetries will abound. In some instances, the prosecutor may have a better sense of the company's (and its individual employees') liability than the company's independent board members or general counsel.

Although the disclosure rules favor the prosecutor, her greatest source of power is her unfettered charging discretion. Absent some showing of post-trial "vindictiveness" or racially motivated behavior, the prosecutor's charging decision is sacrosanct.[70] No court can overturn a prosecutor's decision *not* to prosecute someone.[71] Nor can any court throw out an otherwise factually sufficient indictment simply because the court disagrees with the prosecutor's exercise of discretion.[72]

The plea bargaining process, which includes deferred prosecution agreements[73] (DPAs)—is largely immune from judicial review. The federal prosecutor who pursues a corporate defendant is subject neither to the administrative constraints of a regulator

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67. Matter of Sealed Affidavits to Search Warrants Executed on February 14, 1977, 600 F.2d 1256, 1257 (9th Cir. 1979) ("courts have inherent power, as an incident of their constitutional function, to control papers filed within the courts within constitutional and other limitations"); United States v. Napier, 436 F.3d 1133,1139 (9th Cir. 2006) (affirming lower court's refusal to unseal portions of affidavit that related to confidential informant); Times Mirror Co. v. U.S. District Court, 873 F.2d 1210, 1219 (9th Cir. 1999) (sealing of affidavit appropriate to protect pre-indictment investigation). *See also* David Horan, *Breaking the Seal on White Collar Search Warrant Materials*, 28 PEP. L. REV. 317, 324 (2001) (observing that sealing of federal search warrants has become common).

68. *See* FED. R. CRIM. P. 16.

69. *Id.*

70. "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); *see also* U.S. CONST. art. II, § 3 (granting Executive power to "take Care that the Laws be faithfully executed").

71. *See generally* Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (holding that private individuals lack "judicially cognizable interest" in prosecution of another person).

72. United States v. Williams, 504 U.S. 36, 48 (1992) (holding that prosecutor not required to seek court's approval for indictment).

73. DPAs fall within two broad categories. Some are drafted and entered into before the prosecutor has filed any charges whatsoever. In those instances, the DPA is purely "private" and the courts have no interest in these agreements *ex ante*. In a second group, the Government files an information or complaint, but the parties agree that it will be deferred for the length of time agreed upon in the DPA. A court then must sign off on the DPA insofar as it implicates the Speedy Trial Act. Other than the Speedy Trial Act concern, however, the court does not review the agreement's substance. *See* Wilson Meeks, Note, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?*, 40 COLUM. J.L. & SOC. PROBS. 77, 107 (2006).

nor the litigation restraints of a civil attorney. Her word is final and her mistakes are largely unknowable and uncorrectable.[74]

B. The Prosecutor's Burden

Where prosecutions of individuals are concerned, the prosecutor's broad powers might be justified as necessary to meet the burden of proving guilt beyond a reasonable doubt.

Prosecutors have often claimed that these powers are necessary because: (a) violations within the corporate context are more complex and therefore more difficult to detect and explain to a jury; (b) suspects are well-funded and have access to good legal representation; and (c) the crimes are often committed by groups of people who can use their collective powers (and their positions within the firm itself) to obstruct the government's investigation and thwart legitimate law enforcement aims.[75]

If the government is unable to identify the person or persons who are responsible for wrongdoing, employees and managers will be undeterred from committing corporate crimes. Potential investors, in turn, may question the integrity of public (and private) markets and may either leave the market altogether or invest inefficiently in their own protection. Accordingly, prosecutors argue, there is good reason for the government to have broad power to demand information and access from corporate firms. From this perspective, the corporate managers who complain about corporate liability are not so worried about protecting the entity as they are with protecting their own skin.[76]

Courts and legislatures, however, have alleviated the prosecutor's burden in white collar prosecutions in number of ways.[77] They have made it relatively easy for the government to request and obtain information from corporate entities.[78] They have expanded the prosecutor's reach by enacting a proliferating number of (often overlapping) criminal statutes.[79] They have increased sentences[80] for individual

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74. For similar criticisms of the judiciary, see Richard A. Epstein, *The Unintended Revolution in Products Liability Law*, 10 CARDOZO L. REV. 2193, 2202–03 (1980) ("Today all doctrinal innovation has to come from the courts, where the technical lags and information deficits are at their highest. Yet there is no alternative forum, save legislation, in which to override judgments when they have proved mistaken; indeed, there is no way to find out whether they are mistaken at all.").

75. *See* Bharara, *supra* note 2, at 72 (citing the "widespread—and largely legitimate—view that white collar crime is singularly difficult to detect, investigate, and prosecute"); Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White-Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405 (1993) (analyzing current trends in white collar cases that courts are struggling to resolve).

76. Cohen, *supra* note 19, at 146–47.

77. *See generally* HASNAS, *supra* note 18, at 23–55 (describing solutions to enforcement of corporate criminal liability).

78. Hale v. Henkel, 201 U.S. 43 (1906).

79. HASNAS, *supra* note 18, at 31–32.

80. *See* Frank O. Bowman, Pour Encourager Les Autres*? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM. L. 373 (2004) (tracking the increase of penalties for economic crime offenders under United States Sentencing

offenses (including white collar crimes) and simultaneously have offered attractive cooperation agreements for defendants who help the government, thereby increasing the likelihood that some employee-defendants will turn on others. Finally, they have enacted an incredibly broad liability standard for corporate entities. It is this last "innovation" that is discussed in the next Section.

C. The Need for Composite Liability

The contemporary criminal liability standard for organizations is incredibly broad.[81] Business entities may be held criminally liable for any act by any employee acting within the scope of his apparent authority provided the employee acted with at least a partial intent of benefiting the corporation.[82] The organization may be prosecuted for an employee's conduct regardless of whether it violated corporate policy or specific instructions.[83] Even where criminal conduct cannot be attributed to a single employee, the corporation still may be prosecuted under a collective knowledge theory.[84]

Under this broad enunciation of liability, hundreds of thousands of entities are potentially eligible for prosecution every year.[85] Federal prosecutors, however, lack both the physical and political resources to prosecute every guilty entity. Moreover, prosecutions and convictions of organizations have far-reaching collateral effects. Were the government to systematically indict each plausibly guilty organizational defendant, the visible, harmful fall-out of these indictments might spur the public to contract the liability standard or re-examine its consequences. Instead—either with an intent to preserving resources or maintaining power—the federal criminal justice system has adopted what is often referred to as a "composite" standard of liability. Although the organization technically operates in a strict liability regime, prosecutors (and, pursuant to the Organizational Sentencing Guidelines, judges) may soften that liability when the organization demonstrates sufficient compliance efforts prior to detection, and cooperation efforts after detection.

Guidelines in 2001, and additional increases that occurred following passage of Sarbanes-Oxley Act of 2002); Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 954 (2003) (describing significant increases in statutory maximum penalties for economic crimes pursuant to Sarbanes-Oxley).

81. In a 2005 speech, Mary Jo White, a former United States Attorney of the Southern District of New York, soberly warned an audience of defense attorneys:

> [T]he sweep of corporate criminal liability could hardly be broader. All of you in this audience probably know the law well, but its breathtaking scope always bears repeating: If a single employee, however low down in the corporate hierarchy, commits a crime in the course of his or her employment, even in part to benefit the corporation, the corporate employer is criminally liable for that employee's crime. It is essentially absolute liability.

Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, 1517 PLI/CORP 815 (2005).

82. *See, e.g.*, United States v. Automated Med. Labs, 770 F.2d 399 (4th Cir. 1985).

83. United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972).

84. *See* United States v. Bank of New Eng., 821 F.2d 844 (1st Cir. 1987).

85. *See* HASNAS, *supra* note 18, at 12 (federal criminal law statutes such as mail fraud statute "authorize the punishment of almost any kind of dishonest or deceptive behavior, even when no other party has suffered harm").

Compliance and cooperation help the government and the organization, albeit in different ways. For the organization, compliance and cooperation lessen the possibility that the government will charge the organization at all and, if all else fails, reduce its likely sentence under the Organizational Sentencing Guidelines (OSG). At the same time, the composite system provides the government with a method of screening potential defendants, maintaining control over business entities, and leveraging its prosecution of individuals. Moreover, because it leaves the specific details of internal compliance largely to the private sector, the system creates an impression of flexibility and private initiative.[86]

Theoretically, society ought to prefer the composite system of liability to its two logical alternatives, negligence and strict liability.[87]

Under a negligence regime, organizations are criminally liable only if the government proves that they failed to monitor employees adequately and prevent and report their crimes. This definition of "due care" creates strong incentives for firms to monitor their employees and credibly deters the firm's employees, who fear both internal detection and external prosecution.[88] However, there may be some activities that, regardless of an organization's due care, create substantial costs. Under a negligence system, these costs are borne solely by the firm's victims. If victims are unable to shift these costs back onto producers, then producers will engage in the same level of activity without regard to the activity's true costs. Negligence fails to secure optimal activity levels.[89] Moreover, because a negligence regime requires a determination of due care by a finder of fact, it is administratively expensive and prone to error.[90] Accordingly, strict liability is preferable when externalities are prevalent and due care determinations are likely to be difficult.

Strict liability—which holds the organization strictly liable for all of its employees' work-related torts and crimes—is preferable to negligence insofar as it forces firms to set activity levels at optimal levels. It also avoids the error and cost problems that plague negligence systems. On the other hand, as Professors Arlen and Kraakman explain, strict liability perversely discourages firms from monitoring, detecting, and reporting their employees' wrongdoing because firms receive no credit for monitoring and reporting employee crime.[91] To the contrary, monitoring *increases* the likelihood

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86. "Legislative and regulatory responses to private sector crises using internal controls enable the state to reach into the private sector to exert power, while preserving the essentially private character of its organizations and their operation." Cunningham, *supra* note 56, at 281.

87. Arlen & Kraakman, *supra* note 33, at 718. Arlen and Kraakman further distinguish between "adjusted strict liability" regimes that hold firms strictly liable for their employees' crimes, but insulate their monitoring results (through an evidentiary privilege, for example); and "composite regimes," which hold firms liable for "all detected wrongs but impos[e] an additional sanction on firms with suboptimal policing measures." *Id.* at 726. As used in this Article, the term "composite liability" refers to this second category of mixed liability regimes.

88. *Id.* at 715–16.

89. *Id.*

90. *Id.*

91. *Id.* at 707–09; *see also* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (presenting an economic analysis of the impact of strict liability on corporate expenditures on enforcement costs). Even under a strict liability regime, some corporate managers will employ monitoring as a form of self-defense, which in turn may disclose crimes that "help" the organization. For example, a CFO who is

of liability for residual crimes that the company can only detect but not prevent. If the combined costs of monitoring and increased liability for detection outweigh the benefits of prevention, then rational firms will divert resources from monitoring or instead erect "cosmetic" monitoring programs.[92] Moreover, since employees know that their employer does not want to detect crime, employees in a strict liability regime do not take their employers' monitoring threats seriously.[93]

Under a composite liability rule, the entity is strictly liable for its employees' wrongdoing, but may mitigate its sentence by demonstrating a defined level of care (i.e. monitoring and reporting). The composite system is often deemed superior to a pure strict liability system because it preserves the firm's incentives to monitor and report wrongdoing, yet bypasses the administrative costs of the negligence system. In this ideal world, firms self-monitor, detect, and report crime (for which they are rewarded with lesser penalties), and yet they also strive to set activity levels at optimal levels.[94]

Unfortunately, the composite system's theoretical advantages are eclipsed by the drawbacks of its real-world application. These drawbacks include: (1) the use of vaguely worded performance standards in lieu of specific rules that lay out the terms of mitigation;[95](2) a lack of transparency in the manner in which these performance standards are applied to individual cases; and (3) the dearth of opportunities to challenge the government's decision-making process. All of these drawbacks taken together effectively distort much of the composite system's theoretical benefits.[96]

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cooking the books might also be siphoning money from corporate accounts into his own bank account. If organizations employ controls to deter the second type of conduct, they may simultaneously detect the first type. *See* James D. Cox, *Private Litigation and the Deterrence of Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 1, 14–15 (1997). Self-defensive monitoring, however, may be insufficient if the employee of the organization is effectively insulated from the effects of the employee's criminal conduct (e.g., dumping toxic chemicals into a river that is located far away). Nor does it ensure that corporations will *report* to authorities the misconduct that they detect. *Cf.* Richard A. Epstein, *Imperfect Liability Regimes: Individual and Corporate Issues*, 53 S.C. L. REV. 1153, 1156–57 (2001) (in the context of automobile accidents, observing that self-bonding is an incomplete deterrent when injurer can insulate himself from harm).

92. See Arlen & Kraakman, *supra* note 33, at 707, and Arlen, *supra* note 91, at 836, for discussions of diversion of resources. For "cosmetic compliance," see Vikramaditya S. Khanna, *Should the Behavior of Top Management Matter?*, 91 GEO. L.J. 1215, 1231 (2003) (describing "window dressing" measures); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

93. Arlen & Kraakman, *supra* note 33, at 714–15. If the probability of detection were already very high, firms subject to strict liability might still adopt monitoring regimes since they would not increase the probability of detection substantially. *See* Khanna, *supra* note 92, at 1232.

94. *See* Khanna, *supra* note 92, at 1268–69.

95. I am referring to the tri-partite discussion of regulation (command-and-control rules, performance based standards, and incentives) set out by Susan Rose-Ackerman and amplified by Jon Hanson and Kyle Logue. Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1173–74, 1264 (1998) (citing SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE (1992)).

96. "The most profound problem with [the composite regime] is the likely indeterminacy of the undertaking to engage in 'optimal' compliance efforts. Such a finding will be made *ex post*

D. The DOJ's Execution of the Composite System

The Department of Justice's (DOJ's) nonbinding internal policies for prosecutors lay out the standards of conduct that prosecutors must consider when they decide whether an organization has earned mitigation under the composite system.[97] Over the last decade, these policies have been circulated in memoranda form by the presiding Deputy Attorney General.[98]

1. The McNulty Memo: An Overview

The McNulty Memo, implemented by Paul McNulty on December 12, 2006, is the latest iteration of the DOJ's internal policy for charging business entities.[99] The McNulty Memo came about in part because the ABA and numerous scholars and practitioners had repeatedly criticized its predecessor policy, the Thompson Memo (named for then Deputy Attorney General Larry Thompson) for encouraging prosecutors to consider the organization's willingness to waive its attorney-client privilege in exchange for lenience.[100] Judge Kaplan's opinion in *Stein I* (which addressed a related issue, the government's pressure on companies to deny attorneys fees to indicted employees), followed by Senator Arlen Specter's threats to enact legislation protecting the corporate attorney-client privilege, precipitated the DOJ's revision of its internal charging policies.[101]

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and there likely will be little guidance *ex ante* as to what constitutes optimal compliance efforts." Cox, *supra* note 91, at 16 (emphasis in original).

97. It is unclear how the DOJ would respond to instances in which prosecutors failed to adhere to these policies, which expressly deny the creation of any substantive or procedural rights for business entities. *See, e.g.*, McNulty Memo, *supra* note 19, at 19. The Department of Justice historically has exercised uneven levels of authority over the United States Attorneys' offices. *See* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 805 (1999) (discussing dispersed authority of U.S. Attorneys' offices).

98. The SEC maintains a separate Framework for Cooperation by which its Enforcement Division evaluates whether corporations should be fined or criminally prosecuted for their employee's violations of the security laws. Like the DOJ's internal policies, the SEC's framework urges its regulators to examine the organization's compliance program and its subsequent cooperation with SEC staff. Criminal charging decisions, however, are ultimately made by the prosecutors within the United States Attorneys' Offices and the Department of Justice. The relationship between federal prosecutors and regulators and the costs and benefits of parallel civil and criminal litigation is beyond the scope of this Article.

99. *See* McNulty Memo, *supra* note 19.

100. *E.g.*, ABA Task Force on the Attorney-Client Privilege, *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*, 60 BUS. LAW. 1029, 1043–46 (2005); Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waiver on the Adversarial System*, 43 AM. CRIM. L. REV. 1225, 1238 (2006).

101. On September 13, 2006, Paul McNulty, then Deputy Attorney General, announced during testimony before the Judiciary Committee (then headed by Specter) that the Department of Justice was reviewing its internal charging memorandum in light of the criticism of the KPMG case. *See* Lynnley Browning, *Justice Department is Reviewing Corporate Prosecution Guidelines*, N.Y. TIMES, Sept. 13, 2006, at C3.

Breaking from its predecessor policies, the McNulty Memo arguably protects attorney-client privileged documents by requiring prosecutors to seek advance DOJ approval and follow certain procedures prior to seeking a corporate waiver.[102] Apart from the new waiver procedure and a provision advising that organizations ordinarily will not be penalized for paying attorneys fees for employees who have been targeted by the prosecution,[103] the McNulty Memo's substantive provisions are nearly identical to the Thompson Memo, which was released to the public on January 20, 2003, and governed prosecutorial charging decisions from that date through December 10, 2006.[104] Both the McNulty and Thompson Memos affirmatively require[105] prosecutors to assess entity-based charges in "any matter" of business crime and to include an analysis of each of nine factors.[106]

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102. McNulty Memo, *supra* note 19, at 8. In order to obtain such approval, the individual prosecutor must demonstrate a "legitimate need" for such documents, which in turn depends on: (a) the likelihood the privileged information will assist the government's investigation; (b) whether alternate means of obtaining the information exist; (c) the completeness of the organization's voluntary disclosure; and (d) the collateral consequences of waiver to the corporation. *Id.* at 9.

103. "Prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment." *Id.* at 11. A footnote suggests, however, that such payments *may* be taken into account if it appears that the corporation is behaving in such a manner as to obstruct the investigation. *Id.* at 11 n.3. It is unclear what the DOJ means by this footnote since any payment of fees is "obstructive" insofar as it assists a target in leveraging his defense.

104. The first DOJ memo to set forth the government's position on charging corporations for their employees' crimes was released by Deputy Attorney General Eric Holder in 1999. The Holder Memo, which originally was not released to the public, was intended only as a summary of "best" practices that different United States Attorneys' Offices had adopted, partly in response to the Organizational Sentencing Guidelines, which also employed a similar "carrot and stick" approach. Finder & McConnell, *supra* note 14, at 3, 6–9.

105. Memorandum from Larry D. Thompson, Deputy Attorney General, to United States Attorneys, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf [hereinafter Thompson Memo]; McNulty Memo, *supra* note 19, at 2; *see also* Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Meyers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1045 (2006) (noting that the Thompson Memo's "analytical framework applies in all corporate fraud investigations").

106. McNulty Memo, *supra* note 19, at 4; Thompson Memo, *supra* note 105, at 3–4. Those nine factors are: (1) the nature and seriousness of the offense; (2) the "pervasiveness of wrongdoing within the organization; (3) the organization's history of similar conduct; (4) the organization's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents" including willingness to waive the attorney-client privilege; (5) the "existence and adequacy of the corporation's compliance program"; (6) remedial actions, including any efforts to implement an "effective" corporate compliance program or to improve an existing one or to replace, discipline, or terminate "wrongdoers"; (7) collateral consequences and impact on the public arising from the prosecution; (8) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and (9) the adequacy of civil or regulatory enforcement actions. *Id.*

Both Memos rest on the assumption that entity-based prosecutions improve corporate business. Without attempting to separate out entity-based prosecutions from prosecutions of individual defendants, the McNulty Memo lauds prosecutors for their "unprecedented success in prosecuting corporate fraud" during the preceding four years. As a result of these prosecutions, "the information used by our nation's financial markets is more reliable, our retirement plans are more secure, and the investing public is better protected as a result of our efforts."[107]

The McNulty Memo does not consider whether the alleged increase in the reliability of markets and pension plans is traceable solely to entity-based prosecutions, or whether such increase in liability stems from structural improvements brought about by the Sarbanes-Oxley Act of 2002,[108] the government's increased prosecution of individual criminals, and the public's and media's increased attention to the veracity of financial reporting. Moreover, the Memo fails to consider the point at which social costs of corporate "self-regulation" outweigh the benefits of fraud reduction. Instead, the Memo implies that *any* reduction in fraud redounds to the benefit of shareholders.

2. McNulty, Morality, and the Nature of the Firm

Like its predecessor, the McNulty Memo defends corporate criminal liability as a means "to address and be a force for positive change of corporate culture [and] alter corporate behavior."[109] This statement is important because it belies a presumption that corporate entities are singular moral actors and therefore amenable to blame and punishment. This presumption, however, is hardly a foregone notion.

Although some scholars have proposed (and the McNulty Memo presumes) that an identifiable "corporate ethos" or culture causes individual criminal conduct and therefore subjects the corporate entity to moral condemnation and criminal liability,[110] nowhere else in criminal law does such a broad theory of vicarious liability exist.[111] Moreover, the culture-based argument for entity liability ignores the modern understanding of the corporation as an organizational form that brings together a mass of uninformed and fairly weak owners (shareholders) who must depend in large part on directors to monitor the strong executives who run the firm.[112]

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107. McNulty Memo, *supra* note 19, at 1.

108. *See* Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002).

109. McNulty Memo, *supra* note 19, at 2; Thompson Memo, *supra* note 105, at 1.

110. *E.g.*, Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099 (1991); Buell, *supra* note 39.

111. According to Professor Brown:

> Criminal law has well established ways to address conduct that wrongly compels others to commit crimes—for example, liability for coercion and duress defenses—or wrongly encourages or aids others in crime commission—for example, complicity and accomplice liability. And when another's influence on an actor's conduct falls short of complicity . . . no liability follows, even though it may be a real influence.

Darryl K. Brown, *Street Crime, Corporate Crime and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1318 (2001).

112. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

To the extent that one subscribes to the view that a public corporation is a form of ownership that permits a diffuse group of investors (shareholders) to efficiently do business with a much smaller, coordinated group of professionals (managers), with the oversight of agents (directors), corporate crime is not a separate moral wrong, but rather yet another agency cost that investors must figure out how to control.[113] These costs are further complicated by the complex organization into which the modern corporation has evolved.[114] Corporate criminal liability, under this view, is not only inefficient, but it is also highly unfair: it effectively punishes shareholders for the very agency costs they already were attempting to reduce and control.[115]

3. McNulty and Compliance

In addition to treating the corporation as a moral actor, the Memo also lauds the prosecutor's opportunity to create "deterrence on a massive scale" by indicting one corporate actor in an industry suffering "pervasive" criminal conduct, as well as the

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113. Agency costs are the costs that arise when managers' interests diverge from those of the principals (shareholders) on whose behalf they act. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). Agency costs have often been described as "one of the central problems organizing the field of corporate law." Steven P. Croley, *Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness*, 69 S. CAL. L. REV. 1705, 1715 (1996).

114. As explained by Dean Oakes:

> The truth is that organizational failure is caused by more than a failure in coordination, planning or information processing. There are micro-economic rewards and punishments within the organization and varying levels of leadership and employee motivation. The corporate setting is even more complicated by concepts and practices such as team production, work groups, independent departmental profit and loss calculations, etc.

Richard T. Oakes, *Anthropomorphic Projection and Chapter Eight of the Federal Sentencing Guidelines: Punishing the Good Organization When It Does Evil*, 22 HAMLINE L. REV. 749, 759 (1999); *see also* Croley, *supra* note 113, at 1706 ("[R]eal firms are not monolithic actors . . . [rather,] they are networks of many semi-autonomous actors whose behavior is related in many complicated and contingent ways.").

115. For a similar criticism of enterprise liability for fraud on the market, see Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Security Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 693 (1992):

> [S]hareholders face collective action problems because they are too numerous to manage the firm . . . . They therefore hire agents (directors) to manage it for them. These directors, not the firm's owners, decide how the firm will deter wrongful acts by its agents. . . .[But] [t]hese directors may not impose optimal sanctions on the firm's agents. This possibility introduces an additional level of agency costs [and] . . . is particularly important in Fraud on the Market cases, because Fraud on the Market is generally committed by some of the very directors and senior officers hired to manage the firm and to deter fraud.

Id. (citation omitted); *see also* John C. Coffee, *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1537 (2006) ("To punish the corporation and its shareholders in such a case is much like seeking to deter burglary by imposing penalties on the victim for having suffered a burglary.").

opportunity to create "specific deterrence" by altering the indicted entity's culture.[116] Absent from the Memo is any analysis of why prosecutors are the proper actors (even among government actors) for improving corporate governance within firms and why criminal law is the appropriate vehicle for altering corporate behavior.[117]

Although the McNulty Memo dispenses with some of the Thompson Memo's emphasis on detecting "false cooperation" by corporate defendants, it has retained the essential nine-factor framework through which prosecutors decide how to treat potential corporate defendants. Despite the presence of nine factors, most government charging decisions boil down to two key questions: the steps the organization took to prevent the given situation (i.e., the organization's compliance program) and the steps the organization took to rectify the situation through cooperation and other "assistance."[118]

Neither the McNulty nor Thompson Memos provide formal guidelines for assessing compliance programs. Instead, both Memos proclaim:

> The fundamental questions any prosecutor should ask are: "Is the corporation's compliance program well designed?" and "Does the corporation's compliance program work?"[119]

In case prosecutors are unsure how to decide if a program is "well-designed" or whether it "works," the Memo offers further guidance:

> In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the serious duration and frequency of the misconduct; and any remedial actions

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116. McNulty Memo, *supra* note 19, at 2. This deterrence argument nevertheless rests in part on a belief that government can improve the moral fiber of individuals who run corporate firms. SEC officials, for example, have claimed an obligation to improve the "moral DNA" of corporate executives. *See* Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 ADMIN. L. REV. 757, 773 (2005) (quoting then-SEC Chairman William Donaldson's 2004 speech to the Practicing Law Institute).

117. Indeed, the DOJ's attempt to define good corporate governance is in stark contrast to the business judgment rule, which ordinarily leaves the internal affairs of the corporation to its board of directors. *See* Del. Code Ann. tit. 8, § 141(a) (2007); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). The corollary to this rule is that shareholders are best served when board members are not unduly risk averse (i.e., when they are free to make decisions that later on turn out to be wrong). *See, e.g.*, Gagliardi v. Trifoods Int'l, 683 A.2d 1049, 1052 (Del. Ch. 1996).

118. "In many of the cases we have seen in the past couple of years, two of the most important factors we've focused on are the corporation's culture, and the authenticity of the company's cooperation. Those two factors are, in some sense, two sides of the same coin." Christopher Wray, Assistant Attorney General, Criminal Division, Department of Justice, Remarks at the 22nd Annual Corporate Counsel Institute (Dec. 12, 2003) 5, *available at* http://www.usdoj.gov/criminal/pr/speeches/2003/12/2003_2986_rmrk121203Corprtconslinst.pdf.

119. McNulty Memo, *supra* note 19, at 14; Thompson Memo, *supra* note 105, at 7.

> taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs.[120]

This inquiry suffers on a number of levels. First, it is difficult to perceive how a prosecutor, even one who has some expertise in corporate governance, will decide whether a program is "well-designed" or whether it "works" without expending considerable time and resources examining the organization, its industrial context and the relative benefits and drawbacks of numerous compliance-related decisions.[121] Even if government prosecutors were inclined and properly situated to undertake this task, they might well come up with the wrong answer.[122]

Moreover, the DOJ's policy presumes that "effective" compliance programs reduce crime. However, deterrence theory strongly suggests that "effective" programs—for example, those designed and funded in such a manner as to deter crime—may create perverse outcomes as a result of substitution effects.[123]

For example, imagine that a well-funded compliance program enacted in good faith deters or apprehends seventy-five percent of the employees who otherwise would have violated the law. The remaining twenty-five percent, however, respond to the compliance program either by continuing their crimes *or* by investing resources in detection avoidance and committing crimes that are less easily detected but more serious (and therefore whose projected payoff exceeds the projected sanction if caught).[124] As Professor Katyal observed in his 1997 article on deterrence, when sanctions are implemented, the criminal's choice is not as simple as "crime" or "no crime."[125] Instead, the criminal may substitute his activity with *other* criminal conduct, or he may supplement the same criminal conduct with measures designed to reduce the probability of detection.[126]

Corporate criminals may be particularly likely to choose detection avoidance over cessation of crime when corporations adopt or enhance compliance programs after crimes have already been committed or are already under way. (This obviously would be the case for any company that attempts to increase compliance efforts after it has already become a going concern). For example, imagine an employee who has already

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120. McNulty Memo, *supra* note 19, at 14; Thompson Memo, *supra* note 105, at 7.

121. In contrast, the Delaware Chancery Court's decision in *In re* Caremark International, Inc., 698 A.2d 959 (Del. Ch. 1996), which both Memos cite, simply held that directors should ensure that some method of measuring compliance or internal controls *existed* within the firm. In fact, the *Caremark* court stressed that "the level of detail that is appropriate for [a legal compliance] system is a question of business judgment" and that, at least as Delaware law was concerned, board members should not be held civilly liable for trusting their employees "absent grounds to suspect deception." *Id.* at 970. Many of the compliance programs that are the source of federal scrutiny would meet the standard laid out by Chancellor Allen in *Caremark*.

122. *See* Paul Rose, *The Corporate Governance Industry*, 32 J. CORP. L. 887, 908 ("A review of recent finance literature suggests that a number of the governance metrics selected [by rating agencies] do not reliably predict firm performance.").

123. *See generally* Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2387 (1997); Chris W. Sanchirico, *Detection Avoidance,* 81 N.Y.U. L. REV. 1331, 1352–60 (2006) (discussing detection avoidance costs).

124. *See* Sanchirico, *supra* note 123, at 1368–69.

125. *See* Katyal, *supra* note 123, at 2387.

126. *Id.* at 2387; Sanchirico, *supra* note 123, at 1337.

committed, or is in the midst of committing, a crime, such as creating a fraudulent financial statement for a company's first quarter disclosure. If, after the first fraudulent statement, the company visibly enlarges its compliance program (and therefore increases the probability of the employee's apprehension), his consideration of whether to file a fraudulent second quarter statement will depend not only on the benefit he can achieve with the new crime (which is reduced by the increased probability of detection), but also the benefit he gets from covering up the prior crime. In other words, the second fraudulent statement not only increases his yearlong bonus, but it also covers up the prior fraudulent statement and permits him to avoid the sanction that would surely accrue if he put out a truthful second statement and triggered an investigation into the discrepancy between the first and second quarter statements.[127]

Accordingly, because of the periodic, ongoing nature of crime (which one could argue is particularly the case with fraud and financial crimes), compliance programs may encourage avoidance detection expenditures. These expenditures, in turn, may result not only in the commission of additional crimes (both to cover up the original crime, and perhaps to compensate for the resources expended on detection avoidance), but also the commission of more serious crimes. For example, if the employee is unable to discern how much his avoidance measures have lowered the probability of detection, he might compensate by increasing the magnitude of his future crime. Finally, as Katyal notes in the street crime context, while the compliance program drives the more risk averse criminals out of the market, the criminals who remain can exercise monopoly power over the remaining goods.[128]

In sum, a "good" compliance program (as opposed to one that is merely cosmetic in character) may encourage the worst employee-criminals to expend greater corporate resources covering up the worst crimes.[129] To counteract this phenomenon (assuming the company is even aware of it), the company either must: (a) increase its detection efforts even more, or (b) increase its sanctions.

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127. Imagine at a given time T, a crime produces a Benefit, *B,* of 10, with a 1% Probability of Detection, *p*, and Sanction, *s,* of 100. Under such conditions, *B* is greater than the expected value of the penalty (*p* multiplied by *s*) and the rational criminal will commit the crime. If, sometime during or following the commission of the crime, at T1, Company X increases its enforcement efforts such that expected penalty increases to 20 (either by increasing sanctions or probability of detection), then the costs of the conduct outweigh the benefits since 20 obviously exceeds 10.

Criminals who have not yet committed the crime will be deterred. Criminals who have committed prior crimes and who are committed to engaging in future crimes in order to cover up the initial crimes (such as fraudulent financial reports for public companies) are much less likely to be deterred, however, because the benefit now includes the foregone sanction from the prior crime assuming cessation of criminal conduct increases the probability of detection to 100%. Or,

> 10 + 100 [the benefit plus the foregone sanction] > 20 [the expected value of the new penalty]

For a more in depth discussion of this timing problem, see Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. (2008) (forthcoming).

128. Katyal, *supra* note 123, at 2415.

129. *Id.* at 2414 (pointing out that equal detection rates may bring down the overall crime rate but encourage the proliferation of "particularly heinous" crimes).

Option A (increase probability of detection) is effectively capped by law. Companies might place video monitors in every office and read every employee's work email, which of course has its own drawbacks. Companies cannot, however, wiretap employees' personal phones, search their homes, or subpoena their personal bank accounts. Would-be criminals who know they are being watched will simply conduct their activities beyond the scope of the company's legal eyes and ears.

Option B (increase sanctions) also has inherent limitations. In most instances, the worst sanction a company can level on an employee is termination. Unfortunately, the DOJ's emphasis on "corporate culture" undermines Option B's usefulness. Swift termination of even slightly wayward employees is the company's way of demonstrating that it does not tolerate crime. This option, however, may eliminate marginal deterrence.[130] If stealing a pencil from the supply closet is sufficient to get fired, then the employee might as well steal the contents of the petty cash drawer too.[131] It may also undermine more subtle attempts at communitarian control. Instead of giving wayward employees a chance to reform, the company will feel compelled to terminate them the minute any wrongdoing, however minor, is detected.

My point is not that compliance is hopeless, but that compliance programs, even those instituted in "good faith," may very well fail in their efforts to prevent wrongdoing. Some employee-criminals will react to increased detection and sanctions by expending private and corporate resources on detection avoidance or on other criminal conduct.[132]

This is not the only problem with the McNulty Memo. The prosecutor's role as arbiter of compliance is equally problematic. Cognitive biases and heuristics, such as hindsight bias and accessibility, may also affect the prosecutor's decision.[133] In other words, the government will be more likely to conclude that criminal conduct was foreseeable to the organization because it in fact occurred. And prosecutors, who regularly come into contact with defendants who lie and cheat, will more likely

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130. *See* Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1245–46 (1985) (explaining that uniformly high sanctions eliminate marginal deterrence for varying crimes).

131. *See* Katyal, *supra* note 123, at 2414–15 (discussing problems when range of sanctions is limited).

132. "Cleave another violation with a sanction and you discourage it. Cleave detection avoidance, and like the hydra, it grows another head." Sanchirico, *supra* note 123, at 1367.

133. *See generally* Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, *in* BEHAVIORAL LAW AND ECONOMICS 38–39 (Cass R. Sunstein ed., 2000) (discussing hindsight bias in the context of negligence determinations by juries). These biases and heuristics apply informatively to prosecutors. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590–91 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006) (discussing hindsight bias as it applies to criminal prosecutions); Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1981–82 & n.35 (2006); Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law,* 1 BUFF. CRIM. L. REV. 23 (1997) (discussing accessibility).

criticize those companies that accepted their employees' non-criminal explanations too easily.

4. McNulty and Cooperation

In addition to judging the organization's compliance efforts, prosecutors must also assess the organization's cooperative efforts during the course of an investigation.[134] Presumably, cooperation is a relevant factor because it helps the government distinguish "good" corporate citizens from "bad" ones. If the corporation did not intend for the crime to occur, then the firm theoretically should be more than willing to extend its "full cooperation" to the government.

Nevertheless, the cooperation-based inquiry substantially undermines the deterrence goals of corporate criminal liability. Because the cooperation factor is aggregated with all other factors under the McNulty analysis, the factor obscures the government's compliance determination. A company could employ a state-of-the-art compliance program (or agree to enact such a program), but if it fails to "cooperate" with the government's investigation, it still may be indicted.

The aggregation problem is of particular importance because prosecutors have institutional reasons for overemphasizing the cooperation prong at the expense of all other factors. Contrary to the government's claims, the prosecutor is not some objective arbiter, measuring the corporation's post-detection conduct against some defined amount of "help." Instead, the prosecutor is a hired gun who will invariably ask whether the entity has provided the government everything it *needs* to identify and prosecute high-level employees. As the McNulty Memo implicitly recognizes, the more pressure the prosecutor places on the organization, the more assistance he or she will obtain from the organization in identifying additional criminal acts by corporate employees. Additional evidence leads to additional indictments. If the corporation cooperates, individual targets are easily isolated and less likely to have the resources to fight. Isolated targets plead guilty more quickly and accept longer sentences and larger fines.[135]

Given these interests, as well as the individual United States Attorneys' Office's institutional interest in competing for the public's good will and limited resources,[136] even the most principled prosecutor will have difficulty—as he wades through muddy

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134. McNulty Memo, *supra* note 19, at 7–12; Thompson Memo, *supra* note 105, at 5–6.

135. *Cf.* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 535–37 (2001) (describing local prosecutors' incentives to preserve resources through plea bargaining procedures).

136. *See generally* Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 932–33 (2000) ("[I]t is at least the perception in United States Attorney's Offices that those offices that bring increasing numbers of prosecutions will be 'rewarded' with increasing allocations of resources (i.e., more positions for prosecutors, investigators, and support staff) and that those offices that bring decreasing numbers of prosecutions will be 'penalized' by the Department of Justice through corresponding reductions in resources."). Simons concludes that this perception leads prosecutors to prosecute crimes that could otherwise be prosecuted in state courts. *Id.* at 933. The perception, however, just as easily supports the hypothesis that prosecutors will extract maximum convictions and maximum terms from corporate defendants.

facts and complex considerations— separating his personal and bureaucratic interests in maximizing individual convictions from his independent obligation to sort "good" corporate citizens from "bad" ones.[137]

Some might argue, as Professor Richman has, that prosecutorial excess can and will be reigned in by the law enforcement agents (such as employees of the FBI, IRS, or SEC) with whom prosecutors partner to investigate and prosecute cases.[138] Law enforcement agents, however, do not have final say on whether the company will be indicted or the specific terms of a firm's DPA. Moreover, law enforcement agents, many of whom come from the enforcement division of a given agency, are also likely to harbor many of the same cognitive biases as their counterparts within the United States Attorneys' Offices.

5. Opacity and Uncertainty

Even if one were to assume that government prosecutors can efficiently discern "good" corporate defendants from "bad" ones, the DOJ's internal policy fails to provide either transparency or consistency.[139] Because the McNulty and Thompson Memos' factors are broad and subjective, it is costly and difficult for companies to predict how they will be applied.[140] The DOJ's internal guidelines do not require prosecutors to publicly explain in writing the process by which they made factual findings, or to quantify individual factors *ex post* (much less in advance). As a result, companies face uncertainty when they try to decide whether a given compliance product will later be viewed as excessive or necessary by a prosecutor. Uncertainty, in turn, can breed overdeterrence and risk aversion, both of which increase the company's (and society's) costs.[141]

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137. Additionally, prosecutors may be unduly influenced by personal interests such as self promotion or ego. *See generally* Kenneth Bresler, *"I Never Lost a Trial:" When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 541 (1996) (criticizing prosecutors who maintain win-loss tallies).

138. Daniel Richman, *Institutional Competence and Organizational Prosecutions*, 93 VA. L. REV. IN BRIEF 115, 116 (2007), http//:www.virginialawreview.org/inbrief/2007/06/18/richman.pdf ("[P]rosecutors rarely act alone, and are unlikely to do so in a sustained white collar investigation.").

139. Plea bargaining in general reduces transparency in the enforcement of criminal law, with negative effects on public legitimacy. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006).

140. "If the legal standard is uncertain, even actors who behave 'optimally' in terms of overall social welfare will face some chance of being held liable because of the unpredictability of the legal rule. More important, these actors can usually reduce that chance by 'overcomplying,' that is, modifying their behavior beyond the point that would be socially optimal." John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 966 (1984).

141. This is a common problem that can render standards (which are defined *ex post*) more costly than rules (which are defined *ex ante*) for regulated entities. *See* Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy In Corporate Law*, 98 COLUM. L. REV. 1908, 1919 (1998) (concluding that indeterminate laws increase costs of obtaining legal advice and risk of litigation); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 569 (1992).

One might reasonably ask why well-funded organizations with access to excellent representation do not take their chances more often by going to trial or by refusing non-binding government requests that they view as excessive or inefficient. The far-reaching collateral consequences of indictment, however, further explain why overdeterrence and risk aversion are the likely outcomes of vague and inconsistently applied standards.

Whereas individual defendants can tame overreaching prosecutors by taking their case to trial (or, in the civil context, by testing regulatory decisions before administrative judges and federal judges), corporate prosecutions offer far fewer opportunities to test prosecutorial decision-making.[142] The DOJ's internal policies are non-binding and not subject to legal review. Negotiations as to how those standards apply occur outside the judicial system before any charges have been filed.[143] Prosecutors need not justify their decisions to courts until after they have indicted entities and individuals.

As has been noted by many others, however, corporate indictments often trigger collateral consequences that threaten many entities' viability.[144] Federal law, for example, requires all federal agencies to debar or suspend any contract with any indicted contractor or its affiliate, regardless of whether the indictment is in any way related to the agency's contract.[145] Similarly, indicted organizations may become ineligible to receive federal aid.[146] Apart from debarment, a corporate indictment may also result in the corporation's loss of licenses, permits, or ability to participate in entire areas of regulated commerce, including accounting, banking, health care, law, and other industries.[147] Corporate indictments also trigger reputation losses, including downturns in the stock market, a reduction in potential employees and customers, and the exodus of current customers and employees.[148] These effects often are

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142. An exception to this rule is the government's prosecution of KPMG, which resulted in a DPA and the government's indictment of former KPMG employees. Jonathan D. Glater, *8 Former Partners of KPMG Are Indicted,* N.Y. TIMES, Aug. 30, 2005, at C1. It should be noted, however, that the entity itself did not challenge the government's behavior in court; rather, the individual defendants who were the subject of the government's prosecution brought the government's conduct to the attention of the court.

143. Because these negotiations occur before charges are filed and outside the judicial system, they too lack transparency and, in many instances, accountability for the negotiating parties. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 938 (2006).

144. *See generally* Bierschbach & Stein, *supra* note 40, at 1749–51 (discussing collateral consequences in terms of "market spillovers"); Creamer, *supra* note 54, at 35–37 (describing effects).

145. Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 9.406-2, -5(a) (2006). For a more in-depth discussion of debarment, see H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post*-Caremark *Era*, 26 DEL. J. CORP. L. 1, 93–102 (2001).

146. Creamer, *supra* note 54, at 35.

147. *See* Greenblum, *supra* note 41, at 1885–86 (cataloguing consequences of criminal convictions).

148. For a recent empirical study of losses suffered by managers upon the disclosure of corporate financial misconduct, see Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Consequences to Managers for Financial Misrepresentation* (April 16, 2007), *available at* http://ssrn.com/abstract =972607 at 30–34 (describing combination of job losses and civil and

irreversible.[149] Although the Supreme Court eventually reversed and remanded Arthur Andersen LLP's conviction for faulty jury instructions, Andersen remained effectively defunct.[150]

In sum, the combination of vague standards, applied by a branch of government that is subject to little oversight and not likely to be held accountable for mistakes in application, backed up by a legal system whose mere initiation creates a drastic and often irreversible sanction, leads organizations to overpay for the crimes that their employees have committed and for the crimes that their employees may one day commit.[151]

E. When and Where Organizations Overpay

The government's aggressive enforcement of a broad criminal liability standard, combined with the significant extralegal consequences that accompany a criminal indictment, creates an atmosphere wherein *all* organizations—not just the relative few who come under the government's charging power—are likely to "overpay" for actual and potential employee crimes. That is, they pay in excess of the penalties that ordinarily would be necessary to deter criminal conduct, make victims whole, and internalize the social costs of their employees' misconduct.[152] A penalty in excess of that necessary to encourage optimal behavior is undesirable because it forces organizations to misallocate resources and underproduce otherwise socially beneficial goods.

Some will no doubt demand empirical evidence of overpayment. Because "overpayment" includes both reduced risk-taking and overinvestment in ineffective compliance, it is difficult to quantify the total amount by which corporate organizations

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criminal penalties). Reputation losses are also discussed at length in Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489 (1999); Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts,* 1988–1990, 71 B.U. L. REV. 247, 266–67 (1991); Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993); Dennis Recca, Note, *Reputational Penalties For Corporations and the Federal Sentencing Guidelines*, 2004 COLUM. BUS. L. REV. 879.

149. "'[A] wrongful indictment . . . works a grievous, irreparable injury to the person indicted' resulting in damage to the person's reputation which, because the public remembers the accusation and suspects guilt, can not be simply cured by a subsequent finding of not guilty." Stolt-Nielsen, S.A. v. United States, 352 F. Supp. 2d 553, 560 n.8 (E.D. Pa. 2005) (quoting *In re* Fried, 161 F.2d 453, 458–59 (2d Cir. 1947)), *rev'd*, 442 F.3d 177 (3rd Cir. 2006).

150. Arthur Andersen LLP v. United States, 544 U.S. 696 (2005). The government declined to retry Andersen.

151. Although the following comments on overdeterrence were not made in regard to corporate criminal liability, they are nevertheless particularly apt: "If there is a risk either of accidental violation of the criminal law or of legal error, an expected penalty will induce innocent people to forgo socially desirable activities at the borderline of criminal activity. The effect is magnified if people are risk averse and penalties are severe." Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1206 (1985).

152. It is also possible that some organizations underpay for corporate crime by creating cosmetic compliance programs and/or designating certain employees as corporate scapegoats for criminal conduct that was sanctioned more broadly. Because the facts supporting these agreements (and indeed, many of the agreements themselves) are not public, it is difficult to test these theories. Nevertheless, recent reports regarding the negotiation of agreements with KPMG and Bristol Myers Squibb suggest an overpayment rather than an underpayment scenario.

overpay for criminal liability.[153] Nevertheless, the sections below discuss potential and actual instances of overpayment both before and after a corporation becomes the subject of a criminal investigation.

1. Prior to Detection: "Regulation by Prosecution"

Prior to detection, organizations are likely to adopt monitoring and compliance programs that please law enforcement actors but either are ineffective or overly deter risky decisions.[154]

The DOJ purposely has not prescribed the content of a corporate compliance program.[155] DOJ officials contend that by leaving content undefined, the government has created a flexible environment for private organizations to determine which compliance tools work best for them.[156] This open-ended form of regulation, however, is illusory. [157] Although the DOJ would have us believe that it has promulgated flexible standards, the flexibility lies solely on the side of prosecutors. Since the McNulty Memo declines to define "effective compliance" or "sufficient cooperation" *ex ante*, the only safe standard is 100 percent compliance. Anything less may result in criminal

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153. *See* Gilbert Geis & Joseph F.C. DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AM. J. CRIM. L. 341 (2002) (observing dearth of proof of corporate criminal liability's effectiveness and suggesting topics for further empirical inquiry).

154. Professor Krawiec has questioned whether compliance programs are effective at all. Krawiec, *supra* note 34, at 591–596. Krawiec hypothesizes that compliance programs remain popular because of political influence exerted by the business lobby and compliance professionals. *Id.* at 610–12. Krawiec further develops her public choice theory in another recent article. *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003) (concluding that business professionals would rather pay for "cosmetic" compliance programs than affect real organizational change).

155. *See* McNulty Memo*, supra* note 19, at 14. Some agencies have filled in this gap. *See*, *e.g.*, *OIG Compliance Program Guidance for Pharmaceutical Manufacturers*, Department of Health and Human Services, 68 Fed. Reg. 23,731 (May 5, 2003).

156. The McNulty and Thompson Memos include both rules and standards as those terms have been defined by Louis Kaplow. Because key terms such as "effective compliance program" and "sufficient cooperation" are only partially defined *ex ante,* they are best viewed as "standards." *See* Kaplow, *supra* note 141, at 559–60 & n.2. Kaplow theorizes that when activity is infrequent or affects few individuals, standards are preferable to rules because the promulgation costs of defining a rule *ex ante* are high. *Id.* at 573. By contrast, "the greater the frequency with which a legal command will apply, the more desirable rules tend to be relative to standards. This result arises because promulgation costs are borne only once, whereas efforts to comply with and action to enforce the law may occur rarely or often. Rules cost more to promulgate; standards cost more to enforce." *Id.* at 577.

Corporate crime and entity-based liability questions are neither infrequent nor so heterogeneous to render *ex ante* rules infeasible. Moreover, if one considers corporate criminal liability to affect all shareholders and stakeholders (employees, customers, etc.), corporate criminal liability affects potentially millions of people. Given the foregoing, we should expect the government to promulgate rules instead of standards. Kaplow nevertheless concedes the possibility that political motivations may cause a governing authority to prefer standards even though rules appear more efficient. *Id*. at 609.

157. Cunningham, *supra* note 56, at 286 n.74 (suggesting that regulation in this context may in fact be involuntary).

liability. If the SEC or some other rule-making agency promulgated a formal rule that expressly required firms to achieve 100 percent compliance, that rule would be met by substantial public (and perhaps judicial) resistance. Instead, by purposely leaving the definition blank in a nonbinding document, the DOJ has cheaply created a functional equivalent of that standard.

By providing a vague standard of compliance and severely punishing corporations that fail that illusive standard, the DOJ stifles experimentation and differentiation. Instead, corporate entities are far more likely to adopt programs that have been publicly designated "best practice" by regulators, prosecutors, or various members of the growing compliance industry.[158] As Professor David Zaring has observed, however, best practice regimes do not always result in *best* practices, but rather, the *same* practices.[159]

Prosecutors, in turn, are not only aware of this herd mentality, but welcome it: "[G]overnance . . . enforced through a multi-year deferred prosecution or non-prosecution agreement can become new standards for an entire industry—a kind of *regulation by prosecution*."[160] (emphasis added). In other words, it is the government's intent that non-regulated entities review publicly announced DPAs and then enact some or all of the reforms present in the agreement.

Unfortunately, "regulation by prosecution" invokes more questions than answers. Unlike regulations that are promulgated by agencies subject to the Administrative Procedure Act and subject to extensive judicial review, regulations by prosecution are subject to none of the checks and balances that ordinarily accompany agency regulations, such as expert analysis, notice and comment periods, and political accountability for final rules.[161] In sum, there is no mechanism that assures accountability for the informal regulation that is wrought by an individual

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158. *See* Laufer, *supra* note 18, at 1343 (describing "elaborate cottage industry" of experts who "lay claim to dramatically reducing the likelihood of criminal liability"); Rose, *supra* note 122, at 925–26 (criticizing "homogenization" of corporate governance industry); Linda Klebe Trevino, *Out of Touch: The CEO's Role in Corporate Misbehavior*, 70 BROOK. L. REV. 1195, 1196–97 (2005) (noting that Ethics Officers in charge of compliance programs "meet regularly to benchmark and discuss best practices in ethics and legal compliance management").

159. Zaring defines "best practices" as a form of regulation that encourages regulated parties' input and experimentation instead of handing down distinct rules. David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 297 (2006). Regulation is "horizontal" instead of "hierarchical" insofar as organizations look to each other for the content of rules. *Id.* Zaring observes that although best practices "might suggest a rather democratic form of regulatory experimentalism," wherein organizations learn from each other and regulators publicize their successes, "best practices usually fall short of this ideal. They are not a panacea, not always horizontal, and often, at least in effect, not really voluntary. In short, although best practices purport to be 'best,' there is nothing particularly 'best' about them. The rulemaking technique is a way of obtaining *common* practices, not ideal ones." *Id.* at 297–98 (emphasis in original).

160. Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The* Thompson Memo *in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1185 (2006).

161. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1024–25 (2006) (arguing for greater oversight of prosecutor's plea bargaining power). *See also* Garrett, *supra* note 10, at 861–69 (observing that the government's agreement with KPMG effectively regulates the manner in which accounting firms provide certain tax planning advice).

prosecution.[162] Moreover, "regulation by prosecution" creates additional inefficiency insofar as there exists no mechanism for a corporation to determine in advance if its program passes muster with the prosecutors who "regulate" corporate compliance *ex post*.[163]

Finally, because corporate compliance programs have been married to the criminal justice system, they may undermine attempts at creating the very type of culture that is most likely to encourage law-abiding behavior.[164] Because compliance is judged by prosecutors and judges, organizations appoint lawyers to design and maintain their compliance programs.[165] Lawyers, in turn, tend to prefer command-and-control systems.[166] Command-and-control systems, particularly those that are backed up by singularly punitive measures such as termination, are not only extremely costly, but they are also ineffective at creating the types of norms that encourage compliance with internal rules and external laws. To the contrary, they may undermine employee morale and compliance.[167]

In lieu of extensive command-and-control rules, extensive monitoring systems, and harsh disciplinary systems, some scholars have argued that organizations should direct more of their focus to intangible items such as the development of "self-regulatory" norms within the corporation.[168] The focus on "norms" creation may well be more effective over the long term than a checklist of rules and procedures that a company implements upon the advice of its lawyers. Nevertheless, risk averse compliance lawyers will choose the programs that intuitively "look better" to prosecutors, regardless of whether they work.[169]

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162. Although Christopher Wray and Robert Hur agree that the proliferation of corporate prosecutions raises the possibility that the government will inconsistently enforce corporate governance standards, their proposed solution is for DOJ officials to watch for inconsistency and, if necessary, impose a more centralized system. *See* Wray & Hur, *supra* note 160, at 1187–88.

163. In contrast, Ayers and Braithwaite assumed that the "enforced self-regulatory" model of compliance would include an individualized *ex ante* review of the corporation's compliance program before wrongdoing was detected. IAN AYERS & JOHN BRAITHEWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 106 (1992). "Under enforced self-regulation, the government would compel each company to write a set of rules tailored to the unique set of contingencies facing that firm. A regulatory agency would either approve these rules or send them back for revision if they were insufficiently stringent." *Id.*

164. *See* Tom E. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 BROOK. L. REV. 1287, 1301–02 (2005) (command-and-control systems "consume organizational resources. Even if they work, these strategies are costly and inefficient.").

165. Langevoort, *supra* note 37, at 75–76 (stating that lawyers are primary "compliance engineers" in many firms).

166. Ironically, the DOJ's "flexible" standards encourage firms to adopt command-and-control internal compliance regimes. *See* Cunningham, *supra* note 56, at 307; Langevoort, *supra* note 37, at 73.

167. Langevoort hypothesizes that lawyers in particular prefer rules and command-and-control based systems. *See* Langevoort, *supra* note 37, at 118.

168. Tyler, *supra* note 164, at 1300–01 (arguing that the "self-regulatory" approach is preferable to command-and-control systems because employees are more likely to follow rules that conform to their ethical values and are promulgated by institutions they view as fair).

169. *See* Cunningham, *supra* note 56, at 307–09.

2. Post-Detection Overpayment: Cooperation through Uncertainty

Overpayment continues and increases after the organization becomes the target of a federal investigation or prosecution. Attorneys have widely criticized the DOJ's pervasive pressure on organizational defendants to waive attorney-client privilege and the manner in which the "culture of waiver" has chilled contact between employees and corporate counsel.[170] Aside from the waiver issue, however, overpayment can occur in other aspects as well.

First, companies may initiate internal investigations with the express intention of handing over their findings to the federal government.[171] This may sound like a good development in theory. If federal agents are already aware of (or even demand) the investigation, however, the entity's internal investigators, who intend from the outset to demonstrate the organization's cooperation, may concede or declare wrongdoing more quickly than an objective fact-finder.[172]

Cooperation (at least as envisioned by the DOJ) may also undermine the organization's relationship with its employees. In a further attempt to curry favor with the government, an organization might fire employees who are in fact innocent or, as was the case in KPMG, coerce employees to speak with government agents by threatening to terminate those who declined to speak with the government.

Christopher Wray and Robert Hur, both former high-level Justice Department officials, contend that the pressure for corporations to cooperate is "merely the outgrowth of similar leverage strategies used by prosecutors for years to 'flip' individual targets or defendants on each other."[173] This analogy, however, is incomplete. In the individual context, the defendant comes to the table with more leverage than the corporation. He may remain silent and despite the angst and economic harm he may suffer from an indictment, the worst collateral effects will not occur until he is convicted. The fact that an individual may choose to go to trial (a choice that has more or less practical meaning depending on the defendant's individual

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170. For an overview of these arguments, see Bharara, *supra* note 2, at 96–97 (describing pressure on organizations to waive privilege).

171. In *Stolt-Nielsen*, an antitrust case, the corporation's counsel (a former DOJ antitrust attorney) initiated an internal investigation after he had already contacted the government and had advised it of possible illegal conduct. *See* Stolt-Nielsen S.A. v. United States, 352 F. Supp. 2d. 553, 556–57 (E.D. Pa. 2005) (internal counsel purposely notified government prior to completing investigation in order to preserve marker for company), *rev'd*, 442 F.3d 177 (3rd Cir. 2006). He contacted the DOJ prior to completing his investigation because he wished to preserve his client's chances of obtaining amnesty under the Antitrust Division's Amnesty program. The Antitrust Division employs a corporate leniency program that immunizes the first entity that discloses illegal conduct. For a general discussion of the program and its effect on enforcement of antitrust violations, see Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715 (2001) (arguing that excessive fines and "first to cooperate" amnesty policy may lead to overdeterrence within firms).

172. Professor Laufer has argued that the company might purposely scapegoat an innocent employee in order to gain the government's good will and obtain a DPA. *See* Laufer, *supra* note 18, at 1413–14.

173. Wray & Hur, *supra* note 160, at 1182.

resources and access to competent counsel) moderates the bargaining that goes on between prosecutors and individual defendants. At the very least, both parties know that somewhere down the line, the court will get involved insofar as it metes out the defendant's sentence.

By contrast, the "flip" in the corporate context goes to the central question of the corporate entity's "guilt" and effectively removes the corporation from the criminal process altogether. Because the prosecutor alone determines the severity of the "flip" (which in turn determines the charge, if any, imposed on the entity), the prosecutor has more leverage in the corporate context and the corporate defendant has far more incentive to "scapegoat" innocent employees (as opposed to merely ratting out the guilty ones).[174] Indeed, far from intentionally scapegoating employees, it may simply go along with the prosecutor's view of the facts if the corporation's defense counsel deems the facts to be in equipoise. Between the corporate entity's skin and the fair treatment of a potentially innocent employee, the rational defense counsel for the entity will—and indeed should—go along with whatever the government wants.

Cooperation also differs in the corporate context because the organization, unlike the individual, lacks complete knowledge of what "it" has done and lacks complete control over what "it" will do in the future. Board members who must make decisions on the shareholder's behalf are unlikely to have a full picture of the situation *before* they agree that the entity will cooperate, and they cannot exercise absolute control over their employees *after* they agree that the entity will cooperate. This lack of control, in turn, creates risk for the cooperating organization because the DPA invariably permits the government to file charges at a later date (and use all the information the organization has willingly handed over) if the government later learns that someone in the organization was less than truthful.[175]

3. Post-Detection Overpayment: Monitoring and Corporate Abdication

Overpayment also results from the monitoring and reporting systems that are often imposed as a condition of either a DPA or, if the organization has in fact been convicted in court, as a sentence of probation under the OSG.

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174. The power exercised by way of the "flip" is also unnecessary in the corporate context because the organization is already obligated to answer government queries for information and documents. *See* Hale v. Henkel, 201 U.S. 43 (1906).

175. Boeing entered into an agreement with the DOJ that explicitly stated that future crimes by low-level employees would *not* be considered a violation by Boeing. Peter Lattman, *Boeing's Non-Non Prosecution Agreement*, WALL ST. J. LAW BLOG, July 6, 2006, http://blogs.wsj.com/ law/2006/07/06/boeings-non-non-prosecution-agreement. This provision, however, has not been widely used. In another prosecution, Stolt-Nielsen became a victim of its lack of information when prosecutors in the Antitrust Division, having learned that one of Stolt's employees lied to Antitrust investigators about the date he terminated his conduct in a price-fixing cartel, withdrew their prior leniency agreement and decided to indict the company, despite its prior cooperation efforts. *See* Stolt-Nielsen, S.A. v. United States, 442 F.3d 177 (3rd Cir. 2006) (company cannot attempt to enforce leniency agreement until after government obtains grand jury indictment), *cert. denied*, 127 S. Ct. 494 (2006); Press Release, Dept. of Justice, Stolt-Nielsen S.A. Indicted on Customer Allocation, Price Fixing, and Bid-Rigging Charges for its Role in an Int'l Parcel Tanker Shipping Cartel (Sept. 6, 2006), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/218199.pdf.

To date, the benefits and drawbacks of using federal monitors to report on and supervise corporate compliance with federal laws and civil and criminal settlements have not been studied in depth.[176] Professor James Jacobs has described their usefulness in ridding unions of organized crime.[177] Corporate organizations, however, differ significantly from unions. Whereas a monitor's role in overseeing a union may be fairly well-defined and include at least some level of judicial oversight, the monitor's role in establishing "good corporate governance" within a public corporation is far more indeterminate and subject to little or no judicial oversight.[178] Recent perceived abuses in the appointment of monitors have spurred the DOJ's recent circulation of a memo advising United States Attorneys to avoid potential conflicts of interest in the selection of monitors and to treat the monitor as an "independent third party."[179]

Because the monitor effectively reports to the government and not the corporation,[180] the monitor may well overcharge the corporation for his services by

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176. One of the few articles addressing this topic is Brandon Garrett's *Structural Reform Prosecution*, which analyzes DPAs and concludes that the DOJ has "consistently pursued compliance" through monitors and other structural reforms. Garrett, *supra* note 10, at 860. For two recent discussions of issues created by corporate monitoring, see Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89 (2006); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 MICH. L. REV. 1713 (2007).

177. *See* JAMES JACOBS, MOBSTERS, UNIONS, AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT 138–60 (discussing the use of federal monitors in the context of civil RICO suits filed by DOJ against various unions). Borrowing a page from bank regulation, Professor James Fanto has proposed that the SEC hire, train, and pay yearly salaries to corporate monitors who would "engage in a constant dialogue with management of the public firm and alert officers and directors at an early stage to problematic transactions and SEC concerns." James Fanto, *Paternalistic Regulation of Public Company Management: Lessons from Bank Regulation*, 58 FLA. L. REV. 859, 915 (2006). Although Fanto's proposal alleviates some of the overbilling concerns discussed *infra* in the text, it does not solve the confidentiality and authority issues that a monitor poses for the board and the corporation's management. Similar problems plague Cristie Ford's proposal for independent "third party" monitors to report to the SEC on corporate governance issues within firms. *See* Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 ADMIN. L. REV. 757, 798 (2005).

178. One notable exception to the lack of oversight problem is Richard Breeden's oversight of MCI, which occurred in the context of the MCI bankruptcy and was overseen by the district court supervising the bankruptcy process.

179. Craig Morford, Acting Deputy Attorney General, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, March 7, 2008, *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/doj_principles.pdf [hereinafter Morford Memo] The Morford Memo was released in advance of a March 11, 2008, House Hearing on deferred prosecution agreements and corporate monitors. *See* U.S. House of Representatives, Committee on the Judiciary, *Hearing on Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?*, http://judiciary.house.gov/oversight.aspx?ID=425.

180. Although the monitor has no legal obligation to report to the corporation's board, management, or shareholders, the DOJ's newly-released Morford Memo recognizes that the monitor may wish to communicate with both the Government and the "corporation." Morford Memo, *supra* note 179, at 6. The same Memo, however, also implies that it may be appropriate

providing excess services or by overbilling for his services.[181] At the very least, the monitor will have little incentive to minimize costs.[182]

Second—and perhaps of greater concern—the imposition of a monitor may result in the organizational leaders' abdication of responsibility to make decisions on behalf of the owners and stakeholders.[183] For example, the board of a publicly owned corporation might rationally decide to leave questionable decisions to the corporate monitor since any decision approved by the monitor is less likely to result in criminal liability. The problem with this strategy is that the owners of the corporation did not elect the monitor to run the business; they elected the board.

In 2005, Bristol Meyers-Squibb (BMS) signed a DPA with the United States Attorney's office in New Jersey as a result of the United States Attorney's investigation of channel stuffing—the practice of placing high amounts of inventory with dealers and sellers in order to inflate sales temporarily. In exchange for foregoing indictment, the United States Attorney demanded that BMS enter into a DPA that, among other things, required it to employ and pay an outside monitor.[184] The monitor, Frederic Lacey was paid by BMS, but he submitted reports and received direction from the government.[185] Christopher Christie, the United States Attorney of New Jersey who negotiated the DPA with BMS, argued that the DPA demonstrated "the unique value of deferred prosecution agreements and the advantages that they offer the government and corporate America."[186]

In the Fall of 2006, allegations of an unrelated crime (that BMS's representatives had made a side deal with a competitor, Apotex, regarding a rival patent and Apotex's threatened distribution of a generic version of BMS' blockbuster drug, Plavix) triggered an investigation by the DOJ's Antitrust Division. The Antitrust Division's new investigation, in turn, triggered an investigation by BMS's monitor and a separate investigation by BMS's board. Shortly after the new investigation was announced, in September 2006, the BMS board fired its CEO, Peter Dolan, and its general counsel following a special board meeting attended by both the monitor and the United States

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to communicate *solely* with the Government about the corporation's progress in meeting the terms of its DPA. *Id.*

181. I am not suggesting that the monitor will intentionally defraud the corporation. Without any market restraints or significant oversight, he either may provide excessive services or charge in excess of their value.

182. Prosecutors who are supported by attenuated yearly budgets are least likely to be sensitive to these costs.

183. The Delaware judiciary has criticized and overturned agreements in which the board abdicates its judgment to legal advisors in the context of a merger agreement. *See* ACE Limited v. Capital Re Corp., 747 A.2d 95, 106–07 (Del. Ch. 1999) (criticizing contract provision that delegated a merger decision to outside lawyer's legal opinion: "does it make sense for the board to be able to hide behind its lawyers?").

184. Bristol-Myers Squib, Deferred Prosecution Agreement (June 15, 2006), http://www.Bristol-Myers.com/static/pdf/dpa.pdf.

185. Following his appointment as monitor, Lacey and members of his law firm, LeBoef, Lamb, Greene & MacRae "became regular fixtures at Bristol-Myers" and provided the United States Attorneys Office with quarterly reports of 400 to 500 pages that were unavailable to the public. *See* Stephanie Saul, *A Corporate Nanny Turns Assertive*, N.Y. TIMES, Sept. 19, 2006, at C1.

186. Christie & Hanna, *supra* note 105, at 1044.

Attorney, Christopher Christie. Christie allegedly demanded Dolan's ouster during the actual board meeting.[187]

Nine months later, on June 11, 2007, BMS pled guilty in the District of Columbia to two counts of making false statements to the FTC, in violation of 18 U.S.C. § 1001.[188] BMS admitted in court that a former employee (believed to be Dr. Andrew Bodnar) promised a representative at Apotex (the producer of a generic rival to BMS' Plavix) that he would oppose the launch of a BMS-produced generic version of Plavix provided Apotex and Plavix resolved their patent dispute.[189] Bodnar also allegedly implied in his conversation with Apotex's representative that BMS's then-CEO supported this side deal—all of which was not disclosed to the FTC, which had been reviewing a proposed resolution of the patent litigation between BMS and Apotex.

Despite the allegation that a BMS employee lied to the FTC, no further evidence has surfaced that either BMS's CEO or its general counsel approved Bodnar's statement or were even aware of it. Indeed, even as it resolved the matter with the FTC and DOJ, BMS continued to deny that there was any side deal with Apotex.[190] The United States Attorney's Office, meanwhile, further clouded the issue by agreeing to a fairly light punishment (a one million dollar fine) and, more important, by announcing that, despite the alleged crime, BMS "fulfilled" the letter and spirit of the DPA agreement, which expired on June 14, 2007.[191]

The BMS episode demonstrates several problems with regulation-by-prosecution of corporate entities. Although BMS's senior management may have completely mishandled the company's dealings with a rival producer of a generic drug, the remedying of that problem should have been the board's responsibility because the board, and not the United States Attorney, answers to the company's shareholders. The

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187. *See* Saul, *supra* note 185.

188. For discussion of the facts leading up to BMS's guilty plea, see *Bristol-Myers Faces Charges*, L.A. TIMES, May 31, 2007, at C6; Press Release, U.S. Department of Justice, Bristol-Myers Squibb Pleads Guilty to Lying to the Federal Government About Deal Involving Blood-Thinning Drug (May 30, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/223634.pdf.

189. John Carreyrou, *Bristol-Myers Settles Probe of Apotex Deal*, WALL ST. J., May 11, 2007, at B2; Press Release, Bristol-Myers Squibb, (June 11, 2007), *available at* http://newsroom.bms.com/index.php?s=press_releases&item=271.

190. BMS's press release states in pertinent part:

> The company acknowledge[s] that a former Bristol-Myers Squibb senior executive made oral representations to Apotex for the purpose of causing Apotex to conclude that [BMS] would not launch an authorized generic in the event that the parties reached a final revised settlement agreement. Those representations included the former senior executive's statement that he expected to oppose personally the launch of an authorized generic in the future, his statement that he expected to advocate against such a launch, and his implied suggestion that the company's former CEO shared his views. . . . The company acknowledged in court today its responsibility for the conduct of the former senior officer.
>
> The company continues to believe that there was no "side agreement" with Apotex.

Press Release, Bristol-Myers Squibb, (June 11, 2007), *available at* http://newsroom.bms.com/index.php?s=press_releases&item=271.

191. Carreyrou, *supra* note 189.

board might well have been justified in dismissing BMS's CEO and general counsel for their lack of control over the negotiation, but the integrity of that decision was diluted significantly by the government's presence and participation.

Moreover, while the prosecutor and monitor quickly moved for the CEO's termination, they permitted the executive who was the alleged culprit of the "side deal" and ultimate false statement to the FTC, to remain at the company while the investigation was ongoing.[192] In other words, because they acted in haste and were subject to none of the usual checks and balances of criminal litigation, the United States Attorney and BMS monitor either placed blame in the wrong place or assumed more serious conduct than what actually occurred.[193] Either way, they increased the risk of error.

Finally, the manner in which the investigation was ultimately disposed—a relatively light fine paired with the United States Attorney blessed expiration of the DPA—sent a confusing signal to BMS's shareholders. The matter was important enough to warrant the prosecutor's interference in the company's corporate governance, yet not so important as to warrant an overturning of the earlier DPA. Because the prosecutor is not required to explain his reasoning, there is little opportunity for corporate boards to learn anything from this episode. As for BMS's shareholders, the only lesson they may have gleaned is that for a period of time, someone other than the elected board of directors was running their company.

II. PROPOSED REFORMS: WHY TWEAKING THE SYSTEM FALLS SHORT

Many scholars have agreed that the current system of corporate criminal liability is problematic, but they have not agreed on a single solution. Some have called for a stricter standard of liability[194] and some for heightened evidentiary requirements.[195] Others have called for greater judicial intervention in the negotiation process.[196]

A. Alteration of Liability Standard

Many proposals alter the liability standard to limit the number of potentially liable organizations. A narrower liability standard presumably leads to less leverage for prosecutors and fewer instances of prosecutorial overreaching.[197] Professor Buell, for example, has argued that liability should attach only when the government can demonstrate that the employee's "primary purpose" was to benefit his employer.[198]

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192. Bodnar's resignation was announced on May 14, 2007. *See* Shannon Pettypiece, *Shakers: Business Personalities in the News*, INT'L HERALD TRIB., May 14, 2007, http://www.iht.com/articles/2007/05/13/business/bxshake.php

193. Significantly, the Antitrust Division, which initiated the investigation, has not filed any charges against BMS and its two former top executives.

194. *See* Buell, *supra* note 39, at 532 (arguing that liability should attach only when it was employee's primary intent to benefit employer).

195. *See* Bierschbach & Stein, *supra* note 40, at 1775.

196. Greenblum, *supra* note 41, at 1898.

197. *See* Bharara, *supra* note 2, at 112 (arguing that Congress and the courts should develop "clear and expert standards" in order to shift discretion away from prosecutors).

198. Buell, *supra* note 39, at 532.

Buell's proposal rests on the assumption that criminal liability is warranted whenever institutions encourage their agents to transgress the law.[199] Accordingly, Buell's "primary purpose" test is intended as a means of inferring *ex post* whether the institution should be "blamed" for its wrongful "effect" on its employee.

Leaving aside the unproven proposition that formally defined "institutions" encourage wrongdoing (as opposed to larger or smaller informal subgroups such as one's family, one's social group, or smaller sub-units of a given corporation), Professor Buell's proposal is particularly costly to administer insofar as it relies on two inferences, the employee's purpose and the institution's effect on the employee. Moreover, its outcome is difficult to predict *ex ante* and leaves in place both the prosecutor as chief enforcer and arbiter, as well as the extralegal effects of indictment.[200]

Elizabeth Ainslie contends that the federal standard should be reformed to look more like the Model Penal Code, which permits corporate liability for corporations whenever:

> (a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting on behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or
>
> (b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or
>
> (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.[201]

Ainslie's proposal is salutary insofar as it would, among other things, force Congress to identify particular statutes for which it believed corporate criminal liability was warranted. If Congress did designate such liability, however, it is difficult to see how corporations would fare much better than now since paragraph (a)'s liability standard is as broad as the current standard. Although Congress might decline to enact such a law right now, the minute a new scandal appeared on the horizon, legislators and prosecutors would hastily agree to enact laws that quickly returned us to the old system.[202] Moreover, even if Congress declined to explicitly designate corporate liability, many corporations would continue to come under prosecutorial control as a

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199. *Id.* at 477. "The truth is that institutions do produce wrongdoing." *Id.* at 493.

200. Buell praises reputation effects as a means of disciplining firms. *See* Buell, *supra* note 39, at 535.

201. Model Penal Code § 2.07(1) (2001); Ainslie, *supra* note 18, at 120–21.

202. Stuntz, *supra* note 135, at 529 ("Legislators presumably want to stay in office, and perhaps to position themselves for higher office. To do those things, legislators must please their constituents.").

result of paragraph (c) since most competent prosecutors could plausibly argue in most instances that serious employee crimes were "authorized, requested, commanded, performed, or recklessly tolerated" by a "high managerial agent." In a company the size of Walmart or Pfizer, it should not be too difficult to find a "high managerial agent," and it will be even less difficult to find someone who "recklessly tolerated" such conduct.

Finally, Andrew Weissman and David Newman have called for the adoption of a negligence standard whereby prosecutors would have to prove, as an element of their case that the entity "failed to have reasonably effective policies and procedures to prevent the conduct."[203] Thus, Weissman and Newman consciously adopt a negligence standard of criminal liability and, unfortunately, all of the problems that come with it.[204] Although the proposal is beneficial in that it makes prosecutors more accountable for their decisions (they would have to actually *prove* that the company's processes were deficient rather than just say so), it still leaves the definition of compliance quite vague. As a result, *ex ante* it would generate uncertainty and overdeterrence among firms. Firms would no doubt invest in showy and expensive measures designed to impress prosecutors who would still retain the final say on whether to present the case to a grand jury for indictment.

Moreover, the cognitive biases that attach to prosecutorial decision-making might well filter down to courts and juries. It is difficult to perceive how hindsight bias would not cloud a juror's determination as to whether a given corporate compliance department's policies were "reasonably effective" when the juror becomes aware of (presumably) numerous employee violations.

Finally, Weissman and Newman's proposed negligence rule fails to consider at least one benefit of strict liability: efficient activity levels. Assuming certain firms—either because of their industry or some other characteristic—are unable to mitigate their compliance risk, we still would want to find a mechanism that internalizes their costs to a point that they reduce their activity to efficient levels.

B. Reining in Prosecutors: Self Discipline and Judicial Oversight

A second set of reforms call for more explicit checks on prosecutorial power.[205] Professors Stein and Beirschbach suggest that in order to reduce the *ex post* harms to corporate entities, laws should be reformed to make corporate convictions less likely. One way to do that, Stein and Bierschbach theorize, is to cloak the corporation with a "removable" Fifth Amendment privilege that would prevent prosecutors from serving subpoenas on corporations for documents unless and until prosecutors developed separate "probable cause" that a "corporate crime" had been committed, at which time prosecutors could seek a court warrant.[206] Unfortunately, Stein and Bierschbach's proposal is either too broad or too narrow to work. If applied to all corporate investigations, the warrant requirement would severely hamper the government's investigation and prosecution of individual white-collar crime, the evidence of which is

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203. Andrew Weissman & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 414 (2007).

204. *See supra* text accompanying notes 74–76.

205. Greenblum, *supra* note 41, at 1865.

206. Bierschbach & Stein, *supra* note 40, at 1776.

generated and maintained primarily in corporate files. On the other hand, if the proposal applied solely to investigations of organizations, it would be fairly meaningless because the documents that demonstrate individual employee crime almost automatically demonstrate corporate liability.

In a student note, Benjamin Greenblum has proposed judicial oversight of prosecutors to "counterbalance" prosecutorial power.[207] Greenblum's proposal, however, stops short of imposing oversight over the negotiation process, in part because there is no doctrinal support for judicial presence in pre-indictment negotiations. Instead, Greenblum proposes that judges adopt a "wait and see" approach and then reinsert themselves during the implementation of the agreement.[208] Assuming one believes that judges are less conflicted or prone to error than prosecutors, Greenblum's proposal has merit in that it might deter or eliminate some of the more inefficient DPA terms or prosecutorial interventions in corporate governance. Nevertheless, the oversight itself would be inconsistent in that it would rest largely on the judge's own views and discretion. Inconsistency, in turn, would breed uncertainty.

C. Elimination of Criminal Liability

Finally, a number of scholars have, over the years, called for the complete elimination of corporate criminal liability, and replacing it with the tort system as a means of regulating business entities and their monitoring of employees.[209] Professors Fischel and Sykes have argued that in all instances, the civil liability system can more efficiently set organizational penalties for entities than criminal liability.[210] According to Fischel and Sykes, criminal penalties are generally inefficient—in other words, they do not approximate the malfeasor's social harm, adjusted for the probability of detection. If an employee causes $100,000 worth of social harm and there is a one in ten chance that his crime will be detected, the optimum penalty for his crime is a $1,000,000 fine.[211] Any fine above that amount is excessive and likely to overdeter the

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207. Greenblum, *supra* note 41, at 1865; *see also* Garrett, *supra* note 10, at 924 (arguing courts could impose "reasonableness" review on DPA process).

208. This would require that all agreements be filed in court. *See* Greenblum, *supra* note 41, at 1900.

209. *See* Ainslie, *supra* note 18, at 110–15 ("civil sanctions can generally be shaped far more precisely to meet the targeted evil"); Khanna, *supra* note 34, at 1275–76 ("Most, if not all, of the advantages of corporate criminal liability can be achieved by various forms of civil liability at lower cost to the government and society."); Fischel & Sykes, *supra* note 2, at 322–24: "[economic deterrence arguments] are not arguments for corporate criminal liability in particular, but, rather, arguments for a set of monetary penalties, properly calibrated in light of the social harm caused by the criminal acts of corporate agents.").

210. Fischel & Sykes, *supra* note 2, at 321.

211. "[A] total penalty equal to the social cost of crime, discounted by the probability of nondetection, is an appropriate rule of thumb to use in setting the penalty." Fischel & Sykes, *supra* note 2, at 325–26. Additional factors, such as the penalty's effect on enforcement costs or likelihood of detection may also affect the penalty. *Id.* at 326. In addition, a proper system should also consider the penalties imposed on the individual employee—apart from those imposed on the organization—because the individual employee presumably will demand greater compensation *ex ante* to make up for the *ex post* damages he may suffer. *Id.; see also* Ronald Coase, *The Problem of Social Cost*, 3 J.L. ECON. 1 (1960). This Coasian shift is rather uneven.

employee and the organization tasked with monitoring him. Legislatures, according to Fischel and Sykes, fail to follow this rule of thumb when setting penalties; instead, they focus more on impressing the public with a get-tough-on-crime stance.[212]

As Fischel and Sykes recognized in their 1996 article, politicians have had few incentives to eliminate corporate crime. Between the media's coverage of corporate scandals and the growth of a compliance industry, the public would not have looked favorably on legislation that freed corporations from criminal liability, even if it exposed them to vicarious liability in civil form. Moreover, putting aside the difficult question of whether the criminalization of an entity's lack of monitoring retains any expressive value, the wholesale *decriminalization* of entity-based corporate crime might send unintended signals that entities can ignore (or even encourage) their employees' misconduct.

This is not a concern to be taken lightly. As most commentators would agree, fraud *is* bad for the securities markets, and the corporate form should not be used as a shield to hide and perpetuate criminal conduct. However, some of these worries could be alleviated through, among other things, increases in individual criminal liability for certain offenses, such as perjury and obstruction of justice. This would demonstrate to firms that the withholding of properly requested information will not be tolerated. Obstructive conduct by entities could be deterred through civil or administrative provisions such as fines, denial of permits or other similar measures.

In any event, Fischel and Sykes' article concerns itself primarily with the question of why entity-level criminal liability is inappropriate. It does not focus on how we might move from a criminal regime to a primarily civil regime with improved monitoring incentives. Part III of this Article therefore suggests such a mechanism.

III. INSURING CORPORATE CRIME: THE PROPOSAL FOR COMPLIANCE INSURANCE

The essential problem with composite criminal liability is that it causes organizations to overpay for their employees' actual and potential crimes before and after they become targets of federal investigations.[213] Inspired by their healthy fear of the DOJ and the extralegal consequences of indictment, business entities are likely to adopt overly expensive monitoring and compliance systems and agree to suboptimal settlement terms with prosecutors. Moreover, the current regime, although supposedly less taxing than pure strict liability, continues to create a false expectation of near perfection despite the fact that perfect compliance at any cost is neither possible nor desired.[214]

When liability is aimed primarily at the corporation and not the manager, the corporation will have a difficult time shifting liability back to the manager because negotiation with management is not arm's length. Khanna, *supra* note 34, at 1255. This problem, however, would seem to be limited to top managers and not all employees.

212. According to Professor Stuntz, this tendency toward criminalization is shared and supported by prosecutors. *See* Stuntz, *supra* note 135, at 534 ("[A]t the most basic level, elected legislators and elected prosecutors are natural allies."). Although Stuntz was referring to elected prosecutors, this alliance should extend to political appointees as well.

213. "[B]ecause the costs of excessive monitoring must be recovered through prices, improperly high penalties create additional inefficiencies because the price of goods or services produced by corporations will exceed their social costs." Fischel & Sykes, *supra* note 2, at 324.

214. *See* Cunningham, *supra* note 56, at 308–09 (discussing perception gap between legal culture's expectation of "absolute assurance" and reality of leakiness); Fischel & Sykes, *supra*

Corporate employees are human beings with complex motivations. As Professor Macey has observed, they may commit crimes to mask subpar performance, to comply with what they view as the prevailing corporate or industrial culture, or simply because they misunderstand the law.[215] Although education, indoctrination, and monitoring can correct some of these problems, they inevitably will fall short; organizations are not and will never be all-knowing or omnipotent. Ceaseless efforts at monitoring may hamper an organization's legitimate business goals either by redirecting resources from more socially beneficial activity or by undermining the employees' morale, loyalty, or entrepreneurial creativity.[216]

This Article proposes[217] compliance insurance as a plausible solution to the overpayment problem.[218] Unlike the current system, which forces organizations to guess at how well they should self-insure, a "compliance insurance" system would create a market that would enable its participants to: (a) measure a corporation's compliance risk *ex ante*; (b) pool and reduce aggregate risks; (c) monitor and control corporate compliance by charging the corporation a premium based on its calculated risk; and (d) retain funds for victims of wrongdoing. Under this system, business entities would retain the incentive to monitor their employees to the extent such monitoring was cost effective. Prosecutorial excess and mindless devotion to compliance for the compliance industry's sake, however, would disappear because prosecutors and compliance professionals would be replaced by a totally different set of agents: the insurance carrier and the regulators who set minimum coverage targets for insureds.[219]

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note 2, at 346 (compliance at all costs not desirable); Langevoort, *supra* note 37, at 73 (perfection not possible).

215. Jonathan Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. Rev. 315, 326–32 (1991) (describing three primary causes of corporate crime). For further discussion of how corporate culture allegedly causes crime, see generally Ford, *supra* note 116, at 762.

216. Baysinger argues that corporate compliance programs should be judged like any other corporate output: "Like other aspects of production, the outputs of compliance programs must be judged realistically: no system that is cost effective and otherwise tolerable to live with can be absolutely foolproof." Barry Baysinger, *Organization Theory and the Criminal Liability of Organizations*, 71 B.U. L. Rev. 341, 367–68 (1991).

217. Because of the uncertainties about whether and how a market would function, my proposal presumes that the program would be optional for a defined period of time. After the market was established, the regime could become mandatory for organizations above a certain size in terms of capitalization or employees. *Cf.* Richard Epstein, *Imperfect Liability Regimes: Individual and Corporate Issues*, 53 S.C. L. REV. 1153, 1160–61 (2002) (discussing benefits of mandatory insurance tort regime for small corporations). Whether compulsory compliance insurance is necessary or advisable, however, is beyond the scope of this article.

218. By "insurance," I mean the company's purchase of insurance from an insurance carrier, who pools and aggregates the risks of multiple organizations. I do not mean "self-insurance," which the current regime of corporate criminal liability effectively requires. *See* Laufer, *supra* note 18, at 1349 (explaining how corporate compliance has become "a carefully conceived and arguably overpriced form of risk management that serves as an insurance function").

219. Admittedly, the process for devising a schedule of minimum coverage could itself become quite complex and/or inefficient, particularly if the regulator who set a mandatory schedule of minimum insurance set amounts too high or too low as a result of making incorrect assumptions or becoming politically captured by one or more parties. *See* Hanson & Logue, *supra* note 95, at 1267 (discussing information inefficiencies of performance-based regulation).

To some degree, insurance carriers have already begun to encroach on this territory. Contemporary D&O policies extend coverage not only to the costs of defending directors and officers against claims of wrongdoing (which the industry often refers to as "Side A" coverage), but also to entity-based securities claims ("Side C" coverage).[220] This proposal would extend insurance coverage (either through the D&O policy or some separate policy) to nearly all instances of entity liability for individual employee criminal conduct.[221]

This proposal also bears some resemblance to financial statement insurance (FSI), which Professors Ronen and Cunningham, respectively, have proposed and amplified.[222] Under Professor Ronen's and Cunningham's proposals, instead of hiring auditors to review financial statements, corporations purchase FSI from carriers to insure the reliability of their financial statements. To judge the risks imposed by financial statements, carriers hire auditors to audit the corporate insureds. Thus, instead of working directly for corporate managers (creating an inherent conflict of interest),

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If the schedule were transparent, however, and subject to the ordinary rule-making notice and comment procedures outlined by the APA, the inefficiencies would likely be less than those caused by the processes described in Part I of this Article.

220. *See* Griffith, *supra* note 44, at 1167–68.

> Coverage under Side A (referred to as Insurance Clause 1 in some policies) provides coverage to individual insureds where the company is legally or financially unable to indemnify them. Coverage under Side B (or Insuring Clause 2 in some policies) provides corporate reimbursement coverage to the extent the company indemnifies the individual directors and officers, usually in excess of a large deductible. Finally, many traditional D&O policies today also include Side C coverage that provides entity coverage for securities claims, again in excess of a large deductible.

John C. Tanner and David E. Howard, *Blowing Whistles & Climbing Ladders*, 23 No. 4. ACC Docket 32 (April 2005) at 50. Professor Coffee has explained that Side C coverage came about because of allocation issues that arose when both the corporation and managers were sued in class action suits. Carriers would "demand an allocation of the defense costs between their clients [the individual directors and officers] and the corporation…[and] thereby plac[e] the individual defendants at risk for these payments." Accordingly, in or about 1996, carriers began to extend entity-based coverage, "which directly reimbursed the corporation for its own litigation expenses, its own settlement payments in securities cases, and certain other forms of litigation." Coffee, *supra* note 115, at 1569–70.

221. Entity-based policies do not currently cover losses caused by fraudulent or dishonest conduct. *See* David T. Case and Matthew L. Jacobs, *Insurance Coverage for Governmental Investigations of Financial Institutions*, 123 BANKING L.J. 256, 260 (2006); *supra* note 127.

222. Ronen, *supra* note 44, at 48 ("We need to create … an agency relationship between the auditor and an appropriate principal—one whose economic interests are aligned with those of investors, who are the ultimate intended beneficiaries of the auditor's attestation…. [I]nsurance carriers are an eminently reasonable candidate."). *See also* Lawrence A. Cunningham, *Too Big to Fail: Moral Hazard in Auditing and the Need to Restructure the Industry Before It Unravels*, 106 COLUM. L. REV. 1698, 1738–47 (2006) [hereinafter Cunningham, *Too Big To Fail*]; Cunningham, *supra* note 44; Lawrence A. Cunningham, *A Model Financial Statement Insurance Act*, 11 CONN. INS. L.J. 69 (2004). Other scholars have called for the imposition of limited strict liability to force auditors to behave "more like insurers." Frank Partnoy, *Strict Liability For Gatekeepers: A Reply to Professor Coffee*, 84 B.U. L. REV. 365, 375 (2004); *see also* Frank Partnoy, *Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime*, 79 WASH. U. L.Q. 491 (2001); Coffee, *Gatekeeper Reform*, *supra* note 45, at 349.

auditors work for, and their interests are instead aligned with, insurance carriers, who in turn are financially bonded by FSI policies.[223] Whereas FSI is intended to combat the inherent conflict of interest that undermines the auditor's independence and credibility when assessing financial statements, compliance insurance, in contrast, prices the cost of corporate noncompliance rather than criminalizing it.[224] As such, it places entity responsibility for corporate crime back under the tort umbrella. Moreover, unlike financial statement insurance, which pertains only to financial statements,[225] compliance insurance would relate to potentially all types of criminal conduct by an entity's employees.

An outline of compliance insurance and how it might work is set forth below.

A. General Outline of the Program

Imagine a public company known as C Corp. C Corp employs thousands of employees across several states. C Corp produces, markets, and sells products and services to private and public entities, including local, state, and federal agencies. C Corp has hired a compliance officer and additional employees who routinely educate the organization about the law, and it has instituted an ethics hot-line and a Code of Business Conduct to improve its corporate culture. Periodically, C Corp's compliance officer updates C Corp's audit committee on the company's compliance program. Nevertheless, despite the company's publicly stated commitment to compliance, C Corp still finds that some of its employees commit crimes in the course of their employment, even though such conduct is prohibited by C Corp's ethics code and corporate policies. Because C Corp sells products and services to government agencies and because some of these services are covered by any number of federal regulations, C Corp's business would be significantly damaged by a corporate indictment. If investigated, C Corp would most likely agree to virtually any DPA term in order to avoid a criminal indictment, even though these concessions might not be in the best interests of its shareholders, employees, or customers.

Now imagine that if C Corp purchases a specified minimum amount of insurance coverage, it can opt out of the criminal system. Henceforth, C Corp's employees' crimes will, at worst, result only in civil penalties resulting from lawsuits initiated by private or government parties. These penalties will be paid by C Corp's insurance policy or C Corp itself in the event those penalties exceed the limits set by the policy. Instead of acting as a *de facto* insurer for all its employees' criminal conduct (in which the rates are set *ex post* by prosecutors), C Corp will pay *ex ante* for the costs associated with the risk of those crimes by obtaining insurance from an underwriter called Underwriter U.

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223. *See* Cunningham, *Too Big to Fail*, *supra* note 222, at 1742. In his latest article, Cunningham suggests that FSI should be mandatory instead of optional. *Id.* at 1738.

224. "[T]he criminal law prohibits while the civil law prices." Coffee, *supra* note 58, at 1884 (criticizing legislative habit of criminalizing violations of agency-promulgated regulations).

225. Under Ronen's proposal, instead of paying auditors to audit the corporation's financial statements, corporate managers would purchase financial statement insurance from insurance carriers. To assess their risk of payout, insurance carriers would employ auditors to review the corporate books. This alters the agency cost problem because auditors are no longer paid by the very party (corporate managers) that they are auditing. Ronen, *supra* note 44, at 48–49.

Underwriter U sells a product known as "compliance insurance." Compliance insurance might be an extension of either a general commercial liability policy or Side C of a D&O policy;[226] it covers the entity for all entity-based penalties and fines resulting from its employees' criminal conduct. Unlike the current D&O policy, however, it extends beyond wrongdoing to conduct that has been labeled criminal. Since C Corp has purchased a minimum amount of compliance insurance, it is no longer criminally liable as an entity for its employees' conduct. It may, however, still be liable civilly to either private lawsuits or claims brought by administrative agencies. Compliance insurance would cover some or all of these claims.

To begin the process, C Corp would approach Underwriter U and request a proposal for a compliance insurance policy. Underwriter U would then review C Corp's compliance program, its compensation policies, its history of misconduct and any other aspects of its business that Underwriter U deemed relevant to C Corp's risk of employee criminal misconduct.[227] Pursuant to this inquiry, C Corp would give Underwriter U substantial access to C Corp's personnel, policies, and documentation.[228] Because Underwriter U would be in the business of evaluating compliance programs, Underwriter U would possess substantial information about not only C Corp's program but also about similar programs administered by corporations in similar industries or of similar size. Thus Underwriter U's policy would be a function of: (a) C Corp's historical conduct and compliance structure; (b) C Corp's industry, structure, number of employees, or other factors that affect compliance risk but are not necessarily unique to a particular company or its compliance program; and (c) competition within the "compliance insurance" market.

Following Underwriter U's review, Underwriter U would present C Corp with a proposal for compliance insurance, which could be either a separate policy or a component of the entity's general liability or D&O policy. The proposal would include a premium, a deductible, and a schedule of insurance coverage. The proposal might also include restrictions, exceptions, or compliance reforms mandated by Underwriter

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226. A D&O policy covers directors, officers, and insured entities for litigation against directors and officers for violations of fiduciary duty. D&O policies are most often paid out for shareholder litigation.

227. Insurance carriers already perform some of these tasks when assessing risks for D&O policies. *See* Tom Baker & Sean Griffith, *Predicting Governance Risk: Evidence From the Directors' and Officers' Liability Insurance Market*, 74 CHI. L. REV. 487 (2007) [hereinafter Baker & Griffith, *Predicting Governance Risk*]; James Cox, *Private Litigation and the Deterrence of Corporate Misconduct*, 60 L. & CONTEMP. PROBS. 1, 31–32 (Fall 1997); Griffith, *supra* note 44, at 1175.

228. Because compliance risk would include matters known to internal counsel, Underwriter U might request privileged information and/or access to C Corp's privileged documents. A similar issue has already been flagged with regard to auditors who review financial statements. *See* ABA TASK FORCE REPORT, *supra* note 19, at 1052. As a result of the Sarbanes-Oxley Act, auditors have begun to demand from corporate clients documents that historically were considered covered by the attorney-client privilege. *Id.* at 1052–53. Although the ABA Task Force did not take a formal position on the issue, it noted with apparent approval the suggestion that Congress enact selective waiver legislation that would permit corporations to supply materials to auditors but maintain the attorney-client privilege or work product protection with regard to other parties. *Id.* at 1055 & n.106. Similar legislation could apply to compliance insurance.

U, as a result of its review of C Corp's policies and past experience. If C Corp were a large entity, it might likely secure policies from multiple carriers, each of which would insure a certain level of liability above the primary amount insured by Underwriter U.

In order to ensure an appropriate reserve of funds for victims of criminal acts, the federal government would specify a minimum schedule of coverage that C Corp must purchase in order to opt out of entity-based criminal liability, which would remain the default system.[229] The schedule might be based on some combination of named factors such as the company's capitalization, number of employees, and type of industry; or it might rely on other relevant factors. C Corp would pay the premium, and Underwriter U would adopt C Corp's risk and pool it with the risks of other companies. By pooling the risk, the insurance system could reduce the aggregate costs of employee noncompliance across the pool.

B. Damages and Claims

Compliance insurance is preferable to corporate criminal liability if it more efficiently encourages entities to identify, quantify, and reduce their compliance risks *ex ante* but also continues to compensate victims *ex post*.[230] This system therefore would have to pay attention to the manner by which it compensated the victims of C Corp's employees' criminal conduct.[231]

It is important to note that the purpose of this proposal is not to generate new private causes of action or reduce the corporate employee's individual criminal liability. Moreover, one of the goals of this proposal is to maintain some level of compensation for those harmed by corporate executives and who otherwise would remain unpaid by judgment proof individuals. Accordingly, this proposal would replace corporate criminal liability with civil penalties assessed by courts and sought primarily by civil government attorneys (which is already largely the case due to parallel litigation under numerous regulatory regimes), and require corporations to purchase minimum insurance coverage to cover these penalties.[232]

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229. Critics will argue that the federal regulator who sets the schedule will likely re-introduce inefficiencies into the system. *Cf.* Hanson & Logue, *supra* note 95, at 1281 ("[The process] place[s] huge information demands on regulators . . . . Without perfect information, regulators will set prices too high or too low, and they will be unable to respond properly to changes in the amount of harm a product does."). However, assuming the regulator *published* the schedule and its factors every year and made this schedule available for notice and comment, it would be far more transparent and still less inefficient than the current system.

230. Some might argue that this system makes sense only for economic crimes (which are the bulk of crimes that occur within corporate settings) and not those employee crimes that lack a readily quantifiable value, such as obstruction of justice. (I am thankful for Steve Schulhofer's comment on this distinction). Although certain crimes may cause valuation problems, those problems would persist regardless of whether the underlying crime resulted in either criminal or civil fines imposed on the entity.

231. Since this system presupposes the elimination of corporate criminal liability, the insurance carriers would take on the organization's liability in tort for all civil fines and penalties assessed as a result of the organization's employees' criminal misconduct.

232. Since some criminal statutes do not have a civil or regulatory component, Congress might enact an omnibus statute permitting civil government lawsuits on behalf of victims against corporations whose employees were found guilty of federal crimes. This would ensure

Thus, the proposal would move entity-based liability back into the realm of tort law. To be efficient, the standard of liability would be composite, presumably with a strict liability phase followed by a penalty phase that would reflect the harm caused by the corporation's employees, modified by the likelihood of detection, *plus* some reduction or reward for monitoring and self-reporting.[233]

The reward is necessary to induce firms to monitor and report offenses. If Underwriter U's premium and coverage is linked to the carrier's assessment as to how much money it is likely to pay out for C Corp's employee crimes, its risk calculation will include not only the likelihood and magnitude of crimes committed by C Corp's employees, but also the likelihood that the those crimes will be detected.[234] This, in turn, will create the same perverse problems that Professors Arlen and Kraakman observed for all strict liability regimes.[235] In other words, if Underwriter U charges a higher premium because C Corp's compliance program increases the likelihood of detection without sufficiently decreasing losses caused by criminal harm, C Corp will either shut down its compliance program or erect a fake one.

Thus, as predicted by professors Arlen and Kraakman, entity liability for employee crimes in a civil system will function best under a system of composite liability, whereby judges and juries (and thereby carriers) reward firms for monitoring and self-reporting. On the other hand, to the extent such a reward is offered *ex post*, firms may *ex ante* devise otherwise inefficient monitoring and compliance regimes designed to impress juries and judges (and to a lesser degree, carriers), much as they currently fund compliance regimes with an eye toward impressing prosecutors.[236] These are certainly problems; but despite them, the resulting system still would be preferable to corporate criminal liability.

First, the legal standard that would determine if and when the corporation was entitled to the reward would be more transparent and subject to correction. Judicial determinations of whether a given entity was entitled to a penalty reduction would be placed on the record in writing and would be subject to appeal. Firms could exercise their right to appeal without fear of the collateral consequences of a criminal indictment.

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that the federal government had the same ability to pursue corporate entities civilly for the same crimes that previously would have triggered corporate criminal liability. The difference, of course, is that corporations would be forced to insure the liability, and the collateral consequences of criminal indictment (and the leverage accruing to the prosecutor as a result of those consequences) would drop out.

233. This article presumes that corporations would continue to be held strictly liable (albeit with some encouragement for self-reporting) for their employees' crimes. I choose strict liability as a baseline because: (a) employees may be insolvent and therefore entity liability will prevent the employee's moral hazard; and (b) the costs and errors associated with discerning negligent monitoring outweigh the value of a negligence scheme.

234. The expected value would be a multiple of the expected criminal penalty for a given crime multiplied by the probability of detection.

235. *See* Arlen & Kraakman, *supra* note 33, at 707–09. Although presumably the same problem should plague D&O liability (whereby increased corporate governance leads to greater detection but not a sufficient decrease in actual wrongdoing), Griffith does not address it. *See* Griffith, *supra* note 44, at 1181 ("By continually optimizing its governance structure, a corporation ought to find that it pays consistently less for D&O insurance than its competitors.").

236. I am grateful to Professor Krawiec for bringing up this point.

Second, it would spur less uncertainty. Organizations would base their conduct on judicial decisions and jury verdicts, and not by guessing how the latest United States Attorney (or the department as whole) would handle a given offense. Obviously, some level of uncertainty would remain (particularly in the beginning while the standard was taking shape), but not as much as exists within the current system.

Third, it would eliminate errors and inefficiency currently caused by prosecutorial biases and conflicts of interest. Jurors and judges would determine the penalty based on the organization's *prior* conduct and not on future promises to assist in the prosecution of designated employees. This is not to say that the company should be given a free pass to obstruct justice. Separate civil fines for obstruction (and separate criminal prosecutions for those who intentionally hindered a federal investigation) would be implemented and encouraged. However, the concept of prosecutorial cooperation would no longer clog up the concept of composite liability, which should be used to encourage *ex ante* monitoring and self-reporting.

C. Who Is Covered? Moral Hazard and Fortuity

The strongest argument against insurance will be the fear of moral hazard. In other words, if insurance buffets the consequences of bad behavior, insureds engage in more of that behavior.[237] Moral hazard is arguably the reason that state courts reject insurance of criminal conduct as a matter of public policy.[238] At the same time, most state courts have upheld insurance contracts for punitive damages when the insured is only vicariously liable.[239] The principle that appears to divide the insurable from the noninsurable conduct is fortuity. If the insured has complete control over how and when the act will happen, the act cannot and should not be insured. On the other hand, if the insured knows only that there is a great risk that an event will occur, the event is insurable because it is fortuitous.

In the context of corporate crime, the criminal act is fortuitous when it is beyond the control of the entity that purchases the insurance. If one defines the "insured" as the organization's control group (i.e., the board of directors and senior executive officers), then fortuity fails to exist whenever control group members commit crimes.[240] State

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237. *See generally* Tom Baker, *On the Geneaology of Moral Hazard*, 75 TEX. L. REV. 237, 270 (1996).

238. *See* Nw. Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962) (proclaiming insurance against criminal penalties void and against public policy in deciding against insurability of punitive damages); s*ee also* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 421–32 (2005) (discussing debate over insurability of punitive damages and suggesting that insurability should fall along lines of whether conduct was intentional instead of whether given relief is labeled compensatory or punitive).

239. Sharkey, *supra* note 238, at 428–29 ("Most of the states that prohibit insurance for punitive damages on public policy grounds nonetheless permit that insurance when punitive damages are vicariously (as opposed to directly) assessed against a defendant."). *See also* Deborah Travis, Comment, *Broker Churning: Who is Punished? Vicariously Assessed Punitive Damages in the Context of Brokerage Houses and Their Agents*, 30 HOUS. L. REV. 1775, 1812 (1994) (explaining that as of 1988, all but three states permitted insurance of vicarious punitive damages).

240. This at least provides a doctrinal backdrop to the otherwise completely intuitive notion that management's participation in a criminal act should result in greater penalties for the

courts have adopted the control-group theory when considering the insurability of punitive damages for corporations that have been held vicariously liable for their employees' misconduct.[241] Because an employee's crime is as fortuitous to his employer as his tort, there should be no logical barrier preventing the extension of this rule to criminal conduct.[242]

If, on the other hand, the "insured" is perceived as the collective group of shareholders who bear the cost of insurance, then insurance should apply in all instances of employee crime, except where the owner—such as a controlling shareholder in a closely held corporation—has participated in the crime. In other words, the *shareholder's* purchase of insurance through the corporation makes the *shareholder* no more likely to commit criminal conduct.[243] The control group's purchase of *entity level insurance,* assuming it is structured in a way as to *not* alleviate directors' and officers' personal criminal liability, need not cause this problem either. The moral hazard problem only occurs when managers and directors purchase entity-level insurance that covers not only the entity's liabilities, but also the directors' and officers' individual liabilities.[244] Accordingly, to prevent moral hazard, compliance insurance would apply only to entity-based penalties; in no circumstances would it apply to monetary penalties assessed on individuals through the criminal justice system.

Between the two rules—control group or ownership—the ownership rule adheres more faithfully to the notion of the corporate form and seems more sympathetic to the problem of agency costs. If there is a separation between management and ownership, then any crime—whether it is committed by a lowly employee or a CEO—is unintentional and fortuitous insofar as a public shareholder is concerned. If shareholders foot the bill for the company's insurance, it is a double insult that in addition to suffering the costs of agency shirking, shareholders must also lose the benefit of their insurance bargain through conduct over which they inherently have little or no control. In fact, even though current D&O liability insurance policies exclude coverage for the director's intentional criminal acts, most policies sever this exclusion for outside directors when management's conduct is deliberately fraudulent

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organization. *See generally* Khanna, *supra* note 34.

241. *See* Michael A. Pope, *Punitive Damages: When, Where and How They Are Covered*, 62 DEF. COUNSEL J. 539, 541 (1995) ("If the persons responsible for the corporation's misconduct are officers or directors of the corporation, the misconduct is generally attributed directly to the corporation.").

242. *Cf.* Sharkey, *supra* note 238, at 432 (criticizing label-based approach to deciding availability of insurance for punitive damages). The resistance to insuring criminal liability—even liability that is vicarious in nature—may stem from the historical fears that insurance fuels crime. *See* Baker, *supra* note 237, at 259 (explaining that morality of insurance is linked to exclusion of criminals and those "linked with" criminals).

243. It might increase overall investment in corporations if shareholders believe an insurance system results in less waste and uncertainty than under a corporate criminal liability regime.

244. This in fact has become the problem with D&O insurance. The corporation not only purchases D&O insurance for the directors and officers, but it also purchases Side C coverage for entity-level penalties incurred during securities litigation. Because one insurer covers everything, directors and officers need not worry about allocation or contribution, except where the penalties exceed coverage. Coffee, *supra* note 115, at 1567 ("[I]f the settlement is fully covered by the corporation's own liability insurance . . . the board has little reason to resist a settlement that involves no contribution by the individual defendants.").

or otherwise violates the terms of the insurance policy.[245] Severability provisions such as these "protect innocent outside directors' coverage from the misconduct of inside managers."[246] If such protection is available for outside directors, then, one might reasonably wonder why the same protections should not be available for (presumably) innocent shareholders in a public corporation. Finally, it is easier and cheaper to adjudicate an ownership rule than a control group rule, which is highly contextual and fact-specific.[247]

Unfortunately, since most states adhere to a control-group rule, the adoption of an ownership rule would incur transaction costs. Although the federal government retains the power to regulate insurance under the Commerce Clause (presumably where either the carriers or the organizations purchasing the insurance operate in interstate commerce),[248] insurance has nevertheless explicitly been delegated to the states by the 1944 McCarran-Ferguson Act.[249] Replacing the control group test of vicarious liability with the ownership rule would require Congress to partially repeal McCarran-Ferguson and expressly preempt state laws. If a legislator were to consider the opposing rules, she would have to balance the administrative efficiencies of the ownership rule against the political costs of upending the control-group rule.

Assuming an ownership rule were adopted (and promulgated through federal legislation that preempted state insurance laws), the following scenarios could result:

If C Corp is a closely held corporation and its owners are committing crimes, C Corp will be denied compliance insurance coverage because insurance would present a moral hazard in this instance. Without compliance insurance, both C Corp *and* its owners may be charged criminally and held subject to substantial penalties.[250]

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245. Bernard Black, Brian Cheffins & Michael Klausner, *Outside Director Liability*, 58 STAN. L. REV. 1055, 1087 (2006) ("[P]olicies are now widely available that provide for full severability with respect to both conduct exclusions and the insurer's right to rescind the policy.").

246. *Id.*

247. One way to shore up an ownership rule is to require that all insurance contracts are negotiated and approved by independent directors. *Cf.* Coffee, *supra* note 115, at 1575 (suggesting that SEC require independent directors to examine proposed class action settlements to prevent self-dealing).

248. *See* United States v. Se. Underwriters Ass'n, 322 U.S. 533 (1944).

249. 15 U.S.C. § 1011 (2000):

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Over the years, commentators have periodically called for a repeal of the McCarran-Ferguson Act on various grounds. *See* Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 641–44 (1998) (discussing Congressional criticism of state regulation of insurance). Following the terrorist attacks on September 11, 2001, Congress partially preempted state regulation of insurance with the passage of the Terrorism Risk Insurance Act of 2002. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322.

250. Under this analysis, partnerships ordinarily would be ineligible for such insurance as well.

Prosecutors will retain the same power over the privately held C Corp and its employees.

If C Corp is a *public* corporation and it has purchased a minimum floor of compliance insurance, it will no longer be subject to criminal prosecution for its employees' criminal acts. If employee crimes occur, civil attorneys may pursue C Corp for entity-level fines or other penalties, which will be set by a court. Underwriter U will pay those fines and may in fact defend the litigation. Finally, if C Corp detects employee crime and promptly reports that crime to its carrier, Underwriter U, corresponding penalties will be decreased and Underwriter U will presumably pass along those benefits through a cheaper policy.

Continuing with the assumption that C Corp is a public corporation and has purchased compliance insurance, if it fails to detect criminal conduct or its top executives participate in criminal conduct, C Corp still will be covered by the insurance policy, but its civil penalties may be higher. Following the incident, Underwriter U may drop C Corp as a client, charge C Corp higher premiums or insist that C Corp change its governance structures. To prevent this consequence, C Corp must improve its employee screening, adopt better crime detection mechanisms, or adjust production levels to a socially optimal level.[251]

D. Claims, Occurrences, and Adjudication

Once an organization successfully obtained coverage, its employees' subsequent criminal misconduct would no longer subject it to entity-level criminal liability. Thus, for covered entities, the DOJ's internal charging memos and the Organizational Sentencing Guidelines would cease to be relevant. Individual employees, however, would remain criminally liable for their wrongdoing.

That still leaves the question of who initiates the claim. Because corporate criminal liability is premised on the idea that the United States was itself a victim or represents "the people" generally as a victim, one could imagine a system in which government attorneys (either agency attorneys or attorneys employed by the civil division of the United States Attorneys offices and the DOJ) would continue to file claims where violations of federal laws were concerned; payments either would compensate identifiable victims or go to the public fisc. Class actions and other private methods of enforcement would be unchanged by this proposal.

Admittedly, this proposal presumes that government attorneys who prosecute civil suits are subject to fewer conflicts of interest, greater judicial oversight, and more accountability than their counterparts in the DOJ's Criminal Division. The proposal also assumes that in most cases, carriers would assume control of the company's defense in court.[252]

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251. There is some evidence that auditors charge higher fees to issuers with higher liability risks. *See* Coffee, *Gatekeeper Reform*, *supra* note 45, at 348–49 (expressing concern that auditor screening may drive law-abiding firms from the market); Partnoy, *supra* note 222, at 374 (citing Ronald A. Dye, *Auditing Standards, Legal Liability, and Auditor Wealth*, 101 J. POL. ECON. 887, 908 (1993)).

252. D&O carriers do not assume defense of claims, which unfortunately permits greater *ex post* loss. In other words, management will settle any claim that does not exceed the coverage amount. Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The*

In some cases, insurance companies would simply settle with the government. Unlike DPAs, however, the carriers' settlements would be approved by a federal judge. Accordingly, it is less likely that settlements would include terms designed to leverage the prosecutor's prosecution of individual employees. Moreover, where the government sought too high a payout (or disagreed that an entity was entitled to a reduction in penalty owing to its compliance program), insurance carriers (and companies, to the extent the government sought penalties in excess of the coverage amount) would have incentives to litigate the claim at trial.[253] Unlike the current system, which forces corporate defendants to settle because they fear the extralegal costs of an indictment, carriers would have no such fears. The government would have no more power over the carrier than it does over any civil litigant.

Although the burden of proof technically would shift from "beyond a reasonable doubt" to "preponderance of evidence," this shift would nevertheless result in less overall liability for most firms because: (a) collateral consequences would decrease substantially; and (b) penalties would be assessed by courts and juries and not prosecutors.[254]

Finally, to best align the underwriter's interests with that of shareholders and the government in deterring crime, claims would be made on an occurrence basis. In other words, if the government brought a claim in year three for a crime that took place in year one, the underwriter that wrote the policy for year one would be on the hook for payment.[255]

E. Disclosure and Market Signals

For public companies, disclosure of Compliance Insurance is desirable because it can alert investors as to whether a particular company is at risk of noncompliance.[256] Insofar as the insurance underwriter is measuring and assessing the corporation's

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Directors' and Officers' Liability Insurer, 95 GEO. L.J. 1795, 1813–17 (2007) [hereinafter Baker & Griffith, *Missing Monitor*]; *see also* Baker, *supra* note 227, at 270 (discussing *ex post* losses and moral hazard). In other insurance contexts, such as commercial liability, carriers take over the entire defense of the claim. Baker & Griffith, *Missing Monitor*, *supra* at 1814. It is unclear how compliance insurance would function in this context. Again, if the insurance contracts were negotiated and approved by outside directors, carriers might obtain the right to defend the claim, rather than reimburse the corporation for its own defense.

253. Assuming a strict liability regime, litigation costs should be lower than current costs under a criminal regime. Ideally, compliance insurance would assume some of the characteristics of "first party insurance" in that the finder of fact should not focus time and energy on how or why the crime was committed by the given employee. *Cf.* MARK GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY 55–56 (2006).

254. As the role of criminal prosecutors decreased, regulatory agencies might see their role increase under this system. Overall, this should be a good result. *See* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 35 (1997) (preferring "expert regulators" to criminal prosecutors in field of corporate crime). However, inefficient aspects of the criminal process, such as overly intrusive unbonded monitors, might reappear through civil and regulatory settlements. I leave these worries for future consideration.

255. *See* Cox, *supra* note 227, at 33 (criticizing the fact that D&O insurance is on a claims made and not occurrence basis).

256. Griffith theorizes that disclosure of D&O premiums creates an additional incentive to reduce the premiums and improve governance. *See* Griffith, *supra* note 44, at 1181–82.

compliance program, the insurer bears some resemblance to the auditors, credit rating agencies and lawyers who assess and review corporate controls on a regular basis and who are regularly deemed corporate "gatekeepers." Either the SEC or Congress could require C Corp (and any other public company) to disclose its yearly compliance insurance policy in public filings. To the extent that compliance insurance policies bore similar standardized characteristics for groups of similarly situated corporations (or for example, a given corporation's policy remained stable over time), these policies would send signals to the investor markets, which analysts and institutional shareholders could further question and explore.[257] Disclosure would increase transparency and create an additional incentive for C Corp to improve its compliance program.[258]

F. Potential Challenges

Despite its benefits, numerous problems may arise in the attempt to implement Compliance Insurance. I address some of the more prominent ones here.

1. Reductions in Prosecutions of Individual Employees

Prosecutors would most likely object to an insurance-based system on the grounds that the government cannot effectively prosecute individual employees unless it has the ability to pressure companies to hand over information and cooperate.[259] Although this should remain an important concern, it is not insurmountable. Aside from the government's overwhelming power to obtain documents through subpoenas and search warrants, the government would also retain the benefit of (1) whistleblower hotlines; (2) provisions that have strengthened gatekeeper oversight by attorneys and auditors; (3) federal statutes and sentencing guidelines that subject even minor participants to prohibitively high sentences (thus increasing the attraction of individual cooperation agreements); and (4) numerous regulatory controls (such as civil fines and contempt orders) that regulators could employ when organizations affirmatively attempted to shield employees from blame. Moreover, when board members or upper management appeared to be intentionally hindering an investigation, prosecutors might make greater use of statutes such as 18 U.S.C. § 3 (accessory after the fact) and 18 U.S.C. § 4 (misprision of a felony).[260]

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257. Griffith raises similar arguments in his proposal for D&O disclosure. *See id.* at 1182–85.

258. Ronen also proposes disclosure for Financial Statement Insurance. Ronen, *supra* note 44, at 48–49 (describing "flight to quality" that occurs when companies realize that their policies will signal quality of their financial statements and controls).

259. *See* Bharara, *supra* note 2, at 107. "[T]he elimination of all criminal liability for business entities would completely eviscerate prosecutors' leverage against corporations to obtain incriminating information about individual miscreants." *Id.*

260. 18 U.S.C. § 3 states in pertinent part:

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact. . . . [A]n accessory after the fact shall be imprisoned not more than one-half the maximum

It is also helpful to remember that the prosecutors' main implement in the "war" on white collar crimes is not the corporation's "cooperation," but rather the testimony of whistleblowers and coconspirators, buttressed by the writings contained in company documents. Scott Sullivan, not entity liability, led to the successful conviction of Bernard Ebbers for defrauding Worldcom's shareholders, and Andrew Fastow performed the same service where Ken Lay and Jeffrey Skilling were concerned. (Indeed, Enron had ceased to exist by the time Lay and Skilling were tried for their crimes.)

In the one recent case where a company, the law firm of Milberg Weiss, refused to cooperate and was indicted as a result, the company's refusal did not appear to make any dent in the government's case. Regardless of Milberg Weiss' lack of assistance, the government was able to obtain guilty pleas from one of the firm's partners, David Bershad, who was expected to testify in the prosecution of his law partners, who ultimately pleaded guilty to the charged conspiracy.[261] The Milberg episode demonstrates that although prosecutors might like companies to bend over backwards to identify (and even pressure) suspected wrongdoer-employees, the government is by no means dependent on companies to do so.

2. Limits of Coverage

Even if politicians and courts agreed that the public policy exception against insuring criminal conduct should not apply to organizations, there still would be organizational limits to the types of business entities that could take advantage of compliance insurance. Partnerships and closely held corporations, for example, might be ineligible for coverage or might find themselves restricted to coverage for crimes committed by non-partners or non-shareholders. This is unfortunate because the innocent partners and shareholders in closely held organizations have far more to lose than public shareholders in the event criminal conduct takes place. Following detection of a criminal event, partners may lose all of their personal assets, and shareholders of closely held corporations could quickly find their shares inalienable. On the other hand, members of smaller firms presumably have better ability to monitor and prevent criminal conduct by their peers.[262]

> term of imprisonment or . . . fined not more than one-half the maximum fine prescribed for the punishment of the principal.

18 U.S.C. § 4 states in pertinent part:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

261. *See* Julie Creswell, *Ex-Partner at Milberg Pleads Guilty to Conspiracy*, N.Y. TIMES, July 10, 2007, at C1. For the plea agreement, see Plea Agreement for Defendant David J. Bershad, No. CR 05-587(B) JFW (C.A.C.D. July 9, 2007), *available at* http://www.nylawyer.com/adgifs/decisions/071007bershad_agreement.pdf. Bershad's plea agreement was followed by William Lerach's and Melvin Weiss' guilty pleas. *See* Anthony Lin, *Weiss Agrees to Plead Guilty to Role in Kickback Scheme*, NEW YORK L.J., March 21, 2008, at 1.

262. Smaller organizations, however, may not need compliance insurance. *Cf.* Clifford G. Holderness, *Liability Insurers as Corporate Monitors*, 10 INT'L REV. L. & ECON. 115, 124 (1990) (finding from review of 1979 data that smaller closely-held organizations and

3. How and If Carriers Would Monitor Insureds

Two related questions that arise from this proposal are how carriers would assess risk and whether risk would be reduced or simply shifted onto those carriers. For many lines of insurance, the carrier foregoes intensive investigation and instead places the insured in a particular risk pool based on certain basic characteristics and the carrier's actuarial tables.[263] Other lines of insurance, such as title insurance and the proposed financial statement insurance, presume an investigatory audit by the carrier.[264]

It is premature to say which approach would be more amenable to compliance insurance. On one hand, a full-scale audit might provide greater guidance *ex ante* to corporations on how to improve monitoring and corporate governance. Such audits, however, would cost money, and those costs would be reflected in expensive premiums.[265] Moreover, if investigation yielded insufficient returns in predicting whether an organization's employees would commit crime, then carriers should be permitted (and in fact encouraged) to use other less expensive methods of predicting risk.[266] However, as Professor Cunningham points out, risk pooling is ineffective when the insured's risks are dependent on each other. In other words, if the risk of noncompliance rises for all companies due to some cultural event, then pooling fails to diminish risk.[267] Given the different types of noncompliance that may beset different companies, one would expect carriers to find a way to establish a workable pool.

In addition, the empirical evidence of what carriers actually do, as opposed to what they should do, is mixed. In two forthcoming articles, Professors Baker and Griffith report on extensive interviews with over forty participants in the D&O market. Baker and Griffith's articles are particularly relevant because one might expect D&O carriers to be the carriers who sold compliance insurance, either as a separate policy or as an extension of the D&O policy. (One could also imagine compliance insurance as an extension of the corporation's general commercial liability policy.) In any event, Baker and Griffith's inquiry as to the actions and views of D&O carriers is relevant insofar as D&O insurance extends to the wrongful conduct of managers.

As a result of their interviews, Baker and Griffith conclude that D&O carriers *do* investigate the corporate governance characteristics of potential insureds, and that carriers *do* build these characteristics into the price of the carrier's D&O premium.[268] This demonstrates that carriers could presumably take on the role of insuring corporate liability for crime. In writing their D&O or general commercial liability policies,

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partnerships do not purchase D&O insurance).

263. Cunningham, *Too Big to Fail*, *supra* note 222, at 1743 ("Most insurance underwriting exercises involve classifying risks using general actuarial tools rather than specific investigation.").

264. *Id.* at 1743–44 (listing other products in which carriers rely on specific investigation).

265. For example, for FSI, Professor Cunningham presumes that insurers would hire external auditors to assess the reliability of the corporation's financial statements. *Id.* at 1744.

266. Indeed, we might learn through a compliance insurance regime that it is simply impossible to reduce certain risks of employee crime in certain sectors or industries beyond a certain point. If so, the costs of that crime should simply be internalized and expressed as a cost of doing business, rather than cited as cause for moral shame and massive penalties.

267. *Id.* at 1740.

268. Baker & Griffith, *Predicting Governance Risk*, *supra* note 227, at 489.

carriers could simply expand the inquiries that they already make and price the additional risk into their policies.

Unfortunately, in a second article, Baker and Griffith also report that although D&O carriers price corporate governance into their policies, they explicitly *do not* monitor insureds during the life of the policy.[269] Although carriers monitor insureds in other contexts, including commercial liability policies, they do not engage in similar conduct for D&O policies because corporate managers are unwilling to pay for the monitoring.[270] Thus, D&O insurance does not reduce risk; rather, it simply redistributes it to carriers. Since shareholders could just as easily distribute that risk by diversifying their portfolio, Baker and Griffith conclude that D&O insurance encourages agency shirking by managers and should not be purchased.[271]

Baker and Griffith theorize that agency costs are behind the managers' purchase of D&O insurance-minus-monitoring. In other words, managers benefit from an insurance policy that caps the company's exposure and protects their own position and compensation, but simultaneously shields them from the monitoring and intervention that D&O carriers might otherwise provide on behalf of shareholders.[272] Although Baker and Griffith theorize that the lack of D&O monitoring may also result partially from other factors, including futility or prohibitive cost of monitoring, lack of monitoring expertise, D&O carriers' fears of liability for mistakes in monitoring advice, and various market failures, they still conclude that agency costs are the primary reason that public corporations decline the carriers' loss intervention services in the D&O context.[273]

Baker and Griffith's analysis is daunting to say the least. If D&O insurance can be replicated through portfolio diversification without cost, then what does that say about the current proposal for compliance insurance? Would managers simply use the compliance insurance as a means for smoothing risks and further shirking their fiduciary duties?

Hopefully not. Baker and Griffith's analysis is not addressed directly to the topic of corporate compliance, and as a result they fail to consider several explanations besides agency costs that might explain the current lack of interest in D&O monitoring.

First, corporations may be rationally engaging in the perverse behavior that Professors Arlen and Kraakman identified with regard to corporate criminal liability.[274] In other words, if a corporation perceives that a carrier's monitoring will simply increase detection of wrongdoing without a corresponding benefit for such detection in terms of lessened penalties, then firms will choose not to monitor. Although firms nominally receive credit for monitoring and detection under the McNulty Memo and Organizational Sentencing Guidelines, these standards are quite vague and subject to little or no oversight. Thus, one would expect the perverse incentives identified by Arlen and Kraakman to continue to play some role. Moreover, because criminal

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269. Baker & Griffith, *Missing Monitor*, *supra* note 252, at 1813.

270. According to Baker and Griffith, the one carrier of which they were aware that made an attempt to specialize in loss prevention could not demonstrate the value of their services and eventually left the D&O market. *Id.* at 1810–11.

271. *Id.* at 1822.

272. *Id.* at 1833–34.

273. *Id*. at 1840–41.

274. *See supra* note 235 and accompanying text.

liability is so devastating, the company might reasonably worry that by involving a carrier in the process, it would effectively relinquish control over how it handled questionable violations of law and how and when it would bring those violations to the attention of both government authorities and the public.

Second, even where pure prevention services are concerned, various formal and informal regulations already require public corporations to purchase corporate compliance services from lawyers, accountants, and other personnel. Although insurance carriers may indeed be the more efficient architects of compliance because they are bound financially by their mistakes, they are not currently favored over lawyers, compliance consultants, and accountants by regulators and prosecutors. Accordingly, the advice that a corporation currently purchases from an insurance carrier either may be duplicative of the advice that it is already receiving or in conflict with that advice. If it is duplicative, the corporation may choose not to purchase the advice even if a carrier could provide such advice more cheaply because the corporation perceives regulators and prosecutors prefer its current stable of advisors. If the carrier's advice is in conflict with the other compliance experts, the corporation will ignore it because under the current regulatory environment, the governance advice preferred by prosecutors and regulators will be the advice that the corporation adopts, regardless of whether that advice is in fact correct.[275]

Finally, fear of an evidentiary paper trail might also derail interest in carrier monitoring. For example, following a carrier's audit, a carrier might offer the corporation a reduced premium in exchange for an alteration in a particular method of governance. In the current environment, however, the corporation might fear that its rejection of that method, although completely reasonable and permissible under the business judgment rule, would result in significantly higher penalties in subsequent civil or criminal litigation.

In sum, the lack of monitoring by D&O carriers may result from factors other than agency costs or market failures; it should not, by itself, derail further inquiry into the possibility of compliance insurance.

4. Lack of a Market

A separate challenge is whether a sufficient number of private carriers would enter the compliance insurance market at all.

Private carriers might reasonably conclude that insuring entities for intentional wrongs is either too risky or too likely to encourage moral hazard. Similarly, carriers might write policies whose premiums and deductibles are so high as to offer little

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275. Another possibility is that shareholders want their agents to purchase D&O insurance-minus-monitoring because: (1) they know that their agents inflate the company's books; and (2) they believe that they will, on average, benefit from their agents' fraud. If they believe that they will benefit from such fraud, they will prefer a policy that caps wealth transfers to loser shareholders, but still permits their agents the latitude to continue inflating the books. By contrast, portfolio diversification zeroes out the shareholders' wins and losses. D&O insurance-minus-monitoring preserves benefits for "winner" shareholders, which they willingly share with their agents. Although this theory would undermine some of my arguments against corporate criminal liability (shareholders are usually viewed as innocents), it does not seem particularly plausible beyond a small portion of traders who are particularly savvy and enjoy risk.

coverage to the insured. Moreover, we know from experience that the insurance industry has endured cycles of "hard" markets (where premiums are high and coverage is difficult to obtain) and "soft" markets (where premiums are low and coverage terms are cheaper and more desirable).[276]

There are several possible answers to this problem. To the extent carriers were concerned about moral hazard, several provisions would continue to deter individuals from intentional wrongful misconduct. First and most important, this proposal presumes that individual criminal liability would continue unabated. Whereas directors and officers may not harbor much personal financial worry with regard to securities shareholder litigation,[277] officers and directors do harbor real fears of jail and fines, and they should continue to harbor those fears.[278]

As for carriers' fears of excessive penalties, carriers could reduce their overall exposure by reinsuring the risks. Moreover, similar to casualty and property insurance, corporations that offered the greatest risks presumably would spread their coverage over several carriers.[279]

5. Overly Concentrated Market

Even if a market formed, it is possible that it would come to be dominated by a few players. Concentrated markets could pose several problems. Insurance carriers might collude and agree to carve up the market and extract excessive premiums from potential corporate clients or price some clients out of the market altogether.

Although the possibility of a concentrated market is a concern, it still represents an improvement over the current system, which grants the federal prosecutor a monopoly. Firms presumably would prefer to pay an expensive premium over the combined costs of an inefficient compliance program and the risks of an exorbitant DPA or criminal prosecution.

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276. *See* Sean M. Fitzpatrick, *Fear is the Key: A Behavioral Guide to Underwriting Cycles*, 10 CONN. INS. L. J. 255, 259 (2004) ("[P]ricing volatility and periodic constrictions of supply will be inevitable in the insurance market, as insurers react to unforeseen changes in the underlying liability environment that affect policies written in earlier periods, or simply to having 'guessed wrong' in their pricing in a stable liability environment.").

277. Coffee, *supra* note 115, at 1550 (explaining that the corporate entity and the insurer ordinarily pay entire amount in securities litigation). In fact, one of the exceptions to this rule is when individual defendants have been prosecuted criminally. *Id*. at 1551.

278. Officers, however, do sometimes face civil liabilities in excess of their insurance coverage. *Id.* at 1577.

279. *See* Baker & Griffith, *Predicting Governance Risk*, *supra* note 227, at 504 (describing "towers" of coverage, which are essentially "separate layers of insurance policies stacked to reach a desired total amount of insurance coverage"). According to Baker and Griffith, the layering of coverage may decrease each carrier's incentive to monitor the insured's corporate governance practices because the costs of the monitoring are borne solely by the monitoring carrier while the benefits are spread to all layers of insurance. Baker & Griffith, *Missing Monitor*, *supra* note 252, at 1811 n.72, 1839.

6. Overdeterrence

Some might worry that eventually, insurance carriers would extract the same overpayment through premiums that prosecutors extract through DPAs. This problem may be magnified if the employee responsible for purchasing the insurance, the organization's risk manager, purchases excess coverage or authorizes excess premiums because she is risk adverse or overly worried about her career.[280]

If carriers and risk managers are as risk adverse as prosecutors, what benefit is there to having a market for compliance insurance? There are several. As an initial matter, risk managers should be no worse than the compliance "experts" and regulators who urge corporations to adopt costly compliance mechanisms regardless of their effectiveness. To the contrary, because carriers are bonded financially to their governance advice, they have little to gain from demanding showy (but ineffective) monitoring systems.[281] Finally, insofar as entity liability under this system is civil, the extralegal consequences of a criminal conviction drop out. Accordingly, carriers will write policies that insure against the costs of all civil liabilities, but not the criminal costs that organizations currently self-insure. Finally, as discussed above, unlike prosecutors or judges, carriers are at least partially constrained by a market and, therefore, are less likely to be able to get away with systematically demanding overpriced premiums.

Another concern might be that insurance carriers are as prone to command and control systems as lawyers, judges, and compliance professionals. The evidence from the D&O market, however, seems to suggest otherwise. According to Professors Baker and Griffith, D&O carriers carefully assess risk by reviewing and considering the corporate entity's culture and character because psychologists have identified these characteristics as the most relevant to encouraging corporate compliance.[282]

7. Underdeterrence

The opposing concern is that the insurance system would underdeter corporate crime as a result of carriers being captured or conflicted.

Following the fall of Enron and the detection of similar corporate reporting scandals, observers commented that auditors compromised their independence and failed to report or detect fraudulent financial statements because they were focused on retaining clients for their consultation services.[283] Consequently, the Sarbanes-Oxley Act of 2002 prescribes auditors from offering consultation services to clients.[284]

Although similar legislation could prevent Underwriter U from offering consulting services to C Corp, a slightly different conflict arises in the insurance context because insurance companies presumably sell insurance products other than Compliance Insurance. Thus, there is a possibility that an underwriter might underprice its Compliance Insurance premium in order to maintain or increase business in other insurance markets. (This would presume that the other markets are sufficiently less

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280. *See* Baker & Griffith, *Missing Monitor*, *supra* note 252, at 1833–34.
281. Indeed, this is why they are the preferred monitor. *See id.* at 1834–35.
282. Baker & Griffith, *Predicting Governance Risk*, *supra* note 227, at 516–25.
283. Ronen, *supra* note 44, at 47.
284. *See* Title II of Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002).

concentrated). Similarly, if the insurer had a long-term relationship with the same corporate entity over a long period of time, the insurer might lose its objectivity and adopt the views and needs of its client. This phenomenon is often referred to as capture. Capture and conflict both undermine the third party monitor's independence.

At first blush, the threat of capture and conflict appear less prevalent than in the auditor context. Unlike auditors, who might systematically ignore or miscalculate the risk that they will be held liable for financial misstatements, insurers are in the business of affirmatively calculating and accepting financial risks.[285] Moreover, carriers are bonded not just by their reputation, but by their capital. Capture therefore seems far less likely.[286]

As for the concern that the carrier will purposely underprice compliance insurance in order to obtain the customer's business in more competitive lines of insurance, this becomes a problem only if the carrier itself lacks minimum solvency to pay the costs of C Corp's suboptimal deterrence. In other words, if Underwriter U underprices too many compliance insurance policies, sooner or later it will become responsible for paying the greater liabilities that result from its practices.

8. Administrative Costs

A final potential argument against compliance insurance is that it would generate administrative costs that outweighed the benefits of dismantling corporate criminal liability.

Some of the costs of reviewing the organization's compliance program have already been absorbed by the corporation's D&O and general commercial liability premiums.[287] If coverage were expanded, however, to include insurance for entities as a result of employees' intentional wrongs, substantial transaction costs might accrue, particularly at the contracting stage, when experience was lacking, terms were ill-defined *ex ante*, and both sides were unsure how courts would interpret coverage terms *ex post*.[288] Over time, as both parties gained experience with these types of policies, however, these costs would abate. This proposal does assume, however, that the costs

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285. Moreover, one might argue that auditors systematically ignored risks because the "capital" they gave up–their reputation–was hard to define or calculate. *See* Coffee, *Gatekeeper Reform*, *supra* note 45, at 326.

286. Professor Griffith has argued:

> Insurance companies are experts at assessing risk. Because the success of an insurer's business depends upon taking in more capital than it pays out, the insurer must develop an ability to assess the probable payout obligations of each exposure and then charge an appropriate premium for the risk. . . . D&O underwriters therefore ought to develop categories of high risk corporate governance and low risk corporate governance and, in a well-working insurance market, seek to price and sell their policies at least partly on that basis.

Griffith, *supra* note 44, at 1174.

287. Moreover, carriers already evaluate compliance risk insofar as they may be liable under D&O policies for the follow-on civil suits that are filed after the announcement of criminal charges.

288. Coverage disputes between insureds and carriers would further increase these costs. *See* Cox, *supra* note 227, at 32 (discussing D&O coverage disputes and their effect on management).

of supplying uncertain contractual terms in insurance policies are dwarfed by the costs imposed by the DOJ's internal charging policies and the uncertainty that flows from them.

CONCLUSION

The current system of corporate criminal liability results in overpayment by corporate entities that are subject to an extremely broad criminal liability rule and which rightfully fear the extralegal penalties of indictment. Overpayment, in turn, results in social inefficiency and may reduce compliance across organizations. An insurance system, in contrast, creates a market for compliance and places insurance carriers—who already assess corporate compliance risks in the D&O arena—in the position of judging corporate compliance programs *ex ante* instead of prosecutors who review compliance *ex post* with an eye to coercing organizations to assist in prosecuting individual employees.

Preventing corporate crime is and will remain an important topic for private and public entities alike. Just as communities have been unable to find ways to prevent their citizens from transgressing deeply held norms of what is right and wrong, so have organizations failed to prevent their employees from breaking the law. That failure is unlikely to change any time soon.

Insurance may not be the final answer on preventing socially undesirable behavior within corporate firms. It does, however, provide a promising framework for further discussion of how we might go about reforming corporate criminal law.

Maintaining Government Accountability: Calls for a "Public Use" Beyond Eminent Domain

GREGORY S. KNAPP*

"No man's life, liberty, or property are safe while the legislature is in session."[1]

"Government is a trust, and the officers of the government are trustees; and both the trust and the trustees are created for the benefit of the people."[2]

INTRODUCTION

In *Kelo v. City of New London*, the U.S. Supreme Court upheld the taking of private property for the purpose of an economic redevelopment project.[3] The decision has sparked a flurry of criticism.[4] Much legal commentary calls for heightened scrutiny of such economic development takings under the public use provision of the Takings Clause.[5] For these critics,[6] the Supreme Court's deferential standard is deficient in that it allows special interests to abuse the eminent domain power to pursue their own economic interests. As a result, governments routinely condemn property on behalf of politically connected private developers, who offer in return only the speculative public benefit of stimulating the local economy.

Apart from this line of criticism, this Note argues that seeking increased protection of private property rights under the public use provision lacks a strong constitutional basis. The Constitution does not require that economic legislation be free from the influence of special interests, and this principle is no less true for economic development takings. Given this weakness of the constitutional argument for heightened judicial scrutiny, if citizens wish to impose greater restraints on

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1. Estate of A.B., 1 Tuck. 247, 249 (N.Y. Surr. Ct. 1866).

2. Henry Clay, Speech at Ashland, Ky. (Mar. 1829).

3. 545 U.S. 469 (2005).

4. *See, e.g.*, Scott Bullock, *The Specter of Condemnation*, WALL ST. J., June 24, 2006, at A11 (characterizing the approval of the taking of private property for economic development in *Kelo* as "the most universally despised Supreme Court decision in decades," setting off "a nearly unprecedented, grass-roots backlash against eminent domain abuse . . ."); Michael Corkery & Ryan Chittum, *Eminent Domain Backlash Threatens Some Projects*, CHI. TRIB., Aug. 14, 2005, at 39 (reporting on public opinion regarding eminent domain, which, in the wake of *Kelo*, was overwhelmingly against the taking of private property for economic development); Dan Haar, *Plan Expertly Before Grabbing*, HARTFORD COURANT, July 31, 2005, at D1 (characterizing *Kelo* as "a touchstone for a nationwide uprising against 'eminent domain abuse'").

5. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. As used herein, the "public use provision" refers to the "for public use" language of the Fifth Amendment.

6. See discussion *infra* Part I for an overview of the criticism of the Supreme Court's deferential review of economic development takings.

legislatures' use of eminent domain for economic development, they must demand those restraints not from the Federal Constitution, but from state law.

In determining the proper response—if any—to these demands for increased restrictions on eminent domain, state courts and legislatures should consider the source of those demands. In particular, this Note suggests that the recent criticism of the Supreme Court's eminent domain jurisprudence does not stem from a genuine belief that private property rights are sacred. Instead, these specific attacks against economic development takings reflect a more general frustration with perceived abuses of the political process. Consistent with this premise, state decision-makers who are considering eminent domain reform should recognize anti-*Kelo* sentiment for what it is—a genuine call for governmental accountability, but not necessarily a sound basis for categorically rejecting economic development takings. Courts and legislatures should accordingly resist the temptation to impose sweeping restrictions on states' condemnation authority for the sole purpose of amplifying the public outcry against *Kelo*. Instead, state decision-makers should engage in eminent domain reform only where necessary to provide a targeted, measured response to actual deficiencies in eminent domain practice.

Part I of this Note analyzes the principal Supreme Court cases that have applied minimal scrutiny to exercises of eminent domain and examines the main arguments for a heightened standard of review. Part II contextualizes the modern deferential standard by viewing it in light of the development of the Court's rational basis analysis. This perspective illustrates that the deference accorded to legislatures' use of eminent domain is consistent with that accorded to a larger category of economic legislation. Based on this consistency, the argument for heightened constitutional protections against the taking of private property lacks substantial merit.

Part III suggests that, given the weakness of the argument for increased judicial scrutiny of exercises of eminent domain, the recent criticism of economic development takings does not represent a genuine call for increased constitutional protection of property rights. Rather, this public outcry against eminent domain is merely symptomatic of a nationwide frustration with the misuse of public resources to benefit private interests. It is only the high visibility of a landmark eminent domain case that makes it a convenient vehicle through which to express a broader dissatisfaction with failures in government accountability.

Finally, Part IV evaluates recent decisions by state courts and legislatures to restrict the taking of private property for economic development. Many of these decisions enforce government accountability in the taking of private property, thereby offering a reasonable solution to eminent domain abuse. However, other more extreme court opinions and legislative bills impose sweeping restrictions on economic development takings, thereby sacrificing a significant portion of states' legitimate eminent domain authority.

I. EXPANSIVE READING OF THE PUBLIC USE PROVISION

Over the past half century, the Supreme Court's eminent domain jurisprudence has adhered to an expansive view of public use, affording legislatures broad discretion to determine which exercises of eminent domain further the public interest. The Court has also extended this view to accept economic development as a valid justification for the taking of private property.

The starting point is *Berman v. Parker*,[7] where the Court upheld the District of Columbia's condemnation of a department store as part of a larger project to redevelop an area ridden with "substandard housing and blighted areas."[8] Rejecting the argument that the taking of non-blighted commercial property failed to serve a public use, the Court held that Congress had the authority to determine that the redevelopment plan served a "public purpose."[9] The Court found no constitutional violation in the fact that the recipient of the property was a private developer, rather than the general public, since "the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established."[10]

Through this "public purpose" standard, the *Berman* Court adopted a conception of public use that was unquestionably broad. The subsequent case of *Midkiff v. Hawaii Housing Authority*,[11] however, went even further in removing any substantive protection of private property rights from the public use provision. The Court upheld an Act authorizing the forced transfer of residential tracts from landowners to existing tenants, finding that the resultant breakup of a land oligopoly constituted a valid exercise of the State's police power.[12] Writing for a unanimous Court,[13] Justice O'Connor stressed the importance of judicial deference toward a legislative decision to exercise eminent domain, which the Court would uphold if "rationally related to a conceivable public purpose . . . ."[14] Moreover, the Court in no uncertain terms rejected the notion that the public use provision provides any independent protection against legislative action: "The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."[15]

Berman's acceptance of redevelopment as a valid public purpose and *Midkiff*'s even broader conception of public use intersected in the widely publicized case of *Kelo v. City of New London*.[16] At issue was the constitutionality of the City's condemnation of non-blighted residential property as part of an integrated plan to develop an "economically distressed" area.[17] The Court upheld the plan, finding that such a comprehensive revitalization program "unquestionably serves a public purpose" so as to "satisfy the public use requirement of the Fifth Amendment."[18] Writing for the majority, Justice Stevens put forth a principle of deference toward legislative judgment that was perhaps more qualified than *Midkiff*'s "conceivable public purpose" standard:[19] "[T]he City [would not] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[20]

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7. 348 U.S. 26 (1954).
8. *Id.* at 28.
9. *Id.* at 32–33.
10. *Id.* at 33.
11. 467 U.S. 229 (1984).
12. *Id.* at 242.
13. Eight members of the Court joined the opinion in *Midkiff* (including the author, Justice O'Connor), but Justice Marshall took no part in the case.
14. *Midkiff*, 467 U.S. at 241.
15. *Id.* at 240.
16. 545 U.S. 469 (2005).
17. *Id.* at 472.
18. *Id.* at 484.
19. *Midkiff*, 467 U.S. at 241.
20. *Kelo*, 545 U.S. at 478.

Nonetheless, the Court accepted economic development as a valid justification for the use of eminent domain, irrespective of whether the development project confers a benefit on individual private parties.[21]

This line of jurisprudence accepts a broad range of public purposes, including economic development, as sufficient to justify the taking of private property. Many commentators have attacked this deferential standard, arguing that courts should read the public use provision more narrowly so as to restrict the use of eminent domain when it would benefit private parties.

Several critics point to the potential for abuse of eminent domain to benefit special interests.[22] Absent judicial oversight, politically connected developers are free to influence government officials to condemn private property on their behalf, irrespective of the burdens placed upon politically powerless condemnees.[23] Related to this problem of political favoritism, a deferential judicial standard undermines the basic economic principle of free market negotiation. Unchecked by the courts, private developers have a strong incentive to appropriate the state condemnation power in order to bypass the free market and acquire land at less than fair value.[24]

Another line of criticism focuses not on the potential for abuse but on the speculative nature of economic development takings. Since governments do not hold private recipients of condemned property accountable to use it in a way that bolsters the local economy, the ultimate public benefit of the condemnation is dependent on the recipients' own initiative and success.[25] Hence, the taking does not serve a "public

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21. *Id.* at 484.

22. *See* Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173 (2003) (arguing that rational basis review of laws affecting economic and property rights encourages special interest legislation). In the context of economic development takings, Simpson states that a deferential judicial standard allows the condemnation of private property "on little more than legislative fiat." *Id.* at 198 (citing DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003), http://www.castlecoalition.org/pdf/report/ED_report.pdf.

23. *See* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003) (arguing for a heightened "means-ends" standard of review of economic development takings on the ground that rational basis review permits the exploitation of eminent domain against the politically unorganized); Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1008–10 (observing that the "economic development rationale" is so broad that it can justify any exercise of eminent domain, making economic development takings particularly prone to abuse by powerful commercial interests at the expense of the poor).

24. *See* Ashley J. Fuhrmeister, Note, *In the Name of Economic Development: Reviving "Public Use" as a Limitation on the Eminent Domain Power in the Wake of* Kelo v. City of New London, 54 DRAKE L. REV. 171, 213 (2005) (attacking judicial deference toward economic development takings as fostering "interest group capture" of the eminent domain power, allowing special interests to acquire land at a lower cost than that of the free market); Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 301–02 (2000) (criticizing the judiciary for erroneously presuming that economic development takings result from a truly democratic process, when in fact special interests often abuse the eminent domain power to acquire land more cheaply than the open market price (citing RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 354–55 (1993))).

25. *See* Fuhrmeister, *supra* note 24, at 207–09 (distinguishing economic development

purpose" in that it occurs without any guarantee that the project will produce a net public gain.[26] This lack of accountability is also problematic in that it encourages developers to seek increasingly favorable concessions from legislatures that are already willing to condemn property on the developers' behalf. The result is an "economic war among the states" to attract big business.[27]

Still other commentators focus on the disproportionate burden borne by the individual condemnee. These critics argue that, in interpreting the constitutional right to be free from uncompensated takings, courts should take into account the "demoralization costs" of condemnation—those psychological burdens associated with losing one's home that are not included in a fair market valuation of the property.[28] Under a permissive standard of review, however, courts do not require legislatures to consider these psychological costs, resulting in "inefficient and inequitable eminent domain actions."[29]

II. THE CONSTITUTIONAL CONSISTENCY OF A HOLLOW PUBLIC USE PROVISION

While the potential abuse of eminent domain has generated understandable frustration with the Supreme Court's deferential review of economic development takings, the fact that this abuse may occur does not in itself provide a constitutional basis for heightened scrutiny. On the contrary, applying minimal scrutiny to the use of eminent domain is consistent with the modern rational basis standard applied to all

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takings from "traditional" takings in that the asserted public benefits derived from the former, such as increased jobs and taxes, are not guaranteed but contingent on the future success of the private transferee).

26. *See id*. at 208 ("When the public purpose derived from a taking is merely a fortuitous side-effect of the subsequent private use, it is difficult to see how the public benefit is paramount to the private benefit."); Somin, *supra* note 23, at 1011 (emphasizing that the lack of accountability placed on private recipients to deliver the public gains contemplated by the taking "creates an incentive . . . to rely on exaggerated claims of economic benefit . . ."); Haar, *supra* note 4 (urging a drawback from *Kelo*'s permissive standard for approving economic development takings, "not because private property rights are sacred," but because the asserted benefits of the taking may not materialize due to "shoddy planning").

27. Ivan C. Dale, *Economic Development Incentives, Accountability Legislation and a Double Negative Commerce Clause*, 46 ST. LOUIS U. L.J. 247, 256–57 (2002) (decrying states' and localities' seemingly irrational decisions to offer economic incentives to attract business with no guarantee of a return public benefit); *see also* Peter M. Agnetti, Comment, *Are You Still Master of Your Domain? Abuses of Economic Development Takings, and Michigan's Return to "Public Use" in* County of Wayne v. Hathcock, 79 ST. JOHN'S L. REV. 1259, 1273–74 (2005) (suggesting that, without a federal standard of holding private recipients of condemned land accountable to deliver promised economic benefits, states and localities will "race to the bottom" in their competitive attempts to attract private developers).

28. *See* James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1306 (1985) (arguing that, because "[s]pecific demoralization costs appear to be greater for eminent domain actions than for other governmental actions," they should factor into the costs of taking private property); Garnett, *supra* note 23, at 944–49 (citing background research in support of the proposition that a fair market valuation of condemned property does not take into account the property owner's psychological losses).

29. Durham, *supra* note 28, at 1301; *see also* Garnett, *supra* note 23, at 938 (arguing for a stricter standard of review of economic development takings on the ground that fair market monetary compensation does not necessarily cover all of the condemnee's losses).

economic legislation. Accordingly, demands for heightened protection of private property rights under the public use provision run counter to the Court's well-established practice of deferring to legislative judgment in areas of economic policy.

The principle of carefully scrutinizing legislation that affects property rights is not completely lacking from Supreme Court precedent. In *Lochner v. New York*,[30] the Court invalidated a statute prohibiting bakers from working more than sixty hours per week, holding that the law was an "unreasonable, unnecessary and arbitrary interference" with the liberty of contract.[31] While acknowledging that the State could restrict property rights to protect the "general welfare of the public,"[32] the Court concluded that the statute was a "mere meddlesome interference[]" with the liberty of contract passed under the guise of a health law.[33]

Although discredited as a case of judicial activism to protect the rich at the expense of labor,[34] *Lochner* articulated a principle of judicially-enforced government accountability that, if practiced today, could benefit advocates of private property rights. Where a law passes under the "mere pretext" of promoting the public welfare[35] but in fact originates from "other motives"[36]—abuse of the legislative process to benefit special interests—a court should strike it as a violation of due process. However, as of the late 1930s, the Supreme Court had abandoned *Lochner*'s practice of carefully questioning the public benefit derived from economic legislation in favor of an increasingly deferential rational basis standard.

In *Nebbia v. New York*,[37] the Court stepped back from the *Lochner* approach of protecting private property rights, stressing that the judiciary is generally without authority to interfere with the economic policies of the states.[38] "With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."[39]

Modern articulations of *Nebbia*'s permissive review of legislation affecting property rights are even more deferential. An illustrative case is *FCC v. Beach Communications, Inc.*,[40] where the Court made clear that legislatures are virtually unchecked in their decisions to enact socioeconomic policies. Such laws are valid "if there is any reasonably conceivable state of facts that could provide a rational basis"

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30. 198 U.S. 45 (1905).

31. *Id.* at 56.

32. *Id.* at 53.

33. *Id.* at 61.

34. *See, e.g.*, Rebecca E. Zietlow, *Exploring a Substantive Approach to Equal Justice Under Law*, 28 N.M. L. REV. 411, 418–19 (1998) (characterizing the *Lochner* Court as an "agent of the wealthy" in its establishment of substantive economic rights and noting that no such constitutional protection has been extended to the economic rights of the poor).

35. *Lochner*, 198 U.S. at 56.

36. *Id.* at 64.

37. 291 U.S. 502 (1934).

38. *Id.* at 538.

39. *Id.*; *see also* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) ("Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.").

40. 508 U.S. 307 (1993).

for the legislation.[41] Note the striking similarity between this language and *Midkiff*'s "conceivable public purpose" interpretation of the public use provision.[42]

Under this modern rational basis standard, the Court seems willing to forgo even the *Nebbia* check against "arbitrary" or "capricious" redistributions of wealth to benefit special interests.[43] Responding to a challenge that the proffered justification for the statutory classification at issue in *Beach Communications* belied legislative history, the Court stated, "[w]hether the posited reason for the challenged distinction actually motivated Congress is 'constitutionally irrelevant.'"[44]

This modern deferential standard of review of socioeconomic legislation leaves little constitutional basis for substantive protection of private property rights. Given the Court's self-admitted incompetence to question the wisdom of economic policies,[45] it is not surprising that the Court is unwilling to second-guess legislatures' taking of property for economic development.[46] Indeed, the Court has repeatedly highlighted this parallel between the deferential review of eminent domain proceedings and the broader standard of deference applied to all socioeconomic legislation.[47] Thus, contextualizing economic development takings as simply one example of legislative economic policy, it is apparent that arguments for heightened protection against these takings have little constitutional backing. Just as the Constitution does not require that economic legislation be free from the influence of special interests, it does not invalidate economic development takings that benefit politically connected developers. Just as the Supreme Court does not demand that economic policies guarantee a net public benefit, it does not throw out redevelopment projects simply because they promise only speculative public gains.

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41. *Id.* at 313; *see also* Heller v. Doe, 509 U.S. 312, 320 (1993) ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." (quoting *Beach Commc'ns*, 508 U.S. at 315)).

42. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

43. *Nebbia*, 291 U.S. at 525. Indeed, nowhere in the *Beach Communications* or *Heller* opinions does the word "arbitrary" appear.

44. *Beach Commc'ns*, 508 U.S. at 318 (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

45. *See id.* at 313 (noting that the Fourteenth Amendment "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices"); *Nebbia*, 291 U.S. at 531.

46. *See* Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 16 (2005) (suggesting that the Supreme Court has not developed a heightened scrutiny standard for eminent domain controversies, despite the sharp criticism of its takings jurisprudence, because "eminent domain was carried along in the wide stream of judicial deference to economic regulation in the twentieth century").

47. *See* Kelo v. City of New London, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring) (noting that the *Midkiff* public use requirement—that a taking be "'rationally related to a conceivable public purpose'"—"echoes the rational-basis test used to review economic regulation" (quoting *Midkiff*, 467 U.S. at 241)); *Midkiff*, 467 U.S. at 243 ("[E]mpirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."); Berman v. Parker, 348 U.S. 26, 32 (1954) (indicating that the principle of deference toward social legislation "admits of no exception merely because the power of eminent domain is involved").

III. DEMANDS FOR A PUBLIC USE BEYOND EMINENT DOMAIN

If, as this Note has argued, calls for heightened protection of property rights under the public use provision have no particular constitutional basis,[48] why has judicial approval of economic development takings provoked such extensive criticism? Much of this criticism focuses on the potential for abuse of the political process and the lack of accountability imposed on private developers of condemned property.[49] This Part suggests that these legal arguments directed specifically against economic development takings reflect a broader frustration with the misuse of government resources to benefit private interests. Further, given the localized, case-specific nature of condemnation proceedings, eminent domain jurisprudence provides a convenient venue within which to criticize these perceived failures in government accountability.

A. Backlashes Against Privatization and Calls for Government Accountability

Commentators have noted a shift in public opinion regarding the optimal division of responsibility between the public and private sectors in the management of government resources. In contrast to the view of previous decades that privatization was generally desirable to streamline a large, wasteful government, citizens in recent years have urged a larger role for the government in monitoring the private entities that provide public services.[50] Under this emerging view, waste and abuse of public resources originate not in the government itself, but in those private contractors employed by the government without adequate oversight.[51]

This backlash against privatization is indicative of—and is itself reinforced by—a growing perception among Americans that the government serves special interests at the expense of the public welfare. This Note does not seek to provide an exhaustive list of reports of public-private collaborations that have arguably involved abuses of government power. Nonetheless, because these perceived abuses form the backdrop to recent state efforts to reform eminent domain practice,[52] highlighting the more prominent examples informs the analysis.

Americans increasingly associate defense spending with the misuse of public resources to benefit private interests. The Department of Defense (DOD) receives continual criticism for granting military contracts without imposing sufficient oversight

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48. *See* discussion *supra* Part II.

49. *See* discussion *supra* Part I.

50. *See* Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 417–21 (2006) (comparing past public frustration over the seeming inefficiencies of government bureaucracy with the modern recognition of the essential role of the government in overseeing the provision of defense and entitlement programs); David Brooks, Editorial, *From Freedom to Authority*, N.Y. TIMES, May 14, 2006, at 12 (contrasting the conservatism of the 1970s and 1980s, which viewed less government as desirable for enhancing freedom, with that of the present, which fears not "bureaucrats possessing too much control" but "ungoverned sources surging out of control").

51. *See* Verkuil, *supra* note 50, at 418 (arguing that privatization has reached its limits in that civil services have been contracted out to such an extent that insufficient government personnel are available to conduct oversight on the provision of those services).

52. *See* discussion *infra* Part IV.

on private contractors,[53] and this lack of accountability becomes more problematic as defense expenditures increase.[54] The conflict in Iraq only exacerbates dissatisfaction with military outsourcing. Charges of political favoritism seem to increase directly with public impatience over the apparent lack of success in securing and reconstructing Iraq.[55]

Government responses to hurricane damage in the Gulf provide another example of perceived mismanagement of public resources. Investigators partly attribute the inadequate response to this national disaster to insufficient oversight in the contracting out of emergency services.[56] Hence, along with the Iraq conflict, Hurricane Katrina has been a major subject of criticism of abuse of political power to benefit private interests.[57] The Katrina issue also bears an interesting relationship to economic development takings. The public's growing distrust over the use of private contractors to provide emergency relief may make the use of eminent domain for reconstructing New Orleans politically infeasible.[58]

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53. *See, e.g.*, DAVID M. WALKER, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO'S HIGH-RISK PROGRAM, GAO-06-497T, at 13–15 (2006) (reporting on the DOD's continued failure to hold contractors accountable for delivering services as promised, resulting in billions in wasted expenditures).

54. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, CONTRACT MANAGEMENT: DOD VULNERABILITIES TO CONTRACTING FRAUD, WASTE, AND ABUSE, GAO-06-838R, at 3–6 (2006) (noting that the DOD's expenditures on services provided by the private sector have increased just as the size of its acquisition workforce has decreased, subjecting more public funds to the risk of waste, fraud, and abuse).

55. *See, e.g.*, Verkuil, *supra* note 50, at 441 (characterizing the conflict in Iraq as a "bonanza" for private contractors); James Glanz, *Series of Woes Mar Iraq Project Hailed as Model*, N.Y. TIMES, July 28, 2006, at A1 (reporting on the failure of an American construction company to complete a children's hospital, "the latest in a series of American taxpayer-financed health projects in Iraq to face overruns, delays, and cancellations"); Frank Rich, Editorial, *The Road from K Street to Yusufiya*, N.Y. TIMES, June 25, 2006, at 13 (decrying the Bush Administration's "lax privatization of [Iraq's] reconstruction" with "pet companies and campaign contributors and without safeguards or accountability to guarantee results").

56. *See* WILLIAM T. WOODS, U.S. GOV'T ACCOUNTABILITY OFFICE, HURRICANE KATRINA: PLANNING FOR AND MANAGEMENT OF FEDERAL DISASTER RECOVERY CONTRACTS, GAO-06-622T, at 6–7 (2006) (reporting that federal agencies deployed insufficient personnel to oversee private contractors hired to provide disaster relief in response to Hurricane Katrina).

57. *See, e.g.*, Editorial, *At Their Bidding–Katrina Works Out Well for Administration's Friends*, PITT. POST-GAZETTE, Sept. 20, 2005, at B6 (comparing the government's "leisurely response" to the Katrina catastrophe with the speed with which no-bid contracts were awarded "to politically well-connected firms whose names you may recognize from the roster of those rebuilding Iraq"); Molly Ivins, Editorial, *Hurricanes Bringing Out Corruption*, BUFFALO NEWS, Sept. 28, 2005, at A7 (criticizing the award of $1.5 billion in no-bid contracts for Hurricane Katrina relief by the Federal Emergency Management Agency (FEMA) as indicative of a "pattern of crony contracts" and "corporate clout" in the Bush Administration); Rich, *supra* note 55 (attributing the inadequate response to Hurricane Katrina to poor leadership at FEMA, which had been privatized to such an extent that "there was little government left to manage the disaster").

58. *See* Judy Coleman, *The Powers of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2 (suggesting that, while the use of eminent domain may be the only way to attract the private investment necessary to rebuild New Orleans, "[t]he urgency of government

These salient, large-scale misuses of public resources reinforce a broader perception that, increasingly, the government functions not for the benefit of the general welfare, but for the benefit of politically connected private interests.[59] Viewed within this context, it is reasonable to conclude that criticism against economic development takings is simply another indicator of public frustration with widespread failures in government accountability.[60] Indeed, the arguments offered by those who criticize economic development takings provide support for this conclusion. The most zealous opponents of eminent domain focus not on the substantive rights of property owners, but on the potential for abuse of the political process.[61] States enact legislative reforms[62] not for the practical purpose of addressing actual eminent domain practice within their own jurisdictions, but for the expressive purpose of disapproving of *Kelo*.[63]

Based on this analysis, criticism of economic development takings at the local level bears a much stronger relationship to government accountability failures at the national level than it may first appear. Just as commentators attack the transfer of property to private developers as an abuse of the political process, they allege political favoritism in the award of federal contracts. Just as the speculative nature of economic development takings prompts calls for heightened judicial scrutiny, federal agencies' failure to hold private contractors accountable generates calls for reform. *Kelo*, although involving the eminent domain power of a single state, really has served as "a touchstone for a *nationwide* uprising" against the use of political power to benefit private interests.[64]

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planning . . . is offset by the fact that the first contracts went out to some of the usual suspects").

59. *See, e.g.*, Editorial, *Backlash*, BALT. SUN, Nov. 8, 2006, at 22A (attributing the shift in party power resulting from the 2006 congressional elections to voters' frustration with political corruption, abuse of power, and special-interest projects); Judy Sarasohn, *Under Bush, the Revolving Door Gains Speed*, WASH. POST, Oct. 27, 2005, at A25 (suggesting that the movement of personnel between the private and public sectors "contributes to a cynicism about government—who is making policy and why, and who is making money off public service").

60. *See* Coleman, *supra* note 58 (characterizing the backlash against *Kelo* not as a genuine defense of American property values, but as a "deeper distrust" that government operates as a "too-eager partner of private interests").

61. *See* BERLINER, *supra* note 22, at 3 (identifying the states' "widespread abuse of eminent domain . . . for private benefit and private profit").

62. *See* discussion *infra* Part IV.B.

63. *See, e.g.*, Act of Oct. 3, 2006, ch. 84, § 1(a)(1), 2006 Alaska Sess. Laws (finding that *Kelo* "demonstrates that an overly expansive application of eminent domain powers can be a threat to the property rights of all private property owners"); Act of May 18, 2006, ch. 192, 2006 Kan. Sess. Laws 1345 (presenting as the purpose of eminent domain legislation a reaction against the U.S. and Kansas Supreme Courts' approval of "the taking and transferring of private property from one private party to another . . ."); CASTLE COALITION, INST. FOR JUST., 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* 33 (2007), http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf (observing that the Governor of New Hampshire signed eminent domain legislation on the one-year anniversary of the *Kelo* decision).

64. Haar, *supra* note 4 (emphasis added).

B. The Particular Focus on Takings

If, as this Note has suggested, attacks against the use of eminent domain to benefit private interests are merely a symptom of a broader frustration with failures in government accountability,[65] why have economic development takings generated such particular criticism within the legal community?

One key factor is the potential for high visibility in eminent domain controversies. The individual citizen who actively resists the condemnation of private property is likely to draw media attention, providing a sympathetic figure for calls against abuse of government power.[66] This high visibility combines with conditions that facilitate litigation. While systemic waste in the award of military contracts may be highly visible and detrimental to the public welfare,[67] the frustrated taxpayer has neither the incentive[68] nor the right[69] to challenge this government mismanagement in court. In contrast, eminent domain proceedings involve concrete, localized cases in which the burdens of state action fall disproportionately on a small number of property owners.[70] Such individualized circumstances are far more likely to generate litigation, and, resultantly, a Supreme Court decision that may serve as the topic of numerous law review articles.

In addition to the individualized nature of eminent domain controversies, it is noteworthy that the Federal Constitution makes explicit reference to the taking of private property for public use.[71] Although this Note has argued that the public use provision provides little substantive protection against compensated condemnations,[72]

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65. *See* discussion *supra* Part III.A.

66. *See* William A. Fischel, *The Political Economy of Public Use in* Poletown*: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 934 (comparing the "embarrassingly visible" nature of abuses of eminent domain with less politically costly means of granting special favors, such as tax breaks and deregulation); Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 6 (2006) (noting that the most publicized controversies surrounding urban renewal projects involve eminent domain, and the individual property owner who resists condemnation "becomes an embodiment of the status quo in the face of structural change and often an inadvertent champion of community interests").

67. *See* discussion *supra* Part III.A.

68. Durham, *supra* note 28, at 1307 (comparing the targets of eminent domain proceedings, who directly observe the consequences of government actions that adversely affect them, with federal taxpayers, who do not directly link particular government actions with which they disapprove to their individual tax burdens).

69. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343–48 (2006) (observing that federal taxpayers have no standing to challenge tax or spending policies by virtue of their status as taxpayers and holding that state taxpayers also lack such standing).

70. *See* Garnett, *supra* note 23, at 944 (suggesting that the taking of a home imposes a burden on the homeowner that is far greater, even with just compensation, than that imposed on the taxpayers who must pay for the compensation).

71. U.S. CONST. amend. V.

72. *See* Simpson, *supra* note 22, at 198 (acknowledging but criticizing the fact that courts have not read the public use provision as providing protection of property rights any greater than the minimal protections afforded to other, non-enumerated economic rights); discussion *supra* Part II.

the mere presence of the Takings Clause may kindle academic debate over eminent domain. Coupling this constitutional reference with the case-specific nature of condemnation proceedings, the issue of eminent domain becomes a convenient vehicle through which to criticize perceived abuses of government power.

IV. RESTRICTIONS ON ECONOMIC DEVELOPMENT TAKINGS BY STATE DECISION-MAKERS

Even accepting that the Supreme Court's modern rational basis review of economic legislation neither provides substantive protection of property rights nor filters out the influence of special interests,[73] states do not have to accept such a deferential standard as a good idea. Indeed, *Kelo* expressly opened the door for states to impose additional restraints on the exercise of eminent domain, either through judicial interpretations of state constitutions or legislative initiatives.[74]

However, states electing to undertake *Kelo*'s invitation to reevaluate eminent domain practice should do so with caution. This Note has argued that criticism of economic development takings stems not from a genuine belief that private property rights are sacred, but from a widespread dissatisfaction with perceived abuses of the political process.[75] Consistent with this thesis, state decision-makers who are considering eminent domain reform should take the public outcry against *Kelo* for what it is—a genuine call for governmental accountability, but not necessarily a sound basis for categorically rejecting economic development takings. Stated another way, state decision-makers should resist the temptation of using anti-*Kelo* sentiment as a basis for imposing unnecessarily draconian restrictions on states' eminent domain authority.

This Part examines the responses to *Kelo* by state courts and legislatures. This analysis reveals that many such responses provide reasonable checks against eminent domain abuse. Some state-court decisions and legislation, however, take anti-*Kelo* sentiment too far and impose categorical restrictions on economic development takings.

A. Judicial Restrictions on Economic Development Takings

Several state high courts have had the occasion to strike down takings initiated for the ostensible purpose of economic development. Some of these courts have invalidated economic development takings on the narrow ground of providing a judicial check against the most obvious abuses of eminent domain. By adopting an approach that does not assume that all economic development takings are necessarily invalid, these courts have successfully resisted the temptation to read too much into the backlash against *Kelo*.

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73. *See* discussion *supra* Part II.

74. Kelo v. City of New London, 545 U.S. 469, 489 (2005) (emphasizing that nothing in the Court's decision precludes states from imposing greater restrictions on economic development takings, either as a matter of state constitutional law or through eminent domain legislation).

75. *See* discussion *supra* Part III.

Other courts, however, have used post-*Kelo* eminent domain controversies as an opportunity to impose sweeping, constitutional restrictions on the taking of private property for economic development. In so doing, these courts have improperly used eminent domain jurisprudence for the expressive purpose of disapproving of *Kelo*, at the cost of unnecessarily restricting states' legitimate use of economic development takings.

1. Judicially-Enforced Government Accountability

In *Rhode Island Economic Development Corp. v. Parking Co.*,[76] the Supreme Court of Rhode Island scrutinized the taking of The Parking Company's (TPC) contractual right to operate a parking garage servicing an airport owned by the Rhode Island Airport Corporation (RIAC).[77] RIAC had invoked the eminent domain power of its parent company, the Economic Development Corporation (EDC), after RIAC failed in its negotiations with TPC to acquire the right to operate the garage.[78] The court struck down EDC's actions as an "arbitrary, capricious, or bad faith taking of private property."[79]

In reaching its decision, the court relied not on any sweeping expansion of state constitutional restrictions on eminent domain beyond the federal baseline, but on specific facts that indicated an abuse of the eminent domain power.[80] In particular, RIAC had a contractual right to purchase the garage from TPC under a previously negotiated option agreement; however, making use of EDC's condemnation authority allowed RIAC to acquire the property for substantially less than the option price.[81] Under these circumstances, the court concluded that the taking did not represent a legitimate effort to further a public purpose, but rather a bad-faith commandeering of the State's eminent domain authority to "alter[] the balance of bargaining power."[82]

The Rhode Island Supreme Court's approach in *Parking Co.* is consistent with this Note's premise that courts should not restrict the scope of economic development takings for the mere expressive purpose of disapproving of *Kelo*. Indeed, the court did not disapprove, but rather distinguished, *Kelo*. Unlike the "hasty maneuvering" of EDC, the condemning authority in *Kelo* acted pursuant to a "comprehensive and thorough economic development plan."[83] By applying this narrow, fact-specific standard for scrutinizing exercises of eminent domain, the Rhode Island Supreme Court seems to appreciate that, *Kelo* notwithstanding, many economic development takings may serve the public interest.[84]

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76. 892 A.2d 87 (R.I. 2006).

77. *Id.* at 92–93.

78. *See id.* at 93.

79. *Id.* at 103 (quoting Romeo v. Cranston Redev. Agency, 254 A.2d 426, 434 (R.I. 1969)).

80. *See id.* at 104.

81. *See id.* at 104–05.

82. *Id.* at 106.

83. *Id.*; *see also id.* at 104 ("The City of New London's exhaustive preparatory efforts that preceded the takings in *Kelo*, stand in stark contrast to EDC's approach in the case before us.").

84. *See id.* at 103 (acknowledging that "traditional notions of public use . . . must yield to 'the ever changing conditions of our modern society' such that 'what constitutes a public use necessarily [varies] with the changing conceptions of the scope and functions of government'"

At the same time, *Parking Co.* responds to the calls for government accountability that underlie the reaction against economic development takings.[85] The decision recognizes that, although courts are generally limited in their ability to review legislative determinations of what constitutes a "public use," they will nonetheless step in to prevent takings that represent egregious abuses of the political process.[86]

The reasoning of *Parking Co.* obtains further support from its consistency with the rationales of pre-*Kelo* state-court decisions invalidating economic development takings. The courts in these cases obviously did not rule with the expressive purpose of disapproving of *Kelo*. Instead, these decisions, like *Parking Co.*, had the more judicious purpose of curbing abuses of the eminent domain power.

In *Southwestern Illinois Development Authority (SWIDA) v. National City Environmental, L.L.C.*,[87] the Illinois Supreme Court invalidated SWIDA's condemnation of private property for transfer to a racetrack operator. The court acknowledged that "economic development is an important public purpose" that could justify the use of eminent domain in certain cases.[88] However, because SWIDA failed to formulate an economic development plan of its own, but rather agreed to condemn whatever property the racetrack operator desired, the court concluded that SWIDA had abused its authority.[89] Thus, the peculiar facts of the case, rather than any heightened standard of review, prompted the court to invalidate the taking. As the court noted, the purpose of the taking was to bestow "a purely private benefit," not to serve a "public use" as required by the state constitution.[90]

In *Casino Reinvestment Development Authority (CRDA) v. Banin*, the court denied CRDA's authority to forcibly transfer private property to facilitate a hotel redevelopment project.[91] As in *SWIDA*, the court declined to apply a heightened standard of review to exercises of eminent domain that "result[] in a substantial benefit to specific and identifiable private parties."[92] However, much like the *SWIDA* court's disapproval of the private developer's control over the condemnation process, the *CRDA* court reasoned that the discretion afforded to the hotel developer over the use of the property defeated any finding of a "public purpose."[93] In particular, CRDA did not condition the transfer of the property on any assurances that the developer would use it for the public benefits that originally justified the taking.[94] Because the "consequences and effects" of the condemnation were left to the complete discretion of the private

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(quoting *Romeo*, 254 A.2d at 431)) (alteration in original).

85. *See* discussion *supra* Part III.

86. *See Parking Co.*, 892 A.2d at 101 ("[A] legislative determination on the issue of public use . . . will be accorded deference by this Court, but is not dispositive.").

87. 768 N.E.2d 1, 11 (Ill. 2002).

88. *Id.* at 9.

89. *Id.* at 10.

90. *Id.* at 9–10.

91. 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998).

92. *Id.* at 104 (quoting City of Atl. City v. Cynwyd Invs., 689 A.2d 712, 721 (N.J. 1997)); *see also* Twp. of W. Orange v. 769 Assocs., L.L.C., 800 A.2d 86, 94 (N.J. 2002) (affirming that New Jersey courts do not apply "heightened scrutiny" to economic development takings, but rather a "manifest abuse of discretion test").

93. *CRDA*, 727 A.2d at 110.

94. *Id.* at 105.

transferee, the court concluded that "any potential public benefit is overwhelmed by the private benefit . . . ."[95]

Parking Co., *SWIDA*, *CRDA*, and other state cases restricting the scope of eminent domain[96] do not offer expressive disapproval of the Supreme Court's takings jurisprudence, nor do they purport to impose heightened constitutional protections against economic development takings.[97] Instead, these cases represent isolated checks against the most obvious abuses of public power by unusually influential private interests.[98] Accordingly, the reasoning of these decisions is consistent with this Note's argument that courts should contextualize the recent outcry against *Kelo* as symptomatic of a broader frustration with the perceived lack of government accountability.

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95. *Id.* at 111.

96. In addition to the state cases discussed herein, see also *Bailey v. Myers*, 76 P.3d 898, 904 (Ariz. Ct. App. 2003) (invalidating under the state constitution the taking of a business at the request of a private developer as not "'really public'"); *Avalon Bay Cmtys., Inc. v. Town of Orange*, 775 A.2d 284, 302 (Conn. 2001) (setting aside the Town's plan to take the property of a housing developer for construction of an industrial park as adopted in "bad faith" and as a mere pretext to prevent affordable housing); *In re Redevelopment Authority of City of Philadelphia*, 891 A.2d 820, 831 (Pa. Commw. Ct. 2006) (invalidating the City's forced transfer of property to religious entities to construct a private school as made under the mere pretext of a public purpose).

97. Not every pre-*Kelo* decision invalidating economic development takings relied on the narrow ground of preventing egregious abuses of the political process. In *County of Wayne v. Hathcock*, 684 N.W.2d 765, 782 (Mich. 2004), the court established heightened protections against economic development takings, holding that transfers of condemned property to a private entity satisfy the public use requirement of the Michigan Constitution only if the entity remains accountable to the public in its use of the land. However, the practicability of the Michigan Supreme Court's requirement that the property "remain[] subject to public oversight after transfer to a private entity," *id.* at 783, is questionable. *See* Agnetti, *supra* note 27, at 1270–74 (stating that the *Hathcock* decision "left readers and real property owners guessing as to how liberally [the public accountability] exception will be applied by the judiciary" and suggesting alternatives for enforcing the promises of private developers through public oversight); Boudreaux, *supra* note 46, at 5 (criticizing proposed reforms to the Supreme Court's deferential review of exercises of eminent domain, including the *Hathcock* formula, as "likely to lead courts into an inextricable bog of trying to assess and weigh the benefits of public development projects—a fact-finding job that is a legislative, not judicial, function"); Rachel A. Lewis, Note, *Strike That, Reverse It:* County of Wayne v. Hathcock*: Michigan Redefines Implementing Economic Development Through Eminent Domain*, 50 VILL. L. REV. 341, 366–67 (2005) (noting that the *Hathcock* court did not indicate what level of control over the private developer's use of the condemned property would have satisfied the "public use" requirement). In any event, one could agree with the Michigan Supreme Court that some level of heightened scrutiny of economic development takings is appropriate, while still agreeing with this Note's premise that courts choosing to apply such heightened review should not do so for the mere expressive purpose of disapproving of *Kelo*.

98. *See* Simpson, *supra* note 22, at 199–200 (characterizing the takings in *SWIDA* and *CRDA* as abuses of eminent domain to "dole out special favors").

2. Judicial Overreaction

Unlike those state courts that have invalidated takings only where necessary to prevent an abuse of the political process, some courts have fallen into the trap of using anti-*Kelo* sentiment as a basis for imposing severe restrictions on economic development takings. The Ohio Supreme Court was the first to accept *Kelo*'s invitation to extend its state constitutional protections against eminent domain beyond the federal baseline. In *City of Norwood v. Horney*, the court invalidated the City's exercise of eminent domain under an ordinance authorizing the condemnation of property falling within a "deteriorating area."[99] The court rested its decision primarily on the rationale that the "deteriorating area" test was a "standardless standard," making the ordinance unconstitutionally void for vagueness.[100] However, the court took the opportunity to rule much more broadly against economic development takings: "[T]he fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of . . . the Ohio Constitution."[101]

Several aspects of this holding suggest that the Ohio Supreme Court was concerned not with developing a workable standard for reviewing economic development takings, but with disapproving of the U.S. Supreme Court's deferential review of such takings. First is the court's observation that, with respect to the limitations on eminent domain imposed by the Federal Constitution, *Kelo* represents the "death knell" of the public use requirement.[102] In addition, the court's application of the law to the facts centered almost entirely on the void-for-vagueness doctrine.[103] Indeed, because the City was not even asserting that an economic benefit alone motivated its decision to condemn,[104] the court's pronouncement that such a benefit "cannot serve as the sole basis" for a taking[105] would not seem essential to its decision. For these reasons, *Horney*'s disapproval of *Kelo*-type condemnations is more expressive than analytical, and the decision offers little in the way of an alternative standard of review of economic development takings.

The Oklahoma Supreme Court has also had the opportunity to use its state constitution as an amplifier of anti-*Kelo* sentiment. In *Board of County Commissioners of Muskogee County v. Lowery*, the court found that the County violated state constitutional and statutory restrictions on eminent domain by taking easements in property in order to construct water pipelines that would serve an electricity plant.[106] Much like the Ohio Supreme Court in *Horney*, the Oklahoma Supreme Court separated itself from the *Kelo* decision, holding that "economic development alone does not

99. 853 N.E.2d 1115, 1123 (Ohio 2006).

100. *Id.* at 1146.

101. *Id.* at 1123.

102. *Id.* at 1135.

103. *See id.* at 1142–46.

104. *See id.* at 1127 (indicating that the lower state court accepted the City's conclusion that the property was within a "deteriorating area" based on evidence that failing to implement a comprehensive development plan "could lead to impairment of sound growth, an economic liability and a menace to the public welfare").

105. *Id.* at 1141.

106. 136 P.3d 639 (Okla. 2006).

constitute a public purpose and therefore, does not constitutionally justify the County's exercise of eminent domain."[107] But also much like *Horney*'s sweeping disapproval of economic development takings, *Lowery*'s equivalent holding was arguably unwarranted by the facts before it. Indeed, the County was not bringing about a "specter of condemnation" by bulldozing a private home in favor of office space.[108] On the contrary, these takings of easements in land, while ultimately beneficial to a private utility operator, advanced interests beyond private economic development.[109] The Oklahoma Supreme Court's opinion, then, appears to contain a gratuitous element of joining the outcry against *Kelo*. *Lowery* does not provide a workable alternative to the U.S. Supreme Court's permissive review of economic development takings, but only a rejection of it.

In sum, several state courts have properly invalidated economic development takings where necessary to prevent the most egregious abuses of the eminent domain power. In contrast, cases such as *Horney* and *Lowery* have imposed sweeping constitutional restrictions on states' eminent domain authority for the mere expressive purpose of joining the public outcry against *Kelo*. The latter approach fails to appreciate anti-*Kelo* sentiment for what it is—a convenient vehicle through which to express broader frustrations with failures in government accountability, but not a sound basis for finding heightened constitutional protection of property rights.

B. Legislative Restrictions on Eminent Domain

The preceding discussion illustrates that specific instances may arise where state courts provide an important check against abuse of the eminent domain power. Nonetheless, based on the well-established principle of deference toward legislative determinations of economic policy, the judiciary's role in eminent domain controversies is generally limited.[110] Hence, if citizens have a genuine desire to impose greater restraints on legislatures' authority to exercise eminent domain,[111] they should first look to the legislatures themselves. In a majority of states, the people have done just that. Following the Supreme Court's decision in *Kelo*, forty-two states have passed

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107. *Id.* at 650.

108. Kelo v. City of New London, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting).

109. *See Lowery*, 136 P. 3d at 644 (indicating that the lower state court had authorized the taking on the ground that it was necessary for the installation of water lines that "'are necessary for the private electricity generation plant to operate, for the benefit of Muskogee County residents and the general public'").

110. *See* R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 103 (R.I. 2006) (embracing a liberal, evolving view of "public use" and affording broad discretion to the legislature in its decision to exercise eminent domain); discussion *supra* Part II.

111. The federal government, of course, also has eminent domain powers. However, the controversy surrounding eminent domain abuse largely focuses on condemnations by state authorities. *See* DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-*KELO* WORLD (2006), http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf (documenting condemnation proceedings either planned or initiated by local governments since the 2005 *Kelo* decision). Further, the legislative approach advanced by this Part is based on the efforts of state governments to restrict their authority to exercise eminent domain.

laws, either through legislation or constitutional amendment, that in some way limit their authority to take property for economic development.[112]

The wisdom of this rush toward legislative reform is questionable. This Note has argued that public criticism of economic development takings stems not from a belief that property rights are sacred, but from a widespread dissatisfaction with perceived abuses of the political process. Attacks against eminent domain abuse merely provide a convenient vehicle through which to express these broader frustrations.[113] It stands to reason, therefore, that this reform movement carries the risk of using anti-taking legislation not as a targeted response to real problems in eminent domain practice, but as an expressive outcry against the governance problems that *Kelo* has come to represent.

This Part examines characteristic provisions of recent eminent domain legislation for their consistency with the accountability goals advanced by this Note. Based on this analysis, reasonable legislative reforms are those that attach greater electoral accountability to decisions to exercise eminent domain, encourage increased public scrutiny of condemnation proceedings, and provide additional procedural opportunities for the condemnee to contest the taking. However, more extreme provisions, such as an absolute bar on economic development takings, risk taking anti-*Kelo* sentiment and the call for political accountability too far.

1. Accountability-Based Legislative Reform

In order to attach electoral accountability to decisions to condemn private property, some states have passed legislation requiring elected officials to expressly authorize any economic development taking. Both the Alaska and Kansas legislatures have passed bills that generally prohibit the taking of property for transfer to a private developer, but that allow the legislatures to approve such transfers on a case-by-case basis.[114] Utah has enacted a similar accountability provision that prohibits the taking of private property "unless the governing body of the political subdivision [within which the property is located] approves the taking."[115]

The Georgia legislature has raised this accountability reform to the constitutional level; voters have ratified an amendment requiring that "[e]ach condemnation of privately held property for redevelopment purposes . . . be approved by vote of the elected governing authority . . . ."[116] Florida voters have approved a similar constitutional amendment.[117]

This form of accountability legislation offers a reasonable approach to reforming eminent domain practice. By requiring elected officials to sign off on all economic development takings, these provisions impose a high political cost for allowing an

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112. CASTLE COALITION, *supra* note 63, at 1.

113. *See* discussion *supra* Part III.

114. ALASKA STAT. § 09.55.240(d)–(f) (2006); KAN. STAT. ANN. §§ 26-501a(b), -501b(f) (Supp. 2006).

115. UTAH CODE ANN. § 78-34-4(2)(b) (Supp. 2007).

116. GA. CONST. art. IX, § 2, ¶ VII(a).

117. FLA. CONST. art. X, § 6(c) (prohibiting transfers of condemned property to a private party "except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature").

exercise of eminent domain that, while strongly supported by private developers, may not be in the best interest of the public. Hence, these legislative reforms respond to the extensive body of criticism suggesting that economic development takings are inherently prone to abuse by private interests.[118]

A second favorable component to legislative reform is a requirement that authorities give full public notice of their plans to exercise eminent domain. For example, the Minnesota legislature now requires that a public hearing precede the commencement of condemnation proceedings and that the public receive notice of the meeting through publication.[119] Under a new Georgia bill, authorities must provide notice of meetings to approve a condemnation through both publication and a sign posted on the affected property.[120]

These public notice provisions are a key corollary to the electoral accountability provisions discussed above. Without the increased public scrutiny facilitated by the former, the latter would not effectively deter officials from abusing eminent domain for the benefit of politically connected private interests.

Finally, equally important as notice to the public is, of course, notice to the condemnee. Several of the states' recent eminent domain bills require that the property owner receive individual notice of a meeting to approve the condemnation, along with a statement of the right to attend and to object to the proceedings.[121] Missouri now requires that condemning authorities provide notice to the condemnee sixty days before filing the condemnation proceeding, along with a statement of the owner's rights, which include the opportunity to contest and to seek assistance from the State's newly-created Office of the Ombudsman for Property Rights.[122]

These increased procedural mechanisms serve the obvious purpose of affording the condemnee a full and fair opportunity to contest the condemnation proceedings. The primary goal of providing this opportunity is to ensure that the property owner is not marginalized from the political process, which, according to some commentators, is the true measure of the justness of an exercise of eminent domain.[123]

While these increased procedural opportunities are essential to afford political participation to the private condemnee, they are also effective in imposing greater burdens of justification on the government condemnor. Faced with the prospect of genuine opposition by local property owners, officials will be less likely to approve economic development takings that are not easily defensible as serving the public interest. Thus, these process-oriented legislative reforms work in tandem with the

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118. *See supra* notes 22–24 and accompanying text.

119. MINN. STAT. ANN. § 117.0412(2)(a) (West Supp. 2007).

120. GA. CODE ANN. § 22-1-10(a)(1), (3) (Supp. 2007).

121. *E.g.*, GA. CODE ANN. § 22-1-10(a)(2), (d) (Supp. 2007); IOWA CODE ANN. § 6B.2D(1) (West Supp. 2007).

122. MO. ANN. STAT. § 523.250 (West Supp. 2007).

123. *See* Boudreaux, *supra* note 46, at 47–48 (arguing that the level of scrutiny applied to exercises of eminent domain should focus not on the end use of the property or the economic benefit bestowed on private recipients, but on the affected property owner's ability to participate in the political process); Clayton P. Gillette, Kelo *and the Local Political Process*, 34 HOFSTRA L. REV. 13, 14–18 (2005) (suggesting that private property rights are best protected by political safeguards and that the Supreme Court upheld the taking in *Kelo* precisely because these safeguards were in place).

public notification provisions discussed above. Together, these measures reduce an elected representative's incentive to approve takings that, while trumpeted by private developers as offering economic revitalization, have only speculative public benefits. Based on this effect on political incentives, these legislative reforms address the concerns of some commentators that courts' deferential review of exercises of eminent domain encourages inefficient takings.[124]

2. Legislative Overreaction

In addition to the political accountability mechanisms discussed above, several states have responded to perceived eminent domain abuse with far more draconian legislative provisions. For example, many bills passed in the wake of *Kelo* simply disallow "economic development" as a sufficient purpose to justify the use of eminent domain.[125]

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124. *See supra* notes 25–27 and accompanying text.

125. LA. CONST. art. I, § 4(B)(1), (3) (barring the taking of private property except for "public purposes," which do not include "economic development, enhancement of tax revenue, or any incidental benefit to the public"); MICH. CONST. art. X, § 2 ("'Public use' does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues."); COLO. REV. STAT. ANN. § 38-1-101(b)(I) (West 2007) (disallowing "the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue" as not a "public use"); GA. CODE ANN. § 22-1-1(9)(B) (Supp. 2007) ("The public benefit of economic development shall not constitute a public use."); IDAHO CODE ANN. § 7-701A(2)(b) (Supp. 2007) (prohibiting the exercise of eminent domain for "the purpose of promoting or effectuating economic development"); IOWA CODE ANN. § 6A.22(2)(b) (West Supp. 2007) (excluding economic development activities from the definitions of "public use," "public purpose," and "public improvement"); KY. REV. STAT. ANN. § 416.675(3) (LexisNexis Supp. 2006) (prohibiting the "condemnation of private property for transfer to a private owner for the purpose of economic development that benefits the general public only indirectly, such as by increasing the tax base, tax revenues, employment, or by promoting the general economic health of the community"); MO. ANN. STAT. § 523.271 (West Supp. 2007) ("No condemning authority shall acquire private property . . . for solely economic development purposes."); NEB. REV. STAT. ANN. § 76-710.04(1) (LexisNexis Supp. 2006) (disallowing a taking that is "primarily for an economic development purpose"); N.H. REV. STAT. ANN. § 162-K:2, IX-a(b) (LexisNexis Supp. 2006) ("[P]ublic use shall not include the public benefits resulting from private economic development and private commercial enterprise, including increased tax revenues and increased employment opportunities."); N.D. CENT. CODE § 32-15-01(3) (Supp. 2007) ("[A] public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health."); TENN. CODE ANN. § 29-17-102(2) (Supp. 2006) ("'Public use' shall not include either private use or the indirect benefits resulting from private economic development and private commercial enterprise, including increased tax revenue and increased employment opportunity . . . ."); TEX. GOV'T CODE ANN. § 2206.0001(b)(3) (Vernon Supp. 2006) (prohibiting the taking of private property "for economic development purposes, unless the economic development is a secondary purpose"); VT. STAT. ANN. tit. 12, § 1040(a) (Supp. 2006) (disallowing a taking that is "primarily for purposes of economic development"); W. VA. CODE ANN. § 54-1-2(a)(11) (LexisNexis Supp. 2007) ("[I]n no event may 'public use' . . . be construed to mean the exercise of eminent domain primarily for private economic development.").

Of course, states have the right to impose whatever restraints they wish over their authority to condemn property. However, this categorical exclusion of economic development from the legitimate scope of eminent domain embraces the outmoded conception of "public use" that the Supreme Court rejected as unworkable.[126] This approach is also problematic in that it may prohibit states from engaging in redevelopment projects that deliver an unquestionable public benefit.[127] In these cases, where the use of eminent domain would serve the public interest and occur with full procedural protections for the condemnee, it makes little sense to disallow the taking merely because it falls within the disfavored category of "economic development."[128] Rather than deny legislatures the ability to develop a "carefully formulated" economic development plan,[129] eminent domain reform should ensure that legislatures implement those plans in a manner that maintains the integrity of the political process.

Another recurring feature of eminent domain legislation is a requirement of stepped-up compensation for the taking of homes. These provisions focus not on political accountability throughout the condemnation process, but on mitigating the burden placed on the individual condemnee. For example, Missouri now requires that, in the case of such a "homestead taking," the State provide a minimum compensation of 125% of the fair market value of the property.[130] Kansas's new standard for compensation is potentially more extreme, but remarkably pliable: where the legislature exercises its authority to override the general prohibition on economic development takings, it "shall consider requiring compensation of at least 200% of fair market value to property owners."[131]

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126. Kelo v. City of New London, 545 U.S. 469, 479 (2005) (dismissing a narrow definition of public use as "impractical given the diverse and always evolving needs of society").

127. *See* Theodore C. Taub, *Post-*Kelo*: Emerging Impacts and Issues in Eminent Domain*, SM004 A.L.I.-A.B.A. 1721, 1772 (2006) (questioning the appropriateness of the legislative response to *Kelo* in light of the fact that "[r]edevelopment is a necessary tool in enhancing the public's quality of life"); Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, N.Y. TIMES, Jan. 18, 2006, at C5 (commenting on the legislation passed in the wake of *Kelo* and suggesting that "weakening or destroying the power to condemn property will seriously undermine efforts to rehabilitate decaying cities and might even hinder the rebuilding of New Orleans").

128. Critics of the result in *Kelo* may argue that the taking of private property for the purpose of economic development is not in any event justifiable. *See, e.g.*, Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 497–98 (2006) (acknowledging that *Kelo* was the right result under Supreme Court precedent but arguing that, because economic development takings are unjust and not particularly effective at revitalizing economically distressed areas, legislatures should ban them). However, one can question the wisdom of economic development takings while still accepting this Note's premise that, to the extent that legislatures desire to deprive themselves of this significant redevelopment tool, they should do so not as a hasty, expressive reaction against the abuse of public power that *Kelo* has come to represent, but as a carefully considered determination that the public costs of economic development takings outweigh the public benefits.

129. *Kelo*, 545 U.S. at 483.

130. MO. ANN. STAT. § 523.039 (West Supp. 2007).

131. KAN. STAT. ANN. § 26-501b(f) (Supp. 2006).

This Note does not dispute the independent merits of these advanced compensation provisions. They provide a reasonable, if not complete, response to the concerns of many commentators that current eminent domain practice fails to take into account the high "demoralization costs" associated with the taking of one's home.[132] Nonetheless, these provisions do not address the need for transparency and accountability in the use of eminent domain. If, as this Note has argued, public frustration with eminent domain practice stems from perceived abuses of the political process, requiring that the legislature waste twenty-five percent more of the public's funds in acquiring the property is hardly a solution. Instead, if eminent domain legislation is to provide a meaningful response to government accountability failures, its provisions must impose political restraints on the decision to take property.

CONCLUSION

The Supreme Court has not read the public use provision of the Federal Constitution as providing substantive protection against the compensated taking of private property. On the contrary, the Court's broad interpretation of "public purpose" has expanded to include transfers of property to private parties for economic development. This judicial deference has invited much criticism; many commentators argue that heightened review of economic development takings is necessary to guard against the abuse of eminent domain by special interests. Nonetheless, the deferential standard applied to legislatures' use of eminent domain dovetails the rational basis review applied to a broader category of economic legislation. Accordingly, calls for stricter readings of the public use provision have no particular constitutional basis.

Based on the weakness of the argument for heightened judicial review, it is unlikely that the extensive criticism of economic development takings represents a genuine call for increased constitutional protection of property rights. Rather, demands for a "public use" of condemned property are merely a proxy for demands that all government resources be used on behalf of the public. While the image of the private homeowner standing against the state-sponsored developer may be especially compelling, the particular outcry against economic development takings actually reflects a deeper frustration with the mismanagement of public resources.

Unfortunately, several state courts and legislatures have failed to contextualize the public backlash against the Supreme Court's decision in *Kelo* as merely symptomatic of a broader frustration with failures in the political process. Instead, these decision-makers have taken anti-*Kelo* sentiment to the extreme, imposing severe restrictions on states' authority to initiate economic development takings. These sweeping judicial and legislative reforms are problematic in that, at best, they serve only the expressive purpose of disapproving of *Kelo* without addressing any real problems in the condemnation process, and, at worst, they unnecessarily restrict the legitimate scope of states' eminent domain authority.

More importantly, this overreaction against economic development takings misses the broader point of government accountability. If this Note is correct that the particular outcry against eminent domain abuse reflects a broader, nationwide call for government accountability, then state officials should not limit their response to

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132. *See supra* notes 28–29 and accompanying text.

passing an anti-taking bill. Rather, the real solution to the accountability problem that *Kelo* has come to represent is a renewed commitment to legitimate political processes and a continuing insistence on the responsible use of public resources. It is a solution that, somewhat ironically, *Kelo* already demands.[133]

133. *See* R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 104 (R.I. 2006) (interpreting *Kelo* as requiring "good faith and due diligence" on the part of a condemning authority); Gillette, *supra* note 123, at 17 (concluding that the Supreme Court's reasoning in *Kelo* implicitly imposed a requirement that a taking be free from "any apparent political process failure").

The Limits of Offshoring—Why the United States Should Keep Enforcement of Human Rights Standards "In-House"

JOHN MCKENZIE*

INTRODUCTION

As the world becomes more integrated, the recognition that globalization constitutes a force with growing influence over a host of transnational problems has gained increasing traction.[1] In response to these problems, many theorists have posited an emergent new world order as the construct most descriptive of how the world currently confronts all global problems or as prescriptive on how the world should confront these problems in the future.[2] These theories often expressly or implicitly suggest that all the global problems can be solved through a single new framework or reconfiguration of existing frameworks.[3]

While the search for a unified solution can play an integral role in policy development, this Note rejects the view that any single panacea will bring relief to the myriad afflictions influenced by globalization. Rather, each problem requires a solution tailored to its own unique characteristics, such that a proposed solution for human rights abuses by private actors may prove poorly suited to confront human rights abuses committed by state actors.

By examining the discrete global problem of corporations committing human rights abuses, Part I of this Note will first contend that no single strategy is currently being deployed on a global level to confront human rights abuses, corporate or otherwise. Next, Part II will argue that global economic and legal conditions foreshadow an increase in corporate human rights abuses because corporate actors can avoid liability under most existing legal theories while they simultaneously increase their operations across the globe. Finally, Part III will suggest that because globalization stands poised to exacerbate the abuse of human rights by private actors, Congress should modify existing legal theories and extend the jurisdiction of U.S. Courts as an effective and desirable method of stemming the proliferation of global misfeasance by private actors.

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1. *See, e.g.*, Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 IND. J. OF GLOBAL LEGAL STUD. 9, 14–19 (1993).

2. *See generally* Michael Hardt & Antonio Negri, *Globalization as Empire*, *in* THE GLOBAL TRANSFORMATIONS READER 116, 117 (David Held & Anthony McGrew eds., 2000); Anthony McGrew, *Models of Transnational Democracy*, *in* THE GLOBAL TRANSFORMATIONS READER, 500, 500–05 (David Held & Anthony McGrew eds., 2000).

3. *See, e.g.*, Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, *in* THE GLOBAL TRANSFORMATION READER 189, 192–93 (David Held & Anthony McGrew eds., 2000).

I. THE CURRENT GLOBAL RESPONSE TO HUMAN RIGHTS ABUSES

An assortment of initiatives launched by governments, international institutions, and transnational private actors has transformed human rights from a collection of lofty aspirations into actual benchmarks augmented by global awareness and methods of enforcement.[4] Although effective at promoting human rights as a precept of global values, the various institutions shepherding the human rights movement thus far have proven largely ineffective at coalescing around a single global vision of human rights.[5] Rather, different institutions often endorse different theories on how to define the precise contours of human rights and how exactly these rights should be vindicated once identified.[6]

Within this uneven theoretical landscape, legal claims tailored to confront the full range of possible human rights abuses have yet to find solid footing. Consequently, to understand the discrete global problem posed by private actors committing human rights abuses, the first step in analysis requires appraising the current state of human rights and identifying both the non-legal and legal components of their enforcement.

A. The Non-Legal Measures Taken to Address Human Rights Abuses

Although legal claims provide a familiar method for defining and enforcing fundamental rights, the theory that law alone can serve these functions misconstrues the growing advocacy role played by governments, international institutions, and transnational organizations.[7] In confronting human rights abuses, international and transnational institutions have helped define the normative foundations for human rights and instituted monitoring programs across the globe.[8] Further, governments and international institutions have crafted political responses to egregious human rights abuses through the use of sanctions, and even military intervention in extreme cases.[9] While these measures have certainly enhanced global awareness of human rights and possibly decreased the incidence of abuses, non-legal measures remain confined in their application within certain theoretical and practical limitations.

The United Nations Universal Declaration of Human Rights ("the Declaration") ratified in 1948 provides a telling example of how international institutions can further the theory of human rights, and yet still face limitations in garnering global

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4. *See, e.g.*, Human Rights Watch Who We Are, http://www.hrw.org/about/whowe are.html; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg. at 71, U.N. Doc. A/810 (Dec. 12, 1948); Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), *available at* http://www.icc-cpi.int/library/ about/officialjournal/Rome_Statute_120704-EN.pdf.

5. Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization*, 30 YALE J. INTL'L L. 211, 253 (2005); Human Rights Watch Who We Are, *supra* note 4; G.A. Res. 217A, *supra* note 4.

6. *See* Human Rights Watch Frequently Asked Questions, http://www.hrw.org/about/faq/.

7. Jost Delbrück, *Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization*, SWISS REV. INT'L & EUR. L., 1, 4 (2001).

8. *See* Human Rights Watch Who We Are, *supra* note 4.

9. Although many governmental and international responses that I have characterized as political involve a legal element, these interventions are in their character more political than legal insofar as adjudication and process remain the talisman of legal remedies.

acceptance.[10] Despite its capacious and seminal language, the Declaration still enjoys only partial recognition among U.N. member states if state compliance fairly approximates recognition.[11] Many states in the U.N. openly ignore select strictures of the Declaration, instead crafting their own roster of human rights that they feel deserve protection. As a result, any binding effect that the Declaration may impose on states applies to private actors only insofar as each member-state incorporates the Declaration's tenets as cultural or legal imperatives.

Attempts by non-governmental organizations (NGOs) to produce both credible human rights standards and meaningful enforcement regimes have likewise achieved mixed results. NGOs can operate with a flexibility largely inaccessible to staid international institutions such as the U.N. This advantage derives from the independence NGOs enjoy as transnational rather than international institutions. Whereas international institutions often rely on state participation and ratification for their legitimacy, transnational institutions instead function by developing expertise within a certain subject and then deploying that expertise on a global level.[12]

Independence from state actors certainly simplifies the process of achieving internal consensus on human rights standards. Nevertheless, whatever advantages NGOs may realize by foregoing cumbersome state ratification procedures comes at the cost of widening democracy deficits and growing dissonance between NGO policy makers and other stakeholders in the global human rights movement. However attenuated the democratic connections between the U.N. General Assembly and the people ultimately represented by the U.N., the ratification process of the General Assembly bears many hallmarks of democratic decision-making.[13] NGOs, in contrast, often reach their normative conclusions without the benefit of democratic processes and with an eye towards serving the organizational mission. One manifest result of these structural differences is the expansive human rights definition endorsed by some NGOs, which surpasses the scope of the Universal Declaration of Human Rights.[14]

Apart from definitional problems that have undermined global consensus on the limits of human rights, enforcement without resort to legal process poses significant obstacles. While the U.N. and government actors have recourse to political solutions such as sanctions, resolutions, official condemnation, and war, these choices in practice often produce a Hobson's choice between extreme enforcement and no enforcement at all.[15] Confronted with these stark alternatives, state governments and the U.N. usually opt for very mild enforcement strategies, which effectively supply

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10. G.A. Res. 217A, *supra* note 4.

11. *See* HUMAN RIGHTS WATCH, ANNUAL REPORT 19–35 (2005), http://www.hrw.org/annual-report/2005.pdf.

12. *See* Human Rights Watch, Who We Are, *supra* note 4.

13. *See* U.N. Charter art. 27, 28, *available at* http://www.un.org/aboutun/charter/index.html. *But see* Robert A. Dahl, *Can International Organizations be Democractic? A Skeptic's View*, *in* THE GLOBAL TRANSFORMATIONS READER 530, 538 (David Held & Anthony McGrew eds., 2000).

14. *See* HUMAN RIGHTS WATCH, ANNUAL REPORT, *supra* note 11, at 24–25 (describing "corruption" as human rights abuse).

15. *See* Michael A. Fletcher, *Bush Wins Only Mild Rebuke to North Korea*, WASH. POST, Nov. 19, 2006, *available at* 2006 WL 20087937.

almost no enforcement at all.[16] Further, most of these political measures are tailored to the problems of state actors leaving them largely inapposite as a remedy for corporate malfeasance.

For NGOs, enforcement measures include monitoring programs, public shaming, and global populism on the theory that by applying these tactics human rights abusers will feel real political and economic pressure to reform.[17] In addition, the cooperation of host states in accommodating the continued presence of NGOs proves a necessary prerequisite to the ongoing effectiveness of these monitoring strategies supplemented by subsequent action.[18] The non-legal enforcement measures of NGOs, therefore, have tended to stall in situations where 1) political and economic pressure has failed to materialize in the wake of damaging human rights revelations, 2) political and economic pressure has materialized, but remains insufficient to promote genuine reform, and 3) states have suspended their cooperation with NGOs upon the revelation of damaging information and forced them to leave the country. Thus, the non-legal enforcement methods practiced by NGOs can yield tangible results; however, these results depend on the particular circumstance of each case.

B. The Legal Measures Taken to Address Human Rights Abuses

The creation of substantive human rights protected by international law has occurred predominately through a patchwork of national legal standards rather than a unified global vision supplemented by global institutions.[19] To date, the instances where international tribunals have adjudicated alleged human rights abuses remains the exception, not the rule. With no international judiciary available in many cases, national courts often provide the only legal recourse for enforcement of international human rights norms.[20] Relying on national forums to vindicate human rights victims, however, requires courts in each instance to determine under what circumstances they should exercise their jurisdiction and what substantive claims stand available once jurisdiction has been established.[21] With cultural biases entrenched in each legal system, consensus on these issues has proven elusive with the result that only a very small core of "crimes against humanity" survive as transnational legal theories available to human rights victims.[22]

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16. *See, e.g.*, *id.*

17. *See* Human Rights Watch Who We Are, *supra* note 4.

18. *See* Amy Kazmin, *Burma Tells Red Cross to Halt Aid Projects*, FIN. TIMES ASIA, Nov. 29, 2006, at 6, *available*, *at* 2006 WL 20643383.

19. *See* Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L LAW 1, 35 (2002); G.A. Res. 217A, *supra* note 4 (articulating an international consensus on human rights, but neglecting to propose any global institution that would vindicate such rights).

20. *See* Stephens, *supra* note 19.

21. Note, the courts must also determine which processes are available to these defendants, but these problems come after the determination that the forum has jurisdiction as well as what legal theory exists for this particular plaintiff. *Id.*

22. *See* Elements of the Crimes, 3d plen. mtg., U.N. Doc. ICC-ASP/1/3 (Sept. 9, 2002), *available at* http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf; Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).