THE LAW OF CORPORATE INVESTIGATIONS AND THE GLOBAL EXPANSION OF CORPORATE CRIMINAL ENFORCEMENT

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Abstract: The United States model of corporate crime deterrence, developed over the last two decades, couples an extremely broad rule of corporate criminal liability with a practice of reducing sanctions, and often withholding conviction, for firms that assist enforcement authorities by detecting, reporting, and helping prove criminal violations. This model has recently attracted more interest among reformers in overseas nations that have sought to increase the frequency and size of their enforcement actions. In both the U.S. and abroad, insufficient attention has been paid to how laws controlling the conduct of corporate investigations are critical to the operation of regimes of corporate criminal liability and public enforcement. Doctrines governing self-incrimination, employee rights, data privacy, and legal privilege, among other areas, largely determine the relative powers of governments and corporations to collect and use evidence of business crime, and thus the incentives of enforcers to offer settlements that reward firms for private efforts to both prevent and disclose employee misconduct. This Article demonstrates the central role that the law controlling corporate investigations plays in determining the effects of enforcement policies. It then argues that discussions underway in Europe and elsewhere about expanding corporate criminal liability and settlement policies—as well as nascent conversations about changes to the U.S. system—must account for the effects of differences in

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investigative law if effective incentives for reducing corporate crime are, as they should be, a principal goal.

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INTRODUCTION

American criminal and civil enforcers have demonstrated a unique ability to obtain a large and steady volume of high-profile settlements from the world's largest corporations.[1] The United States has pursued many more criminal enforcement actions than any other nation, has collected vastly more sanctions than any other country, and has occupied center stage in the global enforcement arena. This dominance is largely due to the broad scope of its corporate criminal liability rule combined with a policy governing negotiated settlements designed to encourage corporate self-reporting, cooperation and settlement.[2]

Unlike in most other countries, in the U.S. companies can be held criminally liable for crimes committed by any employee in the scope of employment, through the doctrine of *respondeat superior* liability.[3] The U.S. also has an official policy of offering to resolve cases through deferred and non-prosecution agreements (DPAs and NPAs)[4] if firms self-report criminal conduct or fully cooperate with government efforts to investigate and prosecute.[5] DPAs and NPAs not only generally impose lower sanctions but do not trigger the collateral consequences of a formal conviction, such as debarment or delicensing.[6] The longstanding

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1 *See* Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537 (2015); *Corporate Prosecution Registry*, LEGAL DATA LAB, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html (last visited Jan. 30, 2019); *Foreign Corrupt Practices Act Clearinghouse*, STAN. L. SCH., fcpa.stanford.edu (last visited Jan. 30, 2019); *Violation Tracker*, GOOD JOBS FIRST, https://www.goodjobsfirst.org/violation-tracker (last visited Jan. 30, 2019).

2 In addition, the United States has adopted powerful statutes, with transnational reach, that subject both domestic and foreign corporations to sanction by American prosecutors for acts overseas. *See, e.g.*, 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff (2012) (foreign bribery); 18 U.S.C. § 1030 (2012) (computer fraud and abuse); *id.* § 1952 (travel in aid of racketeering); *id.* § 1956(a)(2) (prohibited currency transportation); 31 U.S.C. § 5322 (2012) (bank secrecy); 50 U.S.C. § 1705 (2012) (export controls).

3 *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909); United States v. Dye Constr. Co., 510 F.2d 78 (10th Cir. 1975); see also Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, in RESEARCH HANDBOOK ON NEGOTIATED SETTLEMENTS (Abiola Makinwa & Tina Soreide ed., forthcoming 2020). (comparing U.S. law on corporate criminal liability and negotiated settlements with that of England and France).

4 Under a DPA, the prosecutor files charges but agrees to dismiss the charges, without conviction, if the corporation complies with the terms of the agreement. Under an NPA, the prosecutor agrees not to file charges against the firm if the corporation fulfills the bargain. *See* Brandon Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 893–902 (2007).

5 U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-28.000 (2018) [hereinafter JUSTICE MANUAL]; *see also* U.S. SENTENCING GUIDELINES MANUAL § 8 (U.S. SENTENCING COMM'N 2018); Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144 (A. Harel & K. Hylton eds., 2012).

6 See Garrett, supra note .

practice of settling most corporate cases involving publicly-held firm (and other large corporations) in this way, in lieu of indictment and conviction, has enabled enforcement authorities to leverage corporate compliance programs and internal investigations to detect and obtain actionable evidence of misconduct, thereby allowing simultaneous pursuit of numerous complex enforcement actions.[7]

As other countries observed the progress of American enforcers, especially in imposing sanctions on other nations' companies doing business globally, some acquired a competitive taste for a greater presence in corporate enforcement. Meanwhile, expanding role of the Organisation for Economic Cooperation and Development (OECD) in a global effort to control corporate bribery increased pressure on other countries to strengthen corporate enforcement efforts.[8] U.S. law and practices have offered the most salient model for nations motivated to expand the laws and institutions of corporate enforcement.[9]

The arguments in favor of the U.S. approach are familiar. Both broad organizational liability and the use of DPAs targeted at corporate self-reporting and cooperation are essential tools for reducing corporate crime.[10] In theory, corporate liability deters by increasing the

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[7] We focus on publicly-held firms and large privately-held firms with many employees because these are the firms that enter into DPAs. Small owner-managed firms do not cooperate to get a DPA because (1) owner-managers regularly are implicated, (2) the firm has little to gain because it cannot survive the criminal fine, or (3) prosecutors do not need cooperation because they can readily obtain evidence of the crime. See Arlen, *supra* note 5, at 148, 152-53. Our analysis is limited to crimes that could produce a corporate conviction, such as corrupting a foreign official, fraud, and money laundering, as distinct from purely personal crimes by employees, such as receiving a bribe, or most insider trading.

[8] *See* Organisation for Economic Co-operation and Development [OECD], *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Dec. 17, 1997) (entered into force Feb. 15, 1999); Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 LAW & CONTEMP. PROBS. 193 (2017); *Country Reports on Implementation of the OECD Anti-Bribery Convention*, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/investment/countryreportsontheimplementation oftheoecdanti-briberyconvention.htm (last visited Jan. 30, 2019).

[9] *See*, *e.g.*, Organisation for Economic Co-operation and Development [OECD], *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* (2016), https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf; Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89 (2004); Markus Rübenstahl & Christian Brauns, *Trial and Error—A Critique of the New German Draft Code for a Genuine Corporate Criminal Liability*, 16 GERMAN L.J. 871 (2015); Frederick Davis, *Limited Corporate Criminal Liability Impedes French Enforcement of Foreign Bribery Laws*, GLOBAL ANTICORRUPTION BLOG (Sept. 1, 2016), https://globalanticorruptionblog.com/2016/09/01/guest-post-unduly-limited-corporate-criminal-liability-impedes-french-enforcement-of-foreign-bribery-laws/.

[10] *E.g.*, Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); A. Mitchell Polinsky & Steven Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?* 13 INT'L REV. L. & ECON. 239

probability that corporations will expect crime to be costly instead of profitable. This can induce corporate managers to pursue prevention efforts. In addition, corporate liability can deter by increasing the expected cost to employees of corporate misconduct. Employees face a substantially higher threat of punishment when corporations have strong incentives to detect misconduct, report it, investigate it, and provide actionable evidence to government officials about individual wrongdoers—that is, a motive to engage in corporate policing. In the U.S., corporate policing has particular public value because large, complex firms are better able to obtain evidence about individual misconduct within the corporation than are government officials situated outside the corporation.[11] U.S. enforcement policy strives to induce corporate policing by offering DPAs with reduced fines to companies that self-report or fully cooperate and remediate,[12]and declinations to many companies that self-report, fully cooperate *and* remediate.[13]

Increasingly, other countries are seeking to enhance corporate enforcement with reforms adapted from the U.S. approach. Such reforms have included expanding the scope of corporate criminal liability and adopting laws and policies that allow negotiated criminal settlements,

(1993); *see also* Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CAL. L. REV. 1345 (1982); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984).

[11] Our methodological approach in this Article is to assume this well-established theoretical model for corporate criminal liability, for which we have argued extensively elsewhere. *See*, *e.g.*, SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 109-75 (2016); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*; 81 IND. L.J. 473 (2006); Arlen & Kraakman, *supra* note 10; Arlen, *supra* note 5; Arlen, *supra* note 3. We of course recognize that the model and its implementation have skeptics. *See*, *e.g.*, JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017); BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); Jed S. Rakoff, *The Financial Crisis: Why Have No High Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014); David M. Uhlmann, *Deferred Prosecution Agreements and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295 (2012).

[12] JUSTICE MANUAL § 9-28.000 (2018). This approach has spread beyond criminal enforcement to civil regulatory agencies, such as the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). *E.g.*, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, 76 SEC Docket 220 (Oct. 23, 2001) ("Seaboard Report"); U.S. COMMODITY FUTURES TRADING COMM'N, ENFORCEMENT ADVISORY: COOPERATION FACTORS IN ENFORCEMENT DIVISION SANCTION RECOMMENDATIONS (Jan. 19, 2017), https://www.cftc.gov/sites/default/files/idc /groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf.

[13] JUSTICE MANUAL, FCPA Corporate Enforcement Policy, FCPA Corporate Enforcement Policy, 9-47.120.

including DPAs and NPAs, generally targeted at firms that self-report or cooperate.[14] The international debate surrounding such reforms has largely focused on the broad question of whether an instrumental, deterrence-focused approach to rules and policies concerning corporate criminal liability and enforcement settlements is desirable. In the U.S. as well, critiques of the system of corporate criminal enforcement have been directed mostly at the manner in which enforcers have settled large corporate actions, including the type and size of sanctions imposed on firms (as well as individuals) and the form of criminal resolutions.[15]

These debates have focused on comparative analysis of liability regimes without attending sufficiently to a host of other laws—which we refer to as the laws governing corporate investigations—that determine the extent to which enforcement authorities benefit from inducing corporations to conduct and share with them the fruits of compliance efforts and internal investigations.[16] The law governing corporate investigations includes four important fields: (1) doctrines determining employees' rights during public and private interrogation, including laws on self-incrimination and rights to counsel; (2) employment laws governing employers' ability to discipline and terminate employees for failure to cooperate in investigations, including both substantive and procedural rights of employees; (3) laws determining employers' access to employees' workplace communications and activities, including data privacy and surveillance rules; and (4) the law governing the activities of counsel

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[14] *See, e.g.*, *Loi 2016-1691 du 9 décembre 2016 relative à la transparence à la lutte contre la corruption et à la modernisation de la vie économique* [Law 2016-1691 of December 9, 2019 on Transparency in the Fight Against Corruption and the Modernization of Economic Life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 10, 2016 ("*Sapin II*"); U.K. SERIOUS FRAUD OFFICE, *Deferred Prosecution Agreements*, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements (last visited Jan. 30, 2019); U.K. SERIOUS FRAUD OFFICE ET AL., *Guidance on Corporate Prosecutions*, https://www.sfo.gov.uk/?wpdmdl=1457 (last visited Jan. 30, 2019). For a discussion of these reforms, see Arlen, supra note 3.

[15] *See, e.g.*, Uhlmann, supra note 11; see also Miriam Baer, *When the Corporation Investigates Itself*, at 308, 326-28, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 87 (Jennifer Arlen ed. 2018) (cautioning that corporations relied on to investigate may not fully seek to detect and reveal misconduct). In addition, recent court decisions express concern about practices involved in government-incentivized investigations by private corporations. *See* United States v. Connolly, 2019 WL 2120523 (S.D.N.Y. May 2, 2019).

[16] Kevin Davis makes a similar point, emphasizing the application of a central point from comparative law studies that the effects of adopting a given doctrine depend heavily on the surrounding legal environment, including institutional arrangements. KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY, 154-55 (2019).

for corporations and their employees, including attorney-client privilege and work product doctrines.[17]

This Article offers three contributions to our normative understanding of corporate criminal enforcement policy. First, it shows that the value of inducing corporations to investigate and provide prosecutors with information about misconduct rests, to a considerable degree, on a range of U.S. laws—laws governing corporate investigations—that give firms a comparative advantage over enforcers in gathering evidence of corporate misconduct, particularly in the early stages of inquiries. Second, it demonstrates that most other countries currently pursuing reforms in the area of corporate crime have materially different laws controlling public and private access to evidence of white-collar offenses. These differences can dramatically alter both the expected value of corporate investigations and the relative positions of corporations and enforcement authorities in investigating corporate misconduct, such that public officials overseas may be in an equivalent, or even superior, position to private corporations to investigate and gather evidence. Finally, we examine how these differences can fundamentally alter the manner in which effective enforcement policy can and should incentivize and reward firms for private efforts to reduce corporate crime.

There are, of course, extensive additional differences across legal systems and nations, too numerous to count and too complex to treat in a single article, that influence the progress of efforts to expand corporate criminal liability and public enforcement.[18] These include, most prominently, laws and institutions generating and controlling prosecutorial discretion, the extent to which civil regulatory and liability regimes are available alongside corporate criminal liability, the scope of substantive liability for white collar offenses, and cultures and norms that

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[17] *See* Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613 (2007); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311 (2007).

In defining the law governing corporate investigations we focus on those laws governing corporate investigations that would persist after introduction of DPAs, with the attendant increase in prosecutorial discretion. For a discussion of current procedural differences in prosecutorial discretion in the U.S. and Germany see Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L. J. 126, 159-65 (2008).

[18] *See* Michele Graziadei, *Comparative Law and the Study of Transplants and Receptions* in THE OXFORD HANDBOOK OF COMPARATIVE LAW (M. Reimann & R. Zimmerman eds., 2006); Mathias Siems, *Malicious Legal Transplants*, 38 LEGAL STUDIES 103–19 (2018); Karen J. Alter, Laurence R. Helfer & Osvaldo Saldias, *Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice*, 60 AM. J. COMP. L. 629 (2012); Katerina Linos, *When Do Policy Innovations Spread? Lessons for Advocates of Lesson-Drawing*, 119 HARV. L. REV. 1467 (2006); Frank Dobbin, Beth Simmons & Geoffrey Garrett, *The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?*, 33 ANN. REV. SOCIOLOGY. 449-72 (2007).

influence management and employee behavior. This Article's comparative focus is solely on the laws governing investigative powers. Because a primary goal and effect of introducing DPAs (and their equivalents) is to enhance the scope and role of corporate investigations, the doctrines governing corporate investigations are the logical place to begin expanding analysis of how enforcement of corporate criminal liability is apt to differ across legal systems. In addition, investigative law is, at present, an area in which foreign jurisdictions active in corporate enforcement vary substantially, not only with respect to U.S. law but also among themselves.

In Part I of this Article, we explain the United States model of corporate criminal liability and describe how that model is influencing the development of law and its enforcement in other nations. In Part II, we explain the doctrines in American law that constitute the law of corporate investigations, and we show how those laws allocate powers between the government and firms. In Part III, we explain how the investigative laws of other nations greatly differ, and thus place governments and corporations in different positions relative to investigating corporate misconduct. In Part IV, we examine how differences in relative access to and control over evidence between corporations and enforcers affects analysis of how to shape law and settlement policies to deal effectively with corporate crime.

I. CORPORATE CRIMINAL LIABILITY IN THE U.S. AND OVERSEAS

This Part discusses the U.S. approach to deterring corporate crime and the steps other countries are taking to follow the U.S. model. We discuss how the U.S. Department of Justice (DOJ) has pursued a policy that seeks to target liability at individual wrongdoers by structuring corporate liability in a manner designed to induce corporations to both detect and self-report misconduct, and to aid government investigations by conducting, and sharing the fruits of, private investigations. We then describe how other countries have begun reforming their systems in the direction of the U.S. approach, by both expanding the scope of corporate criminal liability and introducing negotiated corporate settlements.

A. Settlement and U.S. De Facto *Corporate Criminal Liability*

The American approach to corporate criminal liability and its enforcement begins with the nature of crime within organizations. Misconduct by large economic enterprises can impose greater social harms than individual crime due to leveraging effects of team production and firm assets. The size and complexity of these organizations also makes crime hard to detect and

punish. Wrongful business behaviors often are embedded within ordinary economic activities and frequently implicate statutes, like fraud laws, that have contestable boundaries.[19] Low risk of detection impedes governments' efforts to use criminal sanctions to deter misconduct because people tend not to fear sanctions that they believe are rarely imposed.[20]

In addition, misconduct by large firms, particularly publicly held firms, can be particularly difficult to deter because employees regularly benefit personally from such actions and thus are not adequately deterred by the mere threat that the firm may be sanctioned.[21] Employees are less likely to commit crimes when they face a material and salient threat of going to jail.

In the U.S. system, enforcers learned that corporations are able to detect and investigate individual misconduct at far less public cost than if the government attempted to police corporate crime in a manner comparable to policing of street crime. Firms can deploy compliance programs to deter and detect misconduct, pursue internal investigations to develop proof of misconduct, report detected wrongdoing to the government, and assist the government in gathering probative evidence of crime.[22]

In light of structural and political realities that prevent prosecutors and police from having the resources and public support to comprehensively and intrusively surveil activities inside large corporations, business firms thus can be viewed not only as a source of crime but also as a resource in crime prevention.[23] Policing activities by firms make employees less likely to violate the law, both because a firm's systems may prevent them from doing so in the first instance and because employees are less likely to engage in misconduct when faced with the higher probability of detection and sanctioning that results from the coordinated efforts of their employers and government enforcers. Public enforcement policies not only can promote

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19 *See* Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547 (2015); Samuel W. Buell, *"White Collar" Crimes* in THE OXFORD HANDBOOK OF CRIMINAL LAW pp. 837-61 (Marcus D. Dubber & Tatiana Hörnle eds. 2014).

20 *E.g.*, Arlen & Kraakman, supra note 10; Arlen, supra note 10.

21 Corporate crime, in other words, is an agency cost. *See* Jonathan Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315 (1991); Arlen, supra note 10; Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691 (1992).

22 Arlen & Kraakman, supra note 10. Firms also can deter through internal systems that make it more difficult to commit misconduct and through employee compensation and retention policies that encourage compliance and sanction agents who violate the law. *Id*.

23 BUELL, *supra* note 11, chs. 4-5; Arlen & Kraakman, supra note 10; Arlen, supra note 10.

private policing but, depending on the government's particular policy goals, also can structure corporate enforcement policy to differentially reward preventive compliance efforts, self-reporting of detected crime, and cooperation in the gathering and furnishing of evidence.

The doctrine of corporate criminal liability is the starting point for this model of enforcement. In the U.S., corporations can be held liable for all crimes committed by all employees in the scope of employment through *respondeat superior*.[24]

As corporate enforcement grew in the 1980s and 1990s, it became apparent that strict *respondeat superior* liability—which holds a firm liable for any crime by any employee at any level, regardless of whether the firm had an effective compliance program or engaged in self-reporting and cooperation—is not the best way to deter crime by individual actors within large firms. Firms held liable for all employee misconduct will be discouraged from seeking to discover, disclose, and investigate if such efforts will only assist enforcement authorities in imposing higher corporate sanctions.[25]

The Criminal Division of the DOJ and influential United States Attorneys' Offices, through a series of policy memoranda and practices developed across many corporate criminal settlements,[26] replaced the *de jure* rule of *respondeat superior* with a *de facto* regime for sanctioning and controlling corporate crime. This regime provides incentives for companies to self-report and cooperate, by offering more favorable forms of resolution and lower sanctions.[27] Companies that self-report misconduct and fully cooperate generally can expect to (1) resolve criminal matters without a formal conviction through the use of deferred or non-prosecution agreements (DPAs or NPAs), (2) be subject to reduced criminal fines, and (3) be less likely to be subject to mandatory oversight in the form of a monitor or other intrusive internal reforms.[28]

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[24] *N.Y. Central*, 212 U.S. at 481; Thomas J. Bernard, *The Historical Development of Corporate Criminal Liability*, 22 CRIMINOLOGY 3 (1984); *Developments in the Law—Corporate Crime—Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979).

[25] Arlen, supra note 10; Arlen & Kraakman, supra note 10.

[26] *See* JUSTICE MANUAL, *supra* note 5, § 9-28.000; GARRETT, *supra* note 11; Arlen, supra note 5; Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C. L. REV. 823 (2018).

[27] A large and maturing corporate criminal defense bar—comprised of many lawyers with federal prosecution experience—has worked in coordination with enforcers to develop the *de facto* practice of corporate enforcement. *See* BUELL, supra note 11, at chs. 5-6; Buell, *supra* note 26; Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practice in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221 (2011).

[28] *See* BUELL, supra note 11; Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 U. CHI. L. REV. 323 (2017).

Indeed, under current policy, in some circumstances companies that self-report, fully cooperate, and remediate are presumed to be entitled to a declination of prosecution.[29] These guidelines embrace a model in which the government uses the stick of severe corporate criminal sanctions, together with the carrot of their partial or complete elimination, to extract information from firms about either the existence of misconduct or the identity of perpetrators and the nature of the evidence of their guilt.[30]

U.S. prosecutors could maximize the incentive to self-report by reserving avoidance of criminal conviction, through a DPA or NPA, for companies that self-report as well as cooperate. But they have not done so because the value to the government of corporate cooperation in investigating crime, even in the absence of self-reporting, is so substantial. Full credit for cooperation, which can result in a DPA or NPA, requires a firm to conduct a thorough and proactive internal investigation, collect and preserve all documentary records (especially overseas documents), disclose all relevant facts about individual wrongdoing (including attribution of facts to identified sources), and "de-conflict" and "make available" relevant witnesses over whom the corporation may exercise control.

The public benefits of corporate cooperation are likely to be particularly large under one or more of three conditions: when prosecutors are in the early stages of an investigation, before they have sufficient evidence of individuals' culpability to threaten individual liability as a means of producing cooperating witnesses; when employees and documents relevant to the misconduct can be identified only after digesting large masses of potentially relevant materials; and when information is located overseas and beyond the reach of U.S. legal procedures. The

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[29] Under the current policy, self-reporting, together with cooperation and remediation, can earn corporations a declination (that is, exemption from prosecution)—provided that the firm does not have a history of prior violations, otherwise demonstrates no "aggravating circumstances" relating to the offense or the offender, and agrees to disgorgement of unlawful gains. If the firm does not get a declination, a firm that undertakes these activities can obtain a fifty percent reduction in the fine. JUSTICE MANUAL, *supra* note 5, § 9-47.120. Although the DOJ originally adopted this policy for FCPA enforcement actions, JUSTICE MANUAL, *supra* note 5, § 9-47.120, but later extended it to all actions by the Criminal Division. Rod J. Rosenstein, Deputy Attorney General, *Remarks at the 32nd Annual ABA National Institute on White Collar Crime* (March 2, 2018).

[30] In addition, DPAs regularly require companies to undertake remedial measures designed to deter and prevent future wrongdoing, including disgorgement of the benefits of misconduct, adoption of reforms to the company's compliance program, and acceptance of an external monitor. These measures potentially promote the goals of specific deterrence and rehabilitation. JUSTICE MANUAL, *supra* note 5 § 9-47.120; *see generally* Arlen & Kahan, *supra* note 28 (discussing voluntary and mandated remediation measures); Garrett, *supra* note 4 (same); *see also* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007); Jonathan J. Rusch, *Memorandum to the Compliance Counsel, United States Department of Justice*, 6 HARV. BUS. L. REV. ONLINE 69, 86 (2016).

benefits of using DPAs and NPAs—which, unlike formal conviction, typically do not trigger potentially ruinous collateral consequences to corporations such as debarment from an industry or line of business[31]—to encourage cooperation is seen as outweighing the reduction in incentives to self-report that results from offering access to DPA and NPAs to firms that merely cooperate after government detection.

To be sure, there is abundant skepticism about whether U.S. enforcement policy is calibrated to achieve its goals effectively, and whether prosecutors have pursued this model of corporate crime control with sufficient zeal.[32] Many have accused the DOJ of failing to follow through on the principal deterrence benefits of this policy: the ability to use corporate cooperation to facilitate prosecution of individual violators.[33] Still, as measured by expansion in corporate compliance programs,[34] increase in internal corporate policing, and the numbers and size of U.S. enforcement matters resolved in recent years, U.S. prosecutors appear, at least, to have benefitted from the enhanced access to information about corporate misconduct that this system has produced.

B. THE U.S. MODEL OF CORPORATE CRIMINAL ENFORCEMENT OVERSEAS

European and other nations have been adopting or expanding their corporate criminal regimes and introducing DPA-like corporate criminal resolutions. This movement has been driven in part by growing concern over corruption of public officials in international business affairs and shifting European norms about bribery.[35] It also is a response to the substantial sanctions imposed by U.S. authorities on European and other global companies, as well as efforts of the OECD to combat under-enforcement against corrupt companies by European and

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31 *See* Cindy Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime* in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 87 (Jennifer Arlen ed. 2018).

32 *See, e.g.*, GARRETT, *supra* note 11.

33 *See* sources cited *supra* note 11. Others have questioned the competence of prosecutors to design and manage programs of corporate reform. *See* Arlen & Kahan, *supra* note ___; *see generally* ANTHONY S. BARKOW & RACHEL E. BARKOW, eds., PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (2011).

34 *See* Miriam Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949 (2009); Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003 (2017).

35 For comprehensive treatment of these developments, see DAVIS, *supra* note 16. According to a recent OECD report, countries that bring corporate enforcement actions for foreign corruption tend to use non-trial corporate criminal resolutions. OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention (2019), https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf.

other nations.[36] Especially since the global financial crisis, European regulators have developed an increasing appreciation for the costs of all corporate crime and the need to think about the problem of its control.[37]

Many countries are adopting corporate criminal liability or expanding its scope. For example, in 2010, the United Kingdom adopted comprehensive new anti-bribery legislation with both domestic and international applications.[38] This statutory scheme may prove broader than even the Foreign Corrupt Practices Act (FCPA), turning on arguably less demanding mens rea requirements and extending its jurisdiction more broadly. The U.K. Bribery Act of 2010 imposes *respondeat superior*-style corporate criminal liability for all employee bribery (with the possibility of an affirmative defense for compliance efforts) and even attaches individual criminal liability to senior managers of firms who do not themselves commit bribery but allow it to be committed with their "consent or connivance."[39]

In 2016, the French parliament enacted *Sapin II*, an extensive new legal regime governing bribery and anti-bribery enforcement.[40] *Sapin II* imposes administrative liability on

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[36] Brewster & Buell, *supra* note 8; Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIRICAL LEGAL STUD. 409 (2014); Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775 (2011).

[37] The United Kingdom has become a leader and partner with the United States in focusing on financial sector crime, as shown in the multiple and coordinated prosecutions on both sides of the Atlantic relating to the LIBOR scandal, a problem involving criminal securities fraud and antitrust violations. *See* UK Serious Fraud Office, Libor Cases, https://www.sfo.gov.uk/cases/libor-landing/; Liam Vaughn & Gavin Finch, *Libor Scandal: The Bankers Who Fixed the World's Most Important Number*, THE GUARDIAN, (Jan. 18, 2017); James McBride, *Understanding the LIBOR Scandal*, Council on Foreign Relations Backgrounder (Oct. 12, 2016). Even Switzerland, with its participation in the FIFA prosecutions and its somewhat greater willingness to to cooperating with efforts to overcome banking secrecy, appears to be moving in a similar direction. *See* Luke Brown, *Sepp Blatter Under Criminal Investigation by Swiss Authorities Over "Disloyal" Payment to Michel Platini*, THE TELEGRAPH (Sept. 26, 2015); *Swiss Prosecutor Appeals for Cooperation on FIFA Case File*, N.Y. TIMES (Apr. 20, 2018).

[38] BRIBERY ACT 2010, c 23 (U.K.).

[39] *Id.* §§ 7, 14; *see also* Liz Campbell, *Corporate Liability and the Criminalisation of Failure*, 12 LAW & FIN. MKTS REV. (2018); Jonathan J. Rusch, *Section 7 of the United Kingdom Bribery Act 2010: A "Fair Warning" Perlustration*, 43 YALE J. INT'L LAW Online 1 (2017). In Ireland, the Law Reform Commission has delivered a comprehensive report recommending a host of changes in Irish law relating to corporate criminal liability and white collar offenses. The report recommends expansion of corporate criminal liability to hold firms responsible for most offenses that would be covered by U.S.-style *respondeat superior* liability if there were also a potential defense to liability for effective corporate compliance. LAW REFORM COMM'N OF IRE., REPORT: REGULATORY POWERS AND CORPORATE OFFENCES 417-28 (2018). The Commission also recommended the creation of a new "Corporate Crime Agency." *Id.* at 17-40.

[40] Loi 2016-1691 du 9 décembre 2016 relative à la transparence à la lutte contre la corruption et à la modernisation de la vie économique [Law 2016-1691 of December 9, 2016 on Transparency, the Fight Against Corruption, and the Modernization of Economic Life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 10, 2016 ("*Sapin II*"). For a discussion of Sapin II see, Arlen, *supra* note

companies that do not have a sufficient anticorruption compliance program, criminal liability for influence peddling, with extraterritorial application; and creates a new anti-bribery enforcement agency.

In addition, countries in Europe and elsewhere have adopted, or are considering the introduction of DPA-style corporate criminal settlements, often with the explicit goals of encouraging corporate self-reporting and cooperation, as well as settlement.[41] For example, the U.K. Serious Fraud Office is now empowered to propose to courts negotiated DPAs—authority which is targeted at firms that self-report wrongdoing, fulfill obligations to assist prosecutors, and improve compliance efforts, and it has issued written guidance for corporations on how to obtain credit for assisting in investigations.[42]

The French *Sapin II* legislation introduced a form of non-trial corporate criminal resolution akin to DPAs.[43] Canada also has introduced DPAs for some offenses,[44] as has Singapore.[45] Efforts are underway in other countries, including Australia, Switzerland, and

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3. In addition, Germany has gone from permitting corporations to treat overseas bribes as a tax deductible business expense to becoming a willing partner in the OECD effort to expand anti-bribery enforcement. *See* OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Germany* (March 2011); Carter Dougherty, *Prosecutions of Business Corruption Soar in Germany*, N.Y. TIMES (Feb. 15, 2007). Germany is entertaining the adoption of corporate criminal liability, an idea once unthinkable in a system of criminal law predicated on moral theory. *See* Rübenstahl & Brauns, *supra* note 9.

41 OECD, *supra* note 35.

42 *See*, *e.g.*, Serious Fraud Office v. Rolls-Royce PLC [2017], No. U20170036, https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf (Eng.) (judgment of Sir Brian Leveson in the Southwark Crown Court approving deferred prosecution agreement); U.K. DIR. OF PUB. PROSECUTIONS, U.K. SERIOUS FRAUD OFFICE & U.K. DIR. OF THE REVENUE & CUSTOMS PROSECUTION OFFICE, *supra* note 11; *Deferred Prosecution Agreements*, *supra* note 11; UK Serious Fraud Office, SFO Operational Handbook: Corporate Co-Operation Guidance (2019), https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/. In the U.K., resolution through a DPA is subject to a form of judicial review that courts are not able to undertake in the U.S. *See* Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements*, 8 J. LEGAL ANALYSIS 191 (2016); Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483 (2017).

43 Law 2016-1691 of December 9, 2016 (Fr.); *Client Update: First French DPAs for Corruption Offences*, DEBEVOISE & PLIMPTON (Mar. 17, 2018), https://www.debevoise.com/insights/publications/2018/03/first-french-dpas-for-corruption; see Arlen, *supra* note 3.

44 Milos Barutciski, et al., *Canada Now Has Deferred Prosecution Agreements*, FCPA Professor (Sept. 24. 2018); see also Government of Canada, Department of Justice, Backgrounder: Remediation Agreements and Orders to Address Corporate Crime (March 27, 2018) https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html.

45 *See* Criminal Justice Reform Bill 2018 (Bill 14 of 2018) (Singapore). Chile and the Netherlands also allow prosecutors to enter into DPA-like resolutions with corporations. See OECD, *supra* note 35, at 21, 49-50. Other countries permit prosecutors to use some form of non-trial resolutions to involve criminal or administrative cases against corporations for corruption, including Brazil, Germany, Italy, Norway, and Switzerland. Id. at 21, 23, 27, 60; Davis, *supra* note 16, at 173.

Ireland, to permit the use of DPA-style criminal settlements.[46] In addition, the OECD is formulating principles for corporate settlements in anti-bribery enforcement. These developments are particularly striking in light of very different attitudes, traditions, and institutional arrangements in Europe versus the United States with respect to prosecutorial discretion and plea bargaining.[47]

Given these accelerating international developments in the area of corporate liability and settlements, a pressing question for jurisdictions pursuing enhanced deterrence of corporate crime is whether they can increase the ability of prosecutors to detect and sanction corporate misconduct by following U.S.-style approaches to liability and settlements.

As the remainder of this Article will explain, there is cause for skepticism. As we explain below, the benefits to U.S. enforcement authorities of the U.S. system's mix of rewards for corporate self-reporting, cooperation, and remediation depends greatly on doctrines and features of U.S. law unrelated to the law of corporate criminal liability. These benefits arise from laws governing the right against self-incrimination in public and private investigations, employment law, data privacy laws, and laws governing legal privilege that impact the relative efficacy of public and private investigations. Thus, before one can further consider the impact of adopting enforcement and settlement regimes that follow in the path of the U.S., one must understand the contrast between U.S. law governing corporate investigations (explained in Part II) and the investigative laws of other countries (explained in Part III).

II. THE LAW OF CORPORATE INVESTIGATIONS IN THE U.S.

U.S. officials benefit from providing incentives to firms to detect, self-report, investigate and provide evidence to government authorities because corporations generally are better able than government investigators to detect and investigate their employees' misconduct. Yet the benefit to U.S. authorities of cooperate cooperation depends on factors

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46 The Parliament of the Commonwealth of Australia, Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1108; LAW REFORM COMMISSION OF IRELAND, REPORT: REGULATORY POWERS AND CORPORATE OFFENCES 266-79 (2018); see OECD, *supra* note 35, at 34-35, 50.

47 *See* Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective*, 12 INT'L REV. CRIM. JUST. 1 (2002). The exciting conversation about corporate crime control in Europe, Asia, and elsewhere is extending into other important areas, such as legal regimes affecting whistleblowers, regulatory systems governing corporate disclosure, and individual liability for corporate managers failure to supervise.

external to enforcement policy or firm themselves. Instead it derives from how corporate criminal liability and settlement policies interact with U.S. laws controlling the relative abilities of the government and private corporations to detect and investigate business crime. In the U.S., doctrines relating to self-incrimination, employee rights during questioning, data privacy, and legal privileges combine to place firms in a superior position to the government when seeking to acquire evidence of misconduct, particularly at the early stages of an investigation. We refer to these laws as the laws governing corporate investigations.

The literature on corporate crime has not sufficiently appreciated how essential U.S. evidentiary and procedural laws are to the effectiveness of threatening corporations with criminal liability in order to uncover and prove misconduct within firms. This Part addresses that deficit. It also sets the stage for this Article's discussion, in Parts III and IV, of how differences in investigative law in other countries mean that, when evaluating whether to follow the U.S. approach to both the scope of liability and negotiated settlements, other jurisdictions cannot count on obtaining equivalent benefits from corporate policing without substantial changes to enforcement policies and institutions.

A. INVESTIGATIONS OF CORPORATE CRIME

Before proceeding to the details of investigative laws, a brief description of the current shape of corporate investigations will clarify the doctrinal discussion that follows. When the Justice Department sanctions large multinational firms, the resulting settlement or conviction most often relates to an investigation in one of a few areas: foreign commercial bribery, large-scale fraud such as accounting or consumer fraud, fraud on the government (especially with regard to health care programs and defense contracts), and harm to consumers and the environment through corporations' products and industrial activities.[48]

A first, and critical, investigative step is how a firm or a prosecutor learns about the matter. The most common methods of initial detection are through a firm's compliance systems (e.g., internal reporting by employees, data analytics, or and other monitoring systems), or, in the case of government detection, a whistleblower report, investigative journalism, or

[48] The statutes and regulations available to U.S. prosecutors to sanction these activities are, for practical purposes, countless and thus are far less influential in determining the course of investigation of corporate crime than many public and foreign observers are apt to think.

disclosure by an cooperating defendant implicated in other misconduct, or, less commonly, through detection by regulators..[49]

Following detection, the firm and/or public enforcers pursue preliminary investigation. At this initial stage, the first objective is to determine whether misconduct occurred and, if so, to assess the scope of the wrongdoing and associated legal risks, especially the identities of implicated managers and employees. The company will do this by examining internal documents (including employees' emails) and interviewing employees. If the government is not yet aware of the wrongdoing, an urgent question for the firm is whether to self-report its investigation to enforcers or to attempt to manage the legal risks in-house. For prosecutors, the initial task is to determine whether there is sufficient evidence of potential misconduct to investigate at all, and, if so, what should be the scope and resources devoted to the investigation. They then need to determine who to interview—which requires them to identify the non-implicated employees who may have information relevant to the investigation. Prosecutors conducting initial interview often do not have sufficient evidence of misconduct to pressure implicated witnesses to cooperate. Indeed, initial interviews often enable enforcement authorities to determine what documentary and electronic evidence to seek.

By the time the basic nature of the wrongdoing and the rough scope of involved personnel become clear, the corporation will almost certainly have retained outside counsel. Such private lawyers will conduct witness interviews and data recovery and review on behalf of the company, often with the assistance of other professionals such as forensic accountants. The corporation will also have hired separate counsel to represent many of its employees, especially those who might be implicated in the wrongdoing. At this stage in a government investigation, prosecutors may choose to enter into cooperation deals with more ancillary implicated employees.

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[49] An analysis of corporate fraud indicates that government investigators tend to learn about misconduct from people within the firm, as opposed to through their own monitoring. Alexander Dyck, et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. Fin. 2213 (2010). Public enforcement only detects a small amount of the corporate misconduct that occurs, however. Companies' internal systems detect, and are able to substantiate, substantially more crime. See Eugene F. Soltes, *The Frequency of Corporate Misconduct: Public Enforcement versus Private Reality*, J. FIN. CRIME (forthcoming) (analysis of three publicly-held firms' confidential internal corporate records on substantiated misconduct shows that the number of substantiated corporate misconduct detected by a *single* firm exceeded the *total* number of corporate criminal resolutions involving all publicly-held firms in any given year).

The firm and the government will then move to a phase in which the primary objective is to gather complete and legally admissible evidence of the wrongdoing, both documentary and testimonial. This stage, which often continues well past the point at which the corporation has entered into a settlement with prosecutors, commonly involves private and public lawyers and their agents conducting interviews, data analysis, document review, and sometimes grand jury testimony, all while regularly communicating with each other about the course and findings of the investigation. Before and after any settlement, the firm also will implement internal reforms either voluntarily or as mandated by the settlement. Reforms typically will include changes to personnel and sometimes governance systems, improvements to the corporation's compliance programs, and submission to oversight by an independent monitor. These activities can lead to the detection, and potentially the disclosure of evidence of further detected wrongdoing.[50]

B. ACCESS TO EMPLOYEES' STATEMENTS AND TESTIMONY

At each stage of the investigation, witnesses are frequently essential to identifying and proving a criminal violation. Documents and other forensic materials can, of course, be decisive. But often their probative power, especially for complex business crimes, depends on explanatory testimony of persons who understand and can relate their meaning. As we show in this Section, U.S. criminal procedure and employment law combine to give corporations distinct advantages relative to prosecutors in obtaining testimonial evidence from employees, especially at the early stage of an investigation of corporate crime.

1. Prosecutors' Ability to Obtain Information from Employees: Fifth Amendment, Immunity, and Right to Counsel

Corporate personnel with knowledge of corporate wrongdoing often will be involved in the misconduct and have potential exposure to prosecution.[51] Given the factual and doctrinal complexity of most white-collar crimes, coupled with the extremely broad scope of American prosecutorial discretion, employees close to the misconduct will at least have reasonable apprehension of being charged at the beginning of a criminal inquiry.

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50 *See supra* note 30.

51 *See* Miriam Baer, *Reconceptualizing the Whistleblower's Dilemma,* 50 U.C. DAVIS L. REV. 2215, 2234-67 (2017).

Yet the U.S. Constitution's Fifth Amendment guarantees all such employees a right against self-incrimination, erecting a potential barrier to prosecutors' acquiring their evidence.[52] The core guarantee is that the government may not prove a person's guilt in a criminal trial by offering in evidence verbal or written statements of that person that were compelled by government action.[53] A subpoena, of course, is deemed compulsory because a witnesses who fails to comply faces sanctions, including imprisonment.[54] Therefore, an individual who reasonably fears self-incrimination, even indirectly, has a right to invoke the Fifth Amendment as grounds for refusing to testify in a grand jury, courtroom, or other proceeding that is subject to contempt sanctions.[55]

Of course, outside of compelled proceedings, anyone in the U.S. has the liberty to refuse to answer questions without fear of legal sanction. However, with the Fifth Amendment out of the picture, other consequences may freely flow from such refusal, including incrimination through later official use of the person's refusal to speak and, as discussed below, private sanctions including employment consequences.[56] Thus, without the assistance of private firms, Fifth Amendment doctrine would limit the government's options in obtaining testimony to prove corporate crimes, particularly early in an investigation.

One might think that prosecutors could rely on compelling the testimony of witnesses who have no potential criminal liability, and thus do not have a right against self-incrimination. This route is not promising in the context of corporate crimes for two reasons. First, such crimes are rarely provable without the testimony of those who were themselves involved in illegal activity because of predictable efforts by violators to keep wrongdoing secret from those who are not members of criminal conspiracies.[57] Second, law and courts take a deferential posture

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52 U.S. CONST. amend. V; *see also* Kastigar v. United States, 406 U.S. 441 (1972); Lisa Kern Griffin, *Silence, Confessions, and the New Accuracy Imperative*, 65 DUKE L.J. 697 (2016).

53 *See* Chavez v. Martinez, 538 U.S. 760, 766-67 (2003); Ullman v. United States, 350 U.S. 422, 430 (1956).

54 18 U.S.C. § 402; Int'l Union, UMWA v. Bagwell, 512 U.S. 821 (1994). *Miranda* doctrine is rarely at issue in the investigation of corporate crime in the U.S. because questioning of suspects in police custody is so uncommon. Miranda v. Arizona, 384 U.S. 436 (1966). Unlike some nations, the U.S. does not permit even temporary arrest solely for investigative purposes. The Supreme Court, in spite of the opportunity to do so, has declined to rule that questioning before a grand jury constitutes custodial interrogation. United States v. Washington, 431 U.S. 181 (1977).

55 Brown v. Walker, 161 U.S. 591, 597-601 (1896).

56 *See* Griffin, *supra* note 52, at 708-09.

57 *See*, *e.g.*, United States v. Provenzano, 615 F.2d 37, 44-45 (2d Cir. 1980).

towards an individual's assertion that she reasonably fears, ex ante, that answering an investigative question might further later prosecution of the individual.[58] Even peripheral witnesses, when well advised by counsel, frequently resist government questioning on Fifth Amendment grounds, especially early in an investigation when neither prosecutors nor defense counsel can confidently predict who, if anyone, will be implicated in wrongdoing.

Another option for prosecutors would be to attempt to build a case on the testimony of occasional uncounseled individuals who voluntarily waive their Fifth Amendment right and submit to investigative questioning. Less well advised or informed employees, those especially keen on currying favor with employers, and those with strong appetite for legal risks might choose to answer questions freely. The opportunity to surprise and deal directly with an unrepresented person that is prized by any detective is rare in major corporate criminal investigations. Firms typically have learned about the potential wrongdoing and, as we discuss below, have either had firm counsel contact their employees before the government commences investigative activities, or have hired individual counsel for their employees soon thereafter. State rules of attorney conduct—which bind federal prosecutors under a 1998 statute[59]—prohibit prosecutors and their agents from contacting individuals who are known to be represented by counsel without counsel present, even during the earliest stages of a criminal investigation before any person has been charged.[60] These rules can particularly inhibit corporate investigations because most states have interpreted them as applying, when a company is represented by counsel, to contacts with senior personnel, while some states have found them to apply to contacts with lower-level employees and even, if privileged information is sought, to contacts with former employees.[61]

A prosecutor seeking evidence from an informed individual represented by counsel thus

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58 *See* Hoffman v. United States, 341 U.S. 479, 485-87 (1951); Davis v. Straub, 430 F.3d 281, 287-90 (6th Cir. 2005). Prosecutors generally eschew the onerous and often fruitless task of litigating whether a particular witness may assert the right to silence, especially during the investigative stage of a matter.

59 28 U.S.C. § 530B.

60 *See* AMERICAN BAR ASSOC., MODEL RULES OF PROFESSIONAL CONDUCT R. 4.2 (2018); United States v. Hammad, 858 F.2d 834 (2d Cir. 1988); *see also* Massiah v. United States, 377 U.S. 201 (1964) (explaining the Sixth Amendment dimension to government contacts with charged defendants represented by counsel).

61 *See*, *e.g.*, Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621 (S.D.N.Y. 1990); Meachum v. Outdoor World Corp., 654 N.Y.S.2d 240 (Sup. Ct. 1996); *see also* JUSTICE MANUAL, *supra* note 5, Crim. Resource Manual § 296 (summarizing uneven state of the law and advising federal prosecutors to study local law before acting).

must obtain a waiver of the Fifth Amendment right, which will come at a price. This price will vary, of course, according to the parties' bargaining strength. At the early stages of a corporate investigation, when the government has not yet gathered enough evidence to determine whether a crime has been committed, much less which employees might have been involved, an implicated individual has little to fear from the government if she does not cooperate and thus little reason to waive her right to silence.

To obtain information from informed, savvy witnesses who assert their rights, prosecutors must deploy a costly measure: the statutory procedure for immunizing witnesses in order to obtain evidence in the face of the Fifth Amendment right. For statutory immunity to comply with constitutional requirements, it must fully "supplant" the Fifth Amendment right, that is, place the immunized witness in no worse position than if she had remained silent.[62] Therefore, testimony compelled under such immunity—known as "derivative use" or "*Kastigar*" immunity—may not be used against a witness in any manner, even indirectly as a lead to acquiring evidence. Functionally, this means that later prosecution of an immunized witness will be extremely difficult or even impossible for prosecutors.[63]

At later stages of a corporate investigation, the government may be able to extract a waiver of the right to self-incrimination as part of a guilty plea that exchanges testimony for a reduced sentence or more limited form of immunity protection, but only if the government has solved the problem of how to assemble sufficient proof of wrongdoing in the early stages when witnesses lacked strong incentives to cooperate. Thus, if the government were to act alone, the Fifth Amendment—together with the pervasive and early presence of private counsel—would

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62 *See* 18 U.S.C. §§ 6002-6005; Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

63 *See*, *e.g.*, United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991); United States v. North, 920 F.2d 940 (D.C. Cir. 1990); United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); *see also* Stephen D. Clymer, *Compelled Statements from Police Officers and* Garrity *Immunity*, 76 N.Y.U. L. REV. 1309 (2001). For this reason, Justice Department guidelines disfavor grants of statutory immunity. JUSTICE MANUAL, *supra* note 5, § 9-23.000. It is rare that a prosecutor will be willing to apply to a court for immunity without first having obtained a "proffer" from the witness. The proffer process requires the witness to be willing to effectively give up any prospect of testifying in her own defense, or otherwise putting on a defense case, by previewing her testimony for the government in exchange for a limited form of "use immunity" that guarantees only that the government will not use her proffer statements as evidence in its case-in-chief. *See* Sample Proffer Agreement, United States Attorney, Southern District of New York (May 17, 2005), http://inns.innsofcourt.org/media/66719/2%20-%20SDNY%20Proffer.pdf; *see also* United States v. Velez, 354 F.3d 190 (2d Cir. 2004).

impose costly impediments to the investigation of corporate crime that could disable an investigation at the threshold.

2. Corporations' Ability to Obtain Information from Employees: State Action and Employment Law

In the U.S., corporations do not face similar restrictions when obtaining testimonial evidence from potentially implicated employees. The U.S. Constitution does not constrain non-governmental actors. Private corporations interacting with their own employees generally are not official actors under U.S. constitutional law, even when investigating in anticipation of cooperating with the government in the future.[64] Thus, private corporations can compel their employees to speak to representatives of the firm tasked with determining whether and where law violations have occurred.[65] If an employee refuses to answer at any time, the firm may lawfully terminate, demote, or reduce the compensation of the employee—and thus may obtain employee cooperation by credibly threatening to take such measures.[66] Thus, a firm can pressure employees to speak using the threat of termination and any resulting statements will not, as a matter of constitutional law, have been compelled under penalty of official sanction. In addition, employees do not have a constitutionally granted right to counsel during these interviews.[67]Employees of private corporations in the United States, the vast majority of whom do not have union representation, generally work under the terms of at will employment, meaning the employer can summarily fire the employee, without notice or an opportunity to be heard, as long as the firm does not act in violation of other law, such as statutory prohibitions

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64 *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 350-58 (1974); Jensen v. Farrell Lines, Inc., 625 F.2d 379 (2d Cir. 1980); *cf.* United States v. Slough, 641 F.3d 544 (D.C. Cir. 2011) (government military contractor operating overseas).

65 *See* Gilman v. Marsh & McLennan Cos., 826 F.3d 69 (2d Cir. 2016); *see also* D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155 (2d Cir. 2002); United States v. Solomon, 509 F.2d 863 (2d Cir. 1975); United States v. Antonelli, 434 F.2d 335 (2d Cir. 1970).

66 *Gilman*, 826 F.2d at 69.

67 *See* D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155 (2d Cir. 2002); United States v. Solomon, 509 F.2d 863 (2d Cir. 1975); United States v. Antonelli, 434 F.2d 335 (2d Cir. 1970).

The small percentage of private-sector workers who are represented by unions do have a statutory right to the presence of a union representative if the employee might be subject to discipline as a result of the interview. NLRB v. Weingarten, Inc., 420 U.S. 251 (1975); *see* ROBERT GORMAN & MATTHEW FINKIN, LABOR LAW: ANALYSIS AND ADVOCACY, § 16.4 (2013) (discussing *Weingarten* rights).

on discrimination.[68] This gives companies considerable leverage to pressure employees to cooperate. In addition, even senior managers working under protective employment contracts, or union members working under collective bargaining agreements, usually may be terminated "for cause," a condition that is likely to be met by a manager's refusal to obey a directive to cooperate with a firm's investigation.[69]

Prosecutors who obtain the fruits of such questioning from a cooperating corporation are free to use them as they please, including as evidence in court, even though, as matter of colloquial understanding, such statements have been quite coerced by the firm's threat of action against employees who remain silent.[70] As long as the corporation directs its own investigation, without being directed by prosecutors, the investigation will not be deemed to constitute state action, even if the government benefits in the end.[71]

To summarize, U.S. prosecutors face substantial practical and legal hurdles to obtaining individual testimony in the investigation of corporate crime, particularly at the initial stages of determining whether a crime has been committed and who may be implicated. Firms encounter much lower hurdles to obtaining the statements of their own employees. Prosecutors thus have powerful legal and practical incentives to induce firms to acquire witness testimony in exchange for leniency in corporate sanctioning.

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68 *See* RESTATEMENT OF THE LAW: EMPLOYMENT LAW § 2.01 (AMER. L. INST., 2014); *see* Samuel Estreicher & Jeffrey Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 347 (2014).

69 *See* RESTATEMENT OF THE LAW: EMPLOYMENT, *supra* note **Error! Bookmark not defined.** §§ 2.02, 2.04; *see also* Rachel Arnow-Richman, *Just Notice: Re-Forming Employment at Will*, 58 UCLA L. REV. 1 (2010); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

70 *See* United States v. Garlock, 19 F.3d 441 (8th Cir. 1994); *see also* Colorado v. Connelly, 479 U.S. 157, 166 (1986); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311 (2007).

71 Judges have concluded that a specific private investigation constituted state action when prosecutors exerted undue influence over the firm's investigation. E.g., United States v. Stein, 541 F.3d 130 (2d Cir. 2008); United States v. Stein, 435 F.Supp.2d 330 (S.D.N.Y. 2006); United States v. Connolly, 2019 WL 2120523 (S.D.N.Y. May 2, 2019). In *Stein*, for example, the court found that prosecutors had fully entwined themselves in the conduct of the firm by explicitly threatening the firm (KPMG, which was a partnership in the reputationally sensitive auditing business) with a disabling criminal conviction if it did not follow prosecutors' directives, which included instructions about precisely what the firm should say to its employees to induce employees to talk to the government, including without counsel. The court in *Connolly* likewise found that the government directed specific investigative measures, including individual interviews, while failing to conduct meaningful investigation of its own.

C. THE LAW OF LAWYERS: ATTORNEY-CLIENT PRIVILEGE AND JOINT DEFENSE

Firms' comparative advantage in obtaining evidence during corporate investigations in the U.S. depends on another area outside corporate criminal law: rules governing the attorney-client privilege and the freedom of corporations to hire counsel for their employees and share investigative information with such lawyers.

Firms are reluctant to work proactively to detect and fully investigate misconduct unless they are confident they can control the results of such efforts. Firms have an incentive to expend resources on investigating when they can benefit from sharing the fruits with enforcers and among defense counsel, while avoiding the costs of liability to adversarial third parties who would seek to exploit such evidence in private litigation. U.S. law on privileges and related matters gives firms substantial and early control over information gathered in corporate investigations, thereby enhancing private firms' investigative powers.

1. Counsel for the Firm: Attorney-Client Privilege and Work Product Protection

The American attorney-client privilege protects from disclosure all confidential communications between client and lawyer made for the purpose of obtaining legal advice of any sort: transactional (such as mergers and acquisitions), litigation-related (whether during or in anticipation of legal action), and even general advice unrelated to a specific deal or dispute, such as ongoing compliance advice.[72] Corporate clients enjoy the privilege just as do individuals.[73] Moreover, the U.S. corporate privilege applies both to in-house lawyers and outside counsel when acting as legal representatives for the firm.[74] Corporations and their counsel also enjoy the protection of the work product doctrine, a more qualified protection that shields materials, such as notes of interviews, prepared in anticipation of litigation reflecting the mental processes of counsel.[75]

When lawyers acting on behalf of a firm interview employees about actions undertaken in the scope of employment, the privilege and the work product doctrine protect the resulting information regardless of whether a lawyer speaks with the most senior manager or the lowest-

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72 *See* BRAD D. BRIAN, BARRY F. MCNEIL & LISA J. DEMSKY, INTERNAL CORPORATE INVESTIGATIONS 25-91 (4th ed. 2017).

73 *See id*.

74 Upjohn v. United States, 449 U.S. 383, 394-95 (1981).

75 *Id*. at 397-402.

level employee. Under the Supreme Court's foundational decision in *Upjohn v. United States*, the attorney-client privilege protects confidential communications of all corporate agents to corporate counsel for purposes of rendering legal advice to the corporation, which include communications for the purpose of gathering facts relevant to providing advice.[76] Thus, corporate counsel can conduct internal investigations of wrongdoing knowing, and assuring employees, that the privilege will shelter interviews as long as one of the significant purposes of the investigation is to provide legal advice to the firm.[77]

The privilege may assist corporate investigations in two ways. First, corporations can more freely investigate and respond to misconduct about which the government is unaware because they can control what information is disclosed. In addition, it may lead employees to speak more frankly. The privilege belongs to the corporation, not the employee, and is the corporation's to assert or waive, at the direction of corporate management. However, a corporate lawyer's standard "*Upjohn* warning"[78] explains to the employee, accurately, that the conversation is privileged. (A complete *Upjohn* warning should also explain to the employee that the corporation, not the employee, has the power to choose to waive that protection.[79]) Having been told that a conversation with counsel is confidential, some employees may believe it will remain so, and thus may be more willing to disclose wrongdoing in the hope of retaining employment or at least being allowed to exit on favorable terms. Absent personal counsel, an employee may fail to consider the alternative of keeping silent and going directly to enforcement officials to negotiate for immunity or a plea agreement.

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76 *Id*. at 392-96.

77 *See, e.g.*, In re Kellogg Brown & Root, Inc., 796 F.3d 137 (D.C. Cir. 2015); In re Kellogg Brown & Root, Inc. 756 F.3d 754 (D.C. Cir. 2014); *see also* In re Gen. Motors LLC Ignition Switch Litig., 80 F. Supp.3d 521 (S.D.N.Y. 2015).

78 United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 215 (2d Cir. 1997).

79 *Id.*; *see also* Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents,* 54 B.C. L. REV. 73 (2013). Practitioners differ about whether corporate counsel also should caution an employee to obtain her own attorney and advise her that the corporation may agree to cooperate with the government and share the fruits of its investigation, to the legal detriment of the employee. *See* BRIAN, MCNEIL & DEMSKY, *supra* note 72, at 43-45. Employees must pass a high hurdle to establish a personal privilege with respect to conversations with counsel for the employer. *See In re* Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3rd Cir. 1986). Bar rules have been interpreted to permit *corporate* counsel to simultaneously provide legal advice to both the firm *and* its employees, at least at the early stages of an investigation when counsel is seeking to determine whether wrongdoing has likely occurred and a full internal investigation is warranted. *See* N.Y. Cty. Lawyers' Ass'n. Prof'l Ethics Comm., Formal Op. 747 (June 9, 2014).

Companies seeking to cooperate can do so either by waiving the privilege and providing the government with raw investigative materials gathered by corporate counsel, or by giving the government summaries of the facts of the misconduct.[80] Prosecutors would gain more if firms provided open access to interview records and other original materials. But U.S. companies tend not to supply such raw material because in the U.S. disclosure to one party causes general waiver of the attorney-client privilege, leaving investigative products exposed to private plaintiffs, regulators, and others.[81] Even factual summaries are required to be quite detailed, however, and to include facts identifying relevant witnesses and culpable actions by specific individuals. Firms also are asked to provide the government with a roadmap showing where it can obtain the evidence needed to prove a case.[82] To date, this approach to cooperation has been reasonably successful in maintaining confidentiality vis-à-vis third parties.[83]

2. Counsel for the Employees: Funding and Conflicts of Interest

The relative advantage of firms in the U.S. in gathering information during investigations is additionally enhanced by legal principles that combine to allow firms to exert control over the processes by which individual employees are represented by legal counsel and

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[80] Companies' leverage has been enhanced since the DOJ changed its policy—largely due to lobbying by the bar and business sector—to discourage prosecutors from insisting on a waiver of legal privilege in return for giving cooperation credit but to allow companies to offer to waive. Memorandum from Mark Filip, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (Aug. 28, 2008) [hereinafter Filip Memo], https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf; see Jonathan D. Glater & Michael M. Grynbaum, *U.S. Lifts a Policy in Corporate Crime Cases*, N.Y. TIMES, Aug. 28, 2008). For full treatment of these developments and their importance to firms' bargaining position, see Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminar "No,"* 45 AM. CRIM. L. REV. 1237 (2008).

[81] *See, e.g.*, In re Pac. Pictures Corp., 679 F.3d 1121 (9th Cir. 2012); In re Quest Commc'ns Int'l Inc., 450 F.3d 1179 (10th Cir. 2006); Burden-Meeks v. Welch, 319 F.3d 897, 899 (7th Cir. 2003); In re Columbia/HCA Healthcare Corp. Billing Practices, 239 F.3d 289 (6th Cir. 2002), United States v. M.I.T., 129 F.3d 681 (1st Cir. 1997); Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1424-27 (3d Cir. 1991); see also In re Steinhardt Partners, L.P., 9 F.3d 230, 235–36 (2d Cir. 1993) (discussing the prospect of selective waiver in the context of work-product protection). *But see* Diversified Indus. Inc. v. Meredith, 562 F.2d 596, 611 (8th Cir. 1977) (en banc) (stating that voluntary disclosure of privileged materials to the SEC does not waive the attorney-client privilege as to civil plaintiffs). Rule-makers have adopted only limited waiver protections, such as for some accidental disclosures. *See* FED. R. EVID. 502.

[82] *See* JUSTICE MANUAL, *supra* note 5, § 9-28.720. Under longstanding law governing waiver, it remains unclear whether corporations can share even summaries of information gathered by lawyers through interviews of corporate personnel—including identification, as the government expects, of relevant witnesses—without waiving the privilege.

[83] Cf. SEC v. Herrera, 324 F.R.D. 258 (S.D. Fla. 2017) (reporting the ruling of a single magistrate judge that protection was waived as to some internal investigation fruits due to "oral downloads" of the content of employee interviews to SEC personnel).

by which counsel share information. Firms' control of counsel makes it more likely that employees will cooperate with firms' efforts to gather facts because refusal to cooperate generally results in not only termination but also loss of firm-funded representation. Further, employees provided with counsel may be more likely to assert their rights if prosecutors attempt to compel their statements.

U.S. firms have wide latitude to hire counsel for individual employees for two reasons. First, attorney ethics regimes allow the conflict of interest inherent in such arrangements to be waived by the individual, who will be motivated to do so to avoid legal expenses.[84] Such waivers are virtually automatic in large corporate investigations. Second, the law of incorporation facilitates the funding by firms of attorneys for officers, managers, and employees in investigative and enforcement matters.[85] Almost all large U.S. corporations have a settled practice of paying employees' legal fees in work-related investigative and regulatory matters.[86]

In addition, rules allowing coordination among corporate and individual counsel give corporations greater access to information about the progress and direction of the government's investigation. This stems from U.S. law on the joint defense privilege, which underlies the common practice of joint defense agreements.[87] This doctrine operates as an exception to the ordinary rules governing waiver of the attorney-client privilege. If multiple parties to an actual or potential legal proceeding share a common legal interest and clearly invoke the joint defense privilege, sharing of privileged materials among such persons and their counsel will not waive the attorney-client privilege.[88]

The practice of information sharing under joint defense agreements can greatly enhance corporate counsel's (and thus management's) ability to know what the evidence is in a complex matter, what parts of that evidence are known to the government, and even what the

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84 MODEL RULE OF PROFESSIONAL CONDUCT 1.7 (AMERICAN BAR ASSOC., 2018).

85 DEL. CODE § 145(e). *See generally* TOM BAKER & SEAN GRIFFITH, ENSURING CORPORATE MISCONDUCT (2010).

86 One court concluded that employees of the KPMG auditing firm had a reasonable expectation that the firm would cover their fees based on the firm's past practices (and its own statements), even though they were not contractually entitled to fee advancement. United States v. Stein, 541 F.3d 140 (2d Cir. 2008); *see also* Andrew Ross Sorkin, *Wall Street Debates Who Should Pay Legal Bills*, N.Y. TIMES DEALBOOK (Aug. 12, 2013). "Clawback" actions to recoup fees from employees later convicted of crimes are burdensome and relatively rare. *See* Peter J. Henning, *When Legal Bills Become a Cause for Dispute*, N.Y. TIMES DEALBOOK (Feb. 1, 2010).

87 *See* BRIAN, MCNEIL & DEMSKY, *supra* note 72, at 179-84.

88 *See id*.

government's actions suggest about which persons and crimes it may be targeting. If a firm both is paying the fees of individual counsel and is party to joint defense agreements with those counsel, even the most careful counsel inevitably will have incentives, including potential benefits to their own clients, to exchange information about the progress and direction of the government's investigation with the firm and among individual counsel.

The more that a corporation's employees submit to questioning, and the more the corporation knows about both its own employees' and the government's knowledge of the facts, the better positioned the corporation will be to craft a cooperation strategy that will satisfy prosecutors and earn the firm the sanction reductions it seeks.

D. CORPORATE DOCUMENTS AND RECORDS

Although U.S. authorities can obtain documents by subpoena, firms retain a comparative advantage in the massive enterprise of collecting and assessing documentary evidence in major cases of corporate crime.[89] Whereas prosecutors cannot expend the resources that would be required to blindly subpoena records whenever a hunch about misconduct has arisen, companies in the U.S. can monitor emails and electronic documents to detect misconduct.[90]

Moreover, when investigating crime, companies are better able to identify, collect, and assess vast amounts of potentially relevant information. Corporate records are routinely spread across many locations and housed in multiple jurisdictions. The collection and review of documentary evidence presents government enforcers with severe practical problems. The ability of firms to assist the government in reducing those problems, and thus to speed corporate investigations, and lower their costs, enhances prosecutors' ability to learn of and prove misconduct.

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89 *See* JAY E. GRENIG & WILLIAM C. GLEISNER III, EDISCOVERY & DIGITAL EVIDENCE (2005); MICHELE C.S. LANGE & KRISTIN M. NIMSGER, ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD KNOW (2004); *see also* BRIAN, MCNEIL & DEMSKY, *supra* note 72, at 134; Roger Parloff, *How VW Paid $25 Billion for "Dieselgate"—And Got Off Easy*, FORTUNE (Feb. 6, 2018).

90 As a matter of doctrine, a grand jury may issue a subpoena "just because it wants assurance" that no crime has been committed. United States v. R. Enterprises Inc., 498 U.S. 292 (1991); United States v Morton Salt Co., 338 U.S. 632 (1950).

1. Government Access to Documentary Evidence

The legal mechanism for compelling production of documents in a U.S. criminal investigation is the grand jury subpoena or, in regulatory matters such as SEC or IRS investigations, an administrative subpoena authorized by statute.[91] A grand jury subpoena is a powerful investigatory tool for obtaining corporate records. The government need not have probable cause[92] and corporations and their officers do not have the right to resist production of incriminating corporate records on 5th Amendment grounds. [93]

However, in order to determine which documents to seek and to understand information in them, investigators usually need to undertake preliminary work, generally by interviewing witnesses. Corporations have a large advantage in this endeavor relative to the government, as discussed above. Moreover, even when prosecutors know the broad category of records they need, they often cannot effectively obtain the information without the corporation's help. A subpoena at the outset of an investigation for all records relating to a line of business will elicit a far greater volume of evidence than the government can manage with its own resources.[94] Uncooperative corporations have room to drag their heels in complying, leading to delay in addition to the government being buried in documents.[95]

In corporate investigations that cross international borders, the government faces legal obstacles in addition to these practical problems. A grand jury subpoena is not self-executing outside United States territory. An American court may not issue a warrant to search premises abroad, although electronic evidence *stored* abroad by United States entities may be

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91 *See, e.g.*, 15 U.S.C. § 78u(b); 26 U.S.C. § 7602.

92 R. Enters. Inc., 498 U.S. 292.

93 *See* Hale v. Henkel, 201 U.S. 43 (1906); *see also* Fisher v. United States, 425 U.S. 391 (1976); Sara Sun Beale & James E. Felman, *The Fifth Amendment and the Grand Jury*, 22 CRIM. JUST. 4 (2007).

94 A subpoena that sweeping could prompt litigation on the ground that it exceeds even the wide latitude given to investigative subpoenas because the directive is overbroad, would be excessively burdensome to comply with, and likely covers material subject to attorney-client privilege. *See* FED. R. CRIM. P. 17(c); Swidler & Berlin v. United States, 524 U.S. 399 (1998).

95 Criminal investigators of course have the alternative of proceeding by search warrant. But this requires having evidence in hand sufficient to establish probable cause and, because most documentary evidence is digital, will result in the same problem of overbreadth: the government will end up with reams of data. *See generally* U.S. Dep't of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (2009), https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf.

searchable.[96] Production of foreign documents can be ordered only with cumbersome procedures provided through mutual legal assistance treaties.[97] Given the volume, complexity, and dispersion of data in any investigation of crime within a large global corporation, prosecutors could not succeed on their own in getting to the bottom of a matter in reasonable time, at least not without much greater resources than currently possessed.

2. Corporate Access to and Capacity to Evaluate Documentary Evidence

A cooperative corporation can reduce these problems for government investigators. Corporations in the U.S. generally have the right to access work-related electronic evidence, including employees' emails, on servers or company-owned computers that they have a right to access, even when this information contains employees' personal data.[98] As a result, corporations can better detect misconduct in the first instance by monitoring employees' emails, data storage facilities, and other electronic evidence as a routine practice. A company with an effective compliance program is likely to have sign posts to guide it—transactions flagged by compliance mechanisms or internal whistleblowing reports.[99]

In addition, companies are better able to exploit documents in investigating suspected misconduct because they can use their own knowledgeable employees, and the ability to compel their assistance, to identify problematic conduct and relevant documentary records. A large corporation also can use its systems of data management, which may be more powerful and sophisticated than those available to prosecutors and government investigators. Large

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96 *See* 18 U.S.C. § 2701; Clarifying Lawful Overseas Use of Data (CLOUD) Act, Pub. L. No. 115-141, §103, 132 Stat. 348 (2018); United States v. Microsoft Corp., 138 S.Ct. 1186 (2018).

97 *E.g.*, Mutual Legal Assistance Treaty with Germany, Ger.-U.S., art. 11, Oct. 14, 2003, S. TREATY DOC. NO. 108-27 (2004); Treaty with the United Kingdom on Mutual Legal Assistance in Criminal Matters, U.K.-U.S., art. 14, Jan. 6, 1994, S. TREATY DOC. NO. 104-2 (1995); *see also* JUSTICE MANUAL § 9-13.512 (U.S. DEP'T OF JUSTICE); JUSTICE MANUAL, CRIMINAL RESOURCE MANUAL (CRM) §§ 266–283 (U.S. DEP'T OF JUSTICE); 1 SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 14:4 (2d ed. 2017).

98 See generally MATTHEW FINKIN, PRIVACY IN EMPLOYMENT LAW, Chap. 5 (5th ed. 2018). For example, under federal law, companies may seize and access the contents of company laptops provided to employees and can monitor employees' work-related communications in the ordinary course of business by notifying employees that their electronic communications are being monitored. Id. at 5.86. Employers also can access electronic information, including emails, stored on its own system. Courts have concluded employees do not have privacy rights over work-related materials when the employer clearly reserved the right of access. Employees also cannot claim privacy interests in work-related emails. Id. at, Ch. 5 at § III (D)(3)(c) ("Reading Stored Communications"): see also RICHARD EPSTEIN AND CATHERINE SHARKEY, CASES AND MATERIALS ON TORTS (10th Ed.). California's new privacy law could alter this for residents of California, but at present it appears not to be applicable to employers and employees.

99 Arlen & Kraakman, *supra* note 10.

corporations also have assets to retain outside vendors, such as data management and law firms, to assist in electronic discovery through technical expertise and supplying of personnel for manual document review.

Finally, some documents useful to investigators may be shielded by the firm's attorney-client privilege. Corporations routinely need the penmanship and legal opinions of counsel to conduct deals and, given the prevalence of litigation, have a strong incentive to include lawyers in internal discussions in order to invoke the shield of the privilege.[100] Firms can freely access these materials in the course of determining whether misconduct occurred. In situations where prosecutors need access to the records to make their case, firms are free to waive privilege and provide the documents.[101]

In short, firms own their own records and can choose to access, organize and share them as they please. Given the volume and complexity of documentary records in a large modern corporation, this power and control is of tremendous value to the government in detecting and proving corporate crime.

III. THE LAW OF CORPORATE INVESTIGATIONS OVERSEAS

In the U.S., structuring corporate enforcement policy to substantially reward self-reporting and cooperation can make enforcement more effective because corporations in the U.S. are better able to obtain and analyze information than are enforcement authorities, for reasons beyond resource constraints, substantially as a result of laws governing corporate investigations.[102]

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100 Moreover, firms negotiating with the government over corporate criminal liability sometimes rely on arguments that the advice of counsel contemporaneous with transactions negates liability by providing defenses of "good faith reliance" and the like. *See* Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 639–41 (2011).

101 While the Justice Department's corporate prosecution guidelines no longer allow federal prosecutors to explicitly request waiver of the attorney-client privilege as a condition of cooperation, firms of course remain free to waive and Department policy allows prosecutors to use such information. Justice Manual, 9-28.710 - Attorney-Client and Work Product Protections. .

102 Corporate cooperation would help prosecutors detect and sanction misconduct even if companies do not enjoy a comparative advantage in detecting misconduct provided that corporations are able to devote more resources to investigations. In these conditions, a preferable response would be to increase funding for government authorities. But in this Article we are largely taking existing political economy arrangements as given, at least within reasonable bounds.

Seeking similar benefits, other countries are adopting, or considering the adoption of, broader corporate criminal liability regimes and forms of negotiated settlement, such as DPAs, apparently intended to promote corporate cooperation and self-reporting.[103] The debate over such laws has tended to overlook that we cannot assess the wisdom of these reforms—including their prerequisites for sanction mitigation—without evaluating how local laws governing the conduct of corporate investigations determine corporations' and government authorities' relative abilities to detect and investigate misconduct.

In this Part, we show that many other countries around the world are unlikely to obtain the same boost to their ability to investigate corporate criminal cases as U.S. prosecutors gains from using DPAs to induce corporate investigations and cooperation because differences in laws governing criminal procedure, employment, legal privilege, and data privacy often negatively impact corporate investigations or strengthen government investigations. To demonstrate this, this section focuses on those differences in laws governing corporate investigations that could materially impact an investigation even if the country adopted *respondeat superior* and U.S.-style DPAs,[104] focusing on laws that either enhance prosecutors' investigative powers or impede corporate investigative authority relative to the U.S.[105] To demonstrate that these material differences are wide-spread, we show that material differences in laws governing corporate investigations are present around the world, including in jurisdictions such as England, France, Germany, and Australia that have adopted, or are considering, corporate DPAs or their equivalent. Our focus is on elucidating, and illustrating the importance and prevalence of, these differences in many jurisdictions; we do not seek to

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103 For a discussion of how the U.S.'s success in corporate criminal enforcement have influenced reforms in other countries, both directly and through the OECD, see Davis, *supra* note 16; Brewster & Buell, *supra* note 8.

104 Given our focus on laws that would impact corporate investigations were a country to adopt respondeat superior and DPA-like negotiated settlements, we do not consider legal differences that arise when a country does not permit negotiated corporate criminal settlements. For a discussion of these differences see, e.g., Diskant, *supra* note 17 (discussing U.S. and Germany); Arlen, *supra* note 3 (discussing France and the U.K.) We also do not discuss differences in substantive laws governing corporate liability, such as law governing the scope of corporate criminal liability. Compare with Arlen, *supra*.

105 Thus, by and large, we do not discuss countries where the balance of investigatory power favors corporations even more than in the U.S. For example, in several jurisdictions in Latin America, the police cannot interrogate defendants and those subject to interrogation by government authorities can lie with impunity. *See, e.g.*, Juliana Sá de Miranda, *Brazil: Handling Internal Investigations*, in THE INVESTIGATIONS REVIEW OF THE AMERICAS: 2018 at 51, (Glob. Investigations Review eds., 2018) (discussing Brazil). Also, in some countries, weak legal institutions may give companies greater ability to pressure employees to cooperate because employees lack effective legal recourse.

provide a complete comparative analysis of the laws and institutions in any single country.[106] No matter what the other differences in legal regimes, differences in the law governing corporate investigations are likely to matter. We conclude that in many systems the net benefit of adopting a U.S.-style system is likely to be much lower than it has been in the U.S

A. PROSECUTORS' INVESTIGATIVE POWERS

Prosecutors in many other countries have more latitude than their U.S. counter-parts to compel or pressure potentially implicated people to answer questions. They also often can use evidence derived from conduct that violated the suspect's rights.

Some legal systems, particularly in Asia, do not grant implicated persons a right to silence at all.[107] In other countries, any right to silence is weaker than in the U.S. For example, French investigators can make it costly for implicated employees to remain silent by threatening to introduce their silence as circumstantial evidence of guilt at trial.[108] In England and Wales, suspects are cautioned that invocation of the right to silence can harm their defense, because the fact-finder may draw an inference against facts that the suspect seeks to rely on at trial that were not disclosed during the government's interview.[109]

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106 A full comparison of the laws of the U.S. and another country would necessarily incorporate a host of other laws and institutions reaching far beyond our topic including the institutions governing prosecutorial discretion, the public evidence gathering process, approach to collateral consequences, availability of private class actions, effectiveness and expected sanctions imposed by civil and administrative enforcement, range of white collar offenses and degree of extraterritorial enforcement, magnitude of corporate criminal fines, funding of enforcement authorities, political influence over and potential corruption of enforcement authorities and/or judges, effectiveness of laws governing whistleblowing, willingness to use accomplice testimony, and existence, scope, and effectiveness of laws mandating self-reporting of misconduct.

107 *See generally* L. LIBRARY OF CONG., MIRANDA WARNING EQUIVALENTS ABROAD 15 (2016), https://www.loc.gov/law/help/miranda-warning-equivalents-abroad/index.php (concluding that Cambodia does not recognize a right to silence). For example, in China, people do not have a right to refuse to answer questions asked by regulators, such as the China Securities Regulatory Commission or the Public Securities Bureau, on the grounds that the answers would involve self-incrimination. CORPORATE INTERNAL INVESTIGATIONS: AN INTERNATIONAL GUIDE 491 (Paul Lomas & Daniel J. Kramer eds., 2d ed. 2013). In Hong Kong, individuals may not refuse to answer questions on grounds of self-incrimination. In addition, no privilege against self-incrimination bars the compelled production of documents, although such evidence may be used only derivatively against the person, not directly. *Id.* at 425–26.

108 France permits a strong inference that people who refuse to explain their circumstances are guilty. *See* Antoine Kirry et al., *France*, *in* THE INTERNATIONAL INVESTIGATIONS REVIEW 114 (Nicolas Bourtin ed., 8th ed. 2018). The risk of negative inference is enhanced in countries with strong cultural norms against invoking a the right to silence.

109 *See, e.g.*, Jason Mazzone, *Silence, Self-Incrimination, and Hazards of Globalization*, *in* COMPARATIVE CRIMINAL PROCEDURE 308, 321 (Jacqueline Ross & Stephen Thaman eds., 2016); Jessica Parker & Andrew Smith, *Representing Individuals in Interviews: The U.K. Perspective*, *in* THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS 241 (Judith Seddon et al. eds., 2d ed. 2018); Peter B. Pope, et al., *The Clash of Legal Cultures in the Brave New World of International Law Enforcement*, N.Y.U.: COMPLIANCE & ENFORCEMENT (Mar. 23, 2018),

Moreover, prosecutors in several countries can compel an implicated witness to speak, notwithstanding their right to silence to speak, without granting derivative use immunity.[110] In England and Wales, both the Serious Fraud Office (SFO) and the Financial Conduct Authority (FCA)[111] have statutory authority to compel people to answer questions.[112] Although compelled statements may not be used *directly* against the speaker in a criminal prosecution, prosecutors may be able to make derivative use of such statements, thus avoiding the burdensome or disabling task of disproving taint that U.S. prosecutors face when deploying immunity powers.[113] While English prosecutors tend not to compel statements from people they expect to

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https://wp.nyu.edu/compliance_enforcement/2018/03/27/the-clash-of-legal-cultures-in-the-brave-new-world-of-international-law-enforcement/.

110 According to the DOJ, in a recent petition for rehearing in the Second Circuit Court of Appeals, the following foreign authorities can obtain evidence, including testimony, on pain of sanction: Australia, Austria, Brazil, Canada, the Cayman Islands, Croatia, Cyprus, the Czech Republic, el Salvador, Estonia, the European Union, France, Finland, Greece, Hong Kong, Hungary, Israel, Italy, Japan, Korea, Luxembourg, Malaysia, Poland, Russia, Singapore, Slovakia, Spain, South Africa, Sweden, Switzerland, Taiwan, Turkey, the United Arab Emirates, and the United Kingdom. *See* Petition of the United States for Rehearing or Rehearing En Banc, U.S. v. Allen, 864 F.3d 63 (2d Cir. 2017). Similarly, in Ireland, regulatory authorities can compel cooperation, subject to a form of use immunity. Carina Lawlor, *Ireland*, *in* THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS 614, 619 (Judith Seddon et al. eds., 2016). In Brazil, enforcement authorities' ability to pressure implicated people to answer questions is undermined by subjects' ability to lie with impunity. Camila V. Ancken et al., *Brazil*, *in* CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS 69–71 (Stephen Spehl & Thomas Gruetzner eds., 2013).

Beyond this, prosecutors in other countries may be less impeded by those rights that are granted if they face a narrower exclusionary rule. *See infra* note 172.

111 The Financial Conduct Authority regulates financial services firms and markets in the U.K. through monitoring, investigations, sanctions, and civil and criminal proceedings. *See Enforcement*, FIN. CONDUCT AUTH., https://www.fca.org.uk/about/enforcement (last visited Jan. 30, 2019).

112 The Director of the SFO has authority to investigate suspected offenses involving serious or complex fraud. The SFO Director can compel witnesses to answer relevant questions and provide any relevant documents. *See* Criminal Justice Act 1987, c. 38 § 2 (Eng.). The FCA also has the power to compel, and impose sanctions for refusal. *See* Financial Services and Markets Act 2000, c.8 §§ 171, 174, 177 (Eng.). The FCA also has the power to compel witnesses to speak, but usually do not do so with targets. They favor "interviews under caution" with suspects in a criminal proceeding. U.K. FIN. CONDUCT AUTH., FCA HANDBOOK § 2.14(4). Other U.K. enforcement authorities, such as the Competition and Markets Authority, the National Crime Agency, and the Health and Safety Executive have similar powers to compel witnesses to answer questions and produce documents. Hector Gonzalez et al., *Production of Information to the Authorities*, *in* THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS 173 (Judith Seddon et al. eds., 2d ed. 2018).

113 In England and Wales, prosecutors act in the shadow of the Police and Criminal Evidence Act. *See* Police and Criminal Evidence Act 1984, c. 60 (Eng.). Section 76 of the Act permits a judge to exclude confessions for unreliability, such as confessions obtained through oppression, and Section 78 allows exclusion of material that would affect the fairness of the trial. *Id.* §§ 76, 78. Furthermore, Section 78 gives judges' discretion to exclude evidence that would affect the fairness of the trial in light of all the circumstances, provides judges with discretion to exclude a confession obtained in violation of a defendant's right to silence, but does not require it, and can, but often does not, extend to evidentiary fruits of the excluded statement. Mazzone, *supra* note 109, at 321–22; *see also* Police and Criminal Evidence Act 1984, c. 60, § 76(4)(a) (Eng.) ("The fact that a confession is wholly or

charge,[114] they do to compel statements by implicated employees for use against others—an important tool if they do not have enough evidence against the witness to induce them to cooperate voluntarily.. U.K. prosecutors also can compel cooperation by an employee they assume is not a suspect, without losing the ability to use evidence derived from that testimony against the employee should they learn that the employee should be charged with a crime.[115] Finally, the SFO also can compel testimony for use against the subject in a civil action (for example, to confiscate illegal gains).[116]

Similarly, in Australia, certain enforcement authorities, including the Australian Securities and Investment Commission and the Australian Crime Commission, can compel implicated witnesses to cooperate.[117] Indeed, Australian authorities have compelled statements from defendants already subject to pending charges.[118] Although prosecutors may not make direct use of compelled statements,[119] they can make derivative use of the statements to either obtain other evidence or prepare for trial.[120]

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partly excluded in pursuance of this section shall not affect the admissibility of any facts discovered as a result of the confession."). Cautious prosecutors prefer not to compel statements by targets to avoid exclusion.

114 The SFO has avoided using its powers under Section 2 of the Criminal Justice Act against someone it expects to charge in recognition of both the uncertain admissibility of evidence derived from such testimony, *see supra* note 113, and a 1996 ruling by the European Court of Human Rights that found compelling testimony by an accused violates Article 6 of the European Convention on Human Rights. *See* Saunders v. United Kingdom, 22 Eur. Ct. H.R. 29 (1996). Compulsory production of documents is permitted, however. *Id.*

115 English enforcement officials interviewing an employee, upon learning that the employee is implicated, tend to caution the employee and stop the interview until a lawyer is present, in order to provide the procedural fairness expected. If enforcement officials do compel testimony, these procedural protections also are respected, although lawyers play a more passive role in interrogations in the England than in the U.S.

116 The SFO also pursues civil actions to confiscate benefits of crime. The SFO can obtain and directly use compelled statements to confiscate benefits civilly, including statements identifying location of assets.

117 Statutory commissions in Australia have the power to require a person to attend an examination to answer under oath. It is an offense to fail to answer at an examination, even if the answer could be incriminating. "The right to silence and privilege against self-incrimination [in front of statutory commissions] are expressly abrogated." Honorable T.F. Bathurst, A.C., Chief Justice of New South Wales, Address at University of New South Wales: Statutory Commissions, Compulsory Examinations and Common Law Rights (March 21, 2016) (transcript available at http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/ 2016%20 Speeches /Bathurst%20CJ/Bathurst_20160321.pdf); *see also R v OC* (2015) 90 NSWLR 134 (Austl.); *Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 63.

118 *Compare NSWCC v Lee [No. 1]* [2011] NSWSC 80, 31 (Austl.) *with X7 v Australian Crime Comm'n* (2013) 248 CLR 92 (Austl.).

119 For a discussion of the prohibition on direct use, see, for example, Bathurst, *supra* note 117 (transcript at 3). *See also Australian Securities and Investments Commission Act 2001* (Cth) s 68(3) (stating that a transcript cannot be used in any criminal or penalty proceedings against an individual).

120 For example, enforcement officials can review statements made by an accused under compulsion, following invocation of the privilege, in order to prepare for trial. *R v OC* (2015) 90 NSWLR 134, 120–22 (Austl.); *see also OC v The Queen* [2016] HCATrans26 (12 February 2016) (Austl.). Moreover, the Competition and

Government investigators in many countries also benefit from the freedom to interview implicated suspect away from the protective interventions of defense counsel. Suspects do not have a right to have counsel present during initial interrogations in many countries, including Germany, England and Wales, the Netherlands, Singapore, and Canada.[121] Other countries allow counsel to attend but limit their ability to intervene during the interrogation.[122] In France, witnesses who are not suspects do not have a right to counsel during questioning by the police or the investigating judge.[123] Finally, in many countries, including England and Germany, prosecutors who violate a subject's right to silence or counsel nevertheless likely can introduce at trial evidence derived from those illegally obtained statements, and, in some countries, the statements themselves.[124]

Therefore, prosecutors in other important jurisdictions in the investigation of corporate

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Consumer Act only prevents use in criminal proceedings (essentially cartel proceedings); the transcript can be used in civil penalty proceedings. *See Competition and Consumer Act 2010* (Cth) s 159 (Austl.).

121 See, e.g., Jacqueline S. Hodgson, *From Domestic to European: An Empirical Approach to Comparative Custodial Legal Advice*, *in* COMPARATIVE CRIMINAL PROCEDURE 258, 271 (Jacqueline Ross & Stephen Thaman eds., 2016) (In the Netherlands, counsel is not permitted in the interrogation room); Diskant, *supra* note 17, at 156 (German defendants to not have a right to have counsel present at the initial interrogation). In England and Wales, counsel cannot attend a compelled interrogation. Parker & Smith, *supra* note 109, at 239. In Singapore, police can question an arrested suspect without counsel present, as long as the suspect is afforded counsel within a "reasonable time" after arrest. *See* Ho Hock Lai, *The Privilege Against Self-Incrimination and Right of Access to a Lawyer: A Comparative Assessment*, 25 SING. ACAD. OF L. J. 826, 833, 838 (2013). Canada allows government authorities to continue questioning subjects after invocation of the right, although continued questioning in the face of repeated invocations of the right to silence could lead a court to conclude that statements made were involuntary, and therefore excludable. *See* Lisa Dufraimont, *The Interrogation Trilogy and the Protections for Interrogated Suspects in Canadian Law*, 54 SUP. CT. L. REV. 309, 314 (2011). Investigators in France, Russia, Brazil, Peru, China, Hong Kong, Serbia, and Scotland are not required to caution suspects about the right to counsel. *See generally* L. LIBRARY OF CONG., *supra* note 107.

122 In France, lawyers can attend police interrogations but must remain passive. Hodgson, *supra* note 121, at 271. In England and Wales, a lawyer permitted to attend an interview can provide legal advice and essential assistance but must not interrupt the flow of information provided by the subject. Parker & Smith, *supra* note 109, at 239. Counsel in England may stop the interview, however. *See* Hodgson, *supra* note 121, at 271.

123 DEBEVOISE AND PLIMPTON, TEN THINGS U.S. CRIMINAL DEFENSE LAWYERS SHOULD KNOW ABOUT DEFENDING A CASE IN FRANCE, 34 (2019).

124 In England and Wales, confessions obtained in violation of a suspect's right to silence are not automatically excluded. Instead, courts determine admissibility by balancing the severity of the breach with the severity of the offense, and regularly give considerable weight to the public's interests in prosecuting crimes and seeking the truth. *See* Mazzone, *supr*a note 109, at 322–23, 333–34. In Germany, like most inquisitorial systems, evidence is presumptively admissible. Diskant, supra note 17, at 157. Courts employ a balancing test to determine exclusion of confessions obtained in violation of a suspect's rights and permit admission of evidence derived from such statements in some circumstances. *See* STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], § 136a, para. 3, sent. 2; *see also* Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 18, 1980, StR 731/79, para. 9; Federal Court of Justice, judgement of 24 August 1983 - 3 StR 136/83, BGHSt 32, 68; Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 14, 2010 StR 573/09, para. 13; Christina Monka, BECK'SCHER ONLINE-KOMMENTAR: STRAFPROZESSORDNUNG [BECKOK STPO] [BECK'S ONLINE COMMENTARY: CODE OF CRIMINAL PROCEDURE], § 136a, ¶ 33 (31st ed. 2018); *see generally* Mazzone, *supra* note 109, at 333-34.

crime simply do not face the same steep costs, and difficult choices, that, as explored at the outset of Part II above, would confront U.S. prosecutors if they were to attempt to detect and investigate corporate crime without the assistance of firms.

B. CORPORATIONS' INVESTIGATIVE POWERS

Overseas enforcement officials also may gain less than U.S. prosecutors from providing incentives for corporations to detect and self-report misconduct, and to share the result of internal investigations, because companies may be less able, and less willing, to conduct robust internal investigations due to differences in employment law, criminal procedure rules, legal privileges, and data privacy laws. These doctrines both impede corporations' ability obtain information from employees and increase the costs of investigations, with the greatest apparent effect on investigation of misconduct the government has not yet detected.

1. Corporations' Ability to Obtain Statements from Employees

a. Restrictions on Interviews during Government Investigations

By contrast to the U.S., companies in several countries cannot interview potential witnesses once a civil or criminal investigation has commenced.[125] For example, in France, once an investigating magistrate or a court has begun a formal inquiry,[126] a corporation that could be subject to charges cannot contact potential witnesses before a magistrate determines whether charges should be filed.[127] In Switzerland, lawyers investigating for companies cannot take actions that could influence possible witnesses, a prohibition understood to preclude firms

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125 Christopher J. Clark, *The Complexities to International White Collar Enforcement*, *in* INTERNATIONAL WHITE COLLAR ENFORCEMENT: LEADING LAWYERS ON UNDERSTANDING CROSS-BORDER REGULATIONS, DEVELOPING CLIENT COMPLIANCE PROGRAMS, AND RESPONDING TO GOVERNMENT INVESTIGATIONS 7, 57 (Michaela Falls ed., 2010); D. Michael Crites, *Recent Trends in White Collar Crime*, *in* INT'L WHITE COLLAR ENFORCEMENT (2010); Lucian E. Dervan, *International White Collar Crime and the Globalization of Internal Investigations*, 39 FORDHAM URBAN L. J. 361, 380 (2011).

126 In France, criminal investigations often are conducted by a magistrate who determines whether there is sufficient evidence that an individual or corporation has committed a crime (*mise en examen*). Kirry et al., *supra* note 108. After this determination, the target (the person given *mise en examen* status) has the right to appear before the magistrate to present evidence. The matter can then be referred for trial. Thus, in France much of the investigation takes place before the target has a right to introduce evidence. This can reduce the value to the prosecutor of evidence provided by the firm.

127 *See id.*; Stephane de Navacelle, Sandrine dos Santos, & Julie Zorrilla, *France*, *in* THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS 706 (Judith Seddon et al. eds., 2d ed. 2018); *see also* Clark, *supra* note 125, at 4; Dervan, *supra* note 125, at 380.

from conducting formal interviews after the government's investigation has commenced (although firms may engage in softer fact-finding discussions with employees).[128]

In England and Wales, enforcement officials regularly request companies to refrain from interviewing implicated or material witnesses once their own investigations have commenced[129] to avoid any negative impact on the government's interviews. In addition, authorities prefer to be the first to interview important witnesses to ensure that requisite procedures are followed for obtaining evidence that may be used at trial. For example, a judge might exclude statements on the grounds that they were unfairly obtained or unreliable if a firm's investigators threatened an implicated employee with disciplinary action if she refuses to admit wrongdoing, or offered protection from dismissal for confessing. Reliability also may be questioned if the corporation did not record the interview and the employer and employee later disagree about what was said.[130] Evidence obtained by a firm investigating misconduct as part of a criminal matter also may not be admissible if investigators did not caution the employee about the right to counsel.[131]

b. Limitations on Pressuring Employees to Speak

Corporations in many other countries have less ability to obtain valuable evidence from employees about their own or other employees' misconduct. Employers often cannot use the threat of termination to pressure employees to cooperate because employment laws either preclude such threats or impose greater procedural impediments to employee discipline.[132] In addition, even non-implicated employees often do not voluntarily provide evidence about

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128 Benjamin Borsodi & Louis Burrus, *Switzerland*, *in* THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS 665, 672 (Judith Seddon et al. eds, 1st ed. 2016).

129 *See* Caroline Day & Louis Hodges, *Witness Interviews: The UK Perspective*, *in* THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS 100, 103 (Judith Seddon et al. eds, 2d ed. 2018).

130 *See* Police and Criminal Evidence Act 1984, c. 60 §§ 76, 78 (Eng.). A court is required by Section 76 to exclude a confession that it concludes is unreliable. The court has discretion under Section 78 to exclude a confession that is unfairly obtained.

131 While internal investigators can interview employees without counsel if investigating for purposes of an internal disciplinary proceeding, corporate investigators interviewing employees with a view to providing evidence for a criminal investigation may be required to caution implicated employees about their right to counsel. *Compare R v Twaites* (1991) 92 Cr App. R 106 (Eng.) *with R v Welcher* [2007] EWCA Crim 480 (Eng.); *see also* Day & Hodges, *supra* note 129, at 103.

132 For a discussion of sanctions and efficacy of enforcement in many countries, see Estreicher & Hirsch, *supra* note **Error! Bookmark not defined.**.

others, either because they fear of retaliation or reside in a country with a strong cultural norm against informing on colleagues, as in France.[133]

In the U.S., employer-employee relationships, including employees' rights, are largely defined by contract. By contrast, many countries view employment as a status automatically conferring substantive and procedural rights that dictate both the employee's treatment during the relationship and situations under which the relationship can be terminated.

Indeed, some countries, such as Australia, Austria, Brazil, France, Italy, and Switzerland, employees effectively have a right against self-incrimination in workplace investigations that bars employers from pressuring implicated employees to cooperate.[134] In others, such as Germany, the right to silence does not strictly apply in private interviews,[135] but

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133 For example, in France whistleblowing is not a culturally accepted practice. CORPORATE INTERNAL INVESTIGATIONS, supra note 107, at 309. Employees in other countries also may fear negative repercussions by superiors (outside the formal disciplinary process) for providing information about detected misconduct. This can deter them from coming forward either internally or externally. As of 2013, only four European Union countries had strong protections for whistleblowers; others had only partial or no protections. *See generally* TRANSPARENCY INT'L, WHISTLEBLOWING IN EUROPE: LEGAL PROTECTIONS FOR WHISTEBLOWERS IN THE EU (2013); *cf.* Press Release, European Commission, Whistleblower Protection: Commission Sets New, EU-wide Rules (April 23, 2018), http://europa.eu/rapid/press-release_IP-18-3441_en.htm.

134 Countries that grant a right to silence during internal investigations to employees with a genuinely and reasonably apprehensions of being implicated include Australia, Austria, France, Italy, and Switzerland. *See, e.g.*, *Grant v. BHP Coal Pty. Ltd.* [2017] FCAFC 42 (10 March 2017) (discussing Australia and citing *Police Service Board v. Morris* (1985) 156 CLR 397, 403, 408, 411); Rani John et al., *Australia: Handling Internal Investigations*, *in* THE ASIA-PACIFIC INVESTIGATIONS REVIEW 2019, at 29 (Glob. Investigations Review ed., 2018); Bettina Knoetzl, *Austria*, *in* GLOBAL INVESTIGATIONS REVIEW: THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS 654 (Judith Seddon et al. eds., 2d ed. 2018) (right against self-incrimination applies if the internal investigation can be expected to provide information to a criminal investigation); David Charlot et al., *France*, *in* CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS (Stephen Spehl & Thomas Gruetzner eds., 2013) (French employees' duty to cooperate do not apply if the employee would risk incrimination); Art. 391 Codice di procedura penale [C.p.p.] bis no. 9 (Italy); Mark Livschitz, *Switzerland*, *in* CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS (Stephen Spehl & Thomas Gruetzner eds., 2013) (employee's duty to cooperate does not apply if the employee would risk incrimination).

In Brazil, interpretations of the constitution and case law suggest that employers may not sanction implicated employees who invoke their right to silence. Ancken, *supra* note 110, at 69–71; Esher M. Flesch, Andre G. Fonseca, Fabio Lima, & Bruno C. Maeda, *Brazil*, in CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS 69-71 (Stephen Spehl & Thomas Gruetzner eds. 2013). Indeed, Brazilian courts have concluded that an employee may exercise his right to silence by lying, even under oath. Brazil does not have a crime of perjury. *Id*. at 59, 69–71, 76.

135 *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 30, 1989, III ZR 112/88 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 30, 1964, VII ZR 156/62 (Ger.); Bundesarbeitsgericht [BAG] [Federal Labor Court] Sept. 7, 1995, 8 AZR 828/93 (Ger.); Arbeitsgericht [AB] Hamm [Labor Court of Hamm] Mar. 3, 2010, 14 Sa 1689/08 (Ger.) (an employee's constitutional right to silence does not apply to private parties); *cf.* Björn Krug & Christoph Skoupil, *Befragungen im Rahmen von internen Untersuchungen* [*Surveys in the Context of Internal Investigations*], 2017 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2374, 2375 (Ger.).

any statements obtained by an employer from an implicated employee may be deemed inadmissible against the employee in either a criminal or disciplinary action.[136]

Beyond this, employers often cannot use the threat of termination to compel cooperation by either implicated or non-implicated employees because in many countries employees can only be terminated for cause and failure to cooperate does not justify termination.[137] To justify termination, the employee must have a duty to answer the questions asked and termination must be a proportionate response to the employees' breach. These conditions often are not met. Employers who rush to terminate without adequate grounds risk suit by the employee for wrongful dismissal.[138] Employees do not always have a duty to answer their employer's questions even about workplace conduct. For example, Brazilian employees have a right to either refuse to attend the interview, or attend and then either refuse to answer or simply lie with impunity.[139] In Belgium, employees also have the right not to cooperate; employers who threaten discipline violate their duty to ensure that the employee's statements are voluntary.[140]

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136 Some German courts have ruled that incriminating compelled statements by an employee to an employer may not be introduced as evidence against him in criminal proceedings in some circumstances. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 13, 1981, 1 BvR 116/77 (Ger.); Arbeitsgericht [AB] Hamm [Labor Court of Hamm] Mar. 3, 2010, 14 Sa 1689/08, para. 34 (Ger.); Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE J. 77, 92 (2015); *but see* Landgericht [LG] Hamburg [District Court of Hamburg] Oct. 15, 2010, 608 Qs 18/10 (Ger.).

In England and Wales, employers seeking to obtain credit for providing interview evidence must take care not to make threats or promises that might lead a court to conclude that the interview was unreliable or obtained through unfair process. *Compare* R v. Twaites (1991) 92 Cr. App. R 106 (Eng.) *with* R v Welcher [2007] EWCA Crim. 480 (Eng.); *see also* Police and Criminal Evidence Act 1984, c. 60, §§ 76, 78 (Eng.); Day & Hodges, *supra* note 129, at 103, 112–13, 123.

137 *See* Donald C. Dowling, Jr., *International HR Best Practice Tips: Conducting Internal Employee Investigations Outside the U.S.*, 19 INT'L HUMAN RESOURCE J. 1, 4 (2010).

138 For example, in England employees have prevailed against employers on the grounds that the employer's failure to consider alternatives to suspension was a breach of the employer's duty of trust and confidence, thus triggering a claim for constructive dismissal—a claim not easily won but that, if successful, provides the employee with both damages and release from post-termination restrictions on conduct. Carlton, *supra* note **Error! Bookmark not defined.**, at 179.

In addition, in some countries in Latin America, a company that either threatens an employee for refusing to cooperate or accuses an employee of misconduct during an interview risks a lawsuit for moral damages for infringing on the employee's dignitary rights. Ancken, *supra* note 110, at 61. Employers must tread carefully with employees' dignitary interests in other countries as well, such as France. Cour de cassation [Cass.] [supreme court for judicial matters] soc., Feb. 25, 2003, Bull. Civ. V., no. 66 (Fr.) (sanctioning an employer for infringing on an employee's dignity by disclosing his actions to co-workers with no specific reasons).

139 Sá de Miranda, *supra* note **Error! Bookmark not defined.**, at 53.

140 Hans Van Bavel & Frank Staelens, *Belgium*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: CORPORATE INVESTIGATIONS 2018, at 25, 29 (Glob. Legal Grp. ed., 2d ed. 2018)

In other countries, employees are required to cooperate, at least if the employer had a formal policy requiring them do to so, but only in some circumstances.[141] Yet this duty may be narrow. For example, in France and Germany, employees only have a duty to answer questions directly related to matters within the scope of their jobs. They may refuse to answer other questions, including questions about observations of others' behavior falling outside that employee's scope of employment activity.[142]

Even when employees are obligated to cooperate, labor laws nevertheless often preclude employers from immediately threatening to fire employees who refuse to cooperate. In countries that require for-cause termination, disciplinary sanctions must be proportionate to the severity of the employee's breach. In countries that value preserving employment relationships—including France, Belgium, Brazil, England and Wales, Switzerland, and Japan—an employee's failure to cooperate unlikely to be deemed adequate cause for termination.[143] Even when termination for non-cooperation is possible, employers often cannot

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[141] CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L.1232-1 (Fr.). In Germany, employees may have a right to resist if the employment agreement does not specify a right to cooperate or if the employee's personality rights preempt the employer's right to information. *See* BAG Sept. 7, 1995, 8 AZR 828/93 (Ger.); *see also* Michael Kempter & Björn Steinat, *Compliance – arbeitsrechtliche Gestaltungsinstrumente und Auswirkungen in der Praxis* [*Compliance—Employment-related Design Instruments and Effects in Practice*], 2017 NZA 1505, 1511 (Ger.).

[142] For example, in France and Germany, employees' duty to answer questions only applies to conduct in the core areas assigned to the employee. Thus, employees most likely need not answer questions about breaches by other employees. French courts do not always take an employer-friendly interpretation of whether questions relate to the employee's ability to perform, particularly when the questions involve the employees' observations of the conduct of others. Courts regularly conclude that the employee's right of personality prevails over the employer's right of information. *Id.* art. L.1222-2; Juri-social 1985, F. 82; 16 Juill. 1998, Thibaul, Dr. soc. 1998, p. 947, obs. M.-T. Lanquitin; Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 23, 1989, IX ZR 236/86, para. 95 (Ger.); Arbeitsgericht [AB] Mecklenburg-Vorpommern [Labor Court of Mecklenburg-West Pomerania] July 8, 2016, 2 Sa 190/15, para. 95 (Ger.). Bundesarbeitsgericht [BAG] [Federal Labor Court] Sept. 7, 1995, 8 AZR 828/93 (Ger.); s*ee also* David Charlot et al., *supra* note 134, at 153 (discussing France); Peter Kasiske, *Mitarbeiterbefragungen im Rahmen interner Ermittlungen–Auskunftspflichten und Verwertbarkeit im Strafverfahren* [*Employee Surveys Within the Scope of Internal Investigations—Information Obligations and Usability in Criminal Proceedings*] 2014 NEUE ZEITSCHRIFT FÜR WIRTSCHAFT-, STEUER- UND UNTERNEHMENSSTRAFRECHT [NZWIST] 262, 264 (Ger.) (discussing Germany).

[143] In France, there are no legal provisions permitting employers to sanction employees for refusing to cooperate. An employer can only suspend an employee if the employee has either committed misconduct or is under investigation for such. CORPORATE INTERNAL INVESTIGATIONS, *supra* note 107, at 313 (citing Art. 143-3 of the General Regulation of the AMF). Indeed, an employer who threatens an employee for failing to cooperate may be deemed to have committed an unlawful act that renders any information the employer obtains inadmissible in a judicial proceeding. David Charlot et al., *supra* note 134, at 153, 156–57. Exclusion is particularly likely in a disciplinary action by the employer against the employee. Jeremy Bernard et al., *Investigations in France*, CORPORATE INTERNAL INVESTIGATIONS: AN INTERNATIONAL GUIDE 277, 308 (Paul Lomas & Daniel J. Kramer eds., 2d ed. 2013) (evidence may be inadmissible in a disciplinary action against the employee).

threaten termination until less extreme forms of discipline, such as a formal warning letter or suspension, have failed,[144] and even then, only in some circumstances. In some countries, such as Germany and Austria, even repeated refusals to cooperate may not justify dismissal. To justify termination, the employee's repeated refusal to cooperate must provide the employer reasonable grounds for concluding that the employee could not be trusted in the future. The employer may be unable to establish this if the employee is otherwise trustworthy and is not implicated in the offense, or if the employer did not terminate other non-cooperative employees.[145] Indeed, an employer may even be unable to fire an employee who engaged in

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In England and Wales, an employer must establish that it has reasonable grounds for the suspension or termination, such as evidence that the employee engaged in serious misconduct. James Carlton et al., *Employee Rights: The UK Perspective*, *in* THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS 175, 175 (Judith Seddon, et al. eds, 1st ed. 2016). In the UK, suspension is less of a threat than in the U.S. because unpaid suspension is rare, and indeed is not an option unless the employer explicitly contracted for the right to do so. *Id*. at 177.

In Switzerland, terminating an innocent employee whose only breach was a violation of the duty to cooperate with the investigation will likely be deemed excessive and thus invalid. Livschitz, *supra* note 134, at 372, 386.

In Japan, courts are unlikely to conclude that a refusal to cooperate is "reasonable grounds" for dismissal, since that standard is interpreted in light of Japan's historical culture favoring lifetime employment. See [Labor Contract Acts], Law No. 128 of 2007, art. 3, para 4.

In Brazil, termination for cause is viewed as the harshest disciplinary measure only for extreme situations, such as if there is evidence that the employee engaged in corruption, theft of corporate information, or fraud. Companies have the burden of proof in cases of termination for cause. Sá de Miranda, *supra* note **Error! Bookmark not defined.**, at 53.

144 For example, in Australia an employer must warn an employee prior to commencing procedures to fire him. *See* Estreicher & Hirsch, *supra* note **Error! Bookmark not defined.**, at 359–60. Even then, termination will not be permitted if it is deemed harsh, unjust, or unreasonable under the circumstances. *See Mocanu v. Kone Elevators Pty. Ltd.*, [2018] FWC 1335 (6 March 2018) (Austl.). In England, Wales, Germany, and Italy, companies are expected to proceed through stages, beginning with a warning, and moving to more serious sanctions short of dismissal, before seeking dismissal. Employers may need to delay sanction until obtaining the employee's justification. *See* Joanna Ludlam & Henry Garfield, *England and Wales*, *in* CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS (Stephen Spehl & Thomas Gruetzner eds., 2013); Carlton et al., *supra* note **Error! Bookmark not defined.**, at 179; Bundesarbeitsgericht [BAG] [Federal Labor Court], June 10, 2010, 2 AZR 541/09 (Ger.); ERFURTER KOMMENTAR ZUM ARBEITSRECHT [COMMENT ON LABOR LAW] ¶ 198 (19th ed. 2019) (Ger.); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 622, § 626 (Ger.) (employers should warn first, unless a compelling reason justifies termination without notice); Volker Rieble, *Schuldrechtliche Zeugenpflicht von Mitarbeitern* [*Obligatory Witnessing of Employees*] 2003 Zeitschrift für Wirtschaftsrecht [ZIP] 1273 (Ger.); Burkard Göpfert et al., *"Mitarbeiter als Wissensträger"—Ein Beitrag zur aktuellen Compliance-Diskussion* [*Employees as Knowledge Carriers—A Contribution to the Current Compliance Discussion*] 2008 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1703, 1707 (Ger.); Sebastian Lach et al., *Germany*, *in* THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS 569, 575 (Judith Seddon et al. eds., 1st ed. 2016); Di Garbo et al., *Italy*, *in* CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS 270, 270–71 (Stephen Spehl & Thomas Gruetzner eds., 2013).

145 In Germany and Austria, employers cannot reliably fire an employee for refusing to cooperate even when the employee had a duty to do so. Employers must establish that termination is needed to protect the employer, and not as a punishment. Failure to cooperate may not constitute adequate cause for dismissal if the employee is

misconduct if the misconduct was not severe, the employee was low-level and acting under orders, or the misconduct was severe but was committed with the company's knowledge or tacit consent.[146] Labor laws can also impose procedural burdens likely to dissuade companies from disciplining non-cooperative employees, particularly when investigating misconduct about which the government is unaware. For example, in many countries, employees targeted for discipline are entitled to be apprised of the evidence against them, including witness statements or portions of an investigatory report relevant to their conduct[147]—information that companies

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not implicated and has otherwise proved trustworthy. *See* Bundesarbeitsgericht [BAG] [Federal Labor Court] Oct. 23, 2008, 2 AZR 483/07, para. 32 (Ger.); *see* also CORPORATE INTERNAL INVESTIGATIONS, *supra* note 107, at 263 (discussing Germany). Repeated failure to cooperate may provide cause for termination in Germany if the employer sends the employee a formal warning letter and the employee commits a subsequent violation. Lach et al., *supra* note **Error! Bookmark not defined.**, at 717. These substantive and procedural limitations on dismissal apply even if the employer has concluded that the employee committed misconduct. Bundesarbeitsgericht [BAG] [Federal Labor Court] Oct. 23, 2008, 2 AZR 483/07, para. 32 (Ger.). Repeated failure can justify termination in Austria if they provide evidence of untrustworthiness, yet threat of termination is a last resort, and the employer's right to take such action must be found in a law, a collective agreement, or a works agreement. Georg Krakow & Alexander Petsche, *Austria*, *in* CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS 24–25, 33–34 (Stephen Spehl & Thomas Gruetzner eds., 2013).

[146] *See* Kazuo Sugeno & Keiichi Yamakoshi, THE JAPAN INST. FOR LABOUR POLICY, DISMISSALS IN JAPAN 2, 4 (2015), http://www.jil.go.jp/english/archives/documents /201501_ dismissals_ in_japan.pdf (discussing Japan).

In Germany, a dismissal of an employee for suspected misconduct will withstand judicial review only if the employee's misconduct appears likely based on substantiated incriminating facts, exonerating circumstances have been reasonably assessed, and the employer has exhausted all available sources to clarify the matter. Mario Eylert, *Die Verdachtskündigung* [*The Suspicion Termination*], 2014 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT RECHTSPRECHUNGS-REPORT ARBEITSRECHT [NZA-RR] 393, 404 (Ger.).

In France, a labor court required Societe Generale to pay $510,000 for terminating an employee convicted of fraud relating to rogue trading. The court concluded that the bank fired the employee to punish him for the sanction imposed on the bank, instead of for the misconduct itself, because the bank learned of his rogue trading in 2007 but did nothing until 2008. Michael Stothard, *Kerviel Wins €400,000 from SocGen for Unfair Dismissal*, FINANCIAL TIMES (June 7, 2016), https://www.ft.com/content/82e3c230-2ca6-11e6-bf8d-26294ad519fc. The employee also was ordered to pay Societe Generale damages for the losses he caused. Gaspard Sebag, *Kerviel Loses Bid to Get Retrial of Criminal Conviction*, BLOOMBERG (Sept. 26, 2018, 9:55 AM).

[147] For example, in England, an employer seeking to terminate an employee for cause must undertake a three-step process of notice and meetings priors to disciplinary action. The employee must be given a hearing, including the right to respond to allegations, and an opportunity to appeal. Employment Code of Practice (Disciplinary and Grievance Procedures) 2004, SI 2004/2356 (Eng.), http://www.legislation.gov.uk/uksi/2004/2356/resources. Furthermore, employees suspected of misconduct are often placed on garden leave (leave with pay) pending the resolution of any criminal proceedings against them. In Ireland, employees have a constitutional right to fair procedures in any investigatory or disciplinary process, which obligates the employer to keep the employee apprised of the investigation and give the employee a right to participate in the investigation. Lawlor, *supra* note 110, at 620–21.

Switzerland and Australia afford employees subject to discipline various rights, generally including notice, the right to confront witnesses, discovery rights (such as the right to access to internal investigation files), and protection against any threats by the employer. Bundesgericht [BGer] [Federal Supreme Court] May 4, 2016, 4A_694/2015 (Switz.); *See Fair Work Act 2009* (Cth) s 387(c) (Austl.); *Farmer v KDR Victoria Pty. Ltd. T/A Yarra Trams* [2014] FWC 6539 (22 September 2014) (Austl.); *Cannan v Nyrstar Hobart Pty. Ltd.* [2014] FWC

may be reluctant to share when investigating misconduct about which the government is unaware. Moreover, companies cannot necessarily avoid premature revelation of their investigation by waiting to discipline an employee until after the government learns of the misconduct. Labor laws in many countries, such as France, require companies to initiate any and all[148] intended disciplinary proceedings relatively quickly after discovering facts justifying discipline.[149] In countries such as Germany, France, and Australia that predicate termination on the employer's inability to trust the employee, a company that delays may undermine its claim of just cause for firing.[150] Thus, companies conducting internal investigations overseas may not be able to both threaten to fire employees in order to induce them to talk and maintain confidentiality of investigative findings. This can negatively impact investigations.

c. Employees' Access to Counsel during Employer Interviews

5072 (19 September 2014) (Austl.); *see generally* Andrew Tobin & Adele Garnett, *Misconduct Investigations: Our Top Tips*, HOPGOOD GANIM (Mar. 20, 2015), https://www.hopgoodganim.com.au/page/knowledge-centre/blog/misconduct-investigations-our-top-tips (discussing Australia);

In France, an employer seeking to dismiss an employee must provide notice, meet with the employee to explain its rationale, and provide the employee with opportunity and time to respond. See Estreicher & Hirsch, *supra* note **Error! Bookmark not defined.**, at 389.

148 Indeed, some countries apply the principle of *ne bis in idem* (double jeopardy) to disciplinary procedures. In such countries, a company's decision to sanction the employee for failing to cooperate may prevent the company from later terminating the employee for the misconduct should the evidence reveal the employee was involved.

149 In France, it appears that an employer discovering misconduct or gross misconduct cannot sanction an employee unless the employer begins the dismissal process within two months of becoming aware of the misconduct. Matthew Cowie & Karen Coppens, *Multi-Jurisdictional Criminal Investigations—Emerging Good Practice in Anglo-French Investigations*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: CORPORATE INVESTIGATIONS 2018, at 4, 6 (Glob. Legal Grp. ed., 2d ed. 2018). In Belgium, an employer who has received a credible allegation of misconduct against an employee has only three working days to inform the employee of the factual basis for dismissal and then to discuss it with the employee if the employer wants to discipline. The clock begins running before the firm completes its investigation. Carl Bevernage, *Belgium*, *in* INTERNATIONAL LABOR AND EMPLOYMENT LAW 3–28 (William L. Leller et al. eds., 2009). In Spain, the statute of limitation is 20 days for serious offenses and 60 days for very serious offenses, from the date the employer has notice of the offense. Labor Act art. 60 (Spain); *see also* David Diaz, et. al, *Spain*, *in* CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS 337–38 (Stephen Spehl & Thomas Gruetzner eds., 2013). In Italy, an employer seeking to terminate an employee is required to provide written notice to the employee of his misconduct as soon as the employer detects the violations. The employee has five days to reply. Only then may the employer decide whether to terminate, if it is warranted. Bruno Cova & Francesda Petronio, *Italy*, *in* THE EUROPEAN, MIDDLE EASTERN AND AFRICAN INVESTIGATIONS REVIEW 2017, at 34, 37 (Glob. Investigations Review ed., 2017).

150 In Germany, where discipline is intended to protect the employer from future harm, delay can undermine the employer's claim that dismissal is needed. Moreover, for an extraordinary dismissal, the employer has to act within two weeks after receiving knowledge of the grounds for dismissal. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 626 (Ger.). In Austria, employees are entitled to expeditious and thorough investigation of any matter that might lead to their discipline. Australian courts disfavor terminations following lengthy investigations. *See, e.g.*, *Camilleri v. IBM Austl. Ltd.* [2014] FWC 5894 (10 September 2014) (Austl.).

In the U.S., companies often benefit from the ability to interview employees about sensitive matters without the employee having counsel present. By contrast, in many countries, companies cannot interview employees in isolation because labor laws, contracts, union agreements, or bar rules give employees a right to consult a representative, such as a lawyer or union official, prior to an interview, or to representation during the interview.[151] Indeed, Swiss courts have held that firms interviewing an employee accused of misconduct must afford the employee rights equivalent to those in a criminal investigation, including the right to counsel, the right to remain silent, a confrontation right, access to internal investigation files, and a right against threats by the employer.[152] Austrian labor laws impose on employers a duty of care towards employees that may require informing employees about their right to counsel when the employer and employee have divergent interests.[153] In several countries, such as England, Germany, and France, bar rules provide that lawyers conducting interviews for employees should inform employees about their right to counsel and ensure that employees understand that their statements may be given to authorities and used against them.[154]

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151 Dervan, *supra* note 125, at 380–81. For example, in Italy, employees are entitled to have her union representative present at any meeting to discuss dismissal, or entitled to have the works counsel informed Di Garbo et al., *supra* note [], at 270–71.In Germany, the company may be required to inform any existing works counsel about an employee interview both before and after the interview and consider their proposals of the works counsel when making any disciplinary decision. Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act] § 80(2); Peter Schrader et al., *Auskunft durch den Arbeitnehmer: Was darf er? Was muss er?* [*Information by the Employee: What is he Allowed to Do? What Does he have to Do?*], 2018 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 965, 970; *see also* Estreicher & Hirsch, *supra* note **Error! Bookmark not defined.**, at 404. While the employee is not entitled to have the works counsel present, they can advise the employee before the interview.

152 Bundesgericht [BGer] [Federal Supreme Court] May 4, 2016, 4A_694/2015 (Switz.).

153 Knoetzl, *supra* note 134, at 647. In Germany, by contrast, the employee is not entitled to have a lawyer present, unless the company calls in an external attorney. Arbeitsgericht [AB] Hamm [Labor Court of Hamm] May 23, 2001, 14 Sa 497/01 (Ger.). Nevertheless, in practice employers allow employees to have lawyers of their choice present, particularly if the employee's employment may be at stake. *See* STELLUNGNAHME DER BUNDESRECHTSANWALTSKAMMER 35/2010: THESEN DER BUNDESRECHTSANWALTSKAMMER ZUM UNTERNEHMENSANWALT IM STRAFRECHT, [OPINION OF THE FEDERAL LAW OFFICIAL CHAMBER 35/2010: THESES OF THE FEDERAL LAW COUNCIL TO THE CORPORATE LAWYER IN CRIMINAL LAW] 10 (2010) (Ger.) [hereinafter THESES OF THE FEDERAL LAW COUNCIL], https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2010/november/stellungnahme-der-brak-2010-35.pdf. In extraordinary circumstances, courts have precluded an employer from disciplining an employee for misconduct when the employee was denied a confidant during initial interviews. *See* Arbeitsgericht [AB] Berlin [Berlin Labor Court] July 28, 2005, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1703, 2008 (Ger.).

154 *See, e.g.*, THESES OF THE FEDERAL LAW COUNCIL, *supra* note 153 (discussing Germany); Thomas Baudesson & Charles-Henri Boeringer, *Internal Investigations in France—New Practices, New Challenges*, *in* REVUE INTERNATIONALE DE LA COMPLIANCE ET DE L'ÉTHIQUEDES AFFAIRES 1, 3 (2017) (discussing Paris bar rules); David Charlot et al., *supra* note 134, at 146 (same).

d. Legal Privileges and Role of Counsel

As discussed in Part II, the breadth and reliability of U.S. legal privilege protections encourages companies to detect and robustly investigate misconduct by enabling companies to shield the evidence produced from compelled disclosure to others.[155] Of course, these laws also reduce the value of any resulting cooperation.. Because companies cannot selectively waive privilege only with public enforcers, cooperating firms generally provide investigative summaries but not the raw products of interviews.

The balance can be very different overseas. Overseas, corporations have less incentive to conduct broad investigations, particularly of undisclosed misconduct, because privilege protections tend to be much narrower. On the other hand, prosecutors may derive greater benefit from any interviews that are conducted because they may be able to obtain full access to any recordings or transcripts as a result of narrower privileges or policies granting (and requiring) selective waiver as a prerequisite to cooperation.[156]

Internal investigations are especially risky in countries, such as China, that do not recognize legal privilege at all.[157] Other countries recognize legal privilege in some

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In England, Outcome 11.1 of the SRA Code of Conduct 2011 provides that a solicitor must not take unfair advantage of third parties in either a professional or personal capacity. Particular care is required when the person is implicated in misconduct and does not have legal representation. Solicitors are expected to caution the employee about the potentially incriminatory nature of the interview and, if the interview reveals that the employee is implicated, they should suspend the interview in order for the employee to obtain counsel. See Day & Hodges, *supra* note 129, at 103, 112–13, 123; CORPORATE INTERNAL INVESTIGATIONS, supra note 107, at 163; *compare* R v. Twaites (1991) 92 Cr. App. R 106 (Eng.), *with* R v. Welcher [2007] EWCA Crim. 480 (Eng.).

155 The lack of privilege may deter investigations less in countries with little risk of private litigation or with other barriers to private litigants acquiring information, such as restrictive discovery rules or state-secrets privileges affecting state-owned enterprises.

156 The Serious Fraud Office in the U.K., for example, is granted significant power under Section 2 of the Criminal Justice Act. *See* Criminal Justice Act 1987, c. 38 § 2 (Eng.).

157 *See, e.g.*, Wultz v. Bank of China Ltd., 979 F. Supp. 2d 479, 492-93 (S.D.N.Y 2015); Susan E. Brune, *Representing Individuals in Internal Investigations*, CHAMPION, Sept.–Oct. 2016, at 38, 43 (Oct 2016). Indeed, in China, parties and their lawyers may be compelled to testify in administrative investigations and proceedings. Yingxi Fu-Tomlinson, *Safeguarding Confidential Communication in China*, LAW 360 (Mar. 25, 2016, 10:45 AM), https://www.law360.com/articles/773074/safeguarding-confidential-communication-in-china (citing Zhōnghuá rénmín gònghéguó fǎn lǒngduàn fǎ [Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong. Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68, art. 39.1(2)–(3)). Moreover, the right of lawyers representing clients in criminal proceedings to keep matters confidential does not apply to in-house counsel or unregistered foreign lawyers. *Id*. (citing [Criminal Procedures Law of the People's Republic of China], art. 46, and Zhonghua Renmin Gongheguo Lushifa [Lawyers' Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong. Oct. 26, 2012, effective Oct. 26, 2012), art. 38).

circumstances, but do not apply it to those lawyers best positioned to conduct the initial investigation into preliminary evidence of potential misconduct at the lowest cost: in-house counsel.[158]

Beyond this, even external counsel's interviews with most employees are not protected by legal advice privilege, which is akin to attorney-client privilege. In many countries, legal advice privilege only protects communications with the subset of employees who have authority to represent, and make legal decisions for, the company for purposes of the attorney-client relationship.[159] For example, in England, the Court of Appeals, in *Director of the Serious Fraud Office v. Eurasian Natural Resources Ltd.*, held that legal advice privilege applies only to company lawyers' communications with company employees "specifically tasked with seeking and receiving [legal advice] on behalf of the [company]."[160] Similarly, in Italy legal advice privilege applies only to employees who have the power to represent the company.[161]

In some countries, legal privilege does not attach if a firm hires a lawyer to determine whether the firm has adhered to compliance duties imposed on it by law, on the grounds that compliance duties are not typical activities of a lawyer. Thus, a financial institution hiring counsel to determine whether the anti-money laundering laws have been violated may be unable to shield the investigation under legal privilege. *See* Bundesgericht [BGer] [Federal Supreme Court] Mar. 21, 2018, 1B_433/2017, § 4.5 (Switz.); Bundesgericht [BGer] [Federal Supreme Court] Sept. 16, 2016, 1B_85/2016, § 6.1 (Switz.).

158 In many European countries, privilege applies only to communications with an independent lawyer. In-house counsel are not seen as independent. *E.g.*, Brune, *supra* note 157, at 43–44; Dervan, *supra* note 125, at 370–71. These jurisdictions include Austria, Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Luxembourg, Romania, Russia, Sweden, and Switzerland. Julia Holtz, *Legal Profession Privilege in Europe: A Missed Policy Opportunity*, 4 J. EUROPEAN COMPETITION LAW & PRACTICE 402, 405 (2013); *see also* Krakow & Petsche, *supra* note **Error! Bookmark not defined.**; Lach et al., *supra* note **Error! Bookmark not defined.**, at 575; Charlot et al., *supra* note 134, at 161; Alexei Dudko, *Russia*, *in* THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS 633, 641 (Judith Seddon et al. eds., 1st ed. 2016); Borsodi & Burrus, *supra* note 128, at 665, 671; see also Case C-550/07, Akzo Nobel Chems., Ltd. v. Comm'n, 5 C.M.L.R. 19, 1191, 1192 (2010) (ruling of the European Court of Justice that applicable legal privilege does not extend to legal advice given by in-house counsel or non-EU qualified lawyers).

In addition, many countries restrict legal privilege to communications with external lawyers registered with the bar in that country. *See* Brune, *supra* note 157, at 43–44.

159 This is akin to the "control group" test that the U.S. Supreme Court rejected in the *Upjohn* decision as insufficiently protective to allow corporate lawyers to gather necessary facts. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981).

160 Dir. of the Serious Fraud Office v. Eurasian Nat. Res. Ltd., [2018] EWCA Civ. 2006 (Eng.) ("ENRC"). The Court of Appeals in *ENRC* recognized the rationales against narrow privileges but stated that it was constrained to follow a prior ruling of the House of Lords. Notably, the SFO and FCA often insist that firms waive the privilege and provide full transcripts of employee interviews. England does recognize selective waiver, however. Amanda Radd et al., *Self-Reporting to the Authorities and Other Disclosure Obligations: The UK Perspective*, *in* THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS (Judith Seddon, et al. eds., 1st ed. 2016).

161 *See* Cova & Petronio, *supra* note 149, at 36.

In addition, work product privileges can be narrower than in the U.S., leaving some internal investigations unprotected. For example, England's version of the doctrine is called the litigation privilege. A company claiming this privilege must show that it was "aware of circumstances that rendered litigation between [itself] and the particular person or class of persons *a real likelihood* rather than a mere possibility."[162] In *Eurasian Natural Resources*, the Court of Appeals held that documents, including interview notes, created in the course of an internal investigation, are protected by the litigation privilege only if the firm's dominant purpose was to obtain evidence in relation to, or to advise on, actual or contemplated litigation, including efforts to avoid or settle such litigation.[163] Importantly, the decision suggests that litigation privilege would not apply to internal investigations into misconduct the government has not detected if the firm investigated with no plan to self-report and no expectation that enforcers would detect the misconduct.

Germany does not recognize traditional attorney-client and work product privileges. Instead, prosecutors' ability to obtain information from lawyers about their clients is governed by criminal procedure statutes.[164] Under these provisions, external lawyers are entitled to maintain the confidentiality of client information, and thus cannot be called to testify against a client.[165] However, German prosecutors may be able to seize materials from lawyers offices, including evidence obtained during an internal investigation, in certain circumstances. The German Code of Criminal Procedure delineates when and which objects in a lawyer's

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162 United States v. Philip Morris Inc. [2003] EWHC 3028 (Comm) 46; [2004] 1 CLC 811, 827 (Eng.) (emphasis added).

163 The firm had conducted an internal investigation following a whistleblower report, expecting to self-report to the SFO with hope of obtaining a DPA. The lower court concluded that the company could not claim litigation privilege because an internal inquiry conducted without a pending government investigation, with the intent to avoid litigation under the SFO's policy favoring leniency for self-reporting, was not prepared in anticipation of likely litigation, and thus was not covered by the litigation privilege. Dir. of the Serious Fraud Office v. Eurasian Nat. Res. Ltd., [2017] EWHC 1017 (QB) (Eng.); *see also* RBS Rights Issue Litigation, [2016] EWHC 3161 (Ch) (Eng.).

164 There is less risk of disclosure in civil proceedings in Germany. In civil proceedings, courts usually dismiss motions for production of documentary evidence by opposing parties because German civil procedure follows the principle of production of evidence by the party who bears the burden of proof, that is, it is within every party's responsibility to obtain the evidence necessary to substantiate its claims, and, in principle, to bear the risk for failing to do so. Hans-Joachim Musielak & Wolfgang Voit, ZIVILPROZESSORDNUNG [CIVIL PROCEDURE] § 142, para. 8 (15th ed. 2018).

165 STRAFPROZESSORDNUNG (STPO) [CODE OF CRIMINAL PROCEDURE], § 53, Sec.1, nos. 2, 3 (Ger.).

possession are protected from seizure.[166] Authorities are prohibited from seizing either notes of conversations or written correspondence between a lawyer and a client, as well as defense materials, provided that the materials relate to the defense of a person whom the attorney represents in a criminal matter, or, in the case of corporations, an administrative action threatening financial sanctions.[167] Prosecutors may be free to seize the results of a lawyer's internal investigation conducted on behalf of the corporation if the materials were not prepared to defend the corporation from charges, for example because the prosecutors' criminal investigation is targeted at someone other than the corporate client, such as an employee or subsidiary.[168]

In such situations, German courts tend to use a balancing test to assess the validity of the search. The public interest in effective prosecution normally tips the scale in favor of allowing the search.[169] Applying these principles, the Federal Constitutional Court of Germany

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166 The Federal Constitutional Court recently concluded that the more general protections against prosecutors seeking evidence from lawyers do not extend to the seizure of objects such as documents. Lawyer's protection against document seizure is covered by German Code of Criminal Procedure (StPO), § 97 Sec. 1 No. 1. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 27, 2018, 2 BvR 1287/17, 2 BvR 1583/17, para. 78–79 (Ger.).

167 *Id.*; *see* STRAFPROZESSORDNUNG (STPO) [CODE OF CRIMINAL PROCEDURE] § 97 Sec. 1 No. 1 (Ger.); Federal Court of Justice, Judgement of 25 February 1998 - 3 StR 490/97, BGHSt 44, 46. For a comprehensive discussion of the decision's implications, see Michael Hippeli, *Hoheitliche Eingriffsmaßnahmen gegen deutsche Büros internationaler Kanzleien: Bedarf für ein Legal Privilege?* [*Sovereign Intervention Measures Against German Offices of International Law Firms: Need for a Legal Privilege?*], 2018 GWR 383 (Ger.). Section 97 has been interpreted to apply only to materials prepared to defend a client subject to criminal charges.
In Germany, corporations cannot be held criminally liable, but they are subject to administrative sanctions that resemble criminal liability in other countries; many provisions of the German Code of Criminal Procedure applies to these proceedings. *See* Gesetz über Ordnungswidrigkeiten [OWiG] [Law on Misdemeanors] § 46(1) (Ger.).

168 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 27, 2018, 2 BvR 1287/17, 2 BvR 1583/17, para. 79 (Ger.); Regional Court of Hamburg, judgement of 15 October 2010, 608 Qs 18/10; Regional Court of Bonn ("LG Bonn"), 21 June 2012 - 27 Qs 2/12 NZWiSt 2013, 21 (Section § 97 only applies if the client was already accused of a crime when the potentially incriminating material is obtained, and finding that a subsidiary is not necessarily likewise represented by the attorney that represents the parent company).

This situation can easily occur in Germany because corporations can only be sanctioned under Section 30 OWiG for criminal or administrative misconduct by an employee only if the employee was (1) chairman of the executive committee of an association without legal capacity or a member of such committee; (2) an authorized representative with full power of attorney or in a managerial position as procura-holder or an authorized representative with a commercial power of attorney of a legal person; or (3) another person responsible on behalf of management for the operation or enterprise forming part of a legal person, which also covers supervision of the conduct of business, or other exercise of controlling powers in a managerial position. "Misconduct" of such a person can consist in the lack of proper supervision of any other employee who then committed a crime or administrative infraction. *See* Gesetz über Ordnungswidrigkeiten [OWiG] [Law on Misdemeanors] § 130 (Ger.).

169 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 27, 2018, 2 BvR 1287/17, 2 BvR 1583/17, para. 61, 66, 67 (Ger.)

recently rejected challenges to prosecutors' seizure of materials from the Jones Day firm, which was representing Volkswagen (VW), for use against VW executives. The court concluded that the seizure was permissible because VW was not formally accused of an offense, the government had probable cause to search for evidence against the targets of its investigation based on evidence contained in guilty pleas in the U.S., and the case involved widespread material misconduct.[170]

Overseas regimes governing the conduct of lawyers may also inhibit, more than in the U.S., the ability of corporations to select, fund, and communicate with counsel for individual employees. English practitioners, for example, will explain that lawyers involved in business crime cases do not reach the question of whether joint defense agreements are advisable (even if they would be of any value under narrower privilege laws there) because corporate counsel will be inhibited from discussing the facts with counsel for individuals by fear that it might be treated as "interference with the due administration of justice" or "contempt of court."[171]

3. Monitoring and Processing of Data and Documents

Compared with the U.S., companies overseas also often do not enjoy the same comparative advantage over enforcement officials in obtaining and analyzing corporate emails and other documents.

Like their U.S. counterparts, government authorities overseas often can obtain documents and emails from firms.[172] Indeed, as a result of more restrictive approaches to legal

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[170] The Federal Constitutional Court also rejected claims by the law firm Jones Day that the search violated its constitutional rights because, as a U.S. firm, Jones Day is not entitled to the asserted German constitutional rights. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 27, 2018, 2 BvR 1287/17, 2 BvR 1583/17, para. 78–79 (Ger.).

Similarly, in 2010, the District Court of Hamburg held that the public authorities pursing a criminal investigation of a firm's employees could seize internal investigation material from a law firm because the company itself was not accused or suspected. Landgericht [LG] Hamburg [District Court of Hamburg] Oct. 15, 2010, 608 Qs 18/10 (Ger.). In 2012, the Bonn District Court held that prosecutors could seize material from a lawyer for a parent corporation for use against its subsidiary because the parent was not a potential party. *See generally* Phillipp von Holst, *Germany*, *in* THE EUROPEAN, MIDDLE EASTERN AND AFRICAN INVESTIGATIONS REVIEW 2017, at 29, 31 (Glob. Investigations Review ed., 2017).

[171] For discussion of the scope of these offenses, see ARCHBOLD, CRIMINAL PLEADING, EVIDENCE & PRACTICE §§ 28-30 to 28-50 (2009).

[172] For example, both the SFO and the FACT have the power to compel the production of any kind of evidence by those within their jurisdiction, including documents. Criminal Justice Act 1987, c. 38 § 2(3) (Eng.). In addition, the SFO can obtain evidence by turning to the police to use extensive search and seizure powers, albeit with a warrant. *See generally* Christine Braamskamp & Keyll Hagedom, *KBR Inc.: Foreign Companies Can Now Be Compelled to Produce Documents to the UK Serious Fraud Office*, N.Y.U.: COMPLIANCE & ENFORCEMENT

privilege, foreign authorities in many countries can obtain documents that their U.S. counterparts cannot, such as those prepared by in-house counsel.

By contrast, companies overseas often are less able than companies in the U.S. to monitor employees' communications or freely access and process emails, digital evidence and documents, even when stored on the company's servers or devices, as a result of privacy laws governing data or correspondence. These laws also often cause companies to incur greater cost and face more restrictions when accessing and processing records during an investigation. In addition, financial institutions in some countries may be impeded from conducting adequate internal investigations by bank secrecy laws or state secrets laws.

a. Data Privacy Laws

Overseas companies often cannot freely monitor employees' communications or assess and evaluate documents and digital evidence, even when stored on the company's servers or computers, if employees' communications include personal communications, or if, as it inevitably does, their work-related communications includes personal data..

A company cannot freely process emails and electronic documents in countries with strong privacy protections, such as France, if employees use company-provided computers and

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(Sept. 12, 2018), https://wp.nyu.edu/compliance_enforcement/2018/09/12/kbr-inc-foreign-companies-can-now-be-compelled-to-produce-documents-to-the-uk-serious-fraud-office/.

In Germany, the Federal Financial Supervisory Authority ("BaFin") can demand documents and emails from companies for the purpose of exercising its supervisory duties. *See* Wertpapierhandelsgesetz [WpHG] [Securities Trading Act] Sept. 9, 1998 § 6 (Ger.) or § 6 of the German Banking Act ("Kreditwesengesetz" or "KWG"). BaFin also can compel employees of regulated entities to produce documents even if it would expose them to criminal or administrative liability. An implicated employee's compelled production may not be introduced as evidence against him in criminal proceedings, but derivative use is permitted. *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 13, 1981 Neue Juristische Wochenschrift [NJW] 1431, 1981 (Ger.); Uwe H. Schneider, *Investigative Maßnahmen und Informationsweitergabe im konzernfreien Unternehmen und im Konzern*, [*Investigative Measures and Information Dissemination in the Group-free Company and in the Group*], 2010 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 1201, 1203; *see also* CORPORATE INTERNAL INVESTIGATIONS, *supra* note 107, at 248.

Overseas prosecutors often have more leeway to conduct a search because they face a less robust exclusionary rule if the search is defective. Many countries employ a balancing test—balancing the individual's rights against the state's interest in sanctioning the crime—to determine whether to exclude illegally obtained evidence. In addition, a number of jurisdictions do not extend exclusion to evidence derived from an illegal search ("fruit of the poisonous tree") or exclude derivative evidence only in limited circumstances. *See generally* Slobogin, *A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases*, *in* RESEARCH HANDBOOK IN COMPARATIVE LAW 280, 286–88 (Jacqueline Ross & Stephen Thaman eds., 2016); Jenia Turner, *Do Exclusionary Rules Ensure a Fair Trial*, p. 255, in THE PURPOSE AND FUNCTIONS OF EXCLUSIONARY RULES: A COMPARATIVE PERSPECTIVE (2019) (discussing Spain, Germany, and Switzerland); Stephen Thaman, Comparative Criminal Procedure: A Casebook Approach, pp. 118-124 (2nd ed. 2008).

email accounts for personal purposes.[173] Instead, companies often must incur the added cost of hiring a third-party to sort through emails and other documents to remove materials that the firm is not authorized to access—an added cost that may be material to a smaller or medium-size firm deciding whether to investigate potential misconduct that it is not confident occurred.

Beyond this, companies also face limitations on their ability to process work-related emails and documents because these inevitably contain personal data, often of both an employee and a third-party. In this situation, the company needs a legitimate basis for processing that data and faces potential notice requirements.

Under the General Data Protection Regulation (GDPR),[174] which establishes minimum standards for European Union countries, "personal data" is defined as "any information relating to an identified or identifiable natural person."[175] Email accounts are personalized if the email address includes an employee's name. Data on a company laptop or desktop may be personal if company devices are assigned to individual employees.[176] Even personal identifying information in travel vouchers, requests for reimbursement, corporate contracts, and the like

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173 In France, an employer seeking to collect all of its employees' emails during an investigation needs to satisfy several requirements. First, the company must verify that the company's internal policies clearly state and notify employees that the employers' email accounts are corporate property. If employees are allowed to use their company accounts for personal emails, then the company must separate personal from company emails. Employees have a strong right of privacy in emails markets personal. Cour de cassation [Cass.] [supreme court for judicial matters] May 30, 2007, 05/43102 (Fr.). Second, the firm would need to get prior approval from the French data collection authority, the Commission Nationale de L'Informatique et des Libertes (CNIL). Third, the firm would have to inform the work council and other labor committees. *See* Charlot et al., *supra* note 134, at 146–47. Similarly, in Austria a company that permits employees to use computers or email for private purposes must exclude resulting personal data from its processing, aside from spot checks. Knoetzl, *supra* note 134, at 647, 661. Employees in Canada also may have an expectation of privacy in personal information stored on workplace computers or devices. *R v. Cole* (S. Ct. Canada).

174 Commission Regulation 2016/679 of 27 April 2016, On the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 2016 O.J. (L 119) [hereinafter GDPR]. The GDPR directly affects law in each member state but only sets a floor. In the E.U., individuals' right to protection of personal data is deemed to be a fundamental right. Treaty of Lisbon Amending the Charter of Fundamental Rights of the European Union, Dec 13, 2007, 2007 O.J. Art. 8(1).

175 GDPR, *supra* note 174, at art. 4, para. 1.

176 For a discussion of Switzerland, see Livschitz, *supra* note 134. French law also prohibits a firm from access employees' email and information on computers in employees' possession, even when the firm owns both, if email accounts are personalized and electronic devices are individually assigned, unless the firm has a legitimate basis and proper procedures are employed. PhillippeK v. Cathnet-Science (Cass. soc. 2005); Nikon France SA v. Frederic O. (Cass. soc. 2001).

may be considered personal data. Personal data also includes names, email addresses, and other information of individuals outside the firm who are named in company documents.[177]

A company engages in "processing" of data if it performs "any operation or set of operations on personal data or on sets of personal data."[178] As a result, a company analyzing corporate emails and other electronic records during an investigation invariably will be processing "personal information" of employees and third-parties, as that term is defined by both the GDPR and country-specific data privacy laws.[179]

Companies can process personal data if they obtain either the subjects' voluntary affirmative consent to process data for the specific purpose intended or have a legitimate justification.[180] Companies generally cannot rely on blanket consent inserted in an employee contract or handbook to justify either widespread monitoring or access to employee emails for an investigation because broad consent arguably does not satisfy the GDPR's requirement that the subject affirmatively consent to the specific purpose for which the data will be processed. Consent also must be truly voluntary.[181] As a result, corporations in countries such as Germany tend not to rely on consent because employees must be expressly asked for it, must be able to refuse without risk of sanction, and can withdraw it at any time.[182] Moreover, courts tend to assume that consent is involuntary because of the imbalance of power between the employer and employee, unless the employee derived legal or economic benefit from the consent.[183]

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177 CORPORATE INTERNAL INVESTIGATIONS, *supra* note 107, at 143.

178 GDPR, *supra* note 174, at art. 4, para. 2.

179 The EU and member countries are not the only ones that restrict the processing of personal data. In Switzerland, efforts to screen email accounts for relevant information involve the processing of employees' personal information and fall under Swiss data protection rules, assuming that the email accounts are personalized (as is the case if the email address involves the employees' name).

Some jurisdictions outside the EU, such as South Korea, Malaysia, Hong Kong, and Columbia, also require affirmative opt-in consent. John P. Carlin, et al., *Data Privacy and Transfers in Cross-Border Investigations*, GLOB. INVESTIGATIONS REVIEW (Aug. 09, 2017), https://globalinvestigationsreview.com/insight/the-investigations-review-of-the-americas-2018/1145431/data-privacy-and-transfers-in-cross-border-investigations.

180 Failure to comply with GDPR, leads to administrative fines up to 10.000,00 EUR (approx. 11.400,00 US Dollar), or in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher. See Art. 83 Sec. 4 of the GDPR.

181 Jim Halpert et al., *The GDPR's Impact on Internal Investigations*, DLA PIPER: GLOBAL ANTICORRUPTION NEWSLETTER, (July 10, 2018), https://www.dlapiper.com/en/us/insights/publications/2018/07/global-anticorruption-newsletter/the-gdpr-impact-investigations/ Under the GDPR, the risk of criminal law violations does not justify relying on consent, absent a related national law requiring consent; *see also supra* note 179.

182 von Holst, *supra* note 170, at 29.

183 Section 26(2) of Germany's Federal Data Protection Act provides:

Absent consent, companies may process personal data if they have a statutorily-defined legitimate purpose. Processing is justified if it is needed to comply with a legal obligation imposed by the EU or a member state, or is "necessary for the purposes of legitimate interests pursued by the company" as long as those interests are not "overridden by the interests or fundamental rights of the data subject."[184]

These justifications often are interpreted narrowly narrow. In particular, in many countries neither justification provides companies carte blanche to engage in on-going monitoring of employees, absent a reasonable suspicion that misconduct occurred.[185]

> If personal data of employees are processed on the basis of consent, then the employee's level of dependence in the employment relationship and the circumstances under which consent was given shall be taken into account in assessing whether such consent was freely given. Consent may be freely given in particular if it is associated with a legal or economic advantage for the employee, or if the employer and employee are pursuing the same interests. Consent shall be given in written form, unless a different form is appropriate because of special _____. The employer shall inform the employee in text form of the purpose of data processing and of the employee's right to withdraw consent pursuant to Article 7 (3) of Regulation (EU) 2016/679.

In the U.K., Guidance from the Information Commissioner's Office indicates that consent is less likely to be deemed to have been given freely when there is a significant imbalance of power, such as between employer and employees. *See* INFO. COMM'RS OFFICE, *Guide to the General Data Protection Regulation (GDPR)*, https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/ (last visited Jan. 30, 2019).

184 See supra note 180; Halpert et al., *supra* note 181.

185 For example, in Germany the Bundesdatenschutzgesetz ("BDSG" or "Federal Data Protection Act") permits companies to monitor employees' emails under some circumstances, but does not favor broad ongoing monitoring. *See* Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act], Jan. 14, 2003 BGBL at 66 (Ger.). The law governs data processing for the purpose of both detecting, *id.* § 26(1) sent. 2, and preventing criminal misconduct. *Id.* § 26(1) sent. 1. In order to justify data processing to detect misconduct, the company must both suspect that the employee engaged in misconduct and have tangible facts that support a "concrete suspicion of crime." This provision does not allow for secret monitoring "into the blue." *Id.* § 26(1) sent. 2. In addition to needing a concrete suspicion, a court will apply an overarching reasonableness test to determine whether (1) the data is suitable for the employer's purpose, (2) the data is necessary, in the sense that there is no less restrictive means to serve the same purpose, and (3) the monitoring is reasonable after balancing the employer's interest in receiving the information with employees' right to privacy. *See id.* § 26(1) sent. 1; Martin Franzen, ERFURTER KOMMENTAR ZUM ARBEISTRECHT [ERFK] [COMMENT ON LABOR LAW] BDSG § 26, para. 9, 10 and 11. France also is hostile to on-going surveillance by companies of employees, consistent with the country's historical preference for granting the government a monopoly on surveillance. *See* Jacqueline Ross, The Surveillance State, the Private Surveillance Sector, and the Monopoly of Legitimate Stealth: Nineteenth Century Pathways to Undercover Policing in the United States and France (2018) (unpublished manuscript) (on file with author). In Greece, employee monitoring is illegal and can be prosecuted. Christine Pirovolakis, *Greece Puts Stop to E-mail Snooping in Decision by Data Protection Authority*, PRIVACY LAW WATCH (Feb. 7, 2005).

In England a legitimate interest in processing data may require that a company reasonably suspects misconduct occurred based on documented facts, that the processing is necessary to achieve that interest, and that it is reasonably based on a balancing of the interests of the individual and the firm. INFO. COMM'RS OFFICE, *supra* note 183.

Companies outside of Europe also face restrictions on their ability to monitor their employees' emails and other activities. For example, in Argentina, the National Court on Criminal and Correctional Matters ruled that even if an employer has a disclosed policy of monitoring emails, it cannot do so without violating its employees'

Monitoring is one tool that gives companies an advantage relative to outsiders in detecting misconduct. Data privacy laws also can impede companies from conducting a prophylactic investigation based on misconduct detected by other firms in the same industry or on an internal report from an employee that does not suffice to create a reasonable suspicion.

The GDPR also can negatively impact an investigation even when the company has evidence of misconduct. In the early stages of an investigation, companies often need to sort through massive amounts of emails and documents involving employees that the company will later conclude were not implicated. Companies cannot be confident that their legitimate interests in legal compliance justifies the processing of personal data of many uninvolved employees. Given the liability risks for failure to comply with the GDPR, companies in Europe can be expected to be less proactive than in the U.S. in examining employee communications as part of an investigation, which may reduce their ability to detect and prove misconduct.[186]

Even with adequate justification, companies in Europe must comply with the requirement that the individual whose data is processed be informed about, and possibly object to, the processing. In England, companies can provide the requisite notice of the purposes for which data may be processed in advance, such as when the information is initially collected. Of course, companies do not always do so. Moreover, advance notice often will not have been provided to third-parties whose personal data, such as in contracts, invoices, and the like, can end up in a company's hands. Companies seeking to process this information may need to provide notice to third parties.[187] This requirement may reduce companies' incentives and ability to investigate potential misconduct not yet detected by authorities.

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privacy rights unless the monitoring is under control of the courts. S*ee* Mariela Inés Melhem, *Argentina: Current Anti-corruption Landscape*, *in* THE INVESTIGATIONS REVIEW OF THE AMERICAS 2018, at 45, 48 (Glob. Investigations Review ed., 2017).

[186] Halpert et al., *supra* note 181.

By contrast, the U.K. adopted the Data Protection Act of 2018, which took effect on May 25, 2018 which regulates processing falling within U.K. national law instead of EU law. This Act clarifies that certain categories of data (including criminal convictions) may be processed to prevent or detect unlawful acts, protect the public against dishonesty, prevent fraud, among other reasons.

[187] *See* GDPR, *supra* note 174, art. 12–23; *see also* Halpert et al., *supra* note 181; Caroline Krass, Jason N. Kleinwaks, Ahmed Baladi & Emmanuelle Bartoli, *The General Data Protection Regulation: A Primer for U.S.-Based Organizations that Handle EU Personal Data*, N.Y.U.: COMPLIANCE & ENFORCEMENT (Dec. 11, 2017), . https://wp.nyu.edu/compliance_enforcement/2017/12/11/the-general-data-protection-regulation-a-primer-for-u-s-based-organizations-that-handle-eu-personal-data/.

Some countries, such as Luxembourg and Spain, require that companies also notify data protection authorities before processing personal data.[188] The notice must explain the data to be processed and the purposes of processing. This requirement may increase the risk to the firm of investigating misconduct that is not known to the government, forcing a premature decision on self-reporting. Indeed, companies are less likely even to begin investigating misconduct that government authorities have not detected if they cannot be confident that doing so is in their best interests even though it raises risk of detection.

b. Laws Protecting Secrecy of Correspondence

In addition to data privacy, many companies have laws protecting the secrecy of correspondence (letters, phone calls, and electronic communications) in addition to data privacy laws. These provisions guarantee the secrecy of closed correspondence. They can impede a companies' access to evidence in its employees' offices or work computers if the employee is allowed to make incidental personal use of company facilities. In this case, the company must get the employee's informed consent which can be withdrawn at any time.[189]

c. Financial Secrecy Laws

Some countries, such as Switzerland, Luxembourg, and Singapore, provide heightened protection for personal data of customers of financial institutions. Such rules may preclude transferring customer information outside the country, even to another office of the firm or to the firm's internal investigators. To comply with such laws, external investigators must set up operations contained within the firm, increasing costs of investigation. Investigations also may be hampered by the inability to share customer-specific information with employees or agents of the company in other countries, absent permission from the relevant authorities.

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188 *Comparison Tool*, INT'L COMPARATIVE LEGAL GUIDES, https://iclg.com/practice-areas/data-protection-laws-and-regulations (last visited Jan. 30, 2019).

Prior to the GDPR, countries such as France, Austria, and Germany already had strict requirements for data protection. These have been replaced by the requirement to designate a "data protection officer," pursuant to Art. 37 of the GDPR, who has to be consulted prior to the processing of personal data. *See* GDPR, *supra* note 174, art. 36. The notification obligation under Directive 95/46/EC has been replaced by a recordkeeping obligation. *See id.* art. 30; *see also Data Protection 2018 | Germany*, INT'L COMPARATIVE LEGAL GUIDES (Dec. 6, 2018), https://iclg.com/practice-areas/data-protection-laws-and-regulations/germany.

189 John P. Carlin, et al., *Data Privacy and Transfers in Cross-Border Investigations*, GLOB. INVESTIGATIONS REVIEW, 9 (2020).

In light of much greater legal restrictions overseas,[190] corporations do not have nearly the same power to assist enforcers with data collection and processing as described in Part II with respect to U.S. enforcers. Thus there is less to be gained by enforcers in offering reduced sanctions for corporate cooperation.

IV. IMPACT OF TRANSNATIONAL DIFFERENCES ON EFFECTIVE CORPORATE CRIMINAL ENFORCEMENT

The U.S. model of corporate criminal enforcement has the potential to produce public benefits if implemented properly, but only in the right circumstances. The U.S. model, if properly implemented, potentially benefits society by shifting the primary task of detecting and investigating misconduct to the party that can most effectively undertake these activities at the lowest cost: corporations. Society gains to the extent that enforcement policy induces corporations to detect and self-report misconduct, thereby enabling enforcement authorities to detect more instances of corporate misconduct—more rapidly—than they could otherwise—and in turn to intervene to reform more corporations. Society also gains if enforcement policy induces companies to cooperate by obtaining and sharing evidence that prosecutors likely would not have been able to obtain on their own. Corporate cooperation thus can enable prosecutors to successfully prosecute (and remediate) misconduct that otherwise would have remained unaddressed of the case at hand (including any resulting mandated reforms) and freeing up prosecutorial resources for use investigating other cases.[191]

Legislators and policymakers in the U.S. and elsewhere thus have reasons to be attracted to versions of the U.S. model, but only in the right circumstances. Specifically, this Article reveals that it is essential that the law governing corporate investigations give companies superior ability to detect or investigate (either initially or throughout the investigation). Absent this feature, the main benefit of the U.S. model is simply private funding of public investigations—but funding that comes at a potential price. Corporate primacy over investigations creates a risk that companies may have excessive influence over the government's investigation, and thus the ultimate enforcement action, particularly if government enforcement authorities do not have the resources or will to conduct a robust

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190 In addition, some countries have state secrecy laws that can impinge internal investigations, particularly by companies, such as banks, that are repositories of private information of many state-owned enterprises.

191 *See* Arlen, supra note 3; Arlen & Kraakman, supra note ; see also Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265 (2014).

independent investigation. Thus, it is unlikely that the U.S. model could be justified if it did not induce detection and investigation by a superior party, but instead only enabled private funding of public investigations by firms that might be less effective than the government.

Given this justification for the U.S. model, the principal insight of this Article is that other countries' decisions whether to adopt a version of the U.S. model, and all countries' decisions about how to structure enforcement policy—should be made taking into account legal rules governing investigations that materially impact the extent to which other legal systems can expect to achieve the public benefits of this model of corporate enforcement. In this Part, we discuss conditions in which such differences are most likely to matter and enforcement policy implications that follow from attention to these differences. These laws not only impact the appropriate design of other countries laws, but also should impact structure of enforcement policy in the U.S.

A. POLICY IMPLICATIONS FOR OTHER COUNTRIES

DPAs that offer a more favorable form of settlement and lower sanctions to companies that self-report and cooperate represent a calculated trade-off: they reduce companies' incentives to prevent misconduct in order to enhance companies' incentives to help enforcement authorities detect and sanction misconduct. This policy promotes deterrence—both by speeding detection and remediation and enhancing the deterrence impact of individual sanctions—as long as enforcement policy is properly structured and laws governing corporate investigations contribute to corporations being better also to detect and investigate misconduct than government officials, independent of resource concerns. Yet the analysis in Part III reveals that legal doctrines in many countries grant prosecutors greater power to compel witness cooperation, and greater access to corporate documents and electronic evidence than in the U.S. Moreover, firms operating overseas regularly incur have less ability than firms in the U.S. to detect misconduct by monitoring employees *ex ante*, investigating in response to detected misconduct in other companies, or using in-house counsel to investigate. They also often face more impediments and greater cost in investigating identified misconduct as a result of employment laws, data privacy laws, and laws governing legal privilege. These differences have implications for other countries adopting DPAs or considering their adoption.

1. DPAs as a Substitute for Public Expenditures on Enforcement

In theory, laws governing corporate investigations could lead to the situations where prosecutors have an unambiguous advantage over corporations in detecting and investigating misconduct. In this situation, a country might wisely choose to allow negotiated settlements, such as guilty pleas or even DPAs to permit a more expedient resolution of a case, but would have little reason to offer other forms of settlement—like NPAs or declinations—or substantial sanction mitigation in order to induce firms to detect, self-report and cooperate. This situation is particularly likely to occur in countries that can result on whistleblowers to report misconduct to authorities and that limit companies' ability to monitor employees' activities and emails on an ongoing basis, impose costly substantive or procedural impediments to companies accessing electronic information, or have laws that lead companies to fear liability from measures taken in the course of internal investigations. This outcome is particularly likely if the expected costs of investigations are greatest before companies are confident that misconduct occurred or enforcers have learned about misconduct. Indeed, depending on the rules, especially data privacy laws, costs associated with corporate investigations can exceed those of a public investigation. This is especially true if companies eschew activities for which they have comparative advantages: monitoring of employees' communications and other efforts to detect and investigate potential misconduct the government has not discovered.

Policies that induce corporate investigations can enhance enforcement efforts to the extent that legislatures restrict enforcement funding due to broader forces in political economies. However, when government authorities are better able than firms to detect and investigate, then policymaker can better enhance social welfare by increasing resources devoted to public enforcement in place of using negotiated settlements to encourage self-reporting and cooperation.*2. Structuring Enforcement Policy: Relative Credit for Self-reporting and Cooperation*

In most countries, government authorities do not enjoy a comparative advantage relative to companies over all aspects of the task of detecting and investigating corporate misconduct. In particular, there are good reasons to believe that, notwithstanding various private-law impediments to corporate monitoring and investigations—corporations generally will be better able to detect misconduct than the government. Firms' comparative advantage is likely to persist so long as countries continue to resist adoption of effective bounty regimes and

whistleblower protections.[192] Corporations also likely better able to investigate misconduct occurring overseas. Yet, in some jurisdiction, properly resources enforcement officials could be in a better position to investigate domestic misconduct. The appropriately-resourced government investigators are particularly likely to have comparative advantage in investigating misconduct in countries that grant prosecutors the ability to compel testimony while impeding firms from either compelling testimony or conducting broad searches of internal documents or emails.

The observation that some countries likely have much more to gain from inducing corporate self-reporting undetected misconduct than from inducing corporate investigation and cooperation with respect to previously detected misconduct has implications for the appropriate structure of enforcement policy. Countries that use negotiated settlements to induce self-reporting and cooperation face is a tradeoff between providing adequate incentives to self-report and incentive to cooperate following a failure to self-report.[193] Self-reporting and cooperation can be enormously costly for firms because both activities tend to enable the government to sanction a company for misconduct it otherwise could not have sanctioned. Of the two, self-reporting tends to have the greatest enhancing effect on the company's likelihood of being held liable.[194] By contrast, in countries where prosecutors have robust enforcement authority, and companies' are impeded from investigating by employment and data privacy laws, the government may gain little from inducing corporate investigations—if enforcement authorities are appropriately resourced. This suggests that countries in this position should structure enforcement policy to ensure that the primary benefit of entering into a non-trial corporate criminal resolution is reserved for companies that did the most to help the government (in turn incurring the greatest cost): specifically, companies that self-reported previously undetected misconduct.

Companies potentially benefit in a variety of ways from entering into a non-trial corporate criminal resolution. In many countries, as in the U.S., conviction can trigger

192 *See* Arlen & Kraakman, *supra* note 10; Arlen, *supra* note ; see also *supra* note 49.

193 In theory, sanctions can be structured to ensure that companies have incentives to self-report (and cooperate), and also have an incentive to cooperate even if they did not self-report. Arlen & Kraakman, *supra* note 10; Arlen, *supra* note 5. This approach requires imposing truly enormous sanctions on companies that detect misconduct and fail to self-report, while offering such firms some fine reduction if they nevertheless cooperate.

194 Arlen & Kraakman, *supra* note 10.

mandatory or presumptive debarment or delicensing. Given the enormous potential cost of these collateral consequences of conviction, the strongest incentive available to government authorities is the offer of a DPA, NPA, or declination, instead of a guilty plea or trial conviction. The benefit to a firm of avoiding debarment or exclusion often will far outweigh the impact of any fines the company might pay in a settlement.[195] The conclusion that the benefit of obtaining a favorable form of settlement dwarfs the benefit of fine mitigation applies with particular force in the many countries that impose relatively low maximum sanctions on corporations convicted of misconduct as this reduces the benefit of fine mitigation.[196]

Because insulation from conviction can be the government's strongest source of leverage, countries should only allow companies to obtain the most favorable forms of settlement if they take actions that substantially benefit enforcement officials—enabling them to detect misconduct or obtain material evidence that they otherwise could not have. In the U.S., enforcement policy governing wide-spread misconduct or misconduct involving senior management in effect offers companies such misconduct the same form of resolution (a DPA or potentially NPA) whether they self-report and cooperate or only self-report. Firms that self-report are presumptively eligible for a 50% reduction in the fine instead of the 25% reduction available to those that cooperate. Yet this fine mitigation is in no way sufficient to encourage self-reporting of misconduct that is likely to remain undetected if the firm stays silent. In the case of more serious misconduct, companies can be expected not to—and appear not to-- self-report, knowing that if the government eventually detects the misconduct, the company can use cooperation to their main goal--a DPA or NPA—and also some fine mitigation.[197] This decision to allow companies to obtain the most favorable form of settlement even if they fail to self-report, largely removes companies incentives to self-report because companies can simply stay silent in the expectation of obtaining a DPA for full cooperation in the relatively unlikely event that the government detects misconduct. U.S. prosecutors have adopted this approach—notwithstanding the impact of self-reporting, partially in recognition of the substantial benefit

195 See Arlen, *supra* note 3. Further research should explore the complex question of debarment and delicensing consequences for firms convicted of crime in jurisdictions outside the U.S., as well as the effects within each active enforcement jurisdiction of criminal convictions imposed on firms under the laws of other nations.

196 See, OECD, *supra* note 9 (discussing corporate criminal liability).

197 This is so even if the firm obtains a fifty percent fine reduction for self-reporting, but only a twenty-five percent reduction for cooperation, as long as the risk of detection if the firm does not self-report is less than fifty percent (less than half the risk if it reports).

to U.S. prosecutors of inducing companies to use their superior ability to obtain employees' testimony and their superior access to documents to provide usable evidence to the government in cases where the government has detected misconduct. Laws offering bounties to whistleblowers potentially provide other avenues for self-reporting.

By contrast, in jurisdictions with legal regimes that enhance prosecutors' investigative powers or restrict firms' access to evidence, corporate cooperation may be less likely to provide valuable evidence to prosecutors. In such countries, policymakers may best enhance enforcement capabilities and deter misconduct by restricting access to the most favorable form of settlement (which could be a declination or a DPA or NPA) to companies that either self-report misconduct or report additional instances of misconduct about which enforcers are unaware. This would have the benefit of both incentivizing companies to share information about misconduct that they happen to detect and give firms additional reason to implement measures to encourage employees to report misconduct internally. This could be accomplished by offering declinations (with full disgorgement of all profits from the misconduct) to companies that self-report, cooperate or remediate, while allowing those that only cooperate to obtain a DPA with little fine mitigation, in situations where government authorities could obtain on their own the evidence provided by corporate cooperation, but where conviction would trigger mandatory debarment or delicensing when this is not appropriate. When conviction would not trigger mandatory collateral sanctions, enforcement policy ideally would offer (and restrict) DPAs to companies that self-report previously undetected misconduct, fully cooperate and remediate, while requiring firms that only cooperate to plead guilty, in return for a reduction in the fine. Corporate cooperation that simply produces evidence that the government could eventually have obtained on its own likely should not justify use of a DPA (at least when conviction does not trigger debarment or delicensing).Indeed, in extreme situations where companies are not able to obtain any evidence that the government cannot also readily obtain, then companies should obtain little mitigation for cooperation.[198] Only in this way can the government ensure that it provides the main benefit

[198] Arlen & Kraakman, *supra* note 10; Arlen, *supra* note 5.

To illustrate, a policy that reduces the sanction imposed on companies that self-report and cooperate from $100 million to $50 million will not reduce the expected cost of misconduct to companies that expect to self-report and cooperate if the decision to invest in detection, self-reporting, and cooperation increases the expected likelihood of detection and sanction from twenty five percent to fifty percent. Absent such a policy, companies

available to it—avoidance of conviction—to companies that offer prosecutors a genuine benefit—self-reporting—providing information prosecutors could not readily obtain on their own.

Accordingly, countries considering policies that grant credit for self-reporting and cooperation should not simply mimic the U.S. approach, even on the assumption that the approach is effective within the U.S.

3. Reforming Laws Governing Corporate Investigations

Finally, our analysis suggests that some other countries may benefit from reconsidering some of their laws governing corporate investigations to the extent that they are seriously committed to deterring corporate crime. Some of these laws—such as those protecting employees' rights—arise out of deep, society-wide, commitments and are not likely subjects for amendment. Yet others, such as the scope of legal privilege governing corporate investigations and rules governing corporation's ability to process their own documents and emails, could potentially warrant reconsideration in countries where these laws operate to deter corporation detection and investigation of socially harmful misconduct.

B. POLICY IMPLICATIONS FOR THE UNITED STATES

Our analysis also has potential implications for U.S. enforcement policy. As previously mentioned, U.S. policy does not guarantee companies that self-report, cooperate and remediate serious misconduct a more favorable form of settlement relative to those that simply cooperate.[199] Moreover, the U.S. allows companies to get credit for cooperation even when it arrives quite late in the investigation.[check this but I saw is in the Soc Gen DPA].

This approach likely reflects the substantial benefit to U.S. prosecutors of corporate cooperation, particularly with respect to overseas misconduct. Nevertheless, as noted earlier, it is an approach that comes at a cost: companies have insufficient incentives to self-report misconduct in cases that are likely to end in a DPA.

The merits of the existing trade-off under the current law governing corporate investigations is beyond the scope of this article. Yet this article does have implications for the

face an expected sanction of $25 million (a twenty-five percent chance of a $100 million fine). With the policy, companies that expect to self-report and cooperate also face an expected sanction of $25 million (a fifty percent chance of a $50 million fine).

199 [we need to explain this]

wisdom of this approach going forward. U.S. enforcement authorities may obtain less benefit from corporate cooperation—particularly late-stage cooperation—than they have in the past. There are several reasons for this. First, courts may be tightening up on companies' ability to fully share the benefits of their investigation without waiving privilege.[200] Second, future reform to data privacy laws in the U.S. could impact corporate investigations. Third, U.S. prosecutors may gain less from inducing corporate investigations overseas as a result of two trends impacting corporate criminal enforcement. The first is the rise of parallel and cooperative corporate investigations by overseas enforcement authorities. The second is the negative impact on overseas investigations of both data privacy and secrecy laws and blocking statutes (that preclude companies from sharing the results of investigations with an overseas enforcement authorities with permission from local enforcement authorities. To the extent that U.S. prosecutors benefit more from information obtained by foreign prosecutors' investigations[201]—without running afoul of domestic protections—while obtaining less benefit from inducing cooperation by companies operating overseas—U.S. authorities may be wise to restrict companies' ability to obtain any material benefit for pure cooperation (that does not clearly provide information that the government could not have readily obtained otherwise).[202]

CONCLUSION

This Article has offered two principal contributions to the literature and policy debate on corporate crime. The first is to demonstrate the pivotal function of laws affecting the collection and use of evidence of wrongdoing—testimonial rights and duties, legal privileges, data and document collection and protection regimes, and other doctrines—in allocating powers between corporations and governments in corporate criminal enforcement. This to date largely unexamined phenomenon comes into sharp relief as soon as one begins to think about the potential results from adopting a U.S.-style model of corporate criminal law and enforcement in other jurisdictions.

The second contribution has been to show how differences in the law governing corporate investigations in overseas nations are likely to arrange the relative powers of prosecutors and firms quite differently, with the result that officials overseas should consider

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200 See supra note X.

201 [discuss allen]

202 *See, e.g.*, Gunther Teubner, *Legal Irritants*: *Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

different sanctioning and settlement policies in their efforts to reduce corporate crime. As European and other nations continue down this path, a highly fruitful research agenda—teaching much more about corporate enforcement both abroad and within the U.S.—is sure to follow.