

# ALL STICK AND NO CARROT: THE YATES MEMORANDUM AND CORPORATE CRIMINAL LIABILITY

Paul J. Larkin, Jr. \* and John-Michael Seibler \*

Late in 2015, Deputy Attorney General Sally Yates distributed a memorandum innocuously entitled *Individual Accountability for Corporate Wrongdoing*, also colloquially known as the Yates Memorandum, to senior officials at the United States Department of Justice.<sup>1</sup> It represents the most recent effort by the Justice Department to keep the promises it has long made to hold individual directors, officers, managers, and employees criminally accountable for corporate wrongdoing. Yates hopes to achieve that goal by directing the upper echelon of the Justice Department to follow a far more aggressive game plan than the department has recently pursued in the investigation of corporate wrongdoing. This approach seeks to take maximum advantage of the breadth of liability that American criminal law imposes on a corporation for the actions of the individuals who carry out its business.

Under current law, a corporation can be held liable for almost any misconduct committed by a director, officer, or employee as long as that action can plausibly be said to have been

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\* © 2016, Paul J. Larkin, Jr. All rights reserved. Senior Legal Research Fellow, The Heritage Foundation. M.P.P., George Washington University, 2012; J.D., Stanford Law School, 1980; B.A., Washington & Lee University, 1977.

\* © 2016, John-Michael Seibler. All rights reserved. Legal Fellow, The Heritage Foundation. J.D., Washington & Lee University, 2015; B.A., Boston University, 2011. The views expressed in this article are the authors' own and should not be construed as representing any official position of The Heritage Foundation. We want to thank John Malcolm for valuable comments on an earlier version of this Article and for volunteering to take the blame for any mistakes it contains.

1. See Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & All U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), available at <https://www.justice.gov/dag/file/769036/download> [hereinafter Yates Memo] (depicting who sent and received the memorandum, and the memorandum's title).

done in furtherance of the corporation's mission.<sup>2</sup> A corporation can operate only through the work of its personnel, so it effectively takes the risk that one or more of its employees will break the law in the process. There is also little that a corporation can do to minimize or corral that risk. A corporate director or officer need not have committed the illegal conduct, nor must the company's senior management have authorized it. In fact, a corporation is liable even if its senior management was in the dark as to the individual's conduct (e.g., a low-level employee working overseas) and company policy expressly prohibited what the employee did (e.g., bribing a foreign government official). The bottom line is that a corporation is criminally, strictly, and vicariously liable for whatever crimes corporate personnel commit on company time unless they are on a frolic and detour for their own exclusive, personal benefit. Beyond that narrow exception, there is nothing that a corporation can do to avoid being liable for what its employees have done. Because corporations cannot be imprisoned, the only question is the size of the fine or other penalties that a corporation must pay to bring a criminal case to a close.

The problem that the Justice Department faces is not that there are any serious legal impediments to the conviction of a corporation for any crimes that its personnel may commit while furthering the company's business. Rather, the problem is the one that Joe Friday of *Dragnet* fame always faithfully undertook: acquiring sufficient proof that a crime has been committed.<sup>3</sup> The purpose of the Yates Memo is to remove whatever barriers stand in the way of the government's ability to investigate crime by shifting the onus of the investigation to the corporation. That shift alone would be remarkable given the architecture of the criminal justice system that has been in place since the creation of large-scale, professional law-enforcement agencies in the nineteenth century. Yet the Yates Memo tries to shift that burden by disguising what it seeks to do in a manner reminiscent of David Copperfield.

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2. See, e.g., ELLEN S. PODGOR ET AL., WHITE COLLAR CRIME 28–31 (2013) (explaining how corporations can be convicted for an employee's improper conduct when that employee is acting within the scope of his or her employment).

3. See Ronald Steiner et al., *The Rise and Fall of the Miranda Warnings in Popular Culture*, 59 CLEV. ST. L. REV. 219, 224 n.33 (2011) (noting that Joe Friday was a fictional detective in the television series *Dragnet*).

The Yates Memo forces corporations to become deputies in the government's investigation—turning over to the government whatever evidence of guilt it discovers and abandoning any privilege that it or its personnel could invoke against being conscripted. It effectively directs Justice Department lawyers to refuse to agree to any resolution of a criminal investigation that would afford the target corporation credit for cooperation unless the company supplies the department with proof of guilt of the responsible party or parties that is sufficient to establish the government's prima facie case of illegality.<sup>4</sup> The practical outcome is a shift of the burden of investigation from the government to a private party. The effect of the government's new game plan is to force the suspect of the investigation (e.g., the Acme Company of Road Runner fame) to prove someone else's guilt (e.g., Wiley Coyote) in order to avoid what for corporations may be the equivalent of the death penalty. Whatever the justification for that shift may be—whether to make up for the limited resources that the government can expend on corporate criminal investigations, or for some other reason—the Department's new policy was a paradigm shift in the way that this country has conducted criminal investigations. Accordingly, the Yates Memo raises major issues of criminal justice policy that deserve serious scrutiny and debate among the members of the bar, the bench, and the academy. It is the intent of this Article to help that discussion along.

### *I. THE EVOLUTION OF CORPORATE CRIMINAL LIABILITY*

At common law a corporation was a fictional entity, the offspring of law, not biology.<sup>5</sup> That characterization had important consequences for the criminal process. An entity that exists only in the eyes of the law cannot intend wrongdoing, feel guilt, be imprisoned, or fear death.<sup>6</sup> Therefore, the traditional

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4. See Yates Memo, *supra* note 1, at 2–3 (explaining that corporations are not eligible for cooperation credit unless they divulge all relevant facts about individuals responsible for the misconduct).

5. See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”).

6. John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 386 (1981)

justifications for criminal punishment—retribution, deterrence, incapacitation, and rehabilitation—have little relevance where a corporation is the alleged culprit. The result of this characterization was to place a corporation outside of criminal law, not as an “outlaw,” a party unprotected by the law (although they are close to that status today), but as an entity that could not commit a crime because it lacked the evil intent that the common law deemed necessary.<sup>7</sup> The rule, one that endured for quite some time, was that the members of a corporation could be charged with a crime, but the corporation itself could not.<sup>8</sup>

But change was afoot. Over the course of the nineteenth century, the economy became industrialized as railroads replaced horse-drawn carriages, steamships replaced clipper ships, and industrial plants replaced mills and shops. Increased urbanization followed as cities became the home for manufacturing, as well as finance and commerce. The result was a proliferation in the potential number and gravity of harms that corporate actors could inflict on individuals and society, accompanied by a change in the social perception of corporations.<sup>9</sup> In response, the courts and legislatures chipped away at

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(quoting Edward, First Baron Thurlow, Lord Chancellor of England, saying, “Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?”).

7. See, e.g., *Morrisette v. United States*, 342 U.S. 246, 250–52 (1952) (explaining that a crime cannot be committed without intent).

8. See, e.g., *State v. The President and Dir’s of the Ohio & Miss. R.R. Co.*, 23 Ind. 362, 364 (1864) (explaining how corporations cannot be found guilty because the corporation acts through its agents); *State v. Great Works Milling & Mfg. Corp.*, 20 Me. 41, 44 (1841) (“It is a doctrine then, in conformity with the demands of justice, and a proper distinction between the innocent and the guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation should be indicted.”); *Anonymous Case* (No. 935), 88 Eng. Rep. 1517, 1518 (K.B. 1701) (stating that a corporation cannot be indicted, but its members can); 1 WILLIAM BLACKSTONE, *COMMENTARIES* 464 (1992) (“A corporation cannot commit treason, or felony, or other crime, in [its] corporate capacity: though [its] members may, in their distinct individual capacities.”) (footnote omitted); Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 396 (1982) (explaining that early case law showed reluctance to find a corporation criminally liable); H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279, 280 (1995) (explaining that corporations were thought to be incapable of committing a crime, and could only be charged through its members); V.S. Khanna, Comment, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1479–80 & nn.4–12 (1996) (discussing early history of organizational liability).

9. See, e.g., Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 108–09 (1916) (explaining that the law shifted to the idea that the master is liable for the acts of the servant when the act is reasonably related to his service).

corporate immunity.<sup>10</sup> For example, in 1879 the Supreme Court decided that a corporation could be liable for the negligent actions of its employees.<sup>11</sup> To the Court's mind, corporations could be held liable for whatever torts their employees committed in the course of their business, whether or not the company itself authorized those actions.<sup>12</sup>

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10. See, e.g., Paul J. Larkin, Jr., *Funding Favored Sons and Daughters: Nonprosecution Agreements and "Extraordinary Restitution" in Environmental Criminal Cases*, 47 LOY. L.A. L. REV. 1, 11 nn.22–23 (2013) [hereinafter Larkin, *Nonprosecution Agreements*] (explaining how the legislature took steps to hold corporations liable as society became more industrialized).

11. See *First Nat'l Bank of Carlisle v. Graham*, 100 U.S. 699, 702 (1879):

Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. *Merchants' Bank v. State Bank*, 10 Wall. 604. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel.

In dicta the Court even wrote that "[i]n certain cases [a corporation] may be indicted for misfeasance or nonfeasance touching duties imposed upon it in which the public are interested. Its offences may be such as will forfeit its existence." *Id.*

12. *Id.* at 702. The Court elaborated on this point in the 1899 case of *Washington Gas-Light Co. v. Lansden*:

"That for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances." The doctrine of this case has been approved and reaffirmed in many cases in this court since that time. The result of the authorities is, as we think, that, in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation, and by the corporate agents who were competent to employ the corporate powers actually exercised. There need be no written authority under seal nor vote of the corporation constituting the agency or authorizing the act. But, in the absence of evidence of this nature, there must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject-matter involved may be fairly and legitimately inferred by the court or jury.

172 U.S. 534, 544 (1899) (quoting *Phila. Wilmington & Balt. R.R. Co. v. Quigley*, 62 U.S. 202, 210 (1858)). The Court had also analyzed the situation a few years earlier:

A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. . . . A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice

Nonetheless, the criminal law lagged behind civil law. Even after tort law left behind its goal “of punishing or deterring blameworthy civil conduct”<sup>13</sup> and shifted its concern to compensating injured parties for the dangerous consequences of large-scale industrialization and urbanization,<sup>14</sup> the criminal law continued largely to demand that *motive*<sup>15</sup>—or, more accurately, *evil intent*<sup>16</sup>—remain the universal predicate for criminal liability.<sup>17</sup> No inanimate entity could possess a state of mind, let alone one that was “evil,” so corporations remained free from criminal liability.<sup>18</sup>

The other shoe dropped in the first decade of the twentieth century. The case was *New York Central & Hudson River Railroad Co. v. United States*.<sup>19</sup> To win business away from a shipping firm, a corporate shipping agent offered sugar refining companies a rebate to transport their products by rail, a practice

necessary to support either action, if proved in the agent, may be imputed to the corporation. . . . But, as well observed by Mr. Justice Field, now chief justice of Massachusetts: The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages.

Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. 101, 109–10 (1893) (internal citations and punctuation omitted).

13. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 62 (1980).

14. See, e.g., Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL'Y 1065, 1072–73 (2014) (explaining how industrialization sparked a humanitarian concern for the harms that corporations could inflict upon their workers and consumers).

15. Laski, *supra* note 9, at 108–09.

16. See, e.g., *Morissette v. United States*, 342 U.S. 246, 250 (1952) (explaining that the evil state of mind is necessary to “make criminal an otherwise indifferent act, or increase the degree of the offense or its punishment”).

17. See, e.g., Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 683 (1976):

At common law, the *mens rea* necessary to convict generally required that the government show the defendant to have acted purposefully to bring about a harm, to have known facts indicating that the harm would be a likely result of his action, or to have acted without concern for whether the harm would follow.

See also Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 747 (2012) (“Blameworthiness used to serve as a criterion that distinguished those who were evil-minded from those who were morally innocent, or just negligent.”).

18. See Coffee, *supra* note 6, at 386 (explaining how judges were frustrated when faced with convicting a corporation because corporations do not possess a conscience).

19. 212 U.S. 481 (1909).

forbidden by federal law.<sup>20</sup> Convicted of violating that law, Hudson River Railroad Company argued that, being a corporation, it was immune from prosecution under the common law.<sup>21</sup> On the railroad's appeal, the Supreme Court abandoned the common law doctrine.<sup>22</sup> Beginning with the proposition that corporations could be held liable for the torts of their employees, the Court saw no reason to maintain corporate immunity under the criminal law because criminal responsibility was "only a step farther" than civil liability.<sup>23</sup> Accordingly, the Court ruled that, just as a corporation can be held vicariously liable for its employees' torts, so too should a corporation be held vicariously responsible for its employees' crimes committed by virtue of their authority to conduct the company's affairs.<sup>24</sup> Any other result, the Court reasoned, would immunize corporations for the manifold harms that a modern enterprise could inflict on the public.<sup>25</sup> As a

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20. See Elkins Act, ch. 708, 32 Stat. 847 (1903) (making it unlawful to give or receive rebates in respect to transportation).

21. *N.Y. Cent.*, 212 U.S. at 492.

22. See *id.* at 495–96 (explaining that the only way to stop corporations' abuse of interstate commerce is to break from the common law doctrine that gives corporations immunity from punishment).

23. *Id.* at 494.

24. *Id.*:

In this case we are to consider the criminal responsibility of a corporation for an act done while an authorized agent of the company is exercising the authority conferred upon him. It was admitted by the defendant at the trial that, at the time mentioned in the indictment, the general freight traffic manager and the assistant freight traffic manager were authorized to establish rates at which freight should be carried over the line of the New York Central & Hudson River Company, and were authorized to unite with other companies in the establishing, filing, and publishing of through rates, including the through rate or rates between New York and Detroit referred to in the indictment. Thus, the subject-matter of making and fixing rates was within the scope of the authority and employment of the agents of the company, whose acts in this connection are sought to be charged upon the company. Thus clothed with authority, the agents were bound to respect the regulation of interstate commerce enacted by Congress, requiring the filing and publication of rates and punishing departures therefrom. Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

25. *Id.* at 494–96:

[T]here is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge

result, corporations became a modern-day Deodand—an inanimate object (e.g., a tree) that is punished for whatever injury it causes (e.g., by falling on someone).<sup>26</sup>

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and purposes of their agents, acting within the authority conferred upon them. . . . If it were not so, many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy. . . . We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.

(internal citation omitted). That view has not changed. *See, e.g.*, MICHAEL CLARKE, BUSINESS CRIME: ITS NATURE AND CONTROL 31 (1990) (“The danger of unfettered private enterprise is that it degenerates into greed, ruthlessness and deceit, to the oppression of the interests of those insufficiently cunning, skilled, wealthy or powerful to protect themselves, and so polarizes the haves from the have-nots.”). The Court in *New York Central* seemed reluctant to extend its new rule to its logical limit, which would require treating a corporation the same as an individual. *N.Y. Cent.*, 212 U.S. at 494 (“It is true that there are some crimes which, in their nature, cannot be committed by corporations.”). At first, the federal courts did not extend vicarious criminal liability to every offense, preserving the traditional rule that only individuals could be criminally liable for some crimes. *See* Larkin, *Nonprosecution Agreements*, *supra* note 10, at 12 n.27 (citing *People v. Rochester Ry. & Light Co.*, 88 N.E. 22 (N.Y. 1909) (“dismissing indictment for manslaughter”)); *see also* CHRISTOPHER STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 24–25 (1975) (explaining that “there are some crimes, which in their nature cannot be committed by corporations”). Today, however, “federal and state criminal law exposes corporations to liability for a broad range of conduct committed by [their personnel] in the exercise of their authority.” Larkin, *Nonprosecution Agreements*, *supra* note 10, at 12. *See also* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 787–88 (2013) (demonstrating how the criminal liability of corporations now mirrors its tort liability); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 59–60 (1933) (demonstrating a trend that disregards the element of *mens rea* when convicting a corporation). For a summary of the evolution of corporate criminal liability, *see* JAMES R. COPLAND, REGULATION BY PROSECUTION: THE PROBLEMS WITH TREATING CORPORATIONS AS CRIMINALS, MANHATTAN INSTITUTE FOR POLICY RESEARCH NO. 13 (Dec. 2010), *available at* [http://www.manhattan-institute.org/html/cjr\\_13.htm](http://www.manhattan-institute.org/html/cjr_13.htm) (explaining that the latest trend in prosecuting corporations has been non-prosecution agreements and deferred prosecution agreements).

26. *See* Albert W. Alschuler, *Two Ways To Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1392 (2009) (“[A]ttributing blame to a corporation is no more sensible than attributing blame to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime.”); John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 350



The *New York Central* decision remains debatable as a matter of criminal justice policy.<sup>27</sup> Moreover, it leads ultimately to an unsatisfying result for most of the public. Corporations are still inanimate entities. The Supreme Court in *New York Central* did not, and could not, alter their status; it just exposed them to criminal responsibility. The only punishment that a corporation can suffer is a financial penalty of some type. Yet, oftentimes that sanction seems grossly inadequate or unfair. Fining a corporation treats a criminal sanction like a tax. The fine is nothing more than a cost of doing business, one that, similar to other production costs, is ultimately borne by innocent shareholders or consumers rather than the people responsible for the wrongdoing. Moreover, civil liability regulates corporate behavior more efficiently than criminal prosecutions, which may demonstrate that the only reason for holding a corporation criminally liable is to let the masses see a gladiator die in the arena.<sup>28</sup> Fining a

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(2003) (“Corporations neither deserve nor attract our sympathy. . . . [A]s such they do not deserve sympathy simply because they are not human. For that reason alone, they should not be the subjects of criminal prosecution.”).

27. Corporate criminal liability remains a controversial issue. *See, e.g.*, Larkin, *Nonprosecution Agreements*, *supra* note 10, at 12–15 (summarizing the arguments for why a corporation should be held criminally liable); Khanna, *supra* note 8, at 1478 n.2 (collecting authorities debating merits of corporate criminal liability). It is uncertain that exposing corporations to criminal liability achieves any purpose that civil liability cannot equally promote other than satisfying the public’s blood lust. *See, e.g.*, Woodrow Wilson, *The Lawyer and the Community*, Address to the 33d Annual ABA Meeting, in 35 REPORTS OF THE ABA 427 (1910), quoted in STONE, *supra* note 25, at 58:

You cannot punish corporations. Fines fall upon the wrong persons, more heavily upon the innocent than upon the guilty, as much upon those who know nothing whatever of the transactions for which the fine is imposed as upon those who originated and carried them through,—upon the stockholders and the customers rather than upon the men who direct the policy of the business. If you dissolve the offending corporation, you throw great undertakings out of gear. You merely drive what you are seeking to check into other forms or temporarily disorganize some important business altogether, to the infinite loss of thousands of entirely innocent persons and to the great inconvenience of society as a whole. Law can never accomplish its objects in that way. It can never bring peace or command respect by such futilities.

Nonetheless, the principle that a corporation can be prosecuted for crime is now well settled. *See* Julie R. O’Sullivan, *How Prosecutors Apply the “Federal Prosecutions of Corporations” Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29, 33 (2014) (arguing that later interpretations of the *New York Central* case are flawed but nonetheless prescriptive).

28. *See, e.g.*, Khanna, *supra* note 8, at 1534:

[S]ome justification for corporate criminal liability may have existed in the past, when civil enforcement techniques were not well developed, but from a

corporation, like punishing any inanimate object, does little to satisfy the human desire for retribution.<sup>29</sup> Just as “[a] corporation[] can only commit crimes through flesh-and-blood people,”<sup>30</sup> a criminal punishment, if it is to serve any special purpose not already accomplished by a civil fine, must inflict pain on one or more corporate directors, officers, or employees. The Supreme Court in *New York Central* did little to satisfy that desire.

Nor did that decision make it easier for the government to prosecute the individuals ultimately responsible for a corporation’s misdeeds.<sup>31</sup> The common law always recognized that they could be prosecuted for a company’s misdeeds, so the problem was not the existence of a legal barrier for a prosecutor to overcome. The difficulty was finding out who did what under whose direction. That factual or evidentiary burden still had to be overcome.

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deterrence perspective, very little now supports the continued imposition of criminal rather than civil liability on corporations. Indeed, the answer to the question the title poses—“corporate criminal liability: what purpose does it serve?”—is “almost none.”

*See also* Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 433 (2007) (explaining how courts have already established the parameters of civil corporate liability).

29. *See* Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965) (“[Criminal] [p]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation[.]”); Peter J. Henning, *Should the Perception of Corporate Punishment Matter?*, 19 J.L. & POL’Y 83, 93 (2010) (explaining that criminal prosecutions of corporations satisfy “society’s desire to see those [corporations] responsible for misconduct punished”).

30. Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), available at [http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html?\\_r=0](http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html?_r=0) (quoting an interview with Sally Q. Yates, Deputy Att’y Gen. (Sept. 9, 2015)). *See also* Claudius O. Sokenu, *DOJ Issues Policy on Holding Individuals Accountable for Corporate Malfeasance*, N.Y. L.J. (Nov. 9, 2015) (Sung-Hee Suh, Deputy Attorney General for the Criminal Division, claimed “corporations do not act criminally, but for the actions of individuals . . . [t]he Criminal Division intends to prosecute those individuals, whether they are sitting on a sales desk or in a corporate suite.”).

31. *See* Sokenu, *supra* note 30 (recognizing challenges being faced when prosecuting individuals for a corporation’s actions). Yates recognized that “corporations can only commit crimes through flesh-and-blood people . . .” Apuzzo & Protess, *supra* note 30.

## II. THE EVOLUTION OF THE JUSTICE DEPARTMENT'S APPROACH TO THE INVESTIGATION OF CORPORATE CRIME

Early in the twenty-first century, the public learned that senior officers at a number of large-scale corporations, such as Adelphia and World-Com, had inflated the companies' earnings (and their own bank accounts) by engaging in some form of fraud.<sup>32</sup> The energy conglomerate Enron Corporation was one of those companies. More important than the prosecution of Enron, however, was the indictment of Enron's accounting firm, Arthur Andersen LLP. Arthur Andersen continued to apply its document destruction policy after evidence of Enron's financial irregularities had surfaced, but before any formal charges were filed.<sup>33</sup> The Justice Department prosecuted Arthur Andersen for obstruction of justice,<sup>34</sup> but Arthur Andersen was ultimately cleared of any illegality when the Supreme Court unanimously ruled in its favor on the merits of that charge.<sup>35</sup> By then, however, Arthur Andersen's victory was almost entirely pyrrhic. Despite ultimately winning on appeal, Arthur Andersen's conviction at trial had disqualified the firm in the meantime from auditing publicly held companies under Securities and Exchange Commission regulations.<sup>36</sup> The conviction forced the eighty-nine-year-old firm out of business, costing hundreds of innocent partners and twenty-eight thousand innocent employees their jobs.<sup>37</sup> "The Arthur Andersen prosecution, in short, was a debacle. Everyone lost: the accounting firm, the Justice Department, the public, and, most importantly, the innocent Arthur Andersen employees."<sup>38</sup>

The government brought the Arthur Andersen prosecution in reliance on the corporate charging policies set forth in a memorandum that had been issued by former Deputy Attorney

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32. See Larkin, *Nonprosecution Agreements*, *supra* note 10, at 17–18 (giving the example of the energy company, Enron, and the consequences the fraud had on innocent partners and employees).

33. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 700–01 (2005).

34. *Id.* at 702.

35. See *id.* at 705–08 (explaining that the defendant must be aware that he is doing wrong to be in violation of the law).

36. See 17 C.F.R. § 201.102 (2014) (explaining that people convicted of either a felony or a misdemeanor are suspended from practicing before the Commission).

37. Larkin, *Nonprosecution Agreements*, *supra* note 10, at 17–18.

38. *Id.* at 18.

General Eric Holder,<sup>39</sup> later supplemented by his successors Larry Thompson<sup>40</sup> and Paul McNulty.<sup>41</sup> Those memoranda instructed Justice Department lawyers to weigh a variety of factors when making charging decisions.<sup>42</sup> One particularly noteworthy aspect of those memoranda was that they directed a government lawyer, when deciding whether to give a corporation favorable treatment, to consider whether the corporation had waived its attorney-client privilege and attorney work-product protections to assist the government's investigation.

Those directives displayed an aggressive and novel approach toward corporate prosecution. Aggressive, because waivers enabled the government to obtain "statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements."<sup>43</sup> The government relied on a claim of necessity, arguing that such waivers "are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation."<sup>44</sup> Novel, because the attorney-client privilege and attorney work-product doctrine were mainstays of criminal defense practice. The attorney-client privilege, the oldest privilege known to the common law, was designed to shelter, and in so doing foster open, full, and frank communications between an attorney and his client.<sup>45</sup> Closely related was the attorney

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39. Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys (June 16, 1999), *available at* <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/12/03/response2-appx-k.pdf> [hereinafter Holder Memol].

40. Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys (Jan. 20, 2003), *available at* <http://www.albany.edu/acc/courses/acc695spring2008/thompson%20memo.pdf> [hereinafter Thompson Memol].

41. Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys (Dec. 12, 2006), *available at* [http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty\\_memo.pdf](http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf) [hereinafter McNulty Memol].

42. *See* Holder Memo, *supra* note 39, at 3 (listing eight factors Justice Department lawyers should consider when making charging decisions); Thompson Memo, *supra* note 40, at 3 (listing nine factors Justice Department lawyers should consider when making charging decisions); McNulty Memo, *supra* note 41, at 4 (listing nine factors Justice Department lawyers should consider when making charging decisions).

43. Thompson Memo, *supra* note 40, at 7.

44. *Id.*; *see also* O'Sullivan, *supra* note 27 at 37–40 (describing the defense bar's issues with the prosecution treating waivers as "a requisite of cooperation credit").

45. *See, e.g.*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) (explaining that attorney-client privilege has long been recognized as confidential communication); *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (explaining that attorney-

work-product doctrine, which protects an attorney's written theories, notes, and observations from disclosure by rendering them presumptively undiscoverable.<sup>46</sup> Given the ease of proving that a corporation was responsible for an employee's wrongdoing, corporations had a great incentive to do whatever the government sought in order to receive the maximum credit for cooperating during the investigation.

To be sure, the Holder, Thompson, and McNulty memoranda did not *require* a corporation to waive its attorney-client privilege and attorney work-product doctrine to be deemed cooperative. None of the memoranda made a waiver an express condition for receiving a favorable charging decision. Sometimes, however, the music says far more than the lyrics. The memoranda explained that government lawyers should consider a corporation's decision to assert or waive its privileges when evaluating "the adequacy of a corporation's cooperation."<sup>47</sup> The result was to leave a strong implication that a corporation could receive the maximum benefit only by removing any potential roadblocks that the government's attorneys might come up against during their inquiry. At a minimum, few directors and officers would be willing to take the chance that any sign of recalcitrance would jeopardize a way to settle a case that did not ruin the corporation.

The reaction from the academy,<sup>48</sup> the legal community,<sup>49</sup> the judiciary,<sup>50</sup> and Capitol Hill<sup>51</sup> was clear, intense, and negative.

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client privilege promotes open and honest communication between clients and their attorneys); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (explaining that attorney-client privilege allows lawyers to be fully informed by their clients).

46. *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 509–11 (1947) (holding that an attorney's work must be undiscoverable in order for the attorney to best perform his duties).

47. Holder Memo, *supra* note 39, at 6; Thompson Memo, *supra* note 40, at 7.

48. *See, e.g., Lonnie T. Brown, Jr., Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 897–900 (2006) (describing background of and reactions to the McNulty Memo); Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469, 542–43 (2003) (describing Supreme Court cases affirming the value of attorney-client privilege and the attorney work-product doctrine and arguing that certain federal law enforcement tactics devalued those doctrines); Katrice Bridges Copeland, *Preserving the Corporate Attorney-Client Privilege*, 78 U. CIN. L. REV. 1199, 1222–29 (2010) (analyzing Deputy Attorney General Paul McNulty's testimony before Congress on his waiver policy memo); *Counsel Group Assails Prosecution Policy Compelling Corporations to Waive Privileges*, 67 CRIM. L. REP. (BNA) No. 11, 391 (June 14, 2000) (claiming the attorney-client relationship is undermined when cooperation credit is conditioned upon forced waivers); Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 356–72

(2008) (opposing DOJ waiver policies); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 311 (2007) (examining how cooperation requirements have made internal corporate investigations into “extensions of government enforcement efforts”); O’Sullivan, *supra* note 27 (exploring the purpose of DOJ policies and their effectiveness); Julie R. O’Sullivan, *The Last Straw: The Department of Justice’s Privilege Waiver Policy and the Death of Adversarial Justice in Criminal Investigations of Corporations*, 57 DEPAUL L. REV. 329, 329 (2008) (opposing DOJ waiver policies under the McNulty Memo); Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1468–69 (2007) (describing background and effects of, as well as reactions to the McNulty Memo); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 148 (2000) (explaining how the goal of corporate convictions has eroded attorney-client privilege with forced waivers).

49. *See, e.g.*, AM. COLLEGE OF TRIAL LAWYERS, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 308–09 (2003) (arguing that certain federal law enforcement techniques erode corporate privilege); Richard Ben-Veniste & Raj De, *The ‘McNulty Memo’: A Missed Opportunity To Reverse Erosion Of Attorney-Client Privilege*, WASHINGTON LEGAL FOUNDATION LEGAL BACKGROUNDER VOL. 22, NO. 3 1–2 (Jan. 19, 2007), available at <http://www.wlf.org/upload/1-19-07%20ben-veniste.pdf> (arguing that the policy amendment made in the McNulty Memo is not enough to ensure the protection of attorney-client privilege); Sherry Karabin, *Thanks, But it’s Not Enough: The Justice Department Won’t Ask Companies to Waive Their Attorney-Client Privilege Anymore*, CORP. COUNSEL, 24 (Nov. 2008) (explaining how legal groups pushed the government to change its policies on the issue of privilege); Letter from Stuart M. Gerson, Edwin Meese III, Richard Thornburgh, Carol E. Dinkins, Jamie Gorelick, Walter E. Dellinger III, Theodore B. Olson, Kenneth W. Starr & Seth P. Waxman to the Hon. Patrick Leahy, Chairman, S. Comm. on the Judiciary; Hon. Arlen Specter, Ranking Member, S. Comm. on the Judiciary; Hon. John T. Conyers, Chairman, House Comm. on the Judiciary; and Hon. Lamar S. Smith, Ranking Member, House Comm. on the Judiciary, *Re: S. 186 and H.R. 3013, the ‘Attorney Client Privilege Protection Act of 2007,’* 1–2 (July 30, 2007), available at <http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/AttorneyClientPrivilege7.30.07.pdf> (describing the legal communities belief that Congress needs to get involved to solve issues surrounding the Department of Justice’s cooperation policies).

50. *See, e.g.*, *United States v. Stein*, 435 F. Supp. 2d 330, 381–82 (S.D.N.Y. 2006), 440 F. Supp. 2d 315 (S.D.N.Y. 2006), 495 F. Supp. 2d 390 (S.D.N.Y. 2007), *aff’d*, 541 F.3d 130 (2d Cir. 2008) (dismissing charges against individual corporate employees because the government forced the corporation to choose between paying the employees’ defense counsel fees and receiving a favorable charging decision). A 2003 report of the ad hoc advisory group on the organizational sentencing guidelines scolded the Justice Department for its waiver strategy, suggesting that the department should have at least been forthright about its intent. The committee urged the department to publish commentary on its corporate prosecution guidelines in which it clearly stated that “in some circumstances waiver of the attorney-client privilege and of work product protections may be required in order to satisfy the requirements of cooperation.” Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines (Oct. 7, 2003), available at [http://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/advgrprpt/AG\\_FINAL.pdf](http://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/advgrprpt/AG_FINAL.pdf).

51. *See, e.g.*, Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007) (providing protection for attorney work-product and attorney-client privilege); H.R. REP. NO. 110–445, at 8 (2007) (seeking to abrogate the DOJ’s waiver policies); S. 3217, 110th Cong., 1–2 (2008) (creating protections for attorney-client communications and attorney work product); S. 445, 111th Cong., 1–3 (2009) (preserving the legal protections of attorney-client privilege and attorney work-product); *The McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Subcomm.*

The American Bar Association (ABA) was particularly upset about the Department's aggressive tactics and strongly disapproved of its waiver policy.<sup>52</sup> The ABA eventually issued a memorandum to explain the "adverse consequences that may occur when attorneys within the Department of Justice seek the waiver of these protections" and to publicly suggest that the Justice Department change its policies regarding the waivers.<sup>53</sup>

The Justice Department appeared to heed this show of force by changing the language in subsequent memoranda, but continued to issue guidelines for requesting waivers to obtain credit for cooperation. Subsequent memoranda authorized prosecutors to "request waiver of attorney-client or work product

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*on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary H.R.*, 110th Cong. (2007) (arguing that the McNulty Memo does not adequately protect attorney-client privilege and work-product privileges); *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before S. Comm. on the Judiciary S.*, 109th Cong. 110 (2006) (explaining that everyone would be happy if the DOJ policy was changed); CHARLES DOYLE, CONG. RESEARCH SERV., RL 33842, THE MCNULTY MEMORANDUM: ATTORNEYS' FEES AND WAIVER OF CORPORATE ATTORNEY-CLIENT AND WORK PRODUCT PROTECTION (Updated 2008) (describing DOJ policies under the McNulty Memo); Dan Slater, *On McNulty Memo, Specter Fires Back at DOJ*, WALL ST. J. L. BLOG (July 11, 2008), <http://blogs.wsj.com/law/2008/07/11/on-mcnulty-memo-specter-fires-back-at-doj/> (arguing for an invalidation of the provisions set forth in the Thompson Memo).

52. See Letter from Michael S. Greco, President, American Bar Association, to Senator Arlen Specter, Chairman, Committee on the Judiciary, United States Senate (May 23, 2006) (calling the tactics an "assault [by federal agencies] on the attorney-client privilege").

53. Memorandum from the American Bar Association Task Force On Attorney-Client Privilege to Heads of Dep't Components & U.S. Attorneys, *Re: Guidelines for Determining "Timely and Voluntary Disclosure of Wrongdoing and Willingness to Cooperate"* (Feb. 10, 2006) [hereinafter ABA Memo]. For more material regarding the American Bar Association's response to the DOJ's tactics on the use of attorney-client privilege waivers, see ABA, *Protecting the Attorney-Client Privilege, the Work Product Doctrine and Employee Legal Rights* (Oct. 2010) (arguing for the adoption of an executive order or enactment of federal legislation to solve the problem of government-coerced waivers); American Bar Association, *ABA Attorney Client Privilege Materials*, AMERICANBAR.ORG, [http://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/independence\\_of\\_the\\_legal\\_profession/acprivilege.html](http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/acprivilege.html) (last visited Oct. 25, 2016) (examining issues regarding attorney-client privilege by federal agencies); R. William Ide, III, Chair of the ABA Task Force on Attorney-Client Privilege, *Erosion of the Attorney-Client Privilege and Work Product Doctrine: The ABA and Other Groups Seek Reversal of Government Waiver Policies*, METRO. CORP. COUNSEL (June 1, 2006), available at <http://www.metrocorp.counsel.com/articles/6878/erosion-attorney-client-privilege-and-work-product-doctrine-aba-and-other-groups-seek> (describing the ABA joining forces with various coalitions to help protect the work-product doctrine and attorney-client privilege). One of those adverse consequences, the ABA explained, is that waivers could "prevent entities from conducting internal investigations that may quickly rectify unlawful conduct for fear that their communications will be discoverable by prosecutors." Patricia Brown Holmes, *Mandatory Waiver of Attorney Client Privilege: Cooperation or Coercion*, SCHIFF HARDIN 3 (May 2006), available at [http://www.schiffhardin.com/Templates/Media/files/archive/binary/holmes-mandatory\\_waiver.pdf](http://www.schiffhardin.com/Templates/Media/files/archive/binary/holmes-mandatory_waiver.pdf) (citing ABA Memo).

protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations,” without explicit language compelling a waiver.<sup>54</sup> The Justice Department has continuously reiterated the same coercive approach to seizing privileged information. The Yates Memo is no different, except in one regard—it is more subtle. Because the Yates Memo requires the “all or nothing” disclosure of individual wrongdoing, it delves into the realm of information that might otherwise be a protected communication between an individual and his or her attorney, and will likely force a change in the way corporations and employees manage their defense.<sup>55</sup>

The Yates Memo’s approach to compliance addresses popular criticism that “no high-level executives [have] been prosecuted” in the wake of several corporate scandals.<sup>56</sup> But to accomplish that end, the guidelines shift the Justice Department’s investigatory burden onto the corporation itself.<sup>57</sup> The memorandum first states that prosecuting corporate wrongdoing is a departmental priority.<sup>58</sup> Citing deterrence, accountability, and public trust in the justice system, the memorandum goes on to explain how and why individual accountability is crucial to investigating corporate

54. McNulty Memo, *supra* note 41, at 8–9 (explaining the meaning of “legitimate need” and the facts needed to support a finding that a “legitimate need” exists). *See also* HAROLD K. GORDON, WHAT DOES IT TAKE TO SATISFY THE GOVERNMENT? RECENT DEVELOPMENTS REGARDING CORPORATE COOPERATION IN GOVERNMENT INVESTIGATIONS, JONES DAY PRACTICE PERSPECTIVES: SECURITIES AND SHAREHOLDER LITIGATION & SEC ENFORCEMENT 38–39 (Spring 2007), available at <http://www.jonesday.com/files/Publication/c0b5d9f2-0cb3-40e5-b829-7c5a2b63aba3/Presentation/PublicationAttachment/2ba549be-e9fb-4d5f-b897-7ff59ee92b1b/Satisfy%20the%20Government.pdf> (explaining the evolution of DOJ corporate prosecution policies and the evolving meaning of “compliance”).

55. These changes may well include the way that defense is funded. *See generally* Robert J. Higdon, Jr. & John Staige Davis, V, *The Yates Memo: The Department of Justice Attempts to Refocus Corporate Investigations on Individual Wrongdoers in Both Criminal and Civil Investigations*, WILLIAMS MULLEN (Sep. 23, 2015), <http://www.williamsmullen.com/news/yates-memo-department-justice-attempts-refocus-corporate-investigations-individual-wrongdoers-both> (explaining the Yates Memo’s policies in the context of prior DOJ memoranda on corporate prosecutions, and its likely effects on attorney-client relations).

56. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014). This statement is representative of common popular criticism of the Justice Department in response to a number of corporate scandals and public dissatisfaction with the number and kind of prosecutions brought in response.

57. *See* Yates Memo, *supra* note 1, at 3 n.2 (explaining that corporations are considered to have disclosed enough information for cooperation consideration if the information “is sufficient . . . to identify . . . the individual(s) responsible for the criminal conduct”).

58. *Id.* at 1.



wrongdoing.<sup>59</sup> But that is not without its challenges; according to the memorandum, knowledge, decision rights, and paper trails can be diffused throughout a corporation's structure, making it difficult to attribute a decision to only one person.<sup>60</sup> To overcome those challenges, a working group comprised of senior attorneys throughout the United States Attorneys' offices convened to create a set of practices to achieve individual accountability for corporate wrongdoing. Primarily, the Yates Memo instructs federal prosecutors to consider six factors when investigating and charging corporate wrongdoing:

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.<sup>61</sup>

The memorandum does not offer any guarantee that a corporation itself will be spared from conviction or heavy fines once it "coughs up"<sup>62</sup> what it believes to be the responsible individuals. Rather, the guidelines compel the corporation to proffer a windfall of evidence that would be sufficient to prosecute

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59. *Id.* at 1–2.

60. *Id.* at 2.

61. *Id.* at 2–3.

62. Apuzzo & Proress, *supra* note 30.

the corporation.<sup>63</sup> Together with the looming incentives of a large financial settlement against the corporation,<sup>64</sup> the Yates Memo seems to do little to improve the fate of corporations and their shareholders. Corporations know that they can be prosecuted or face huge fines if any individual employee in the corporation committed a crime in the course of his or her employment. The Yates Memo makes it clear that to have even a hope of avoiding either, the corporation must provide the Justice Department with “all relevant facts relating to the individuals responsible for the misconduct.”<sup>65</sup> That merely means that a corporation must disclose enough pertinent information “to identify . . . the individual(s) responsible for the criminal conduct.”<sup>66</sup> If the corporation misses some vital information or individual(s), it will receive no credit for cooperation and will face prosecution itself.<sup>67</sup> Far from indicating that the Justice Department will forego any enforcement tools, the Yates Memo merely promises to “seek[]

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63. Yates Memo, *supra* note 1, at 3 n.2.

64. The sheer size of the Justice Department’s settlements creates the incentive to keep that practice running, which may lead to some difficult choices between pursuing large sums of money and individuals. See Press Release, Dep’t of Justice, U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit Over Deepwater Horizon Oil Spill (Oct. 5, 2015), <http://www.justice.gov/opa/pr/us-and-five-gulf-states-reach-historic-settlement-bp-resolve-civil-lawsuit-over-deepwater> (describing a \$20.8 billion settlement); Press Release, Dep’t of Justice, Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), <http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading-up-to-and-during-the-financial-crisis> (describing a \$16.65 billion settlement with Bank of America) [hereinafter “Press Release about Bank of America”]; Press Release, Dep’t of Justice, Justice Department Announces Criminal Charge Against Toyota Motor Corporation and Deferred Prosecution Agreement with \$1.2 Billion Financial Penalty (Mar. 19, 2014), <http://www.justice.gov/opa/pr/justice-department-announces-criminal-charge-against-toyota-motor-corporation-and-deferred-prosecution-agreement-with-12-billion-financial-penalty> (describing a \$1.2 billion penalty to Toyota, which is the largest penalty imposed on a car company); Press Release, Dep’t of Justice, Justice Department and Consumer Financial Protection Bureau Reach \$98 Million Settlement to Resolve Allegations of Auto Lending Discrimination by Ally (Dec. 30, 2013), <http://www.justice.gov/opa/pr/justice-department-and-consumer-financial-protection-bureau-reach-98-million-settlement-to-resolve-allegations-of-auto-lending-discrimination-by-ally> (displaying subtitles such as “Settlement Is Department’s Third Largest Fair Lending Agreement Ever and Largest Ever Auto Lending Agreement”).

65. Yates Memo, *supra* note 1, at 2.

66. *Id.* at 3 n.2 (citing USSG § 8C2.5(g), Application Note 13). More recently, in a speech on April 17, 2015, Assistant Attorney General for the Criminal Division Leslie Caldwell stated that, for her Division, “[t]rue cooperation . . . requires identifying the individuals actually responsible for the misconduct—be they executives or others—and the provision of all available facts relating to that misconduct.” Gibson, Dunn & Crutcher LLP, *DOJ’s Newest Policy Pronouncement: The Hunt for Corporate Executives*, GIBSON DUNN (Sept. 11, 2015), <http://www.gibsondunn.com/publications/pages/Yates-Memo--DOJ-New-Posture-on-Prosecutions-of-Individuals--Consequences-for-Companies.aspx>.

67. Yates Memo, *supra* note 1, at 3–4.

accountability from the individuals who perpetrate[]”<sup>68</sup> corporate misconduct in addition to current enforcement tactics against the corporation, such as heavy fines.

As corporate scandals unfold, so too will speculation over how the Justice Department will implement these policies.<sup>69</sup> Several lawyers have already offered their insights on the Yates Memo’s potential consequences.<sup>70</sup> At present, it seems to pose enough potential problems to merit reconsideration.

68. *Id.* at 1.

69. *See, e.g.*, Michael Hiltzik, *VW is a Great Test of Whether DOJ Really Will Put White-Collar Crooks in Jail*, L.A. TIMES (Sept. 21, 2015), <http://www.latimes.com/business/hiltzik/la-fi-mh-vw-is-a-great-test-on-white-collar-crooks-20150921-column.html> (considering whether the DOJ will adopt these policies towards contemporaneous corporate scandals); Aruna Viswanatha et al., *U.S. Targets RBS, J.P. Morgan Executives in Criminal Probes*, WSJ (Nov. 17, 2015), <http://www.wsj.com/articles/u-s-targets-rbs-j-p-morgan-executives-in-criminal-probes-1447786655?cb=logged0.8348281069193035> (indicating that the DOJ is indeed enforcing these policies).

70. *See, e.g.*, Jeffrey L. Bornstein, *How DOJ Policy Will Affect Cos.*, LAW360 (Sept. 16, 2015), <http://www.law360.com/articles/703413/how-doj-policy-on-prosecuting-individuals-will-affect-cos> (arguing that the Yates Memo policies “will make it more difficult and expensive for corporations and their executives to resolve both criminal and civil investigations” and “likely also make it easier for the DOJ to prosecute individuals”); Gibson, Dunn & Crutcher LLP, *supra* note 66 (arguing that the Yates Memo policies “may temper a corporation’s enthusiasm to self-report potential misconduct” and “have an unintended chilling effect on corporate cooperation”); Michael D. Ricciuti et al., *New DOJ Guidance Sharpens the Focus on Prosecuting and Suing Individuals in Corporate Criminal Investigations*, K&L GATES (Sept. 10, 2015), <http://www.klgates.com/new-doj-guidance-sharpens-the-focus-on-prosecuting-and-suing-individuals-in-corporate-criminal-investigations-09-10-2015/> (emphasizing “the harmonization between criminal and civil investigators” and its potential effects on corporate indemnification of civil suits brought by the DOJ against employees); Patrick J. Smith et al., *DOJ Seeks to Revamp and Re-energize its Prosecution of Individuals: Key Takeaways*, DLA PIPER (Sept. 10, 2015), <https://www.dlapiper.com/en/us/insights/publications/2015/09/doj-seeks-to-revamp/> (explaining potential effects of the Yates Memo policies for conflicts of interest between corporations and employees as well as changes in the way companies handle their own internal investigations of wrongdoing); *DOJ Issues Guidance on Individual Accountability for Corporate Misconduct*, ROPES & GRAY (Sept. 11, 2015), <https://www.ropesgray.com/newsroom/alerts/2015/September/DOJ-Issues-Guidance-on-Individual-Accountability-for-Corporate-Misconduct.aspx#Footer> (outlining how corporations, boards of directors, executives, and employees may need to respond to the Yates Memo policies); *DOJ’s New Focus On Executives May Mean Fewer Corporate Settlements*, STEPTOE & JOHNSON LLP (Sept. 21, 2015), <http://www.steptoel.com/publications-10767.html>:

The skilled and aggressive DOJ line prosecutors . . . have never lacked the will, the resources, or the tools to prosecute corporate officers for criminal misconduct. Corporations often plead guilty to crimes for business reasons in cases where no individual could be successfully prosecuted in a contested proceeding. The generality of the new guidelines could be viewed as an effort to appease those who have criticized DOJ for not holding individuals accountable for the 2008 financial crisis or prosecuting more individuals in connection with corporate settlements. However, if line prosecutors actually follow through and implement these new steps, ironically, the policies could

### III. THE PROBLEMATIC NATURE OF THE YATES MEMORANDUM

The Yates Memo begins with the premise that the investigation of corporate or “white-collar” crimes is an enormously difficult undertaking.<sup>71</sup> From there, the memorandum relies on the rationale commonly used to justify plea-bargaining. A corporation is free to decide whether to defend itself at trial or seek a better deal from the prosecutor.<sup>72</sup> Because a corporation is represented by counsel and cannot be incarcerated, there is no risk that an innocent party will wind up in jail by agreeing to plead guilty in order to avoid the risk of facing a whopping term of imprisonment if convicted after a trial.

This premise is correct. Corporate crimes are more difficult to investigate than “blue-collar” or “street” crimes by several orders of magnitude. The fact patterns are far more complicated than package store robberies or other similar crimes. The crimes occur out of public view, sometimes over the Internet, and where video cameras do not record what is happening. Even if there were cameras or witnesses, it might not be immediately obvious that what is recorded is a crime, given that deceit is often a core element of white-collar crime. Finally, the government lacks adequate resources to address the problem. To put it simply, if blue-collar crime is a garage band, then corporate crime is an orchestra.

Start with the nature of white-collar offenses. White-collar offenses can occur at various points in the distribution process.

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well lead to a decrease in corporate criminal resolutions rather than an increase in individual prosecutions.

71. The difficulties are summarized at Larkin, *Nonprosecution Agreements*, *supra* note 10, at 13–14 n.32. Some statistical reports show federal prosecutions of white-collar crime decreased over the last twenty years, from 11,000 in 1995 to 6,900 in 2015. *See* David Cay Johnston, *Enforcement for White-collar Crime Hits 20-year Low*, AL JAZEERA (Aug. 14, 2015), <http://america.aljazeera.com/opinions/2015/8/enforcement-for-white-collar-crimes-hits-20-year-low.html> (displaying a graph that depicts the decrease in prosecution of white-collar crime). Fluctuations in DOJ priorities, real-world problems, and the law, however, may defy perfectly neat explanation for any supposed trends in the DOJ’s prosecution statistics. *See Annual Statistical Reports*, U.S. DEP’T OF JUSTICE <http://www.justice.gov/usao/resources/annual-statistical-reports> (updated Mar. 23, 2015) (displaying statistical data revealing “the many priorities of United States Attorneys in both criminal prosecution and civil litigation”).

72. Larkin, *Nonprosecution Agreements*, *supra* note 10, at 22 n.26 (explaining that plea bargains are defended because they are practical due to the fact that plea bargains often help the defendant).

Corporate offenses ordinarily involve a violation of complex regulatory regimes designed to protect the public against the harms of contemporary manufacturing, distribution, transportation, financial, and other institutions that have developed due to the specialization brought about by the industrial revolution and sophisticated business practices.<sup>73</sup> Each link in that chain creates an opportunity to commit a crime. A business could try to defraud a downstream party by passing off adulterated products as the real McCoy, by generating fictitious transactions and losses for tax purposes, or by simply inflating a bill of lading. A company could try to bribe a government official to “look the other way” when its goods are under review. The financial incentives that corporate employees have to save some money—and pocket the difference, or report it and possibly earn a larger year-end bonus—will induce those parties not only to break the law, but also to hide their tracks.

White-collar offenses can also be difficult to identify as crimes. Mugging victims will immediately know that they have been victimized, but targets of corporate crime might not readily appreciate that fact. Rival firms (e.g., food producers, oil companies, and telecommunications carriers) may conspire to raise the price of a good by a few pennies per unit, an amount that is too small for each consumer to feel, but that can rake in millions for co-conspirators given the massive number of transactions involved. The agreement would be an offense under federal law,<sup>74</sup> and unless someone notices what has happened, there might be no investigation.<sup>75</sup> Or a firm may decide to save

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73. The average person no longer grows his own vegetables, raises his own cattle, builds his own home, or formulates his own medicines. Businesses perform those chores, often at a great distance from the ultimate consumer (particularly if the company is overseas), leaving other companies responsible for the transportation and sale of final products. Numerous federal government agencies—the Food and Drug Administration (which regulates food additives and pharmaceuticals), the Environmental Protection Agency (which regulates pesticides), the Department of Agriculture (which inspects livestock), and the Centers for Disease Control (which examines large-scale health problems stemming from adulterated food) to name four of them—are responsible to ensure that the goods are safe throughout each chain in the distribution process, or, if they are not, for identifying and remedying any problem. Other agencies—such as the Securities and Exchange Commission or the Pension Benefit Guaranty Corporation—oversee the workings of the financial markets and pension funds to protect the savings of investors and retirees.

74. An agreement among competitors to fix prices would violate the Sherman Act, 15 U.S.C. § 1 (2012), a federal law outlawing that practice.

75. Different corporations could have different attitudes toward regulation. Some corporations see it as a relatively benign annoyance; others, as an illegitimate intrusion

the expense of properly disposing of hazardous waste by spilling it in into a river, dumping barrels in a forest, or burying it underground. Those actions would violate federal law,<sup>76</sup> but they may be even more difficult to discover and investigate than a price-fixing conspiracy. Unless buried toxic waste leaches out of its container and makes its way into an above- or below-ground water supply, no one may be aware of what happened until long after the statute of limitations has expired.

The number of investigators will never be as large as the number of opportunities businesses have to shave a corner or the number of people who take advantage of those occasions.<sup>77</sup> The Federal Bureau of Investigation (FBI) and the U.S. Secret Service (Secret Service) are the principal federal law enforcement agencies responsible for investigating white-collar crime. The FBI and Secret Service, however, have numerous other obligations that rank higher on their list of priorities. Since the attacks on September 11, 2001, the FBI's primary mission has been to collect domestic intelligence on potential domestic terrorism incidents and to snuff out any one of them that is dangerously close to success.<sup>78</sup> The Secret Service is responsible for protecting the President, Vice President, their families (among others), and visiting heads of state and foreign nations.<sup>79</sup> Atop that, every fourth year they must devote resources to protecting the presidential candidate in each party.<sup>80</sup> Each agency has been

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into the free market. Some corporate officers are willing to approach the limit of permissible conduct, while others might steer clear from it. Some are responsible citizens; others are scallywags.

76. The conduct would violate the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified in scattered sections of 33 U.S.C.), the Clean Water Act of 1977, 33 U.S.C. §§ 1281(a), 1294-1297 (2006), and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (2012).

77. Corporations have the funds to mount an effective defense, oftentimes more than the government can devote to a particular case. That defense could start well in advance of trial in the document production process. A corporation that claims the attorney-client privilege with respect to a sizeable quantity of documents can delay any review of those documents until after a district court judge or magistrate judge has resolved those claims. Corporate personnel can refuse to be interviewed and may be likely to do so if the company subtly hints that silence is golden. If delaying tactics seem to be failing, some corporations, such as ones working on highly classified and sensitive projects for the defense or intelligence community, might even have the political connections to make some investigations "go away."

78. 18 U.S.C. §§ 351, 3052, 3107 (2012); 50 U.S.C. §§ 1801-1812 (2012).

79. *Id.* at § 3056(a)(1)-(6), (8).

80. *Id.* at § 3056(a)(7).

forced to reassign agents away from white-collar investigations to fulfill their primary missions.

White-collar criminal cases also require different types of investigative techniques. Several traditional law enforcement practices used in blue-collar investigations—such as the use of undercover officers, surveillance, sting operations, hand-to-hand drug sales, and so forth—often do not work well in a white-collar investigation. The conduct being investigated, particularly financial transactions (such as credit default swaps) can be extremely complex, involving multiple parties, transactions, and banking systems.<sup>81</sup> White-collar crimes can span multiple state boundaries. If a firm's conduct crosses international borders, federal investigators are at the mercy of foreign law enforcement agencies for assistance in gathering evidence overseas. New technologies offer ever more mobile ways to transfer information, documents, records, and funds; and there is a monumental amount of information stored in old-fashioned hard-copy files, let alone in computer systems, laptops, tablets, mobile phones, thumb drives, and “the cloud” that must be found and digested in order to determine if a crime has occurred. Investigators need education and experience in law including the pertinent regulatory scheme, accounting, commerce, and investment in order to understand the business conduct and get to the bottom of what happened. These are skills that few investigators may have.

The dollar rewards from financial wheeling-and-dealing can exceed the gross domestic product of many small nations. The opportunity to rake in Croesus-level winnings attracts a never-ending supply of highly educated, highly skilled, and highly motivated players to Wall Street, the Chicago Board of Trade, and other commercial markets. It also creates an incentive for corporate insiders to quickly use their moneymaking

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81. See *Corporate Internal Investigations: Best Practices, Pitfalls to Avoid*, JONES DAY 1 (2013), <http://www.jonesday.com/files/upload/CII%20Best%20Practices%20Pitfalls%20to%20Avoid2.pdf> (explaining that internal investigations present issues with determining the facts because of the various ways witnesses can react to an investigation). Major corporations have different divisions, product lines, or decentralized networks. Each one might use different, temporarily assigned teams to manage projects. Personnel may come and go from division to division within a company or leave for other firms, industries, or locales, making it painfully time-consuming just to interview all of the relevant employees. Different corporations may have different cultures (or the same corporation may have different subcultures) with different attitudes toward cooperating with the authorities. Some parties fear arrest, conviction, public humiliation, and imprisonment; others fear dismissal or loss of a bonus far more.

opportunities to obscure their dealings and to depart before being detected. With this scenario happening over and over, players may always stay one step ahead of regulators and investigators.

To top it off, it may be difficult to distinguish unethical or sharp business practices from crimes, with the result being that years of investigation can go for naught if the courts decide that the proven conduct does not violate federal law, however broadly it is read.<sup>82</sup> When all is said and done, in light of those difficulties, it may not be surprising that the government has sought to conscript private parties into its investigatory team.

That said, the prospects for successful prosecution of corporations are not as dire as the above discussion might suggest. The United States Attorney's Manual sets forth the policies that Justice Department lawyers must consider when filtering culpable from innocent individuals and business organizations.<sup>83</sup> Those policies direct federal prosecutors, when making charging decisions, to weigh criteria such as the likelihood of conviction, the nature and seriousness of the offense, the pervasiveness of wrongdoing within a company, and a corporation's degree of cooperation with the government during an investigation.<sup>84</sup> To attribute liability for an individual's wrongdoing to the corporation, a prosecutor need only prove that the employee's actions "were within the scope of his duties" and "were intended, at least in part, to benefit the corporation."<sup>85</sup>

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82. The Supreme Court's efforts to trim the government's sails in white-collar prosecutions are an example of that phenomenon. *See, e.g.*, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (narrowly construing the "official acts" necessary for conviction of fraud and extortion); *Skilling v. United States*, 561 U.S. 358 (2010) (holding that the statute only covered bribery and kickbacks, and that the actions of the defendant corporation did not satisfy the statute); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (reversing the conviction of a corporation because the statute required corrupt persuasion); *United States v. Sun-Diamond Growers of Ca.*, 526 U.S. 398 (1999) (holding that the government must prove a link between the gift given and the official act to convict); *McCormick v. United States*, 500 U.S. 257 (1991) (holding that the government needs to prove more than just acting in the interest of a constituent before asking for campaign donations is not enough to prove extortion); *McNally v. United States*, 483 U.S. 350 (1987) (explaining that offering to buy insurance through an agent that shares the commission with an agency that the buyer holds interest in is not enough to satisfy mail fraud).

83. OFFICES OF THE U.S. ATTORNEYS, U.S. ATTORNEY'S MANUAL, 9-28.100 (Nov. 2015), available at <http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations> [hereinafter USAM].

84. USAM 9-28.300.

85. *Id.* at 9-28.210.



Proof of those facts has not been a particularly heavy burden.<sup>86</sup> Atop that, the government can often prevail without having to prove its case to a jury. Rather than proceed with an indictment and a trial, for more than a decade the Department has often entered into a preindictment or pretrial settlement with a company known as a “nonprosecution agreement” or a “deferred prosecution agreement.”<sup>87</sup> The amounts involved can appear quite staggering,<sup>88</sup> but corporations have gone along with the government’s proposal because the alternative—a conviction—can amount “to a virtual death sentence for business entities.”<sup>89</sup>

It could be argued that that the Justice Department should have been more aggressive in its pursuit of corporate officials who authorized the later-defaulted loans that led to the collapse of the housing market and the Great Recession.<sup>90</sup> Yet overzealous

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86. The Justice Department “routinely concludes multimillion-dollar criminal settlements with the world’s largest corporations, [but] struggle[s] to convict individuals associated with the alleged misconduct. . . . Over the last few years, the Justice Department has used increasingly expansive views of conspiracy and accomplice liability to assert jurisdiction over [corporate wrongdoing].” Trevor McFadden & Brian Whisler, *Why DOJ Struggles to Convict Individuals in FCPA Cases*, LAW360 (Sept. 8, 2015), <http://www.law360.com/articles/699654/why-doj-struggles-to-convict-individuals-in-fcpa-cases>. That is true despite a 29.3% drop in actual criminal prosecutions of corporations from FY 2004 to FY 2014. TRAC Reports, Inc., *Justice Department Data Reveal 29 Percent Drop in Criminal Prosecutions of Corporations*, TRAC REPORTS (Oct. 13, 2015), <http://trac.syr.edu/tracreports/crim/406/>.

87. See Larkin, *Nonprosecution Agreements*, *supra* note 10, at 1 n.1 (“These agreements have existed since at least 1993, but they have become numerous only in the past decade. For a list of agreements from 1993 to 2007, refer to Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 938–57 (2007).”). No charges are sought in a non-prosecution agreement, whereas already-filed charges are dismissed in the case of a deferred prosecution agreement if the defendant satisfactorily complies with the agreement. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-636T, CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ’S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS 4, 10–11 (2009), *available at* <http://www.gao.gov/assets/130/122853.pdf> [hereinafter GAO PRELIMINARY OBSERVATIONS] (describing that the difference between a non-prosecution agreement and a deferred prosecution agreement is that the deferred prosecution agreement involves filing charges with the court, while the non-prosecution agreement results in no charges being filed).

88. In 2014, for example, the Bank of America Corporation agreed to pay \$16.65 billion to resolve financial fraud allegations related to the onset of the Great Recession. See Press Release about Bank of America, *supra* note 64 (describing “the largest civil settlement with a single entity in American history”).

89. 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, 1097 (2006) (arguing that corporate prosecutions offer the government an “opportunity for deterrence on a massive scale”).

90. See Lawrence White, *Housing Finance and the 2008 Financial Crisis*, DOWNSIZING GOVERNMENT.ORG (Aug. 1, 2009), <http://www.downsizinggovernment.org/hud/housing-finance-2008-financial-crisis> (explaining that the extension of mortgages to previously unqualified borrowers led to the financial crisis of 2008 and 2009).

corporate prosecution strategies can be both unjust and unfruitful. The Yates Memo's all-or-nothing stance essentially deputizes corporate personnel to investigate their colleagues. The approach not only corrodes the benefits of attorney-client relationships<sup>91</sup> and erodes the public policies behind the work-product rule,<sup>92</sup> but also sows distrust among directors, officers, and other employees.<sup>93</sup> That problem would be especially pernicious if senior officers try to pin any wrongdoing on lower-level employees. Senior corporate officials may be skilled at obscuring their responsibility for questionable conduct. (Indeed, that may be how they became senior corporate officers. A wag might say that the people who can climb the corporate ladder generally have the skills to deflect blame onto others.) The upshot is that senior personnel might place the blame on those corporate personnel least able to protect themselves.<sup>94</sup>

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91. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 JOHN WIGMORE, EVIDENCE § 2290 (McNaughton rev., 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”).

92. *Upjohn*, 449 U.S. at 398 (citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)):

[I]f discovery of [work product, meaning material prepared in anticipation of litigation] were permitted “much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.”

93. Katelyn Polantz, *DOJ’s Yates Memo Goes Too Far, Former Deputy AG Says*, NAT’L L.J. (Nov. 20, 2015), <http://www.nationallawjournal.com/id=1202743031700/DOJs-Yates-Memo-Goes-Too-Far-Former-Deputy-AG-Says#ixzz3sF6Zyq2Z>. James Cole, former U.S. Deputy Att’y Gen.,

[explained] how the memo creates a situation where companies will need to volunteer information that would be confidential between attorneys and clients in order to settle investigations. Yates has reiterated that the department’s approach to attorney-client privilege hasn’t changed. “With all due respect, I’m not sure she entirely understands,” he said. Cole said the new policy will cause companies to clam up, even to their lawyers. Or it will prompt corporate legal teams to form joint defense agreements with personal lawyers who represent company leaders, he said, the opposite of what the Justice Department wants.

*Id.*

94. That delegation raises an additional problem. Prosecutors would effectively be using corporate officers to force lower-level employees to incriminate themselves. As argued elsewhere, “[i]n light of the government’s control over internal investigators under the current paradigm of corporate criminal procedure, the constitutional safeguards that apply when public officials question targets should extend to the context of employee

By ordering corporate agents to do the Justice Department's investigation for them without guaranteeing cooperation credit, the Yates Memo takes the unprecedented step of effectively making defendants prosecute themselves. The common law allowed law enforcement to deputize private citizens, but never asked anyone to apprehend himself.<sup>95</sup> Deputizing defendants is a new phenomenon of the Yates Memo. Now, once corporate officers investigate and tell the department who in their employ committed a crime, the entity remains liable for any misdeeds under current liability theories. The government privatizes participation in the criminal justice system by asking juries to decide questions in criminal trials and asking private criminal defense attorneys to defend indigent individuals accused of a crime. But it does not, and should not, ask a private person, much less the defendant himself, to make the prosecutor's case for him.<sup>96</sup>

Historically, two principles of criminal and constitutional law have always compelled the government to bear the entire burden of a criminal investigation. The first is that a private party is entitled to a "presumption of innocence," a legal term of art that is a shorthand way of saying that the government has the burden of proving a defendant's guilt; the defendant is not required to prove his innocence or say anything in his defense.<sup>97</sup> The second,

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interviews." Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 352–53 (2007).

95. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*289, \*293 (on arrest powers of private persons); AKHIL REED AMAR, *THE LAW OF THE LAND* 336–38 nn.3–12 & accompanying text (2015) (arguing that a citizen's arrest is a form of state action when the government authorizes it); N. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice is Being Destroyed*, WASH. LAWYER (Mar. 2005), <http://www.dcb.org/bar-resources/publications/washington-lawyer/articles/march-2005-taking-the-stand.cfm> (explaining how corporate counsel has in essence been deputized by the government and extract information from the employees to make their client, the corporation, safe).

96. See Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 297 (2010) (arguing "that it is inappropriate to outsource to private actors a function so closely identified with the sovereign prerogative of the state"); Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411 (2009) (arguing that it is inappropriate to give nongovernmental actors criminal prosecutorial powers).

97. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (explaining that the idea of innocent until proven guilty places the burden of proof on the government and not the defendant). The Fifth Amendment Self-Incrimination Privilege assists a person in that regard. It permits him to refuse to cooperate in any investigation if doing so would offer the government aid proving any fact necessary to establish his guilt. See, e.g., *Hoffman v. United States*, 341 U.S. 479, 486 (1951) ("The privilege afforded not only extends to

related proposition is that the government has the burden of proving a defendant's guilt beyond a reasonable doubt.<sup>98</sup> This burden is two-fold: the government must not only convince the jury to a state of near certitude of a defendant's guilt,<sup>99</sup> but also must adduce sufficient, admissible proof to withstand later judicial review of the jury's decision.<sup>100</sup> To be sure, there are occasions in which the government may place demands on a defendant. For example, the government may require that a defendant provide notice before trial of a defense of alibi or insanity.<sup>101</sup> Yet those narrow exceptions do not erode the premise that it is the government's burden to prove a defendant's guilt—a burden that it must carry without the defendant's cooperation.

Underestimating the Justice Department's determination to prosecute individual wrongdoers may prove unwise for three reasons. First, by telling prosecutors to force corporations to do their investigations for them, the Yates Memo provides a quick and easy alternative to leading an expensive investigation on their own.<sup>102</sup> Second, while compliance and disclosure are the crux of the Yates Memo, real expectations of deliverables are matched with accountability mechanisms. Line attorneys will either build up satisfactory cases against individuals, or explain why they failed to do so to their supervisors.<sup>103</sup> And, because the Yates Memo compels civil and criminal attorneys to communicate with each other about pursuing convictions, there is peer

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answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.”); *accord* *Ohio v. Reiner*, 532 U.S. 17, 19 (2001) (explaining that the Fifth Amendment gives defendants the right to not incriminate themselves).

98. *See, e.g., In re Winship*, 397 U.S. 358, 361 (1970) (explaining how the burden of proving guilt beyond a reasonable doubt has been well established).

99. *See, e.g., Victor v. Nebraska*, 511 U.S. 1, 12 (1993) (explaining how beyond a reasonable doubt requires moral certainty).

100. *See, e.g., Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979) (describing how beyond a reasonable doubt goes beyond convincing the jury and also require that the record of evidence reflects the satisfaction of this standard).

101. *See, e.g., FED. R. CRIM. P. 12.1* (requiring a defendant to give advance notice of an alibi defense); 12.2 (same, insanity defense); 12.3 (public-authority defense); *Williams v. Florida*, 399 U.S. 78, 80–86 (1970) (upholding the constitutionality of an advance-notice-of-alibi requirement over a challenge based on the Fifth Amendment Self-Incrimination Clause).

102. *See Larkin, Nonprosecution Agreements, supra* note 10, at 13 n.32 (explaining how deputizing corporations to help the government in their investigations is necessary because of the burdens on law enforcement).

103. Yates Memo, *supra* note 1, at 3–7; Gibson, Dunn & Crutcher LLP, *supra* note 66.

accountability as well. Third, the Yates Memo explicitly requires prosecutors to “not release culpable individuals from civil or criminal liability when resolving a matter with a corporation” in the absence of “extraordinary circumstances or approved departmental policy.”<sup>104</sup> Any release requires the personal written approval of the relevant Assistant Attorney General or U.S. Attorney.<sup>105</sup> If prosecutors resolve their case against a corporation before they conclude the investigation of individuals, the Yates Memo orders prosecutors to report on “potentially liable individuals,” the status of investigations into their conduct, what work is yet undone, and the plan to finish the investigation before the statute of limitations has run—although that time can be extended through a tolling agreement if necessary.<sup>106</sup> If prosecutors decide not to bring any charges against individuals, “the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.”<sup>107</sup> Thus, individuals cannot run out the clock or hope the Justice Department just decides to pass them over. The real question then, is whether a corporation must give the department proof sufficient to establish a prima facie case of the guilt of both the individuals and the corporation itself, and how.

Because the Yates Memo does not guarantee to spare a corporation a settlement or conviction in exchange for doing the Justice Department’s job, the Department forces corporations to hope that prosecutors will extend the company leniency.<sup>108</sup> If the

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104. Yates Memo, *supra* note 1, at 5.

105. *Id.*

106. *Id.* at 5–6. A tolling agreement waives the defense of a statute of limitations so as not to rush the prosecutor into pressing charges before the time period expires. It may be thought advantageous when a settlement or cooperation credit seems more likely than not. See Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1841 (2015) (noting that “new DOJ guidance on charging individuals notes the problem of delays in corporate investigations, and suggests making ‘all efforts’ to charge culpable individuals within limitations periods or to obtain a tolling agreement or court order tolling the limitations period”); Michael J. Kaufman & John M. Wunderlich, *Leave Time for Trouble: The Limitations Periods Under the Securities Laws*, 40 J. CORP. L. 143, 191 (2014) (explaining how parties use tolling agreements to work around limitation periods); Jean Eaglesham, *Regulators Try to Beat Clock in Rate Probe*, WALL ST. J. (Sept. 19, 2012), <http://www.wsj.com/articles/SB10000872396390443890304578006573853603846> (stating large financial firms tend to agree with a tolling agreement requests).

107. Yates Memo, *supra* note 1, at 6.

108. See Paul J. Larkin Jr., *The Dangers of the “Trust Us” Approach to Statutory Interpretation*, HERITAGE LEGAL MEMORANDUM NO. 93 (June 12, 2013), available at <http://www.heritage.org/research/reports/2013/06/the-dangers-of-the-trust-us-approach-to->

Yates Memo does compel corporations to prove their own guilt without promising to forego a large financial settlement—which could be had if prosecutors simply write down the corporate entity as a co-defendant—then the Yates Memo would do little or nothing to improve the fate of corporations, shareholders, consumers, and innocent employees. The only incentive for corporate compliance seems to be that if a corporation does not “comply,” it is absolutely certain that it will be severely punished.<sup>109</sup>

The Yates Memo calls for criminal and civil investigators from the Justice Department to coordinate their efforts through “routine communication.”<sup>110</sup> This can be tricky because statutes that regulate the exchange of secret and sensitive information, such as grand jury materials and personal data gathered by criminal prosecutors within the Justice Department, require that some information must not be shared between the Department’s criminal and civil lawyers.<sup>111</sup> The Department’s Office of Legal Counsel, which advises the Attorney General on legal matters, recently published its opinion that Justice Department prosecutors do not have to tell the Inspector General—the office that Congress created for the specific purpose of auditing the Justice Department—how they use this information.<sup>112</sup> With directions from the Deputy Attorney General to routinely

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statutory-interpretation (explaining how the corporations must rely on the “conscience and circumspection in prosecuting officers”). See also Larkin, *Public Choice Theory and Overcriminalization*, *supra* note 25, at 777 (“One of the principal criticisms of overcriminalization, in fact, is that it transfers interpretive authority from courts to prosecutors. No one should be obliged to rely on prosecutorial discretion to avoid being charged with a crime.”).

109. See Marshall L. Miller, Principal Deputy Assistant Att’y Gen. for the Criminal Division, Dep’t of Justice, Remarks at the Global Investigation Review Program (Sept. 17, 2014) (“At the risk of being a little too Brooklyn, I’m going to be blunt. If you want full cooperation credit, make your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation.”).

110. Yates Memo, *supra* note 1, at 2.

111. See Ricciuti, *supra* note 70 (emphasizing “the harmonization between criminal and civil investigators” and its potential effects on corporate indemnification of civil suits brought by the DOJ against employees). Memorandum from Karl R. Thompson, Principal Deputy Assistant Att’y Gen.’s, Dep’t of Justice Office of Legal Counsel, to Sally Quillian Yates, Deputy Att’y Gen., Dep’t of Justice, *The Department of Justice Inspector General’s Access to Information Protected by the Federal Wiretap Act, Rule 6(e) of the Federal Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act* (July 20, 2015), available at <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/07/23/2015-07-20-doj-oig-access.pdf> (hereafter [OLC Op]).

112. See OLC Op., *supra* note 111 (explaining that the Office of Inspector General was created to aid the integrity of agencies within the executive branch).

exchange potentially secretive information between the civil and criminal branches and institutional avoidance of oversight, problems may arise in the way prosecutors handle the information of corporations and their employees.

Knowing that prosecutors—and in some potential circumstances third parties who may be market competitors<sup>113</sup>—may have access to sensitive communications might hamper trust and full transparency between corporate executives, employees, and their attorneys. Knowledge that the Yates Memo instructs civil and criminal attorneys to work together to bring a civil suit against individuals, regardless of their ability to pay, might exacerbate that distrust.<sup>114</sup> How the Justice Department's employees handle, or potentially mishandle, information within the agency may also affect attorney client relationships, directly and indirectly. The potential for civil liability could cause many corporate employees to clam up. In turn, this would diminish the corporation's ability to review past misconduct.<sup>115</sup> Therefore, compelled disclosure might bring in less cooperation than voluntary disclosure.<sup>116</sup>

Implicit in the Justice Department's demand for corporations to turn over their bad apples is an admission that the Justice Department would rather not, or possibly could not, spend the

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113. See GORDON, *supra* note 54:

In addition, the courts have yet to settle the quandary confronting many corporations deciding whether to waive legal protections to cooperate with the government, which is the risk that by selectively waiving those protections and producing protected material to the government, a corporation will be deemed to have waived its privileges and protections with regard to everyone else, including plaintiffs seeking the same information in private securities or derivative litigation against the company. A number of courts have held that a corporation's selective production of privileged or work product protected material to the government triggers a waiver in favor of third parties.

(citing *In re Qwest Communications Int'l Inc.*, 450 F.3d 1179 (10th Cir. 2006), and *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414 (3d Cir. 1991)).

114. Yates Memo, *supra* note 1, at 4–6. “In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit.” *Id.* at 6.

115. See generally *Ide*, *supra* note 53 (arguing that government policies regarding waivers discourages internal investigations, which decreases the detection of misconduct); GORDON, *supra* note 54, at 42–43 (arguing that forcing corporation compliance with the government prevents corporate employees from discussing problems with company counsel).

116. See STEPTOE & JOHNSON LLP, *supra* note 70 (arguing that corporate employees cooperate less with internal investigations because of the knowledge that corporations are pressured into naming wrongdoers).

time and resources to ferret them out on its own. Rather than seek additional resources from Congress, the Justice Department has shifted the burden onto corporations to investigate themselves. The Justice Department essentially asks the suspect (and to some, if you are suspected of something, you are probably guilty of something<sup>117</sup>) to substantiate the accusation and turn itself in. While there are significant obstacles to evidence gathering that are unique to corporate wrongdoing, which slow the pace and raise the cost of investigations, the Justice Department has never said that it is incapable of identifying individual wrongdoers within a corporation. In fact, it regularly does identify them, and its vast resources suggest that it readily could do so at a higher rate, if that were its sole ambition.<sup>118</sup>

It would be far better for the Justice Department to honestly tell Congress what additional resources it needs. The Justice Department should invest in identifying what the missing evidence in corporate investigations there may be and devote the resources to finding it, instead of forcing corporations to do the job for themselves. The latter, present approach risks the harmful consequences of eroding fundamental legal privileges: the attorney-client privilege, the attorney work-product doctrine, and the self-incrimination privilege.

#### IV. CONCLUSION

Tom Sawyer taught us that the easiest way to get a job done is to trick someone else into doing it for you.<sup>119</sup> The Justice Department has gone a step further. Instead of relying on guile, Yates has decided to add coercion to the toolkit that Department lawyers may use when investigating corporate wrongdoing. Drawing as much on the rhetorical talents of Don Vito Corleone as those used by Tom Sawyer, Yates has directed Justice

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117. See Julie R. O'Sullivan, *supra* note 27, at 34 (“[U]nder the federal code and regulations, the crimes that can be charged in white-collar cases are virtually limitless and very malleable. The breadth and flexibility of the criminal code allows prosecutors to charge the corporation in almost any case in which any arguable skullduggery is uncovered.”) (citing Julie R. O'Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 660 (2006)).

118. The DOJ's annual prosecutions and convictions can be read in their annual statistics reports. See *Annual Statistical Reports*, *supra* note 71 (providing statistical data of cases handled by United States Attorneys).

119. MARK TWAIN, *THE ADVENTURE OF TOM SAWYER* Ch. 11 (1876) (the fence-painting episode).



Department lawyers to make corporations an offer they cannot refuse. The result is to shift to corporations the burden of investigating themselves in order to escape the corporate equivalent of the death penalty, crippling liability for the illegal acts of subordinate officials or employees whose unauthorized conduct could shutter the company and leave thousands of entirely innocent parties out in the cold.

The Yates Memo orders corporations and law firms to do the government's job in lieu of reprioritizing resources or asking Congress for more resources.<sup>120</sup> Now, when the Justice Department knocks on a corporation's door they expect enough evidence to identify the person(s) responsible for some alleged wrongdoing,<sup>121</sup> even though it means handing over the key to corporate coffers. Congress and the Justice Department need to reconsider their allocation of resources. The Department should reconsider whether the Yates Memo risks some unintended consequences by pitting employees and corporations against each other.

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120. Corporations and law firms are aware of this new burden and have argued against it. *See, e.g.*, STEPTOE & JOHNSON LLP, *supra* note 70 (arguing that “[i]t is the job of the prosecutor to make [] culpability determinations based on all available information, including facts disclosed by a corporation attempting to cooperate. To require corporations to make judgments about who is ‘responsible’ for corporate misconduct goes a step too far.”).

121. *See* Miller, *supra* note 109 (explaining that true cooperation requires the company to locate and provide evidence that implicates those who are criminally responsible).