THE COSTS OF WAIVER: COST-BENEFIT ANALYSIS AS A NEW BASIS FOR SELECTIVE WAIVER OF ATTORNEY-CLIENT PRIVILEGE

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The nature of corporate criminal liability and the extreme consequences of indictment or conviction place great pressure on corporations to cooperate with federal prosecutors as they investigate corporate wrongdoing. This pressure often leads corporations to disclose privileged corporate communications, including internal investigation reports and notes from employee interviews, to aid prosecutors in their investigation. In most jurisdictions, once these documents are disclosed, the protections of the attorney-client privilege are waived as to everyone—a total waiver. However, in a minority of jurisdictions, when privileged corporate communications are disclosed to the government as part of a criminal investigation, the privilege is waived only as to the government and remains to prevent discovery by third parties, including civil plaintiffs—a selective waiver. Courts have provided various rationales for both positions, although none has been universally endorsed and all are subject to criticism. This Note provides a new justification for the selective waiver rule. It argues that utility-maximizing prosecutors will be more likely to ask for these critical privileged corporate communications under a selective waiver rule because of the high costs of the total waiver rule. This, in turn, will lead to a more efficient and robust investigation and prosecution of corporate crime.

INTRODUCTION

In criminal investigations of securities fraud, a low threshold for vicarious criminal liability[1] and the dire consequences of corporate

 J.D., 2008, New York University School of Law; B.A., 2005, University of Pennsylvania. I would like to thank Professor Stephen Gillers for his assistance and guidance with this Note. I am also indebted to Erik Paulsen, Paul Monteleoni, Pete Devlin, Dimitri Portnoi, Dan Wachtell, Ian Samuel, Andy Delaney, Jennifer Hainsfurther, Neel Chopra, and the staff of the *New York University Law Review* for helping to shape my ideas. Finally, I am especially grateful to Marlon Layton, Rebecca Weinstein, and Mitra Ebadolahi for their tireless efforts on this piece.

[1] Corporations are easily subject to liability for crimes committed by their employees. The corporation is vicariously liable so long as the employee acted within the broadly defined scope of employment and the corporation could have benefited in some way. N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 493–95 (1909) (defining standard for vicarious corporate criminal liability); *see also* Joel M. Androphy et al., *General Corporate Criminal Liability*, 60 TEX. B.J. 121, 121 (1997) ("An employee is considered to be acting within the scope of his or her employment if the employee has either actual or apparent authority to engage in a particular act."); Michael Viano & Jenny R. Arnold, *Corporate Criminal Liability*, 43 AM. CRIM. L. REV. 311, 316 (2006) ("The corporation need not have actually received a benefit; the employee's mere intention to bestow such benefit suffices."). Under this standard, a corporation can be held criminally liable even if

indictment[2] give prosecutors broad power and place extraordinary pressure on corporations to avoid being formally charged. Since one way corporations can dramatically decrease the risk of indictment is by cooperating with government criminal investigations[3]—thus avoiding drastic consequences such as those that befell Arthur Andersen[4]—they are practically compelled to do so.[5]

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an employee violates the company's express prohibition. *E.g.*, United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972) (finding corporation liable for "acts of its agents in the scope of their employment, even though contrary to [both] general corporate policy and express instructions to the agent"). In essence, corporations are held strictly liable for the actions of their employees. Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, *in* 2 37TH ANNUAL INSTITUTE ON SECURITIES REGULATION 815, 817 (PLI Corp. Law & Practice, Course Handbook Series No. B-1517, 2005) ("[T]he sweep of corporate criminal liability could hardly be broader. . . . It is essentially absolute liability.").

[2] Corporations suffer severe penalties from criminal indictment alone, even absent conviction. Commentators have noted that an indictment is akin to a death sentence for the corporation, not only in terms of likelihood of conviction but also because of the effect on the corporation's operations and reputation. *See, e.g.*, Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 426 (2007) ("A criminal indictment can have devastating consequences for a corporation and risks the market imposing what is in effect a corporate death penalty."); Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1097 (2006) ("[I]ndictment often amounts to a virtual death sentence for business entities . . . ."). Because of the easily satisfied liability standard, corporations can rarely win at trial. *See* Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1455 (2007) (noting corporations' difficulties in winning at trial given liability standard). Further, an indictment can seriously damage the company's operations. *See* Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1885–86 (2005) (describing potential consequences of indictment); *Interview with David Pitofsky, Partner, Goodwin Procter LLP, New York, New York*, CORP. CRIME REP., Nov. 28, 2005, at 8, 11 ("[U]pon the announcement of a criminal investigation, companies regularly lose half of their market value. If the price remains depressed long enough, the capital markets dry up, the ability to hire quality people dries up. The company's oxygen supply is cut off."). Companies can be barred from government contracts or lose their state or federal operating licenses. Greenblum, *supra*, at 1885–86. Finally, an indictment can seriously harm the public's perception of a corporation, causing its share price to fall and harming "relationships with customers, creditors, and the public at large." *Id.* at 1886 (citations omitted).

[3] According to Department of Justice (DOJ) Guidelines, there are nine factors prosecutors use to determine whether to charge a corporation. Memorandum from Paul J. McNulty, Deputy Att'y Gen., on Principles of Federal Prosecution of Business Organizations, to Heads of Dep't Components and U.S. Att'ys 4 (Dec. 12, 2006), *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf. In balancing these factors, "much turns on the corporation's 'cooperation' with the government." Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 320 (2007).

[4] The post-indictment, pre-trial demise of Arthur Andersen is a powerful reminder of the potential consequences of a criminal charge. Arthur Andersen, formerly one of the "Big Five" accounting firms, was indicted for obstruction of justice in March 2002.

Among the most important forms of cooperation in these situations is the disclosure of privileged corporate communications. These communications, which typically include the results of the corporation's internal investigation into the matter and notes from employee interviews, often provide a critical roadmap for corporate civil and criminal liability.

Because the fear of indictment gives federal prosecutors unique leverage over corporations, requests for these disclosures and subsequent compliance by the company have become a routine part of corporate criminal investigations.[6] Typically, this voluntary disclosure of privileged communications creates a total waiver of any attorney-client privilege that may have existed. Under this "total waiver" rule, once the privilege has been waived as to the government, it is waived as to all parties for all time. But in some jurisdictions, an alternative rule of "selective waiver" applies. In these jurisdictions, the attorney-client privilege may be waived in the course of a government investigation while preserving the privilege outside the context of that investigation.

Courts have debated the merits and drawbacks of these alternative waiver rules when deciding which rule their jurisdictions should adopt. Courts have considered various justifications for the rules to varying degrees, including the effect the waiver rules will have on corporate self-policing, cooperation with the government, the administration of justice, the purposes of the privilege itself, and notions of fairness. However, these justifications have not been uniformly

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Nicholas Kulish & John R. Wilke, *Andersen: Called to Account; Indictment Puts Andersen's Fate on Line*, WALL ST. J., Mar. 15, 2002, at C1. As a result of the indictment, the accounting firm lost its CPA license and was essentially destroyed, resulting in a loss of 28,000 jobs. *See* Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 3 (2006). Andersen was initially convicted of the charges, but the conviction was later overturned by the United States Supreme Court. Arthur Andersen LLP v. United States, 544 U.S. 696, 698 (2005). Although Andersen was not a corporation, the case points to the potential consequences of the government's policy on entity prosecution generally.

[5] One court has stated that when inducing a business's cooperation by threatening indictment, "the government [holds] the proverbial gun to [the firm's] head." United States v. Stein, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006).

[6] *Cf.* Marcia Coyle, *Lawyers Fear a DOJ 'Culture of Waiver*,' NAT'L L.J., Mar. 13, 2006, at 13 (noting "culture of waiver" at Department of Justice). This pressure to disclose previously privileged information is greatest when the investigation is conducted by the U.S. Attorney's Office, which is the only part of the federal government that is capable of bringing a criminal case. Waiver may also occur by disclosure to other government agencies, primarily the Securities and Exchange Commission (SEC), but the SEC can only bring civil enforcement actions. 15 U.S.C. § 77t(b) (2000). This Note confines its analysis to the waiver of attorney-client privilege in corporate criminal investigations by a U.S. Attorney's Office. Nevertheless, its reasoning may also apply to civil investigations by other government agencies.

endorsed across jurisdictional lines, and, upon close scrutiny, many appear to be in tension with other aspects of the attorney-client privilege and waiver doctrines.[7]

Drawing on the prosecutor's ethical duties, this Note suggests a new rationale for preferring the selective waiver rule to the total waiver rule, at least in the context of criminal investigations of corporate securities fraud: The selective waiver rule allows more aggressive and robust prosecutorial investigation. Given their ethical duties, prosecutors will only take actions when the benefits of doing so outweigh the costs. This cost-benefit analysis attaches to all prosecutorial decisionmaking, including the decision to seek the disclosure of privileged corporate communications. The total waiver rule imposes greater social costs than the selective waiver rule, without any corresponding increase in benefits. As a result, under the total waiver rule, prosecutors will seek privileged information from the corporation in fewer cases than under the selective waiver rule and, consequently, will be forced to act with less information, resulting in less efficient and less complete investigation and prosecution of corporate wrongdoing. Courts have yet to consider the effect that the respective waiver rules will have on pre-indictment prosecutorial decisions. This new rationale should gain salience since prosecutors have become increasingly involved in the early stages of corporate criminal investigations.

This Note proceeds in four Parts. Part I considers the doctrinal underpinnings of the attorney-client privilege. Part II examines the justifications provided for both the total and selective waiver rules and notes the tension between these justifications and other areas of privilege law. Part III examines the prosecutor's role in investigations and the factors that shape prosecutorial decisionmaking as background for suggesting a new rationale for selective waiver. It concludes that the prosecutor's public-regarding duty requires a cost-benefit analysis before acting. Part IV examines the costs and benefits of the alternative waiver rules and provides a new justification for adopting selective waiver. Unlike the selective waiver rule, the total waiver rule facilitates civil litigation by providing private litigants with previously unavailable information. These civil lawsuits, particularly those related to securities violations, impose a heavy cost on the judiciary, the defendant corporation, and, ultimately, innocent shareholders. The Note concludes that the selective waiver rule is preferable

[7] *See infra* Part II (describing debate regarding, and justifications for, selective waiver).

because it eliminates these costs while facilitating the thorough and efficient investigation of corporate criminal activity.[8]

I
ATTORNEY-CLIENT PRIVILEGE AND WAIVER

The attorney-client privilege is a rule of evidence derived from the common law[9] that protects communications between a client and her attorney from compelled disclosure to others.[10] It is the "oldest of the privileges for confidential communications known to the common law"[11] and is central to the effective functioning of the legal system.[12] This Part begins by introducing the privilege and its component parts and then examines the concept of waiver of the privilege.

A. The Attorney-Client Privilege

By protecting attorney-client communications from compelled disclosure to outsiders, the attorney-client privilege promotes two vital public interests: compliance with the law and the effective administration of justice.[13] For a lawyer to give informed legal advice, he must be fully aware of the client's situation.[14] Clients would be reluctant to share embarrassing or potentially damaging facts with a lawyer absent a guarantee that the lawyer would not later be compelled to disclose those facts.[15] The privilege provides this guarantee, allowing the lawyer to discover the facts of his client's situation.

Despite its important role in the legal system, the attorney-client privilege does not apply merely because an individual has spoken with a member of the bar. Rather, it only attaches if several conditions

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[8] It should be stated explicitly at the outset that this Note does not advocate for the selective waiver rule in order to provide greater protection for corporations. Rather, this Note advocates for the selective waiver rule because it will facilitate the investigation and prosecution of corporate crime by leading prosecutors to seek privileged information with greater frequency. To the extent that corporations or their agents violate the law, they should be subject to its penalties. The justification for the selective waiver rule provided below, *infra* Part II, conforms with this principle.

[9] *See* FED. R. EVID. 501 (describing common-law basis for privileges).

[10] PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:1 (2d ed. 1999).

[11] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[12] *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (noting that privilege is "founded upon the necessity, in the interest and administration of justice" of persons being free from "apprehension of disclosure" in availing themselves of counsel).

[13] *See Upjohn*, 449 U.S. at 389 ("[The privilege's] purpose is to . . . promote broader public interests in the observance of law and administration of justice.").

[14] *Id.*

[15] *See id.* (discussing necessity of freedom from threat of disclosure).

have been met. Although the precise elements differ among jurisdictions, Professor Wigmore offers this canonical formulation:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[16]

Generally speaking, the classification of communication as "legal advice" is determined by the client's intent to seek legal assistance, which may be inferred from the circumstances.[17] Members of the bar are "professional legal advisers,"[18] as are nonlawyers who provide "substantive advice and assistance" to attorneys.[19] A "client" is any "person, organization, or entity" that seeks legal advice.[20] In federal court, with respect to corporations, the attorney-client privilege attaches to all communications between counsel and all employees who "possess the information needed by the corporation's lawyers."[21] The privilege only protects "communications" between an attorney and a client, not the underlying facts or information that the communications contain.[22] Factual circumstances are not protected even if they are also contained in a communication to an attorney.[23] Typically, these communications must be made by the client "in confidence." Because it hinders the truth-seeking process, courts generally construe the privilege narrowly.[24] Yet once the above conditions of

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[16] 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (John T. McNaughton ed., 1961).

[17] RICE, *supra* note 10, § 7:1.

[18] *Id.* § 3:2.

[19] *Id.* § 3:3.

[20] *Id.* § 4:1.

[21] Upjohn Co. v. United States, 449 U.S. 383, 391 (1981).

[22] *See id.* at 395 ("'[The] protection of the privilege extends only to *communications* and not to facts.'" (quoting City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962))).

[23] In *Upjohn*, for example, the company's attorneys disseminated a questionnaire to "All Foreign General and Area Managers" as part of an internal investigation of "questionable payments." *Upjohn*, 449 U.S. at 386. During a subsequent investigation, the Internal Revenue Service subpoenaed the completed questionnaires. *Id.* at 387–88. The company relied on the attorney-client privilege in refusing to disclose the questionnaires. *Id.* at 388. In upholding Upjohn's assertion of the privilege, the Court declared that a "client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Id.* at 396 (quoting *Westinghouse*, 205 F. Supp. at 831). The Court also noted that even though the privilege attached to the questionnaires, "the Government was free to question the employees who communicated with" the company's attorneys. *Id.*

[24] *See, e.g.*, United States v. Nixon, 418 U.S. 683, 710 (1974) ("[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for

the attorney-client privilege have been met, the protection that attaches is almost absolute.[25]

B. Waiver of Attorney-Client Privilege

When in place, the protection of the attorney-client privilege is formidable. It protects attorney-client communications from prying eyes and even discovery requests.[26] But this protection can easily be lost by client waiver. There are many ways in which a client can waive the privilege,[27] and voluntary disclosure almost always suffices.[28] This voluntary waiver often arises in the context of corporate cooperation with criminal investigations. Courts have found that releasing docu-

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they are in derogation of the search for truth."); *see also* RICE, *supra* note 10, § 2:3 (describing courts' preference for narrowly construing privilege).

[25] RICE, *supra* note 10, § 2:2 (stating that once privilege is established, absent limited exceptions, "this protection is absolute"); *cf., e.g.*, Martin v. Valley Nat'l Bank of Ariz., 140 F.R.D. 291, 306 (S.D.N.Y. 1991) ("[T]he attorney-client privilege . . . cannot be overcome simply by a showing of need.").

[26] *See* RICE, *supra* note 10, § 2.2.

[27] Waiver of the attorney-client privilege can be express as well as implied. *See, e.g.*, Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 346–47 (1985) (recognizing express waiver of attorney-client privilege); *see also* RICE, *supra* note 10, § 9:22 n.34 (citing cases in which express waiver was recognized). Express waivers are less commonly found in litigated cases than implied waivers. RICE, *supra* note 10, § 9:22 ("Express waivers are less common."). This may be because a client has no reason to litigate an express waiver of the attorney-client privilege.

There is no unified theory of implied waiver, and a judicial determination of waiver depends on the circumstances of a given case. *Cf.* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE §§ 5.01, .06, .11 (3d ed. 2001) (noting inconsistencies of waiver doctrine and that "cases are in disarray," and proposing unified theory of waiver). In general, the inquiry takes two forms. *See id.* § 5.06 (describing forms of waiver inquiry). In the first, courts simply determine whether confidentiality has been breached. *E.g.*, United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982) ("Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege."); *see also* GERGACZ, *supra*, § 5.08 (describing confidentiality inquiry). Any breach is sufficient to find waiver. In the second form of inquiry, breach of confidentiality is merely a threshold issue. After a breach is determined, the judge reviews the client's conduct to determine whether there has been an implied waiver. *E.g.*, *In re* Consol. Litig., 666 F. Supp. 1148, 1150 (N.D. Ill. 1987) (finding implied waiver where there was no "intention to maintain . . . confidentiality"); *see also* GERGACZ, *supra*, § 5.07 (describing theory of waiver based on client intent to disclose); RICE, *supra* note 10, §§ 9:22–:23 (describing circumstances leading to findings of implied waiver). The more care a client takes to prevent disclosure of privileged communications, the less likely it is that a court will find the privilege waived. The manner in which confidentiality was breached is also relevant to the waiver inquiry.

[28] *Cf., e.g.*, United States v. Collis, 128 F.3d 313, 320 (6th Cir. 1997) ("A client can waive the privilege by voluntarily disclosing his attorney's advice to a third party."); United States v. Jacobs, 117 F.3d 82, 91 (2d Cir. 1997) (noting that public disclosures constitute waiver of attorney-client privilege); United States v. Knoll, 16 F.3d 1313, 1322 (2d Cir. 1994) (finding waiver where privileged communications were sent to third party); RICE, *supra* note 10, § 9:27 (describing voluntary-disclosure-as-waiver rule). For a discussion of an exception to the voluntary-disclosure rule, see *infra* notes 80–85 and accompanying text.

ments,[29] testifying at a trial,[30] or responding to a document subpoena[31] constitutes waiver.

Once the privilege has been waived, the client can no longer assert its protection to prevent discovery or introduction of the communications at trial. Thus, the judicial determination that certain communications remain within the privilege's protection can substantially affect the outcome of a trial. Since the selective waiver rule would find that the privilege remained applicable in circumstances in which the total waiver rule would not, the use of one rule rather than the other can greatly influence the outcome of litigation.

The next Part describes the debate over the waiver rules in a specific context: when a corporation has cooperated with a criminal investigation by disclosing privileged communications to the government. In this situation, there is no doubt that the privilege protecting the communications has been waived as to the government. Rather, the debate is over whether different parties—such as plaintiffs in subsequent civil suits—should also have access to the previously privileged communications.

II
The Selective Waiver Debate

In most circumstances, the attorney-client privilege's protections are lost entirely when a client voluntarily discloses privileged communications to a third party.[32] However, courts have not applied this waiver rule uniformly when a corporate client's initial disclosure is to the government. A majority of courts have held that a voluntary waiver of privilege as to the government waives the privilege as to the world—a total waiver. But a small number of courts have found that the privilege is waived only with respect to the government agency to which the communication was disclosed—a selective waiver.[33] This

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[29] *E.g.*, Olson v. United States, 872 F.2d 820, 823 (8th Cir. 1989); *In re* Grand Jury Proceedings, 841 F.2d 230, 234 (8th Cir. 1988); *see also* Rice, *supra* note 10, § 9:27 n.78 (listing released-documents cases).

[30] *E.g.*, United States v. Soudan, 812 F.2d 920, 927 (5th Cir. 1986); Hollins v. Powell, 773 F.2d 191, 196–97 (8th Cir. 1985).

[31] *E.g.*, *Olson*, 872 F.2d at 823.

[32] *See supra* note 28 and accompanying text.

[33] Additionally, some courts have held that while total waiver would generally apply to disclosures to the government, selective waiver applies when the disclosure is accompanied by a confidentiality agreement. *See, e.g.*, *In re* Steinhardt Partners, 9 F.3d 230, 236 (2d Cir. 1993) (stating that per se rule of total waiver would fail to account for situations in which party and government had confidentiality agreement); *cf. In re* Qwest Commc'ns Int'l, Inc., 450 F.3d 1179, 1194 (10th Cir. 2006) (finding Qwest's confidentiality agreements insufficient to support selective waiver). Most of these cases are in the Second Circuit, where the courts evaluate selective waiver claims on a "case-by-case" basis to account for "situations

Part will discuss the arguments that courts use to justify these positions. While many of the arguments on both sides of the issue have some merit, each rationale is ultimately subject to serious criticism.

A. Arguments for Rejecting Selective Waiver

The concept of selective waiver has been rejected in most jurisdictions that have considered the issue, including the First, Third, Fourth, Sixth, Tenth, and District of Columbia Circuits.[34] These circuits retain the traditional total waiver rule.

The D.C. Circuit in *Permian Corp. v. United States* was the first to reject selective waiver.[35] In 1978, Occidental Petroleum Corporation and its subsidiary Permian Corporation (collectively referred to as "Occidental") produced "millions of documents" in the course of litigation pertaining to their attempted acquisition of Mead Corporation.[36] As the litigation unfolded, the Securities and Exchange Commission (SEC) began an informal investigation into the adequacy of Occidental's filings relating to the transaction.[37] To facilitate the SEC investigation, Occidental authorized Mead to produce Occidental's "presifted" confidential documents. Mead submitted fewer than one thousand of the Occidental litigation documents, seven of which were protected by the attorney-client privilege.[38] In a subsequent unrelated investigation, the Department of Energy sought many of these documents, including those protected by the privilege, from the SEC.[39]

After determining that Occidental waived the attorney-client privilege's protections by disclosing the documents to the SEC, the D.C. Circuit declined to "create an exception to the traditional standard for waiver."[40] The court provided four reasons for rejecting selective waiver: the purpose, confidentiality, fairness, and construc-

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in which the [government] and the disclosing party have entered into an explicit agreement that the [government] will maintain the confidentiality of the disclosed materials." *Steinhardt Partners*, 9 F.3d at 236.

34 *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 302 (6th Cir. 2002); United States v. Mass. Inst. of Tech., 129 F.3d 681, 685–86 (1st Cir. 1997); Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1426 (3d Cir. 1991); *In re* Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988); *Qwest*, 450 F.3d at 1192, 1194; Permian Corp. v. United States, 665 F.2d 1214, 1220–22 (D.C. Cir. 1981).

35 *Permian*, 665 F.2d at 1220; *see also* Michael H. Dore, *A Matter of Fairness: The Need for a New Look at Selective Waiver in SEC Investigations*, 89 MARQ. L. REV. 761, 784 (2006) (noting that *Permian* was first circuit court opinion to reject selective waiver).

36 *Permian*, 665 F.2d at 1215.

37 *Id.* at 1216.

38 *Id.* at 1216–17.

39 *Id.* at 1215, 1220.

40 *Id.* at 1220.

tion rationales. Other circuit courts that have adopted total waiver have accepted these rationales to varying degrees.[41] The remainder of this section uses the D.C. Circuit framework to describe these rationales and explore their weaknesses.

1. The Purpose Rationale

The D.C. Circuit's first argument against selective waiver was that it does not "serve the interests underlying the common law privilege for confidential communications between attorney and client."[42] The main purpose of the privilege is to facilitate counsel's representation of the client by encouraging candid discussion.[43] The D.C. Circuit reasoned that when a client divulges information to a party other than her attorney, the privilege is unnecessary to incentivize candid discussion: If the client is willing to disclose to third parties, she will also be willing to tell her attorney what the attorney needs to know without any special protections.[44] Thus, continued protection serves no purpose, and the privilege is waived as to everyone.

However, the content of the waiver rule does not affect the ex ante incentives for frank communication created by the attorney-client privilege. A subsequent decision to waive the privilege does not affect the client's earlier decision to speak. This is because voluntary waiver only takes place when the client wants it to—when waiver will benefit the client. Thus, attorney-client communication is facilitated so long as the client believes herself to be protected from disclosure at the time of communication.

A hypothetical helps to illustrate this point. To simplify, suppose that there are only four types of clients. Client 1 (*C1*) would *never*

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[41] The First Circuit rejected selective waiver relying mostly on the confidentiality rationale, even though it found the arguments favoring total waiver in the case before it "far from overwhelming." United States v. Mass. Inst. of Tech., 129 F.3d 681, 685 (1st Cir. 1997). The Third Circuit rejected selective waiver based on the purpose and construction rationales while expressly avoiding the fairness rationale. Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1426 (3d Cir. 1991). The Fourth Circuit based its rejection of selective waiver solely on the confidentiality rationale. *In re* Martin Marietta Corp., 856 F.2d 619, 623–24 (4th Cir. 1988). The Sixth Circuit rejected selective waiver based only on the purpose and fairness rationales. *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 302 (6th Cir. 2002). Finally, the Tenth Circuit declined to overrule a lower court's rejection of selective waiver relying mostly on the purpose rationale. *In re* Qwest Commc'ns Int'l, Inc., 450 F.3d 1179, 1192 (10th Cir. 2006) ("[H]aving considered the purposes behind the attorney-client privilege . . . we conclude the record in this case is not sufficient to justify adoption of a selective waiver doctrine . . . .").

[42] *Permian*, 665 F.2d at 1220.

[43] Upjohn Co. v. United States, 449 U.S. 386, 389 (1981); *see supra* notes 13–15 and accompanying text.

[44] *Permian*, 665 F.2d at 1220.

want any attorney-client communications disclosed to *anyone* (the costs of disclosure to *C1* always outweigh the benefits). Client 2 (*C2*) would be willing to allow only the *government* access to attorney-client communications (the costs of disclosure to private parties—but not the government—outweigh the gains). Client 3 (*C3*) would be willing to allow only *private litigants* access to the attorney-client communications (the converse of *C2*). Client 4 (*C4*) would always be willing to allow *anyone* access to attorney-client communications (the benefits of disclosure always outweigh the costs).

C1, who will never allow anyone access to privileged information, is unaffected by the waiver rule applied. She will only speak if, at the time the communication is made, it is protected by the privilege. Similarly, the waiver rule does not impact the initial decision by *C2* and *C3* to communicate with their attorneys. Whatever the waiver rule, these clients can safely communicate with their attorneys because the communications remain privileged unless the clients later authorize disclosure, which they will not do if the waiver rule does not match their preference. *C4*, who does not care whether her communications leak out, is unconcerned with either the privilege or waiver rules. The attorney-client privilege therefore facilitates full and frank discussion between client and counsel regardless of the content of the waiver rule.

2. *The Confidentiality Rationale*

A second argument in the D.C. Circuit's decision was that disclosure violated the privilege's confidentiality requirement.[45] When Occidental disclosed the documents to the SEC, it waived the privilege because "the mantle of confidentiality"[46] that protected the communications had been "irretrievably breached."[47] Thus, according to the court, even if the communication was confidential at the time it was made, any subsequent breach of confidentiality vitiated the privilege's protections.

Yet the logic of the court's decision is suspect. Despite the court's implication to the contrary, a breach of confidentiality is not inconsistent with the rationales of the attorney-client privilege.[48] It is

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[45] *Id.* at 1219–20.

[46] *Id.* at 1220 (quoting *In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979)).

[47] *Id.*

[48] Professor Paul Rice has argued that confidentiality "is not generally regarded as a logical imperative" of the privilege doctrine. Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 868 (1998); *see also* RICE, *supra* note 10, § 6:1 (arguing that link between privilege and confidentiality exists "[f]or reasons that have never been satisfactorily explained").

not the confidentiality of the communication but rather the "*exclusionary* effect of the privilege" that encourages candid discussion.[49] The confidentiality requirement itself encourages neither openness nor candor in attorney-client communications. The fact that a client is willing to communicate with her attorney in the presence of others does not mean she is willing for the communication to be used as evidence in court and, further, says nothing about the communications the client would have been willing to make absent the protection of the privilege.[50]

Additionally, judicial practice shows that perpetual confidentiality is not a sine qua non of the privilege. In many circumstances, the attorney-client privilege is preserved even when confidentiality has been breached. For example, courts have found no waiver despite a breach of confidentiality when the disclosure is made under court order,[51] under an expedited discovery schedule,[52] on court suggestion,[53] to a bankruptcy judge,[54] by a co-defendant in a joint trial,[55] or

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[49] Rice, *supra* note 48, at 860. Notwithstanding Professor Rice's compelling argument, most courts and commentators treat confidentiality as a fundamental component of the privilege. *See, e.g.*, United States v. Tellier, 255 F.2d 441, 447 (2d Cir. 1958) (noting that "essence" of attorney-client privilege is confidential communication).

[50] *See* Rice, *supra* note 48, at 859–60 ("The fallacy [of the confidentiality requirement] is that . . . it assumes that a client who is not concerned with public embarrassment is also unconcerned about being legally compromised by the use of these communications. Undoubtedly, if the client speaks to his attorney in the presence of third parties . . . the privilege protection is not necessary to encourage that speech. However, it does not follow as simply that the privilege protection is justified *only* if the client communicated with the expectation of secrecy. Indeed, there is justification for the attorney-client privilege even if the client has no desire for secrecy. It is the *exclusionary* effect of the privilege that is fundamental to the candor being sought . . . .").

[51] *See, e.g.*, Gov't Guarantee Fund of Republic of Fin. v. Hyatt Corp., 182 F.R.D. 182, 187 (D.V.I. 1998) (finding that disclosure of privileged communications to outside party under court order does not waive privilege in subsequent litigation); Laxalt v. McClatchy, 116 F.R.D. 438, 455 (D. Nev. 1987) (holding that compliance with court order to use privileged documents at trial does not constitute waiver); *see also* RICE, *supra* note 10, § 9:25 ("In practice . . . courts generally hold that when production of privileged communications is judicially compelled, compliance with the order does not waive the attorney-client privilege . . . .").

[52] *See, e.g.*, Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 651 (9th Cir. 1978) (finding no waiver where court-imposed expedited discovery process deprived IBM of ability to properly safeguard privileged documents and, in effect, compelled production).

[53] *See, e.g.*, Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1163 (D.S.C. 1974) (permitting privilege to remain despite breach of confidentiality when "voluntary waiver of some communications was made upon the suggestion of the court").

[54] *See, e.g.*, *In re* 50-Off Stores, Inc., 213 B.R. 646, 656 (Bankr. W.D. Tex. 1997) (finding that party who requested and received protective court order during bankruptcy proceeding did not waive privilege).

[55] *See, e.g.*, United States v. Walters, 913 F.2d 388, 393 (7th Cir. 1990) (noting that attorney-client privilege remains in force even if one of two joint clients discloses communications); *see also* RICE, *supra* note 10, § 9:67 (noting that when one attorney represents

among individuals with separate counsel who share a "community of interests."[56] In deciding whether to speak to her attorney, the client cares about excluding the communication from use in litigation, not confidentiality in and of itself.

3. The Fairness Rationale

The *Permian* court's third argument against selective waiver relied on a type of "fairness" argument: "The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others . . . ."[57] The premise of the fairness rationale is that it is unfair for a party to use a communication as both a sword and a shield—that is, to introduce a communication into evidence to advance its position while withholding a portion of the same from an adversary by claiming privilege, or to allow some individuals access to a communication while withholding it from others.[58]

Like the other rationales described above, this argument is subject to criticism. First, the fairness rationale traditionally applies to incomplete disclosures, not full disclosures to one specific party.[59] The classic case occurs when a client discloses privileged communications only as to matters "at issue" in litigation, for example, when a party relies upon privileged communications as a defense to liability.[60] In selective waiver cases, the corporation fully discloses its attorney-

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two clients on same matter, disclosure among clients and attorney does not waive privilege even though confidentiality is breached).

[56] RICE, *supra* note 10, § 9:68; *see also, e.g.*, Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965) ("[W]here two or more persons who are subject to possible indictment in connection with the same transaction make confidential statements to their attorneys, these statements . . . should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings.").

[57] Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

[58] *Id.*; United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991).

[59] *See, e.g.*, Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1426 (3d Cir. 1991) ("[T]he 'fairness doctrine' is invoked in partial (as opposed to selective) disclosure cases."); *In re* von Bulow, 828 F.2d 94, 101–02 (2d Cir. 1987) (noting that fairness requires finding privilege waived when party discloses selected communications for self-serving purposes).

[60] In "at issue" cases, the client affirmatively uses a portion of her attorney-client communications in the litigation. *See, e.g.*, *Bilzerian*, 926 F.2d at 1292–93 (finding privilege waived when defendant relied upon conversations with counsel as defense to liability). Courts require disclosure of more than the selected portions of the communication because allowing the client to pick and choose helpful portions could unfairly deprive opposing parties of the ability to investigate the claims. *Id.*; Livingstone v. North Belle Vernon Borough, 91 F.3d 515, 537 (3d Cir. 1996) ("It would be unfair to allow [the client] to [rely on her attorney's privileged advice] without permitting the opposing parties to investigate her attorney's version of the relevant events.").

client communications to the government.[61] It does not turn over solely the favorable portions and withhold the damaging ones. As a result, in contrast to the "at issue" cases, the prosecutor receiving the privileged communications is not unfairly prejudiced in any way.

Second, the *Permian* court's fairness analysis does not take full account of the peculiar nature of federal criminal prosecution in the corporate context. Corporations are uniquely vulnerable to criminal liability,[62] and the consequences of indictment alone can be dire.[63] Using this leverage, the government can effectively force the corporation to disclose the privileged communications by threatening indictment.[64] Corporations caught in this predicament are not using the privilege for tactical reasons as the D.C. Circuit feared; rather, they are disclosing privileged information in hopes of avoiding the harsh penalties and collateral consequences of indictment.

Furthermore, selective waiver does not unfairly burden or benefit any party except the government. Private litigants are no worse off under a selective waiver regime than they would be had the privilege not been waived at all.[65] While in place, the protections of the privilege are absolute;[66] without any waiver, private litigants would not have access to the privileged communications.[67] Thus, under a total waiver rule, civil litigants receive a windfall: They are granted access to information that would otherwise be privileged. Under selective waiver, civil litigants remain in the same position they were in ex ante: They do not have access to the communications. While private litigants' position remains unchanged under the selective waiver rule, the

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[61] *E.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 599 (8th Cir. 1977) (describing how Diversified disclosed complete documents to government investigators).

[62] *See, e.g.*, N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494–95 (1909) (describing broad standard for corporate criminal liability); *see also supra* notes 1–2.

[63] *See supra* note 2 (describing devastating consequences of criminal indictment of corporations).

[64] *See* Dore, *supra* note 35, at 763 ("[T]he SEC takes . . . a strategic approach to privilege when it forces corporations to choose between the Commission's wrath and wholesale disclosure to suing shareholders.").

[65] Tiffany Seeman, Comment, *Safeguarding the Attorney-Client Privilege in the Face of Federal Securities Regulations*, 4 DEPAUL BUS. & COM. L.J. 309, 338 (2006); *see also* Andrew J. McNally, Comment, *Revitalizing Selective Waiver: Encouraging Voluntary Disclosure of Corporate Wrongdoing by Restricting Third Party Access to Disclosed Materials*, 35 SETON HALL L. REV. 823, 851–52 (2005) ("Advocates of selective waiver, including the SEC, contend that the doctrine is Pareto optimal, that is, that it places subsequent litigants in *no worse a position* than they otherwise would be in without a selective waiver rule.").

[66] *See* RICE, *supra* note 10, § 2:2 (noting that, when all elements of privilege are satisfied, "this protection is absolute").

[67] *See* Martin v. Valley Nat'l Bank of Ariz., 140 F.R.D. 291, 306 (S.D.N.Y. 1991) ("[T]he attorney-client privilege . . . cannot be overcome simply by a showing of need."); RICE, *supra* note 10, § 2:2 (same).

public and the government benefit from the increased government access to information, since corporations should be more willing to disclose under a selective waiver rule. Access to these communications gives government officials a better factual basis on which to act, resulting in a more efficient and effective administration of justice.[68]

4. The Construction Rationale

The *Permian* court's fourth argument against selective waiver is based on a rule of construction: Since the attorney-client privilege "inhibits the truth-finding process, it has been narrowly construed."[69]

Like the other *Permian* arguments, the construction rationale is flawed. While the Supreme Court has counseled that newly created privileges should be strictly construed, it has also suggested that this presumption is weaker with respect to privileges recognized at common law, such as the attorney-client privilege.[70] When courts rely upon the "familiar platitude . . . that the privilege is narrowly confined,"[71] they ignore the instructions of the Federal Rules of Evidence: Interpretation of privileges is to be "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[72] Courts must balance the benefits conferred by the privilege against the need for evidence.[73] Rather than reflexively assume that the narrow construction is the proper one, courts must consider public policy as illuminated by their "reason and experience."[74] Defaulting to a narrow construction in every situation is not consistent with this duty.

Further, and importantly, when courts decide between selective and total waiver, they are not construing a *privilege* at all; rather, they are deciding a rule of *waiver*. While the concepts of privilege and

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[68] *Cf.* Saito v. McKesson HBOC, Inc., No. 18553, 2002 WL 31657622, at *10 n.55 (Del. Ch. Nov. 13, 2002) ("[T]he SEC . . . saved several hundred hours, used half the number of staff to investigate, and completed the investigation of McKesson much earlier than it would have done without the confidential disclosure in this case. . . . [Other] confidentially disclosed reports . . . saved the SEC 29,000 hours of work and . . . approximately $9 million.").

[69] Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981); *see also* United States v. Nixon, 418 U.S. 683, 710 (1974) ("[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

[70] Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998) (distinguishing narrow construction of new privileges from construction of attorney-client privilege).

[71] United States v. Mass. Inst. of Tech., 129 F.3d 681, 684–85 (1st Cir. 1997).

[72] FED. R. EVID. 501; *accord Swidler & Berlin*, 524 U.S. at 403.

[73] For an example of this balancing, see Jaffee v. Redmond, 518 U.S. 1, 9–10 (1996) (creating psychotherapist-patient privilege).

[74] FED. R. EVID. 501.

waiver are inextricably linked, they need not have the same justifications or scope.[75] The question in selective waiver cases is not whether the court should extend the privilege to these communications. The communications at issue are *already* privileged. Rather, the issue is whether the existing privilege should be abolished, and if so, what the scope of the waiver should be. Since there is "no logical necessity that waiver be treated as an 'all or nothing' choice,"[76] courts should evaluate the alternatives.

These four rationales—purpose, confidentiality, construction, and fairness—form the core of the argument against selective waiver. No single argument has found complete acceptance even among courts rejecting selective waiver,[77] and each justification is subject to criticism. Yet total waiver remains the rule in most jurisdictions.[78]

B. Arguments in Favor of Selective Waiver

At the federal level, only the Eighth Circuit has unconditionally allowed the selective waiver of attorney-client privilege. In *Diversified Industries, Inc. v. Meredith*,[79] the court considered waiver of the attorney-client privilege in the context of an SEC investigation. Diversified's Board of Directors had authorized an independent investigation into bribery allegations.[80] The investigating attorneys issued a written report. Some time later, Diversified provided the SEC with a copy of the report in response to a subpoena.[81] During the course of related civil litigation, one of Diversified's customers sought to discover the report.[82] Diversified refused to turn it over, arguing that it was protected by the attorney-client privilege.[83]

Sitting en banc, the Eighth Circuit held that, for reasons of public policy, the traditional total waiver rule should not apply. The protections of the privilege remained in force even after the report was vol-

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[75] *See In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 308 (6th Cir. 2002) (Boggs, J., dissenting) ("It is not clear why an exception to the *third-party waiver rule* need be moored to the justifications of the *attorney-client privilege*.").

[76] EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE §§ 6.12.4–.5 (2002) (describing situations where waiver is not treated as "all or nothing" choice).

[77] *See supra* note 41 (describing rationales various courts have used in rejecting selective waiver).

[78] *See supra* note 34 and accompanying text (listing jurisdictions that have endorsed total waiver).

[79] 572 F.2d 596 (8th Cir. 1977).

[80] *Id.* at 600–01.

[81] *Id.* at 599.

[82] *Id.* at 599–600.

[83] *Id.* at 599.

untarily disclosed to the SEC.[84] The entirety of the court's reasoning on this issue, set out in one paragraph at the end of the opinion, is as follows:

> As Diversified disclosed these documents in a separate and non-public SEC investigation, we conclude that only a limited waiver of the privilege occurred. To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.[85]

The court found that the benefit gained from encouraging corporate self-policing warranted making an exception to the disclosure-as-waiver rule.

No other federal circuit court has accepted the *Diversified* court's reasoning or joined the Eighth Circuit in allowing selective waiver.[86] However, the influential Delaware Chancery Court has accepted the concept of selective waiver in the related area of attorney work-product privilege.[87] In addition, commentators and at least one dissenting circuit judge have put forward several arguments in favor of selective waiver expanding on the *Diversified* decision.[88] Though support for these arguments is not widespread, they form the currently discussed justifications for selective waiver. Before arguing for a new justification in favor of selective waiver, it is necessary to examine objectively the current rationales and explore their weaknesses, just as with the rationales for rejecting selective waiver in Part II.A above.

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[84] *Id.* at 611.

[85] *Id.* (citations omitted). It should be noted that the Eighth Circuit's fears have not come to pass. Despite the rejection of the *Diversified* approach in most jurisdictions, corporations continue to conduct internal investigations regularly. *Report of the Task Force on the Lawyer's Role in Corporate Governance*, 62 RECORD 165, 177–78 (2007) ("The frequency with which inside counsel and law firms are called on to conduct internal investigations for public companies, either at the company's initiative or the initiative of the SEC, some other regulatory agency, or the company's auditors, has sharply increased in recent years.").

[86] *See* sources cited *supra* note 34.

[87] Saito v. McKesson HBOC, Inc., No. 18553, 2002 WL 31657622, at *8–9 & n.55 (Del. Ch. Nov. 13, 2002). Although this opinion analyzes selective waiver of attorney work product protection, *id.* at *4, the logic of the court's reasoning applies equally to selective waiver of attorney-client privilege. In both cases, there is protected information and the client waives the protection as to the government.

[88] *See In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 307–14 (6th Cir. 2002) (Boggs, J., dissenting) (arguing in favor of selective waiver); IMWINKELRIED, *supra* note 76, § 6.12.4 ("On balance, the minority view recognizing selective waiver seems preferable."); *see generally* McNally, *supra* note 65 (summarizing commentators' arguments).

1. *Corporations Will Be More Likely to Cooperate with the Government Under Selective Waiver*

The cost to corporations of cooperating with the government under the total waiver rule is high. Once information is released to the government, it is discoverable in subsequent civil lawsuits.[89] Thus, a corporation otherwise willing to give the government privileged communications to facilitate an investigation may be reluctant to do so because of the costs of potential future civil litigation. The selective waiver rule lowers the cost of corporate cooperation with the government by denying potential civil plaintiffs access to the disclosed information.

The increased cost to a corporation stemming from the total waiver rule is not itself a persuasive justification for selective waiver, particularly if the corporation has engaged in wrongdoing. However, the potential effect this increased cost has on government investigations of corporate misconduct is persuasive. According to proponents of this argument, the high costs of disclosure make it less likely that corporations will provide information to government investigators.[90] Because investigating corporate misconduct can be a difficult and time-consuming task, government agencies with limited resources rely heavily on corporate self-policing and voluntary reporting.[91] Drying

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[89] *See, e.g.*, United States v. Mass. Inst. of Tech., 129 F.3d 681, 684 (1st Cir. 1997) (stating that "where a client chooses to share communications" with outside world, client waives privilege); Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1424 (3d Cir. 1991) ("[W]hen a client voluntarily discloses privileged communications to a third party, the privilege is waived.").

[90] *See Columbia/HCA Healthcare Corp*., 293 F.3d at 311 (Boggs, J., dissenting) (arguing that given high costs of complete waiver, a "holder of privileged information would be more reluctant to disclose privileged information voluntarily to the government"); Seeman, *supra* note 65, at 338 ("[W]ithout the exception, the corporation is less likely to reveal information to the government and thus would not disclose the information whatsoever because it is privileged.").

[91] The SEC has endorsed the selective waiver rule for this reason. *SEC Review of Enforcement Remedies, Proposed Legislation on Administrative Proceedings, FOIA, Privilege*, 16 SEC. REG. & L. REP. 456, 461 (Mar. 2, 1984) ("[T]hat disclosure to the Commission acts as a general waiver . . . impedes the Commission's enforcement efforts because it results in less voluntary compliance . . . ."). The Commission supports selective waiver because "it is believed that [corporations] are likely to selectively waive the attorney-client privilege in order to cooperate in Commission investigations." *Id.* Former Deputy Attorney General James Comey also extolled the benefits of allowing the government to use the fruits of a corporation's internal investigation:

> [Government investigations are] about the public's interest in uncovering corporate crime in a timely fashion, not only to prosecute the wrongdoers, but also to minimize additional losses and maximize restitution. Some internal investigations cost millions of dollars and analyze hundreds of thousands of documents. Federal prosecutors don't have funds for that, and would be unable to replicate that work. They can, however, work with a report of such

up this source of information could greatly hinder government regulation of corporate crime.[92]

Yet it is unclear whether the increased costs of potential civil litigation actually deter corporate cooperation.[93] The fact that corporations disclose privileged information to investigators despite the wide rejection of selective waiver is strong evidence that the potential costs are not prohibitive. It may be that the heightened risks of corporate criminal indictment or civil sanctions are a sufficient incentive for corporations to produce privileged information, even at the risk of total waiver.

2. *The Selective Waiver Rule Encourages More "Full and Frank Communication"*

Another argument is that selective waiver better serves one of the underlying purposes of the privilege: "encourag[ing] full and frank communication between attorneys and their clients."[94] Where a client anticipates the possibility of a future disclosure to a government agency, a selective waiver rule will increase the candor of discussions between attorneys and their clients.[95] Under a total waiver rule, a corporate client who expects to later disclose privileged communications to a government official will be more hesitant in discussing embarrassing or incriminating facts with her attorney because she knows the general public will eventually gain access to the communi-

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> an internal effort in order to conduct a thorough and complete Government investigation.

Interview with United States Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection, U.S. ATT'YS' BULL. (Executive Office for U.S. Att'ys, Washington, D.C.), Nov. 2003, at 1, 3–4.

[92] *See* McNally, *supra* note 65, at 850 ("The absence of selective waiver deprives government agencies of potentially valuable information that could otherwise assist them in the enforcement of applicable laws.").

[93] *Cf., e.g.*, *In re* Qwest Commc'ns Int'l, Inc., 450 F.3d 1179, 1192 (10th Cir. 2006) ("The record [in this case] does not establish a need for a rule of selective waiver to assure cooperation with law enforcement . . . ."); *Westinghouse Elec. Corp.*, 951 F.2d at 1426 ("[W]e do not think that [selective waiver] is necessary to encourage voluntary cooperation with government investigations."); RICE, *supra* note 10, § 9:88 ("[I]t is not clear that additional encouragement to cooperate with . . . investigations is necessary in light of the substantial gains that corporations stand to make from voluntary disclosure . . . .").

[94] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[95] United States v. Mass. Inst. of Tech., 129 F.3d 681, 685 (1st Cir. 1997) ("The primary argument in favor of [selective waiver] is that loss of the privilege may discourage the frank exchange between attorney and client in future cases, wherever the client anticipates making a disclosure to at least one government agency."). The court then rejected selective waiver because MIT retained "the ultimate decision whether to disclose such communications to third parties." *Id.*

cations as well.[96] In contrast, under a selective waiver rule, the client who anticipates disclosure to the government knows that any communications are protected from further civil discovery; therefore, discussions with counsel can be more full and frank.

However, selective waiver may actually reduce full and frank communication. The traditional conflict of interest between the corporation, as holder of the privilege, and its employees, as interviewees with no control over the privilege, may be more pronounced under a selective waiver rule than under a total waiver rule.[97] Under selective waiver, a corporation may be more likely to disclose privileged materials to the government.[98] Yet an employee who is afraid of personal liability may be more hesitant to discuss her conduct fully and candidly with a company attorney if she knows corporate disclosure to the government is more likely.[99]

3. Selective Waiver Furthers the Truth-Finding Process and Facilitates the "Administration of Justice"

One purpose of the attorney-client privilege is to "promote broader public interests in the observance of law and administration of justice."[100] The privilege facilitates this goal by better enabling the attorney to understand the complete factual circumstances of the client's situation.[101] The Supreme Court has recognized implicitly that

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[96] *Cf. Upjohn*, 449 U.S. at 389 (noting that clients are more likely to share information with attorneys if information is protected by privilege).

[97] For a discussion of the conflict of interest between the corporation as privilege-holder and the employee, see John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 640–46 (2005), who argues that businesses are ethically required to maintain confidentiality regarding employees' communications, and Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 EMORY L.J. 1113, 1181–86 (1997), who notes that general counsel face a conflict between professional responsibility and their obligations towards employers. *See also* Symposium Transcript, *After Sarbanes-Oxley: A Panel Discussion on Law and Legal Ethics in the Era of Corporate Scandal*, 17 GEO. J. LEGAL ETHICS 67, 88–91 (2003) (examining conflicts regarding privilege that arise in internal investigations).

[98] *See supra* Part II.B.1.

[99] *See, e.g.*, *In re* Qwest Commc'ns Int'l, Inc., 450 F.3d 1179, 1195 (10th Cir. 2006) ("Rather than promoting exchange between attorney and client, selective waiver could have the opposite effect of inhibiting such communication. If officers and employees know their employer could disclose privileged information to the government without risking a further waiver of the attorney-client privilege, they may well choose not to engage the attorney or do so guardedly.").

[100] *Upjohn*, 449 U.S. at 389.

[101] *Id.*

such full factual development facilitates the administration of justice.[102]

It follows that, like their private counterparts, government lawyers' ability to "administer justice" increases as the amount of relevant information at their disposal increases. While the attorney-client privilege completely shields privileged communications from outsiders,[103] the selective waiver rule grants government officials some access.[104] The rule thus removes "an impediment to the truth-seeking process,"[105] allows more information to be uncovered, and enables government officials to better fulfill their duties. While the government's barriers to full factual development are often linked to the costs generated by fear of civil litigation described in Part II.B.1 above, they need not be. For example, corporations might also be concerned that disclosing information that ends the protection of the privilege will inhibit their sales, affect their stock price, or hurt their public image. This justification for selective waiver is broader, arguing that whatever the incentives, under selective waiver, corporations can assist the government safely in getting a better understanding of the facts than under the total waiver rule.

This argument for selective waiver is subject to the same criticism described above: Selective waiver may be unnecessary for government officials to have access to privileged information.[106] Corporations routinely disclose privileged information to the government, even in jurisdictions with a total waiver rule. As a result, in many cases, the government already has access to these communications.

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These two waiver rules have been extensively debated in the academic literature and judicial opinions since the *Diversified* decision. Although the total waiver rule has gained wide acceptance, its justifications, as well as those of selective waiver, are not universally endorsed and are subject to criticism. While courts have considered the effect each waiver rule might have on corporate internal investiga-

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[102] *See* Trammel v. United States, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.").

[103] *See supra* note 66.

[104] *See, e.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 599 (8th Cir. 1977) (noting that SEC obtained access to previously privileged material).

[105] *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 307 (6th Cir. 2002) (Boggs, J., dissenting); *see also* United States v. Mass. Inst. of Tech., 129 F.3d 681, 685 (1st Cir. 1997) ("The IRS' search for truth will not be much advanced if MIT simply limits . . . its disclosures to the audit agency.").

[106] *See supra* note 93 and accompanying text.

tions, corporate cooperation with the government, government trial practice, and the underlying purposes of the privilege,[107] no court has publicly considered the effect of these rules on prosecutors' continuously increasing pre-indictment investigatory activity. Before analyzing the effect each waiver rule has on this activity, it is necessary to understand how prosecutors make decisions. The next Part considers this issue.

III
THE PROSECUTOR'S DUTY: COST-BENEFIT ANALYSIS

In order to understand the effects of the waiver rules on a prosecutor's pre-indictment investigatory activities, one must first understand prosecutors' powers and decisionmaking processes. This Part begins by describing the federal prosecutor's powers and responsibilities, focusing on her pre-indictment investigative activities. Next, it considers prosecutorial decisionmaking. Rather than undertaking a comprehensive survey of individual prosecutors across the country, this Part examines how a model prosecutor *should* act when complying with her ethical duties and the Department of Justice (DOJ) principles. In essence, the prosecutor's duty is to benefit society: She must consider and internalize both the law-enforcement effects and collateral effects of her actions. A prosecutor should act only when a decision's social benefits outweigh its social costs.

A. The Federal Prosecutor

The federal prosecutor is one of the most powerful officers of the United States government. In order to carry out her statutory duty to "prosecute all offenses against the United States,"[108] the federal prosecutor undertakes various types of activities. The most obvious is the prosecutor's trial work; she is responsible for prosecuting those accused of violating federal criminal law. However, much of the prosecutor's work occurs outside of the courtroom. The prosecutor engages in pre-trial investigative activities, decides whether to bring charges against a suspect, engages in plea bargaining once an indict-

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[107] *E.g.*, *In re* Qwest Commc'ns Int'l, Inc., 450 F.3d 1179, 1192 (10th Cir. 2006); *Columbia/HCA Healthcare Corp*., 293 F.3d at 302; *Mass. Inst. of Tech*., 129 F.3d at 685; Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1426 (3d Cir. 1991); *In re* Martin Marietta Corp., 856 F.2d 619, 623–24 (4th Cir. 1988); Permian Corp. v. United States, 665 F.2d 1214, 1220 (D.C. Cir. 1981); *Diversified Indus.*, 572 F.2d at 611.

[108] 28 U.S.C. § 547 (2000).

ment is issued, and participates in sentencing discussions after trial.[109] Federal law equips the prosecutor with various tools to carry out these duties effectively.

One of the prosecutor's most significant duties is investigating cases prior to indictment. In recent years, prosecutors have increasingly commenced, joined, and directed pre-indictment criminal investigations.[110] This is largely because of the growing complexity of many federal criminal investigations, particularly those related to narcotics, organized crime, and business crimes.[111] The power of federal prosecutors to initiate investigations is largely discretionary,[112] and prosecutors have many legal tools available to help them investigate crime.[113] However, this prosecutorial discretion is not completely unfettered, as the next Section elaborates.

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[109] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.001 (2008), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/ [hereinafter DOJ MANUAL].

[110] Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 724 (1999) ("Public prosecutors in this country have increasingly become involved in the investigative stages of criminal matters during the 20th century.").

[111] *See* Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 925 (1996) ("[T]he prosecutor enters cases involving organized crime, public corruption and large drug organizations much earlier because most inquiry is conducted using subpoenas and grand jury interviews. Furthermore, the methods of investigation, including intricate undercover operations, are more complicated, requiring law enforcement agencies to seek both the advice and the authorization of the prosecuting attorney.").

[112] *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." (quoting United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982))); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause . . . the decision whether or not to prosecute, and what charge to file or bring . . . rests entirely in his discretion."); United States v. Dottereich, 320 U.S. 277, 285 (1943) ("[T]he good sense of prosecutors . . . must be trusted."); *see also* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 840–41 ("Discretion pervades . . . investigations, charging and plea bargaining, trials, sentencing, and responding to postconviction events."). Not only is the investigative decision discretionary, but it does not even need to be based on reasonable grounds. *See, e.g.*, United States v. Luttrell, 923 F.2d 764, 764 (9th Cir. 1991) (holding that Due Process Clause does not require "reasoned grounds" for investigating individual); United States v. Jannotti, 673 F.2d 578, 608–09 (3d Cir. 1982) (en banc) (rejecting "reasonable basis" test); United States v. Myers, 635 F.2d 932, 941 (2d Cir. 1980) (rejecting "reasonable suspicion" requirement).

[113] Prosecutors, like other law enforcement officers, may seek warrants in order to search a target's property or possessions. *See* U.S. CONST. amend. IV; Bruce A. Green, *Why Should Prosecutors "Seek Justice?,"* 26 FORDHAM URB. L.J. 607, 626 (1999) (stating that prosecutors have "the power to apply for search warrants" (quoting N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 683, at 3 (1996))). Unlike private parties, federal prosecutors may seek authorization for a wiretap. 18 U.S.C. §§ 2510–2520 (2000). They may request overt and covert physical surveillance. DOJ MANUAL, *supra* note 109,

B. The Duty of the Federal Prosecutor to "Do Justice"

Prosecutorial discretion is guided by various constitutional, statutory, and ethical duties.[114] Rather than dictate an outcome in any given situation, these duties serve as factors and guideposts for the prosecutor to weigh in making decisions.[115] At the base of these factors is a duty to "do justice." This duty is the core principle of the prosecutor's "professional ethos,"[116] and it appears that federal prosecutors take this command seriously.[117]

While serving as Attorney General, Justice Robert H. Jackson attempted to give content to the duty to "do justice." He suggested that "sensitiv[ity] to fair play and sportsmanship," tempered zeal, "human kindness," truth-seeking, service of the law, and "humility" were critical qualities in a prosecutor.[118] In short, Justice Jackson declared that a prosecutor should put the public's overall welfare above her own personal goals or the desire to obtain a conviction in every case. The job of a prosecutor is not merely to incarcerate criminals; it is to further the public interest.[119]

Subsequent commentators have echoed Justice Jackson's formulation. Professor Little believes the American Bar Association (ABA) should adopt a standard requiring prosecutors to "invoke a conscious analysis of proportionality" when making investigative decisions.[120] Proportionality requires balancing the costs to the government, the suspect, and third parties of a decision to investigate against the likely benefits from that decision.[121] He contends that such a standard would merely codify existing practice.[122] Similarly, Professor Levenson argues that the prosecutor must consider whether her action

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§ 9-2.010 (noting that United States Attorneys are "authorized to request the appropriate federal investigative agency to investigate alleged or suspected violations of federal law").

114 For commentary on these duties, see generally Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513 (1993), Green & Zacharias, *supra* note 112, and Little, *supra* note 110.

115 *See* Gershman, *supra* note 114, at 513 (noting that prosecutorial discretion is constrained by prosecutor's duties).

116 Green, *supra* note 113, at 611.

117 *See* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 238 (2000) ("A variety of evidence suggests that, as a general rule, the Department of Justice takes its duty to serve justice to heart.").

118 Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 6 (1940).

119 *Id.* at 4 ("Although the government technically loses its case, it has really won if justice has been done.").

120 Little, *supra* note 110, at 727, 756.

121 *Id*.

122 *Id.* at 756 (noting that proposed rule would "merely formalize[ ] . . . the standards that many prosecutors might agree are already applied in practice").

is "consistent with the public interest."[123] While the precise meaning of the command to "do justice" is uncertain in any particular case, there is a wide consensus that prosecutors generally should not take actions that are contrary to the public good or that detract from the overall welfare of society.

These principles largely parallel the public-regarding nature of the *ABA Standards for Criminal Justice Prosecution Function and Defense Function*.[124] The *Standards* describe the prosecutor as "an administrator of justice" whose duty is "to seek justice, not merely to convict."[125] Rather than require strict prosecution of each possible crime, the *Standards* ask the prosecutor to use discretion and to evaluate the public benefits of an indictment and possible conviction against the costs that such an action will create.[126]

The DOJ attempts to give more specific content to the "do justice" standard in the *United States Attorneys' Manual*.[127] This manual applies to all federal prosecutors, guiding their day-to-day activities.[128] In essence, it turns the normative and theoretical principles described above into practical guidelines that federal prosecutors are expected to follow when performing their job functions.[129] The *United States Attorneys' Manual* characterizes the decision to prosecute as "a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances."[130]

The DOJ has further operationalized these norms by promulgating binding regulations specifically designed to guide prosecutors in investigating and prosecuting corporations.[131] These regulations require prosecutors to balance the need for and benefits of prosecution against the costs of prosecution to the public. To determine potential benefits, prosecutors look to the nature and extent of the corporation's conduct and whether the corporation has implemented

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123 Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 558 (1999) (quoting Gershman, *supra* note 114, at 514).

124 ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

125 *Id.* at 3-1.2.

126 *Id.* at 3-3.9 (noting factors prosecutors should consider in exercising discretion).

127 *See, e.g.*, DOJ MANUAL, *supra* note 109, §§ 9-27.001 to -27.130 (establishing guiding principles for federal prosecutions).

128 *Id.* § 9-27.120 ("[E]ach Department of Justice attorney should be guided by the principles set forth herein.").

129 *See id.* § 1-1.100 ("[This manual] contains general policies and some procedures relevant to the work of the United States Attorneys' offices . . . .").

130 *Id.* § 9-27.001.

131 U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 162 (2004), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00000.htm [hereinafter DOJ CRIMINAL RESOURCE MANUAL].

any remedial programs. In assessing costs to the public, prosecutors must also consider collateral consequences that flow indirectly from prosecution, such as costs that will fall on corporate shareholders, pension holders, and employees.[132]

These DOJ regulations help ensure that federal prosecutors do, in fact, act as theory suggests they should. Taken together, the specified factors urge the prosecutor to consider and internalize broad social costs and benefits before acting. In essence, when deciding whether to proceed, federal prosecutors are obliged to consciously engage in a cost-benefit analysis; a prosecutor who behaves accordingly will only take actions that provide a net benefit to society. Where the social costs of an action are too high relative to the social benefits, a federal prosecutor will not act. In light of prosecutors' obligations under the DOJ regulations to engage in this cost-benefit analysis before acting, the next Part compares the costs and benefits of the total and selective waiver rules and evaluates their respective effects on prosecutorial decisionmaking.

IV
Cost-Benefit Analysis as a New Rationale for Selective Waiver

While a prosecutor following federal guidelines will subject all of her actions to a cost-benefit analysis, one decision is of particular importance when investigating corporate crime—the decision to ask for privileged information.[133] In this situation, the total waiver rule imposes costs on society that the selective waiver rule does not, without a corresponding increase in benefits. Assuming prosecutors follow the guidelines, the relatively higher costs associated with a total waiver rule will cause rational prosecutors to request confidential information from corporations less frequently than they would if these extra costs did not exist.[134] This, in turn, will lead prosecutors either to act without important information or not to act at all, resulting in less overall investigation and prosecution of corporate crime. As a result, the total waiver rule's relatively higher costs and the related

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[132] *See id.* § 162.II.A.7 (discussing collateral consequences among factors to be considered by prosecutors).

[133] For a discussion of the importance of privileged corporate communications, see *supra* notes 91–92 and accompanying text.

[134] This conclusion assumes that the rational prosecutor is attentive to the costs imposed by the total waiver rule. Whether this is factually true is beyond the scope of this Note. I believe that prosecutors do take these concerns into account, but for my purposes it is only necessary that the rational prosecutor *should* account for them.

negative effects on criminal law enforcement should lead both courts and legislatures to prefer a selective waiver rule.

Despite the different outcomes they often cause in litigation, the selective waiver and total waiver rules operate similarly in most respects. Under both, prosecutors enjoy access to previously privileged corporate communications.[135] In fact, there is only one difference between the two rules: Under total waiver, third parties, including civil plaintiffs, can gain access to previously privileged corporate communications, while under selective waiver they cannot. Therefore, to determine how a utility-maximizing prosecutor will proceed, we need only estimate her assessment of the costs and benefits stemming from this divergence. As mentioned above, by and large, the rules result in the same benefits. The total waiver rule, however, imposes relatively higher costs on society than the selective waiver rule does.

A. The Societal Benefits of Using the Total Waiver Rule Instead of the Selective Waiver Rule Are Illusory

In addition to providing government investigators with previously privileged communications, the main benefit ascribed to the total waiver rule is that it grants injured civil plaintiffs access to highly probative privileged corporate communications.[136] While the benefit of government access applies equally to both waiver rules, the purported benefit of civil plaintiff access is exclusive to total waiver. Access to privileged corporate communications, which usually contain internal investigation reports and employee interviews, can greatly strengthen the civil case against a company.[137] At first blush, these strengthened civil lawsuits appear to benefit the company's shareholders and the public at large by compensating harmed individuals and providing greater deterrence against corporate wrongdoing. However, these

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[135] For a variety of reasons, corporations almost always share privileged communications with prosecutors when asked. *See supra* notes 2–5, 93 and accompanying text (discussing reasons for and extent of corporate cooperation with prosecutors).

[136] *See, e.g.*, Jill A. Hornstein, Comment, *Paying the "Traditional Price" of Disclosure: The Third Circuit Rejects Limited Waiver of the Attorney-Client Privilege,* Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991)*, 71 WASH. U. L.Q. 467, 480 (1993) (supporting total waiver rule because selective waiver rule "greatly hampers private actions against corporations, a primary enforcement and deterrent tool against securities violations").

[137] *See* Richard M. Strassberg & Sarah E. Walters, *Is Selective Waiver of Privilege Viable?*, N.Y. L.J., July 7, 2003, at 7 (calling internal investigation report "a virtual road map to assist [plaintiffs] in their lawsuit").

benefits are illusory, at least with regard to the largest portion of these lawsuits, securities fraud class actions.[138]

First, the current private enforcement legal regime neither effectively nor efficiently compensates shareholders.[139] Both current and former shareholders receive only a fraction of their investments' lost value in any litigation settlement.[140] According to NERA Economic Consulting, the ratio of settlement value to investor loss between 1991 and 2004 never exceeded 7.2%.[141] That is, if as a result of corporate wrongdoing a shareholder's investment lost $100 in value during the class period, the shareholder did not receive more than $7.20 in the settlement. This value is further reduced if the civil litigant was a shareholder of the corporation at the time of settlement: The cost of increased corporate insurance premiums and negative effects on the corporation's stock price and reputation must also be deducted from the value of any settlement recovery.[142]

Even if the settlement amounts did equal the total amount of loss, the shareholders would not be fully compensated because the current system extracts large administrative costs. Thus, under the

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[138] In recent years, securities class actions have averaged between 47% and 48% of class actions pending in all federal district courts. *See* ADMIN. OFFICE OF THE U.S. COURTS, 2004 JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 400 tbl.X-4, *available at* http://www.uscourts.gov/judbus2004/appendices/x4.pdf (showing 47.9% of all class actions pending in district courts in 2004 were securities class actions); ADMIN. OFFICE OF THE U.S. COURTS, 2003 JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 393 tbl.X-4, *available at* http://www.uscourts.gov/judbus2003/appendices/x4.pdf (showing 47.0% were securities class actions in 2003); ADMIN. OFFICE OF THE U.S. COURTS, 2002 JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 395 tbl.X-4, *available at* http://www.uscourts.gov/judbus2002/appendices/x04sep02.pdf (showing 48.0% were securities class actions in 2002); *see also* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1539–40 & tbl.1 (2006) (discussing same statistics). Thus, the costs and benefits associated with these types of lawsuits are particularly important in determining how a utility-maximizing prosecutor would act.

[139] *See* Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1489 (1996) ("As a means of delivering compensation to investors, securities class actions do a rather poor job even on their own terms."); Coffee, *supra* note 138, at 1547 ("[I]t is an open question as to whether the typical securities class action settlement actually produces any net recovery, particularly to diversified shareholders.").

[140] *See* Coffee, *supra* note 138, at 1545 ("Settlements recover only a very small share of investor losses.").

[141] *Id.* (citing ELAINE BUCKBERG ET AL., NERA ECON. CONSULTING, RECENT TRENDS IN SHAREHOLDER CLASS ACTION LITIGATION: ARE WORLDCOM AND ENRON THE NEW STANDARD? 6 (2005), *available at* http://www.nera.com/Publication.asp?p_ID=2544). Professor Alexander has found the recovery to loss ratio to be somewhat higher. Alexander, *supra* note 139, at 1500–01 (estimating that recoveries average about 9% of investor losses and 12% of class's claimed damages, not including deductions for litigation costs).

[142] *See* Coffee, *supra* note 138, at 1558–59 (describing reductions in settlement value when civil litigant is also shareholder).

current recovery system, any amount recovered by injured former shareholders is further reduced by the costs of litigation, including attorneys' fees. These costs can be substantial. For example, plaintiffs' attorneys' fees awards averaged 32% of the recovery during the 1990s.[143] Rather than make injured shareholders "whole," class action settlements (or judgments) merely transfer wealth from one group of innocent shareholders (those who currently hold the stock) to another group of innocent shareholders (those who formerly held the stock), subtracting a significant portion for administrative costs such as attorneys' fees.[144]

The illusory nature of the compensation benefit is further underscored when one considers that most shareholders are diversified.[145] With respect to a given stock, diversified investors are likely to be in both the compensated class of shareholders (those who formerly held the stock and sold at a fraud-induced loss) and the compensating class of shareholders (those who hold the stock at the time of settlement).[146] Diversified investors are also very likely to be in the compensated class of one stock in their portfolio while being in the compensating class of another stock they hold. For every diversified investor whose investment drops in value due to fraud, there is another diversified investor who benefits from the fraud.[147] Since the

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143 Denise N. Martin et al., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions*, 5 STAN. J.L. BUS. & FIN. 121, 141 (1999); *see also* Alexander, *supra* note 139, at 1501 ("[A]dministrative costs, in the form of attorneys' fees, litigation expenses, and expenses of administering the settlement, are large.").

144 Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 694 ("[E]nterprise liability results in large wealth transfers from one group of innocent investors to another . . . . These wealth transfers are subjected to a substantial deduction for litigation costs, a deadweight loss that only benefits attorneys."); Coffee, *supra* note 138, at 1536–37, 1558 (noting that current shareholders bear transaction costs of each wealth transfer, including "the legal fees paid to both plaintiffs' and defendants' counsel, the increased insurance premiums in the wake of the litigation, and the possible costs of business disruption and adverse publicity to the subject company").

145 *See* Coffee, *supra* note 138, at 1559 & n.91 ("[M]ost retail investors do diversify because they invest through mutual funds and pension funds, which are required by law to diversify. Large, sophisticated investors also understand the wisdom of diversification." (footnote omitted)).

146 John C. Coffee, Jr., *Causation by Presumption? Why the Supreme Court Should Reject Phantom Losses and Reverse* Broudo, 60 BUS. LAW. 533, 542 (2005) ("Equally perverse are the implications that flow from the fact that most investors are diversified. In all likelihood, such investors will belong to both the plaintiff class that sues and the residual shareholder class that bears the cost of the litigation.").

147 *See* Alexander, *supra* note 139, at 1496 ("For every buyer who pays too much . . . there is a seller—just as innocent of the fraud—who reaps a windfall in an equal amount."); Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 ARIZ. L. REV. 639, 646 (1996) ("In any non-privity fraud case, each loser—the buyer or seller disadvantaged by the fraud—is balanced by another winner: the person on the other

incidence and value of fraud are randomly distributed,[148] a diversified investor is likely to be both the beneficiary and the victim of fraud that occurs in the market. Over time, for diversified portfolios, the "gains and losses will tend to net out toward zero."[149] That is, in some cases, the diversified investor will have sold her stock at a price inflated by fraudulent information (thus gaining a windfall), while in others, the investor will still be holding stock when a fraud is revealed (thus paying a share of any settlement). In the aggregate, fully diversified investors "will be fully compensated for [their] trading losses that are due to securities fraud by windfalls on other transactions."[150]

The current, private litigation–based system of compensation takes wealth from the left pocket of an investor and returns it to the right pocket, after removing a substantial portion to pay attorneys' fees and other administrative costs.[151] Thus, the shareholder compensation benefit of class actions assisted or enabled by the total waiver rule is minimal.

The benefits of the total waiver rule as opposed to the selective waiver rule are illusory for a second reason: The threat of private litigation is not a meaningful deterrent in cases of government-investigated corporate wrongdoing. Even assuming that private litigation could ever deter corporate wrongdoing,[152] any deterrent effect is

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side of the trade."). To appreciate this relationship, consider a market with two investors and one corporation. Investor *A* owns all the shares of the corporation and Investor *B* owns none. After some fraud (not involving Investor *A*), the stock price rises and Investor *A* sells to Investor *B*. Investor *A* has benefited from the fraud by cashing out at a higher price. Investor *B* has been harmed, since he purchased at the artificially inflated price.

148 *See* Alexander, *supra* note 139, at 1502 ("The chance of being on the losing or winning side of a transaction when the stock price is distorted by a securities violation can be assumed to be random.").

149 Langevoort, *supra* note 147, at 646.

150 Alexander, *supra* note 139, at 1502.

151 *Id.* at 1503 ("[P]ayments by the corporation to settle a class action amount to transferring money from one pocket to the other, with about half of it dropping on the floor for lawyers to pick up."); Coffee, *supra* note 138, at 1558 ("[Shareholders] are effectively making wealth transfers to themselves, in effect shifting money from one pocket to another, minus the high transaction costs of securities litigation.").

152 Indeed, some argue that private litigation does not deter corporate wrongdoing at all because officers and directors of a corporation are never forced to internalize the costs of their actions. *See* Alexander, *supra* note 139, at 1499 ("Individual defendants almost never contribute personally to settlements."); Arlen & Carney, *supra* note 144, at 694 (finding that burden of enterprise liability falls primarily on innocent shareholders and must instead fall on corporate agents in order to deter); Coffee, *supra* note 138, at 1550 ("Although [corporate insiders] are regularly sued, they rarely appear to contribute to the settlement."). Most directors and officers have insurance to pay the costs of any lawsuits against them and the costs of this insurance are paid by the corporation. *See* Coffee, *supra* note 138, at 1550–51, 1553, 1567 (describing extensive insurance coverage of settlements). Since the agent's personal finances are rarely at risk, the threat of civil litigation provides little deterrent effect.

minimal from civil litigation assisted by the disclosure of privileged information under the total waiver rule. In litigation enabled by the total waiver rule, the government is already pursuing a criminal investigation against the corporation. If corporate agents are not deterred by the threat of criminal indictment and incarceration, it seems unlikely that they will be deterred by mere financial penalties.[153] As a result, the very lawsuits enabled by the disclosure of previously privileged information are those in which the deterrence benefits of the civil enforcement scheme will be least applicable.

B. The Total Waiver Rule Imposes Greater Costs on Society Than the Selective Waiver Rule

As discussed in the previous Section, in the context of corporate securities crime, there are few benefits to the total waiver rule over the selective waiver rule. Private securities litigation neither efficiently provides compensation to harmed plaintiffs nor meaningfully deters corporate wrongdoing, at least not when preceded by a criminal prosecution. However, by enabling such private lawsuits through the release of privileged information, the total waiver rule actually imposes substantial costs on innocent corporate shareholders and the judicial system as a whole.[154] It is these relatively higher costs, and their corresponding effects on prosecutorial decisionmaking, that should lead courts and legislators to prefer selective waiver.

By enabling and strengthening civil lawsuits against corporations, the total waiver rule imposes serious costs on innocent corporate shareholders without actually compensating those who were harmed. First, as described above, current shareholders bear the costs of defending civil litigation.[155] The most concrete of these costs are legal fees. Plaintiffs' attorneys' fees averaged 32% of the total settlement amount during the 1990s, while defense counsel's fees averaged an additional 25% to 35% during the same period.[156] A second major cost is the decline in value of the company's stock. A company's share price declines an average of 4.66% on the day a securities fraud class

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153 This is particularly true since most corporate directors and officers will rarely pay for the civil costs of their wrongdoing out of pocket. *See supra* note 152.

154 *See* Coffee, *supra* note 138, at 1538 (noting that securities class actions impose "significant costs" on investors and judiciary); Joan MacLeod Heminway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 AM. U. L. REV. 1131, 1185–86 (2003) (describing some costs of securities class actions).

155 *See supra* note 144 and accompanying text (describing this effect).

156 Coffee, *supra* note 138, at 1558 n.90. During this time period, settlements averaged several million dollars, peaking at $189,920,637. MUKESH BAJAJ ET AL., SECURITIES CLASS ACTIONS: AN EMPIRICAL ANALYSIS 20 tbl.4 (2000), *available at* http://securities.stanford.edu/research/studies/20001116_SSRN_Bajaj.pdf.

action is filed, resulting in an average loss to shareholder wealth of approximately $355,650,000.[157] Other costs include an increase in corporate litigation insurance premiums, business disruptions, adverse publicity, and reputational damage.[158] The corporation's continuing shareholders received no benefit from the fraud since they did not sell their stock at the inflated price. Nonetheless, they bear the burden when suits are brought.

By enabling and encouraging private class actions, the total waiver rule also imposes serious costs on the public and the judiciary.[159] Securities class actions comprise a large portion of the federal court docket: From 2002 to 2004, securities class actions accounted for nearly half of all class actions in the district courts.[160] These cases take longer to resolve than typical civil suits, and they even take longer than other class actions.[161] Furthermore, as compared to cases generally, securities class actions require federal courts to engage in greater oversight at an earlier stage in the proceedings. For example, under the Private Securities Litigation Reform Act (PSLRA), the court must hold hearings to determine a "lead plaintiff."[162] These hearings are "essentially contests among competing teams of plaintiffs' attorneys" and take up "significant judicial time."[163] The PSLRA also imposes heightened pleading requirements on litigants, and courts must consider and rule on the unique motions that this requirement generates.[164] While these burdens exist in any

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157 Amar Gande & Craig M. Lewis, *Shareholder Initiated Class Action Lawsuits: Shareholder Wealth Effects and Industry Spillovers*, J. FIN. & QUANTITATIVE ANALYSIS (forthcoming) (manuscript at 8, *available at* http://ssrn.com/abstract=891028).

158 Coffee, *supra* note 138, at 1558–59.

159 *See* Jack B. Weinstein, *Some Reflections on United States Group Actions*, 45 AM. J. COMP. L. 833, 834 (1997) (noting "added burdens on the court" in class actions).

160 *See* sources cited *supra* note 138.

161 *See* Coffee, *supra* note 138, at 1540 & n.13 (noting that securities class actions "take longer to resolve than most other class actions, and this tendency is increasing" (citation omitted)).

162 Private Securities Litigation Reform Act of 1995 § 101, 15 U.S.C. § 78u-4(a)(3) (2000).

163 Coffee, *supra* note 138, at 1540.

164 *Compare* 15 U.S.C. § 78u-4(b)(1) (heightened pleading requirements under PSLRA), *and* Coffee, *supra* note 138, at 1540–41 (noting extra motions practice that accompanies heightened pleading standard), *with* FED. R. CIV. P. 8 (standard pleading requirements for civil action). The provisions of the PSLRA were intended to cut down on frivolous securities lawsuits—known as "strike suits"—filed by plaintiffs' attorneys to extract settlement payments from corporations. *See* H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 730 ("The private securities litigation system is too important to the integrity of American capital markets to allow this system to be undermined by those who seek to line their own pockets by bringing abusive and meritless suits."). Other provisions, including an automatic stay of discovery until after a ruling on a motion to dismiss, are aimed at the same goal. *See id.* at 37, *reprinted in* 1995

securities litigation, the total waiver rule increases the burden by raising settlement values[165] and thereby increasing the number of claims.[166]

In contrast, the selective waiver rule does not create these additional costs to the shareholders and judiciary, while still generating the same benefit of governmental access to information as the total waiver rule. Under the selective waiver rule, privileged corporate communications that are divulged to the government do not become subject to discovery by private civil plaintiffs. As a result, fewer civil lawsuits—with all the public and private costs they impose[167]—are filed. This cost reduction comes without imposing any additional cost that would not also result from the total waiver rule. Under the total waiver rule, prosecutors may feel compelled to refrain from asking for privileged corporate communications due to the costs the rule generates. Under a selective waiver rule, however, prosecutors will be more likely to ask for the communications because of the relatively lower costs. As a result, prosecutors can request more information and more effectively investigate corporate crime.

The one potential cost of a selective waiver rule is that private plaintiffs will be unable to discover privileged corporate communications. However, as shown above, this is a benefit, rather than a cost, in that fewer follow-on civil suits with minimal social benefit are likely to be brought. In cases where the government is criminally investigating a company, the addition of civil litigation does not effectively compensate or deter. Further, under the selective waiver rule, the

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U.S.C.C.A.N. 730, 736 (describing new provisions aimed at correcting discovery abuses). It is unclear if these reforms have been effective. *Cf.* Heminway, *supra* note 154, at 1184 & n.191 ("Data suggest that the PLSRA [sic] may have been largely ineffective at achieving these objectives."). But even if the PSLRA has been completely successful in preventing plaintiffs in frivolous strike suits from gaining access to previously privileged corporate communications disclosed to the government, the total waiver rule still raises the costs that prosecutors should consider by increasing the strength and number of the claims that remain.

165 As more information, especially highly probative information, becomes available, the settlement value of a case increases. *See* Christine Hurt, *Counselor, Gatekeeper, Shareholder, Thief: Why Attorneys Who Invest in Their Clients in a Post-Enron World Are "Selling Out," Not "Buying In*," 64 OHIO ST. L.J. 897, 949 (2003) (noting that settlement values increase for securities fraud class actions that begin discovery).

166 As more probative information enters the public domain, the number of claims is likely to increase because of the contingency fee–based cost structure of securities litigation. Before the privileged information was public, a number of cases probably existed where recovery was deserved but unprofitable for an attorney to pursue. As the claim becomes easier to prove because of an influx of information, more of these claims can profitably be filed.

167 *See supra* text accompanying notes 155–66 (discussing variety of costs civil suits impose).

government will have access to at least as many privileged corporate communications as it would under the total waiver rule.[168] Corporations have just as strong incentives to self-police and self-report under a selective waiver rule as under a total waiver rule.[169] Selective waiver eliminates some costs imposed by the total waiver rule while at the same time maintaining all of total waiver's benefits and imposing no new costs of its own. As a result, utility-maximizing federal prosecutors will be more likely to ask for privileged corporate communications—including critical internal investigation reports—under the selective waiver rule. This, in turn, will result in the more informed and more frequent investigation and prosecution of corporate criminal activity.

CONCLUSION

Federal courts have been debating the merits of selective waiver of attorney-client privilege at least since the Eighth Circuit's decision in *Diversified*. Over time, most courts have rejected the principle, gravitating toward a total waiver rule. However, the rationales provided by courts on both sides are used inconsistently and are in tension with other aspects of the privilege doctrine.

This Note provides a new rationale in favor of a selective waiver rule: It will better enable utility-maximizing federal prosecutors to investigate and prosecute corporate crime. Privileged corporate communications, including critically important internal investigation reports, are central to efficient and productive investigation and prosecution. As federal prosecutors become increasingly involved in pre-indictment investigations of corporate wrongdoing, access to these privileged communications becomes more important. Though corporations routinely disclose this information to prosecutors when asked, a utility-maximizing prosecutor should not even *seek* the information if not cost-justified. By eliminating significant costs imposed by the total waiver rule, the selective waiver rule emerges as a preferable alternative, permitting prosecutors to seek privileged corporate communications more frequently, and thereby enabling more robust investigation and prosecution of corporate crime.

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168 Indeed, some suggest that corporations will be more likely to cooperate. *See In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 311 (6th Cir. 2002) (Boggs, J., dissenting) (noting that corporations are less likely to cooperate with government investigations under total waiver rule because they have too much to lose).

169 *See* DOJ CRIMINAL RESOURCE MANUAL, *supra* note 131, § 162.II.A.4–.6, (instructing prosecutors to consider corporation's "voluntary disclosure," "willingness to cooperate," compliance program, and remedial actions in deciding whether to indict corporation).