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No Contest: Why Protective Orders Provide Victims Superior Protection to Bond Conditions

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I. Introduction

"A law is only as good as the system that delivers on its promises . . . ."[1] The justice system's goal for victims of domestic violence is to protect the community by ending the violence. In Texas, there is a mechanism for the system to deliver on the promised goal for victims of domestic violence: protective orders. However, in most Texas counties, victims are unable to obtain protective orders. In many of those counties, officials choose instead to incorporate "no contact" provisions into an accused abuser's bond conditions. This practice is problematic and should be avoided because bond conditions are an ineffective substitute for protective orders. A combination of bond conditions and a protective order may provide protection to victims; however, Texas courts should cease issuing bond conditions in lieu of protective orders. This Article explores the differences between protective orders and bond conditions and explains why protective orders provide better protection to victims than bond conditions alone.

Courts that issue bond conditions, high bond amounts, or both as a substitute for protective orders base the practice on three faulty premises: (1) that protective orders and bond conditions accomplish the same goal, (2) that bond conditions promote judicial efficiency by avoiding an unnecessary evidentiary hearing, and (3) that a protective order hearing gives the alleged abuser an advantage in criminal proceedings by allowing defense counsel to hear the victim's pretrial testimony. These underlying premises are flawed. Part II of this Article explores the statutory framework and scheme of protective orders in Texas. Part III explores bond conditions, highlighting the reasons why prosecutors and judges prefer entering bond conditions to protective orders. Part IV compares and contrasts the effectiveness of protective orders and bond conditions in protecting victims.

II. Protective Orders in Texas

For decades, violence and sexual assault among family members or intimate partners were viewed as private matters not meant to be dealt with by the judicial system.[2] Slowly, society has begun to view such violence as unacceptable—a shift that has been accompanied by an increase in political will to intervene in such situations.[3] Accordingly, all fifty states have enacted protection order statutes to offer relief to victims of domestic violence and sexual assault.[4] In recent years, protection has been afforded

1. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 4 (1999).

2. *Id.* at 10–11.

3. *Id.* at 11.

4. Christina Dejong & Amanda Burgess-Proctor, *A Summary of Personal Protection Order Statutes in the United States*, VIOLENCE AGAINST WOMEN, Jan. 2006, at 68–88.

to victims of other violent crimes that carry an increased risk of re-victimization.[5] Current Texas statutes provide protective orders for victims of family violence,[6] sexual assault,[7] hate crime,[8] and stalking.[9]

A. Summary of Texas Statutes

The statutory framework in Texas has two layers: the statutes outlining the types of protective orders available, and the statutes explaining the process of applying for protective orders.

1. Types of Protective Orders

Texas statutes create protective orders of two durations: temporary and final. There are two types of temporary protective orders. A victim may apply for a Temporary Ex Parte Protective Order (EPO),[10] or, generally, a law enforcement agency will apply for a Magistrate's Order for Emergency Protection (MOEP).[11] An EPO lasts twenty days,[12] while an MOEP lasts thirty-one to ninety-one days.[13] EPOs can be extended for additional periods of twenty days.[14]

An EPO is granted when a judge reviews the application and finds that there is a clear and present danger of family violence.[15] Victims under immediate threat of violence may seek an EPO without notice to the abuser, and without the abuser's attendance at a hearing.[16] When the abuser is still living in the home, an EPO can include a "kick out" order excluding the abuser from victim's residence.[17] To obtain an EPO, the victim must file a sworn affidavit that provides a detailed description of the facts and circumstances necessitating protection, including facts that show there is a danger that the abuser will commit family violence again.[18] The victim may testify at the EPO hearing.[19] To issue a kick out order, the court must find

5. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art 7A.01 (West Supp. 2012) (allowing protective orders for victims of child sexual abuse, indecency with a child, sexual assault, aggravated sexual assault, or stalking "without regard to the relationship between the [victim] and the alleged offender").

6. TEX. FAM. CODE ANN. § 85.001 (West Supp. 2012).

7. TEX. CODE CRIM. PROC. ANN. art. 7A.01.

8. *Id.* art. 6.08 (West 2005).

9. *Id.* art. 7A.01 (West Supp. 2012).

10. TEX. FAM. CODE ANN. § 83.002(a) (West 2008).

11. TEX. CODE CRIM. PROC. art. 17.292 (West Supp. 2012).

12. TEX. FAM. CODE ANN. § 83.002(a).

13. TEX. CODE CRIM. PROC. art. 17.292(j).

14. TEX. FAM. CODE ANN. § 83.002(b) (West 2008).

15. *Id.* § 83.001(a).

16. *Id.*

17. *Id.* § 83.006 (West Supp. 2012).

18. *Id.* § 82.009 (West Supp. 2012), § 83.001 (West 2008).

19. *Id.* The court may enter an EPO that does not include a kick out order without a hearing if it "finds from the information contained in the application . . . that there is a clear and present danger of family violence." *Id.* § 83.001 (West 2008). However, if the EPO includes a kick out order, the victim

the following: (1) the applicant resides on the premises to be protected or has done so within thirty days prior to the filing of the application; (2) the respondent committed violence against a member of the household within thirty days before the date the application was filed; and (3) there is a clear and present danger that the respondent is likely to commit further violence against a member of the household.[20] An EPO is available to a victim without regard to whether the abuser has been arrested or charged with a crime.[21]

When an abuser is arrested and charged with family violence, sexual assault, aggravated sexual assault, or stalking, the victim can obtain a Magistrate's Order of Emergency Protection.[22] An MOEP is issued either by the magistrate on his or her own motion or by request.[23] The following persons can request an MOEP for a victim: the victim, the victim's guardian, a peace officer, or an attorney representing the state.[24] Frequently, MOEPs are issued at the request of an arresting or investigating officer.[25] An MOEP can be used to prohibit the abuser from committing family violence, communicating directly with persons protected by the order including the victim and members of the victim's household, threatening the victim or a member of the victim's household, and going near places where the protected persons are likely to be present including their residences, places of employment, childcare facilities, or schools.[26]

These two temporary protective orders are designed to protect victims during the time between the filing of an application for a final protective order and the protective order hearing date.[27] As a practical matter, some prosecutors prefer to extend the temporary order until near the time of the criminal trial to avoid holding the protective order hearing. This practice poses a risk to the victim if the state's attorney fails to obtain a final order.

There are six types of final protective orders in Texas: (1) family violence protective orders,[28] (2) dating violence protective orders,[29] (3) hate

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must testify at the hearing. *Id.* § 83.006 (West Supp. 2012).

20. *Id.*

21. *See id.* § 83.001 (West 2008) (stating that only a showing of "clear and present danger of family violence" is needed for a court to enter a temporary ex parte protective order).

22. TEX. CODE CRIM. PROC. ANN. art. 17.292 (West Supp. 2012).

23. *Id.*

24. *Id.*

25. Interview with D'An Anders, Victim's Advocate, Texas Legal Services Center, in Austin, Tex. (Jun. 7, 2012).

26. TEX. CODE CRIM. PROC. ANN. art. 17.292(c).

27. Interview with D'An Anders, *supra* note 25; *see* TEX. FAM. CODE ANN. § 84.001 (West 2008) (stating that the protective order hearing will take place within 14 days after an application is filed); *see also id.* § 83.002 (stating that a temporary ex parte order lasts up to 20 days).

28. TEX. FAM. CODE ANN. § 85.001 (West Supp. 2012).

29. *See id.* (providing that a court "shall render a protective order" if it "finds that family violence has occurred and that family violence is likely to occur in the future"). "Family violence" is defined to include "dating violence." *Id.* § 71.004(3) (West 2008).

crime protective orders,[30] (4) stalking protective orders,[31] (5) sexual assault protective orders,[32] and (6) protective orders for victims of human trafficking.[33] Family violence is defined as "an act by a member of a family or household against another member of the family or household that is intended to result in," or "a threat that places the family or household member in [imminent] fear of, . . . physical harm, bodily injury, assault, or sexual assault."[34] Dating violence is similarly defined but is committed against a person with whom the abuser has or has had "a continuing relationship of a romantic or intimate nature."[35] In both family and dating violence cases, a judge must find that violence occurred and is likely to occur again before granting a protective order.[36] Hate crime protective orders are granted when a court finds that probable cause exists to believe that an offense was committed because of bias or prejudice and that the defendant is likely to harm the victim again.[37] Stalking protective orders require that the court find "reasonable grounds to believe that the applicant is the victim of stalking."[38] Sexual assault protective orders are granted when a court finds that "there are reasonable grounds to believe that the applicant is the victim of a sexual assault."[39] To enter a final protective order for a trafficking victim, the court must find that there are reasonable grounds to believe that: (1) the applicant is a victim of a human trafficking offense listed under section 20A.02 of the Texas Penal Code; and (2) the applicant is either younger than eighteen years of age or, "regardless of age, is the subject of a threat that reasonably places the applicant in fear of further harm from the alleged offender."[40] Final protective orders for hate crimes and family violence can last a maximum of two years[41] but can be renewed.[42] If the abuser violates a protective order, the order can be extended.[43] Stalking and sexual assault protective orders can last up to the lifetime of the victim or the offender.[44] The process for obtaining a final protective order is essentially the same regardless of the crime.

30. TEX. CODE CRIM. PROC. ANN. art. 6.08 (West 2005).

31. *Id.* art 7A.01 (West Supp. 2012) (referencing TEX. PENAL CODE ANN. § 42.072 (West Supp. 2012)).

32. *Id.* (referencing TEX. PENAL CODE ANN. § 22.011 (West 2011)).

33. *Id.* (referencing TEX. PENAL CODE ANN. § 20A.02(a), (3), (4), (7), (8) (West Supp. 2012)); *Id.* art. 7B.01 (referencing TEX. PENAL CODE ANN. § 20A.02).

34. TEX. FAM. CODE ANN. § 71.004(1) (West 2008).

35. *Id.* § 71.0021(b) (West Supp. 2012).

36. *Id.* § 85.001.

37. TEX. CODE CRIM. PROC. ANN. art. 6.08 (West 2005).

38. *Id.* art. 7A.03(a)(2) (West Supp. 2012).

39. *Id.* art. 7A.03(a)(1). In addition, the court must find that the applicant is either "younger than 18 years of age" or "regardless of age, is the subject of a threat that reasonably places the applicant in fear of further harm from the alleged offender." *Id.*

40. *Id.* art. 7B.03, 7B.04 (West Supp. 2012).

41. TEX. FAM. CODE ANN. § 85.025 (West Supp. 2012).

42. *Id.* §§ 82.008, 82.0085 (West 2008).

43. *Id.* § 82.008(a)(2)(A), (3).

44. TEX. CODE CRIM. PROC. ANN. art. 7A.07 (West Supp. 2012).

2. The Protective Order Process

The victim's first step to getting a protective order is to make an application. Two groups of people may file an application for an adult victim: (1) the victim or victim's guardian or (2) an agent of the state.[45] Any adult may apply for a protective order for a child.[46] Agents of the state include prosecuting attorneys and employees of the Department of Family and Protective Services.[47]

An application for a protective order must include the following five pieces of information: (1) the applicants' names and county of residence; (2) the name and county of residence of each individual alleged to have committed a violent crime; (3) the relationships between the applicants and the individuals alleged to have committed the crime; (4) facts supporting the request for protection, including a showing that the crime has occurred and is likely to occur again; and (5) the specific protective orders the applicants want the court to grant.[48] The application can be filed in any civil court in the county where the victim resides.[49] A protective order can be used to prohibit the abuser from committing further crimes against the persons protected by the order, communicating or going near the persons protected, and possessing a firearm.[50]

Once the application is filed, a hearing date is set and notice must be served on the alleged abuser.[51] Notice is issued by the clerk of the court and served in the same manner as a civil citation, except that notice of the protective order hearing cannot be served by publication.[52] The hearing should take place no later than fourteen days after filing the application; however, in some counties the hearing should be held within twenty days after the application is filed.[53] An extension can be granted by court order.[54]

The protective order hearing is an evidentiary hearing; the applicant's burden of proof is a preponderance of the evidence rather than

45. TEX. FAM. CODE ANN. § 82.002 (West Supp. 2012); TEX. CODE CRIM. PROC. ANN. art. 7A.01 (West Supp. 2012).

46. TEX. FAM. CODE ANN. § 82.002 (West Supp. 2012).

47. *Id.*

48. *Id.* § 82.004 (West 2008); *id.* § 85.001 (West Supp. 2012); *id.* § 85.022. In practice, the victim's application is accompanied by an affidavit or declaration that describes past incidents of family violence including injuries and emotional harm suffered by the applicant and contains facts that show the applicant's fear that family violence is likely to continue if the order is not granted. *See, e.g.*, Sup. Ct. of Tex., Order Approving Revised Protective Order Forms, Misc. Docket No. 12-9078, (May 8, 2012), *available at* http://www.supreme.courts.state.tx.us/miscdocket/12/12907800.pdf.

49. TEX. FAM. CODE ANN. § 82.003 (West 2008).

50. *Id.* § 85.022 (West Supp. 2012).

51. *Id.* § 82.042 (West 2008).

52. *Id.* § 82.043.

53. *Id.* § 84.001.

54. *Id.*

beyond a reasonable doubt.[55] At a protective order hearing, testimony is taken from the victim, any witnesses that can substantiate that violence has occurred and is likely to occur again, and from any witnesses tendered by the defendant in opposition to the application.[56] The defendant may testify, subject to the right against self-incrimination. If the evidence shows by a preponderance of evidence that violence has occurred and is likely to occur again, the court should issue a protective order.[57] A certified copy of the order is presented to local law enforcement, and field officers are notified of the order.[58] This information-sharing between the courts and police officers enables immediate enforcement of the order if violated. Further, victims should keep a copy of the order so that they can provide it to their landlords, children's schools or day care centers, and their employers.

B. Enforcing Protective Orders

Protective orders are a hybrid. Though technically referred to as civil protective orders and generally issued by civil courts, protective orders can also be criminally enforced. Protective orders have both criminally enforceable and civilly enforceable provisions. For example, provisions prohibiting an abuser from committing family violence, communicating with or threatening the victim or a member of the victim's household, going near the victim's residence or job, going near the childcare facility or school of the victim's child, harassing the victim, and possessing a firearm are all criminally enforceable.[59] An abuser who violates these provisions can be immediately arrested, as a violation of such an order is a Class A misdemeanor that can become a third degree felony if the order is violated two or more times.[60]

The following provisions are civilly enforceable: prohibiting an abuser from removing a child, prohibiting an abuser from disposing of property, granting exclusive possession of a residence to the victim, providing possession of and access to a child, requiring payment of child or spousal support, requiring an abuser to complete a batterer's treatment program or counseling with a social worker, and suspending a license to carry a concealed handgun.[61] A violation of a civilly enforceable provision allows a victim to file a civil contempt claim against the abuser.[62]

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55. *Id.* § 85.001 (West Supp. 2012).

56. *See id.* After a hearing on an application for a protective order, the court must make specific findings in order to issue the protective order. *Id.* Testimony from witnesses and a showing of all relevant evidence during the protective order hearing will facilitate affirmative court findings. *Id.*

57. *Id.*

58. *Id.* § 86.001 (West 2008).

59. TEX. PENAL CODE § 25.07(a) (West Supp. 2012).

60. *Id.* § 25.07(g).

61. JEANA LUNGWITZ, LEGAL OPTIONS FOR VICTIMS OF FAMILY VIOLENCE 25–26 (University of Texas School of Law: Domestic Violence Clinic, 2005).

62. *Id.* at 30.

Temporary protective orders have slightly different enforcement procedures. Because temporary protective orders are issued without notice to or the presence of the respondent, criminal enforcement raises due process concerns.[63] Instead, the victim's only option for enforcement is a civil contempt proceeding.[64] As a practical matter, when an abuser violates a Temporary Ex Parte Protective Order by coming to the victim's home, job, or the children's school, the police are called and the abuser is removed from the premises without arrest and simply admonished against further violations of the order.[65] Although this does not result in immediate arrest, it does provide an immediate response that supports victim safety by removing the immediate threat.

A Magistrate's Order for Emergency Protection does not raise the same constitutional due process concerns associated with ex parte orders because the MOEP is entered at a hearing with the defendant present.[66] As such, a violation of an MOEP is criminally enforceable. The abuser can be arrested and charged with a Class A misdemeanor for the first violation, and a state jail felony for subsequent violations of the MOEP.[67] So, in most cases, violating a protective order subjects the respondent to possible arrest and criminal charges. This provides an incentive for compliance.

III. Bond Conditions

Bond conditions are a tool used by courts to avoid the procedure of issuing protective orders for victims of family violence, hate crimes, stalking, human trafficking, and sexual assault. When an accused is arrested and charged, the court sets bail.[68] Assuming that the accused is able to make bail, then for the duration of pre-trial release, the court attaches conditions to the bond.[69] The sole purpose of bail is to secure the accused's attendance at trial.[70] To secure attendance at the trial, the magistrate may impose any reasonable condition related to the safety of a victim or to the safety of the community.[71] Bond conditions may be general or offense-specific, and the magistrate has discretion in setting the conditions that he or she deems appropriate to secure the accused's attendance at trial.

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63. U.S. CONST. amend. XIV, § 1.

64. LUNGWITZ, *supra* note 61, at 30.

65. Interview with D'An Anders, *supra* note 25.

66. TEX. CODE CRIM. PROC. ANN. art. 17.292(a) (West Supp. 2012).

67. LUNGWITZ, *supra* note 61, at 15.

68. TEX. CODE CRIM. PROC. ANN. art. 17.01 (West 2005). Bail is an amount that the accused must pay to obtain release prior to the start of his criminal trial. *Id.* art. 17.01, art. 17.02 (West Supp. 2012). If the accused fails to appear for trial, the bail amount is forfeited. *Id.* art. 22.01 (West 2009).

69. *Id.* art. 17.40(a) (West Supp. 2012).

70. *Id.*

71. *Id.*

A. General Bond Conditions

There are two bond conditions that apply regardless of the offense committed: the accused can be confined to home with electronic monitoring,[72] and the accused can be required to undergo weekly drug testing.[73] The court may also issue bond conditions that are specific to the offense.[74] Judges who are reluctant to issue protective orders may attach offense-specific conditions in an attempt to reduce contact between the victim and the accused.[75]

B. Offense-Specific Bond Conditions

There are three groups of offense-specific bond conditions available to a magistrate. The first group applies to offenses against children under age fourteen.[76] These bond conditions are generally applied in cases involving sex crimes and assault.[77] The court can prohibit communication with the victim; prevent the accused from going near the victim's residence, school, or other location frequented by the victim; and require supervised visits when the victim is the child of the accused.[78]

The second group of offense-specific bond conditions applies to stalking.[79] In stalking cases, the court can prohibit direct or indirect communication with the victim, prohibit the defendant from going near the victim's home or job, and prohibit the defendant from going near the school or childcare facility of the victim's children.[80]

The third group of offense-specific bond conditions applies to family violence.[81] In family violence cases, the court can prohibit the accused from going to or near the victim's residence, school, place of employment, or any other location frequented by the victim and order the accused to wear a global positioning monitoring system device, as well as pay for its costs.[82]

To be valid, bond conditions must be rationally related to securing the defendant's presence at trial even if a secondary purpose is to protect a victim's safety, and the magistrate's discretion is not unlimited.[83] Bond conditions must meet a three part test: (1) they must be reasonable; (2) their

72. *Id.* art. 17.44(a)(1).
73. *Id.* art. 17.44(a)(2).
74. *See id.* arts. 17.40, 17.41, 17.49 (West Supp. 2012), art. 17.46 (West 2005).
75. *See infra* Part III.B.
76. TEX. CODE CRIM. PROC. ANN. art. 17.41 (West Supp. 2012).
77. *Id.* art. 17.41(a).
78. *Id.* art. 17.41(b)–(c).
79. *Id.* art. 17.46 (West 2005).
80. *Id.* art. 17.46(a).
81. *Id.* art. 17.49(b) (West Supp. 2012).
82. *Id.* art. 17.49(b)(1)–(2).
83. Smith v. State, 829 S.W.2d 885, 887 (Tex. App.–Houston [1st Dist.] 1992, pet. ref'd).

primary purpose must be to secure the defendant's attendance at trial; and (3) they must be related to the safety of the alleged victim or the community.[84] A bond condition that is not rationally related to securing the defendant's presence at trial is unconstitutional.[85]

C. Enforcing Bond Conditions

Similar to protective orders, bond conditions are criminally enforceable;[86] however, there are important distinctions that impact the safety of victims. The violation of a bond condition is a Class A misdemeanor that can be upgraded to a third degree felony on subsequent violations.[87] Violation of bond conditions does not necessarily result in revocation or forfeiture of the bond. A court must hold a hearing to determine whether the accused violated the conditions of his or her bond, and the bond may be revoked only if the court finds, by a preponderance of the evidence, that a violation of the bond conditions has occurred.[88] However, violation of bond conditions does not result in arrest prior to the hearing. From the victim's standpoint, the inability to arrest a defendant for violating bond conditions, pending the revocation hearing, provides little comfort.

IV. Why Protective Orders Should be Used: Process Matters

Bond conditions alone do not adequately protect victims—particularly victims of family violence. The dynamics of family violence have been thoroughly researched. This research confirms that the hearing process, which courts and prosecutors sacrifice by substituting bond conditions for protective orders, is one of the most significant steps victims take in ending the violence.[89] The protective order hearing process accomplishes two powerful goals for victims. First, it resets the power dynamic within the intimate relationship between victim and abuser.[90] Second, it empowers victims by giving them the ability to request specific relief according to their individual needs and desires. A protective order is a powerful element in safety planning for victims. The protective order process addresses the underlying dynamics of domestic violence. Bond conditions, on the other hand, do not adequately address the victim–abuser

84. *Ex Parte* Anderer, 61 S.W.3d 398, 401–02 (Tex. Crim. App. 2001); TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 2005), art. 17.40 (West Supp. 2012).

85. Stack v. Boyle, 342 U.S. 1 (1951) (holding that the defendant's bail was not reasonably related to securing the defendant's presence at trial, in violation of the Eighth Amendment); *see also* TEX. CODE CRIM. PROC. ANN. art. 17.15 (listing the five factors to be considered when setting bail).

86. TEX. PENAL CODE § 25.07 (West Supp. 2012).

87. *Id.* § 25.07(g).

88. TEX. CODE CRIM. PROC. ANN. art. 17.40(b) (West Supp. 2012).

89. Jeffrey Baker, *Enjoining Coercion: Enjoining Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & FAM. STUD. 35, 57 (2008).

90. *See id.*

power dynamic because the objective of bond conditions is to secure the defendant's appearance at trial, and because enforcing the bond does not involve the immediate removal or arrest of the abuser.

A. Dynamics of Family Violence

A comparative analysis of the efficacy of protective orders and bond conditions requires an explanation of the dynamics of violence in intimate partner relationships. These dynamics need to be addressed in order to break the cycle of abuse and violence. When most people hear the term "domestic violence," they envision the bigger, stronger partner hitting, shooting, or choking the smaller, weaker partner. However, physical violence is only one symptom or sign of an abusive relationship and is only a fraction of the victim's story.[91] Violence in an intimate relationship is actually the result of a much more fundamental problem: "an integrated, imbalanced conquest over the victim's autonomy, independence, and personhood."[92] The victim–abuser relationship is about control and domination.

Understanding something of the complex journey from victim to survivor of intimate partner violence is valuable to prosecutors and court personnel who serve victims. Over time, victims are conditioned to view themselves as helpless, worthless, and needy.[93] The transition from victim to survivor is highly individualized; although, their journeys tend to share significant similarities. The victim's journey is not taken in a straight line. It consists of a series of fits and starts, sputtering, twisting, and turning eventually toward the survivor's most courageous act: separation from the abuser.[94] A common victim journey involves the victim repeatedly preparing to leave, even perhaps making one or more applications for protection, then returning to the abusive relationship for a period of time.[95] Many victims need to repeat this cycle several times before making the final break.[96] Patience and respect for the survivor's journey are critical at this stage of the healing process, as is the need for state attorneys, judges, and court staff to refrain from judging the survivor's actions.

A victim's apparent indecision to end the relationship is neither flaky nor indecisive. Rather, it is the result of the abuser's systematic breakdown of the victim's sense of control over his or her life. Abusers assert control over their victims in myriad ways. The Power and Control Wheel, developed by the Domestic Abuse Intervention Project in Minnesota, quantifies the different manifestations of control that the abuser

91. *Id.* at 58.

92. *Id.* at 45.

93. Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will it Work this Time?*, 31 PEPP. L. REV. 709, 717 (2004).

94. *Id.* at 723.

95. *Id.*

96. Interview with D'An Anders, *supra* note 25.

exerts over the victim.[97] The Wheel demonstrates the complex web of abuse experienced by victims. Abusers subject their victims to emotional, financial, and sexual abuse.[98] Emotionally, an abuser makes the victim lose self-worth by humiliation and using "looks, actions, and gestures" to induce fear.[99] Moreover, abusers exploit their children by utilizing guilt or threatening to take the children away.[100] Financially, an abuser might prevent the victim from getting or keeping a job, control the amount of money the victim uses and what it is spent on, and use the victim's reliance on the abuser's income to establish dependency and control.[101] It is the continuous and systematic use of these tactics that separates intimate partner violence, including sexual assault, from isolated violent crimes.[102] This systematic, continuous process of abuse can last for years, even decades, resulting in severe damage to a victim's confidence and self-esteem.[103] Given the grave consequences from the victim's perspective—fear that the abuser will make good on threats, fear for the children's safety or of their removal, and fear of being financially cut off—it makes sense for a victim to vacillate when deciding whether to end the abusive relationship.

B. How Protective Orders Alter the Dynamics of Abusive Relationships

Legislatures have developed the protective order process to address the underlying power dynamics of the intimate victim–abuser relationship.[104] Protective orders provide a measure of safety for victims escaping abuse. By giving victims a set period of time during which their abusers must stay out of the home, away from children's schools or daycare, and refrain from harassing or intimidating them, protective orders delineate a safety zone where victims can begin the process of rebuilding their lives.[105] Equally important, applying for a protective order is one important step victims can take to address the underlying power dynamics of the intimate victim–abuser relationship.[106] Choosing to apply for a protective order, signing the affidavit, and appearing at the hearing are acts in which victims exercise control over their situation. The act of exercising

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97. *Power and Control Wheel*, NAT'L CTR. ON DOMESTIC & SEXUAL VIOLENCE, http://www.ncdsv.org/images/PowerControlwheelNOSHADING.pdf.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Interview with D'An Anders, *supra* note 25.

103. *Id.*

104. *See* White, *supra* note 93, at 747 (noting that the Louisiana legislature increased access to protection orders "as a mechanism to offer immediate relief" to abuse victims); *see also* Baker, *supra* note 89, at 38–39 (listing states with policy provisions and statutes that intend to empowering victims of domestic abuse and preventing continued violence).

105. Interview with D'An Anders, *supra* note 25.

106. Margaret Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1128–29 (2009).

control inherent in the protective order process resets the victim–abuser power dynamic. At the same time the protective order process is empowering victims, it sends a sobering message to abusers—their control over the victims has waned.

Each stage of the protective order process—filing the application, the hearing, the variety of relief options, and the physical issuance of the order—empowers victims and gives them back a measure of the control that had been ceded to the abuser. Conversely, the act of being subjected to warnings, lectures, and condemnation by a judge, despite having presented their side of the story, sends a sobering message to abusers that increases the likelihood of compliance.[107] Thus, the protective order process empowers the victim while undermining the power of the abuser.

Each stage of the protective order process is an opportunity for the victim to gain more confidence and control. Filing the application is a decision made independent of the abuser, establishing a new degree of control that did not exist within the abusive relationship.[108] Moreover, the act of filing an application for protection signals a demand for liberation and exposes the abuse to public scrutiny, which begins to erode the abuser's power.[109] A qualitative study of women seeking protective orders revealed that victims use the application for a protective order "as a 'loudspeaker' to notify the abuser that the law [knows] about his behavior."[110] Victims attached particular significance to this "loudspeaker" because they saw the legal system "as having power over the abuser that they themselves had lost . . . ."[111] By choosing to file for a protective order, the victim makes an autonomous decision, independently brings in the power of the legal system, and places the abuser in a vulnerable position—a reversal of what the norm had been in their relationship.

The protective order hearing provides victims a forum in which to tell their story. The hearing allows victims to publicly object to the abuse.[112] For victims, the act of standing in a courtroom—a forum that affords some small measure of safety—looking at their abuser, saying the abuser's actions were wrong, and admitting that they deserve better treatment can result in a profound sense of validation.[113] Furthermore, when the victim is represented by an attorney at the protective order hearing, the abuser "can see that his partner now has someone on her side, providing input from the

107. *See id.* (discussing studies showing that women who obtain a protective order experience less subsequent abuse than women without a protective order and noting that even when a protective order is denied, women who engage in the protective order process experience less subsequent abuse than women who do not seek a protective order at all).

108. *Id.* at 1129.

109. Baker, *supra* note 89, at 36.

110. Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 AM. J. PUB. HEALTH 613, 617 (2004).

111. *Id.*

112. Johnson, *supra* note 106, at 1129.

113. *Id.*

world outside the relationship and depriving him of control."[114] This is true whether the victim is represented by the state's attorney or private counsel. This can empower a victim and increase self-confidence, undermining the feeling of worthlessness that existed in the abusive relationship.

The options available for relief in the protective order enable the victim to directly attack the sources of dependency on the abuser, facilitating liberation from the abuse. The significance of leaving an abusive relationship cannot be overstated. In the vast majority of abusive relationships, the abuser is the primary wage earner for the family.[115] Caring for spouse, home, and children may be the victim's only work experience, and victims, especially those who are continually denigrated, may not know how to translate their real world experiences into job skills.[116] This financial imbalance forces many victims to stay in abusive relationships—especially when children are involved.[117] Consequently, the economic and childcare relief offered in a protective order may be the key to freeing the victim from dependency on the abuser.[118]

When granted, the victim receives a copy of the protective order with a judicial finding of family violence.[119] A frequent mantra of those who disfavor protective orders is that a protective order is just paper—alone it does not protect a victim.[120] This attitude ignores the significance of a protective order to a survivor's healing process. The physical document is tangible proof that a victim has begun to erode the abuser's power. It is the manifestation of a victim's conscious choice and action. Further, the document is something that the victim can show to law enforcement if the order is violated. Protective orders "[combine] victim-initiated intervention with the power of enforcement by the criminal justice system," merging deterrence with victim empowerment.[121]

Studies show that when victims complete all stages of the protective order process, the cumulative impact can increase their emotional well-being, sense of security, and sense of control.[122] Surveys of victims who requested protective orders revealed that 98% of victims felt more in control of their lives and 89% felt more in control of their relationships.[123]

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114. Leigh Goodmark, *The Legal Response to Domestic Violence: Problems and Possibilities: Law is the Answer? Do We Know That for Sure? Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 24–25 (2004).

115. Interview with D'An Anders, *supra* note 25.

116. *Id.*

117. *Id.*

118. Epstein, *supra* note 1, at 11.

119. McFarlane et al., *supra* note 110, at 613.

120. *See* James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women of Domestic Violence*, 26 St. Mary's L.J. 1149, 1164 n. 48 (1995) (noting negative judicial attitudes on the efficacy of protective orders).

121. Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 504 (2003).

122. Goodmark, *supra* note 114, at 11.

123. Jane Stoever, *Freedom from Violence, Using the Stages of Change Model to Realize the*

In follow-up interviews, 85% of victims reported that their lives had improved, and 90% felt better about themselves.[124]

While the protective order process empowers victims, it has the opposite effect on the abusers. As a civil process distinct from criminal proceedings, the public warnings, lectures, and condemnations from judges in protective order hearings can have a sobering impact on the abusers, rendered even more potent because the victim is in the courtroom. The hearing is a means of bringing the abuse out of isolation and into the light of day. Studies have revealed that "judicial warnings or lectures to the defendants about the inappropriateness and seriousness of their violent behavior can improve some defendants' future conduct."[125] In contrast, warnings and lectures issued by a judge when ordering bond conditions are likely viewed as routine criminal procedure without any individual significance for the abuser. At that point in time, the defendant may be more interested in the bail amount than in other conditions because it is the amount of bail that will determine whether he or she is able to achieve pretrial release. Moreover, the victim is rarely present at the arraignment and does not hear any of the court's admonishments.[126]

The presence of the victim at a protective order hearing communicates to the abuser that the victim, not the state, initiated the hearing and that the victim seeks to stand up to the abuser.[127] This sends a more compelling message to the abuser because, in the presence of the victim, the judge singles the abuser out for the violence because of the victim's request.

In addition to serving as a wake-up call for the abuser, the protective order process increases the likelihood of compliance. Recent social science research shows that "defendant compliance with court orders depends more on the 'procedural justice' with which the sanction is delivered than on the certainty and severity of the sanction itself."[128] Researchers determined that a building block for "procedural justice" is the extent to which a person has the opportunity to state his or her case and be heard.[129] In other words, a person who is eventually afforded an opportunity to be heard is more likely to abide by an adverse decision than one who is subjected only to an ex parte order. A defendant who feels unfairly treated is more likely to view the process itself and any subsequent court order as illegitimate and defy such orders.[130] Thus, we should ask which is more likely to induce compliance: a protective order resulting from a hearing in which both sides are heard, or a bond condition issued at the

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Promise of Civil Protection Orders, 72 OHIO ST. L.J. 303, 319 (2011).

124. *Id.*

125. Epstein, *supra* note 1, at 44.

126. Interview with D'An Anders, *supra* note 25.

127. *Id.*

128. Epstein, *supra* note 1, at 46–47.

129. *Id.* at 47 (citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW 108, 136–38 (1990)).

130. *Id.* at 46–47.

discretion of a judge without a hearing and with no findings? Studies confirm that protective orders are effective at protecting victims from future violence.[131] For example, 149 women who took part in one study "reported significantly lower levels of intimate partner violence, including worksite harassment, up to 18 months after applying for a protection order."[132]

The victim knows the dynamics of the relationship, the tendencies of the abuser, and relief necessary to protect the family. Victims have a "unique ability to predict the abuse, to use techniques to minimize the violence, and to assess when it is safe to leave" the relationship.[133] Research shows that victims are better at predicting their abuser's future behavior than outside parties.[134] The protective order process is flexible. This flexibility taps into the victim's unique familiarity with the abuser, addresses the vacillation that occurs when terminating an abusive relationship, and provides flexibility with respect to the type and duration of the relief granted. The flexibility of the protective order process enables the system to use a victim's knowledge of the abuser to craft a protective order that will best address the abuser's tendencies: "The survivor defines the nature of the problem and chooses when to bring the case, which events to allege, and what relief to pursue in an attempt to meet her particular safety needs."[135]

Every victim is an individual. The flexibility of the protective order process can accommodate both the victims who are ready to leave the relationship and those victims who want to end the violence but are not ready to end the relationship. In one survey of survivors, 39.3% of respondents indicated that they wanted to remain in contact with their abusers, and 17.3% wanted to retain their intimate relationships with the abusers.[136] In such situations, a protective order can be crafted to prohibit the partner from assaulting, harassing, or physically abusing the victim while the couple attempts to salvage their relationship.[137] While such a protective order prohibits conduct that is already illegal,[138] moving through the stages of the process empowers the victim, leads to decreased violence,[139] and improves the emotional well-being of the victim, making it healthier for those who choose to stay and try to salvage their relationships.[140]

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131. McFarlane et al., *supra* note 110, at 616.

132. *Id.*

133. Goodmark, *supra* note 114, at 30 (quoting Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 627 (2000)).

134. Laurie Kohn, *The Justice System and Domestic Violence: Engaging the Case by Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 245 (2008).

135. Stoever, *supra* note 123, at 320.

136. Murphy, *supra* note 121, at 512.

137. Goodmark, *supra* note 114, at 21; *see also* TEX. FAM. CODE ANN. § 83.001(b) (West 2008) (providing that a "court may direct a respondent to do or refrain from doing specified acts").

138. Goodmark, *supra* note 114, at 21.

139. McFarlane et al., *supra* note 110, at 616.

140. Goodmark, *supra* note 114, at 11.

The duration of a protective order provides protection for the victim. Family violence protective orders last up to two years and can be extended if the threat persists.[141] When the abuser is arrested and convicted, release is a critical time both in the victim's healing process and safety.[142] If a protective order expires before the defendant's release, the victim receives an automatic one-year extension of protection.[143] Thus, protective orders provide protection beyond the criminal trial. A two-year protective order survives the criminal proceedings even if the defendant is acquitted.

A protective order is more effective than bond conditions at helping a victim end the family violence. The process of getting a protective order recalibrates the power dynamics within an abusive relationship, empowers the victim, and provides a reality check to the abuser. The adaptability of the process promotes confidence and control by enabling the victim to shape the outcome around the family's specific needs given the dynamics of their unique relationship.

C. Bond Conditions and the Dynamics of Family or Intimate Partner Violence

Some judges and prosecutors prefer bond conditions over protective orders for perceived procedural advantages, because entry of a final protective order requires an evidentiary hearing, whereas no evidence is required for a court to enter bond conditions.[144] However, any perceived advantages of bond conditions are at best illusory.

Courts have noted three perceived advantages to entering bond conditions in lieu of protective orders. First, without a hearing, bond conditions are purely up to the discretion of the court, giving the court the power to decide how best to protect the victim.[145] Second, presenting the evidence required for a protective order runs the risk of disclosing the state's trial strategy to defense counsel. Finally, issuing bond conditions requires no finding that a crime occurred or is likely to occur again.[146] Many prosecutors and courts mistakenly believe bond conditions accomplish the same ends as protective orders. As a result, courts issue bond conditions and fail to issue protective orders to victims. This course of action denies victims the long-term safety afforded by protective orders.

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141. TEX. FAM. CODE ANN. §§ 82.008, 82.0085 (West 2008); § 85.025(a) (West Supp. 2012); *see also supra* notes 41–43 and accompanying text.

142. Interview with D'An Anders, *supra* note 25.

143. TEX. FAM. CODE ANN. § 85.025(c) (West Supp. 2012).

144. Interview with D'An Anders, *supra* note 25.

145. TEX. CODE CRIM. PROC. ANN. art. 17.40(a) (West Supp. 2012) (stating that a magistrate "may" impose any condition of bond related to the safety of a victim).

146. TEX. CODE CRIM. PROC. ANN. art. 17.40(a). Issuance of a protective order does require such a finding. TEX. FAM. CODE ANN. § 85.001(a) (West Supp. 2012); *see also supra* Part II.A.2.

1. Bond Conditions Alone Do Not Address the Dynamics of Family Violence

Judges and prosecutors argue that bond conditions serve victim safety and simultaneously avoid jeopardizing the state's trial strategy.[147] That is not the case. Protective orders and bond conditions are not interchangeable. The civil remedy and criminal remedy have different goals: "The criminal justice system is focused primarily on the protection from and eradication of severe physical violence for the benefit of society, while the civil system's goal is to provide the petitioner with a remedy that addresses her harms from domestic violence."[148] Operating in the criminal system with a goal of protecting the community at large, bond conditions are a court- or state-initiated intervention—not a victim-initiated one.

Although the court *does* intervene in domestic violence through the issuance of bond conditions, the fact that sole power resides with the court deprives the victim of input and reinforces the victim's sense of powerlessness.[149] When bond conditions are not followed by a final protective order, the justice system loses a valuable opportunity to empower the victim to change the abusive relationship. Because bond conditions are part of a criminal proceeding, the state, not the victim, is a party to the case. Therefore, the state asks for the relief to be granted and the conditions to be attached to the abuser's bond.[150] This procedure supports the purpose of bond conditions—to secure the abuser's appearance at the criminal trial.[151] Even conditions relating to the safety of the victim and community must be framed in terms ensuring the defendant's attendance at the criminal trial.[152] The court is required to consider the victim's safety when setting the *amount* of bail, but there is no requirement that bond *conditions* address a victim's safety concerns.[153] In such situations, the victim may experience a "profound sense of disempowerment" because the victim views the bond conditions as an assessment by an authority figure that she has been "deemed incapable of healthy decisions about her intimate issues."[154] This reinforces the helplessness that the abuser has cultivated—that the victim needs the direction of a parent figure.[155] By shutting the victim out of the

147. Interview with D'An Anders, *supra* note 25.

148. Johnson, *supra* note 106, at 1142.

149. In reality, victims have a constitutional right to be notified of and to be present at court proceedings, as well as a statutory right to be informed of relevant proceedings including the defendant's right to bail. TEX. CONST. art. I, § 30(b)(1)–(2); TEX. CODE CRIM. PROC. ANN. § 56.02(a)(3)(A), (a)(4) (West Supp. 2012). However, victims must request these rights and are rarely informed of these rights in time to enforce them before bail is set.

150. *Id.*

151. TEX. CODE CRIM. PROC. ANN. art. 17.40(a).

152. *Id.*

153. TEX. CONST. art. I, § 30; Kohn, *supra* note 134, at 240.

154. Kohn, *supra* note 134, at 240–41.

155. *See* Joan M. Schroeder, *Using Battered Women Syndrome in the Prosecution of a Batterer*, 76 IOWA L. REV. 553, 557–59 (1991) (discussing the theory of learned helplessness).

process, bond conditions also reinforce an abuser's perception of the victim as weak.[156] The focus on ensuring the accused's presence at trial fails to address the underlying power imbalance between victim and abuser.

This should be no surprise to system-based advocates or court personnel. The Texas Family Violence Benchbook recognizes that the control issues leading to family violence are not usually resolved by an arrest and the subsequent initiation of a standard criminal proceeding.[157]

Undoubtedly, abusers or their defense counsel can use a protective-order hearing to intimidate or re-victimize the victim.[158] However, the possibility that a victim would be eviscerated at the protective order hearing can be preempted by planning and witness preparation. A victim who has been prepared for the possibility of an aggressive cross-examination is less likely to be traumatized and more likely to be empowered by the hearing, even if the cross-examination brings up painful memories or embarrassing facts.[159] It is preferable to give the victim the option to file an application for a protective order rather than for system-based personnel to rob the victim of decision making. Many fully-informed victims will risk the discomfort of a protective-order hearing because the control and sense of safety gained through the process outweighs the fear and intimidation they may suffer in the hearing.[160] Well-prepared victims are strengthened by the protective order process, not victimized.[161] The crucial point is to defer decision making to the victim, and when a victim seeks a protective order to provide the opportunity to get it without regard to whether bond conditions have been imposed.

2. Enforcement of Bond Conditions Offers Inadequate Protection

Bond conditions offer little in the way of protection for those victims whose abusers do not respect authority. Victims are rarely present at arraignment proceedings and may not even be informed that bond conditions exist.[162] Few victims are given a copy of the bond conditions

156. Johnson, *supra* note 106, at 1150.

157. The Office of Court Administration, *The Texas Family Violence Benchbook*, TXCOURTS.GOV, 263 (September 2011), http://www.txcourts.gov/pubs/Manuals/judges/DomesticViolenceBenchBook.pdf [hereinafter *Tex. FV Benchbook*].

158. Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 467, 487 (2003) (noting domestic violence often increases after a protective order hearing and that mandatory disclosure of embarrassing exculpatory evidence to defense counsel often undermines the victim's confidence in the system).

159. *See id.* at 490 (stating that victims who frequently communicated with their advocates in preparation for protection order hearings reported higher levels of emotional support and less abuse).

160. McFarlane et al., *supra* note 110, at 616 (recording domestic violence victims using the protective order application, and subsequent qualification, as public announcements of autonomy and independence from abusers).

161. Epstein, et al., *supra* note 158, at 490.

162. Interview with D'An Anders, *supra* note 25.

imposed on the accused.[163] If a victim is not aware that bond conditions have been imposed, the victim has no reasonable means of knowing when conditions are violated.[164] This has been a serious flaw that compromises rather than enhances community safety. This situation may soon change for the better. Senate Bill 893 was passed by the Texas Legislature in the eighty-third regular session and has been signed into law.[165] Senate Bill 893 mandates that victims of family violence, sexual assault, and stalking be informed of the issuance, modification, or removal of bond conditions.[166] The new law becomes effective on September 1, 2013.[167]

Even when a victim is fully informed, bond conditions are ineffective if violated. For example, if the accused comes to the victim's workplace in violation of bond conditions, the victim must notify the state's attorney who then must initiate proceedings to revoke the bond.[168] This is not an efficient or effective way to ensure victim safety. Prosecutors are busy people with overwhelming caseloads, so it comes as no surprise that many offices have developed gatekeepers, rendering direct contact with state attorneys nearly impossible.[169] This makes it difficult for a victim to report bond-condition violations. Additionally, much abusive behavior happens at night and on weekends when county offices are closed.[170] Assuming a victim can reach the state's attorney immediately, revocation of the bond will not occur without a motion, a notice to the defense, and a hearing.[171]

In the past, if the abuser was banging on the victim's door in the middle of the night, the police would merely ask him to leave if the victim had only bond conditions as protection because the officers did not have access to the bond conditions. Senate Bill 893 provides for the entry of bond conditions into the state's law enforcement information system.[172] This will allow law enforcement to be informed of bond conditions in cases of family violence, sexual assault, or stalking.[173] While the change in law may not result in the arrest of an accused who violates bond conditions, it will give law enforcement the ability to better document the violation of bond conditions which may eventually lead to better enforcement of bond conditions in cases of family violence, sexual assault, and stalking.

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163. *Id.*

164. *Id.*

165. Act of May 26, 2013, 83d Leg. R.S. ch. 760, 2013 Tex. Sess. Law Serv. S.B. 893 (West).

166. *Id.* § 3, sec. 411.042 (to be codified as an amendment to TEX. GOV'T CODE ANN. § 411.042(g)).

167. *Id.* § 10.

168. *See id.* (stating that a hearing must be held to determine if the defendant violated the conditions of bond).

169. Interview with D'An Anders, *supra* note 25.

170. *Id.*

171. TEX. CODE CRIM. PROC. ANN. art. 17.40(b).

172. Act of May 26, 2013, 83d Leg. R.S. ch. 760, § 3, sec. 411.042, 2013 Tex. Sess. Law Serv. S.B. 893 (West) (to be codified as an amendment to TEX. GOV'T CODE ANN. § 411.042(b), (g)).

173. *Id.*

To the extent that bond conditions can be enforced, their duration provides inadequate victim protection. If the defendant is convicted, and the victim's final protective order expires before the defendant's release, the victim receives an automatic one-year extension of protection.[174] Even when the abuser is acquitted, a protective order may be renewed if the threat of violence is still present.[175] In contrast, bond conditions cannot address the recursive, vacillating nature of terminating an abusive relationship. Bond conditions only last until the end of the criminal trial and are, therefore, completely ineffective at protecting a victim once the trial is over—regardless whether the defendant is convicted or acquitted. When an incarcerated offender is released, bond conditions have long since expired and offer no protection whatsoever to a victim if the offender is intent on retaliation or revenge.[176] In such cases, the failure to offer a protective order may put the victim's safety at risk.

Release is a critical time in the victim's healing process and safety.[177] Absent pre-release contact, the victim has no means of identifying whether the incarcerated offender presents a threat after release.[178] This uncertainty presents a significant concern for the safety of the victim and the victim's family members. Consequently, bond conditions should not be pursued without a subsequent protective order to protect the victim beyond the criminal trial and prison term if the abuser is found guilty.

3. Protective Order Hearings Do Not Compromise Trial Strategy

Victims' rights advocates are disturbed that judges and prosecutors will sacrifice the valuable protective order process in order to preserve a perceived strategic trial advantage.[179] Proponents of bond conditions in lieu of protective orders argue that a protective order hearing gives the abuser and defense counsel a preview of the evidence and the state's trial strategy.[180] This fear is unfounded. The evidence necessary to support a protective order is available to the defense whether or not a hearing takes place. Through the police report, discovery, or client interviews, the abuser's attorney will be exposed to the same information that would be presented at a protective order hearing.[181] The burden of proof to support a protective order is a preponderance of the evidence—a lesser standard than the beyond reasonable doubt necessary to support a conviction.[182] In most

174. TEX. FAM. CODE ANN. § 85.025(c) (West Supp. 2012).
175. *Id.* §§ 82.008, 82.0085 (West 2008).
176. Interview with D'An Anders, *supra* note 25.
177. *Id.*
178. *Id.*
179. *Id.*
180. *See supra* note 147 and accompanying text.
181. Interview with D'An Anders, *supra* note 25.
182. Barber v. Keas, No. 02-11-00073-CV, 2011 Tex. App. Lexis 8408 (Tex. App.—Fort Worth

cases, a well-written police report is sufficient to meet the evidentiary burden for a protective order.[183]

To receive a protective order, a victim must show that the underlying offense occurred and is likely to recur.[184] Evidence of past threats and incidents of family violence are often sufficient to prove that family violence will likely occur in the future.[185] Accordingly, the victim need only provide an account of the abuse in the relationship, relate ongoing threats of abuse, and offer photographs or medical documentation of the abuse—all information contained in most police reports available to the defendant.[186] To the extent that evidence is presented at a protective order hearing that is not covered by the police report, the defense is entitled to the evidence through discovery. The bottom line is that an able defense attorney will eventually discover any information that would be presented at a protective order hearing. Hence, nothing is gained by the state in avoiding a protective order hearing, yet there is much to be gained by both the victim and the state in getting a protective order. When a victim takes the stand to testify to the facts necessary to obtain a protective order, he or she is getting practice testifying. It is an opportunity for the state's attorney to evaluate the victim's courtroom demeanor and hear the victim's story in the victim's own words, which may prove valuable in plea negotiations or in preparing the victim for trial.

Nevertheless, the fear remains that a hearing will reveal the state's trial strategy. A modicum of testimony and documents must be revealed in a protective order hearing, which *may* benefit the defendant.[187] However, this minimal risk is overshadowed by the effect of a finding that criminal conduct occurred even when the finding is made by a civil court using the lesser, preponderance-of-the-evidence standard. There are ways to mitigate any minimal risk of revealing trial strategy.

Protective order hearings happen before the bench, not a jury.[188] Evidence plays differently to a jury. Furthermore, the burden of proof to obtain a protective order is the lesser standard of a preponderance of the

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October 20, 2011, pet. denied).

183. Interview with D'An Anders, *supra* note 25.

184. *See, e.g.*, TEX. FAM. CODE ANN. § 85.001 (West Supp. 2012).

185. *Tex. FV Benchbook*, *supra* note 157, at 73.

186. Interview with D'An Anders, *supra* note 25.

187. *See* Ford v. Harbour, No. 14-07-00832-CV, 2009 WL 679672, at *5 (Tex. App.—Houston [14th Dist.] Mar. 17, 2009, no pet.) (mem. op.) (observing that defendants in a protective order hearing generally must have "more than a cursory opportunity to cross-examine the other party's witnesses," but "that right is not unlimited as a trial court has the discretion to impose reasonable limits on cross-examination based upon concerns about harassment, prejudice, confusion of the issues, and marginally relevant interrogation"); Striedel v. Striedel, 15 S.W.3d 163, 166 (Tex. App.—Corpus Christi 2000, no pet.) (holding that the trial court abused its discretion in cutting off the defendant's cross-examination of the plaintiff and granting the protective order before the defendant had an opportunity to finish the cross-examination and present other evidence).

188. *Id.* § 71.002 (West 2008).

evidence rather than the criminal standard of beyond reasonable doubt.[189] The state need only present the minimum evidence necessary to support a finding by a preponderance of the evidence, and there is no need to provide a full preview of the case to defense counsel.

To the extent that courts and prosecutors conclude that a protective order hearing presents a danger to the state's trial strategy, consideration should be given that the door swings both ways. The serious collateral consequences of a finding of family violence can provide incentive for the abuser to oppose the application. A finding of family violence is a factor to be considered in conservatorship, visitation, termination of parental rights, spousal support, and occupational licensing hearings.[190] If the protective order is opposed, the state's attorney will get a preview of the defensive issues through the defense cross-examination of the victim, documents offered by the defense, and witnesses called to testify at the hearing. Thus, to the extent that the defense counsel will get a preview of the victim's evidence and trial strategy, the victim and state may receive an equally extensive preview of the defendant's evidence and trial strategy.

V. The Legislature Intended that Courts Issue Protective Orders

Protective orders are superior to bond conditions because they address the underlying power dynamics of the abusive relationship, but protective orders should be used independent of the merits of the process. Both Congress and the Texas Legislature have expressed a clear intent for courts and prosecutors to use protective orders.

At the national level, Congress has dedicated significant funding to increase the use of protective orders. The passage of the Violence Against Women Act (VAWA) signaled a "major national commitment of funding to encourage the use of civil protection orders and other civil remedies as a response to domestic violence."[191] Through VAWA, Congress provided direct funding for legal assistance for the purpose of obtaining and enforcing protective orders at the state level as well as substantial funding for data collection, communication systems, and community coordination with "the goal of improving the effectiveness of civil protection orders."[192] Congress conditioned state access to VAWA funding "on the creation of systems that: (1) ensure that protection orders are given full faith and credit by all sister states; (2) provide government assistance with service of process in protection order cases; and (3) criminalize violations of protection orders."[193] Given the amount of money dedicated to creating an

189. *Id.* § 85.001 (West Supp. 2012).

190. *Tex. FV Benchbook*, *supra* note 157, at 308.

191. Murphy, *supra* note 121, at 502.

192. *Id.* at 503.

193. Epstein, *supra* note 1, at 12 (internal citations omitted).

effective civil protective order scheme, it is clear that there is a national, federal interest in state courts using the protective order process.

The Texas legislature has enacted a comprehensive set of protective order statutes for victims of violent crimes including family violence,[194] sexual assault,[195] hate crimes,[196] stalking,[197] and human trafficking.[198] The Legislature intentionally uses permissive language in delineating a victim's ability to seek a protective order and mandatory language in directing courts to issue protective orders. For example, Texas Code of Criminal Procedure article 7A.01(a) states that a victim may file an application for a sexual assault protective order.[199] However, article 7A.03 states that a court shall make a finding whether there are reasonable grounds to believe that a sexual assault has occurred and, if such a finding is made, the court shall issue a protective order.[200] The Texas Supreme Court has recognized the advantages that protective orders provide for victim safety. In 2005, the court appointed a task force to develop a set of forms to be used by low income individuals seeking protective orders. The court approved those forms for use on April 12, 2005.[201] The Governor has underscored the Supreme Court's support of the use of protective orders as a means to help family violence victims on the road to recovery.[202] Governor Rick Perry has recognized protective orders as a way to "give families and individuals the opportunity to begin on the path to the life everybody deserves—one free of fear and full of hope—back on the road to happiness."[203] The value of protective orders is recognized by Texas's highest level state officials; for victims to be denied access to this tool is a travesty.

VI. Conclusion

Crime victims have a constitutional right to be reasonably protected from the accused throughout the criminal justice process.[204] Protective orders are an important tool in the state's arsenal for upholding this right. Protective orders are far superior to the issuance of bond conditions in protecting victims because protective orders survive the criminal trial; whereas, bond conditions cease once the accused has appeared. Protective

194. TEX. FAM. CODE ANN. § 85.001 (West Supp. 2012).

195. TEX. CODE CRIM. PROC. ANN. art. 7A.01 (West Supp. 2012).

196. *Id.* art. 6.08 (West 2005).

197. *Id.* art 7A.01 (West Supp. 2012).

198. *Id.* arts. 7A.01, 7B.01.

199. *Id.* art. 7A.01(a).

200. *Id.* art. 7A.03.

201. Sup. Ct. of Tex., Order Approving Protective Order Forms, Misc. Docket No. 05-9059, (Apr. 12, 2005), *available at* http://www.supreme.courts.state.tx.us/miscdocket/05/05905900.pdf.

202. Press Release, Tex. Access to Justice Comm'n, Self-Help Protective Order Kit Now Available for Domestic Violence Victims (April 2, 2005), *available at* http://www.supreme.courts.state.tx.us/advisories/Protective_Order_Kit_Press_Release-Logo.htm.

203. *Id.*

204. TEX. CONST. art. I, § 30(a)(2).

orders support the victim's recovery as well as safety because the victim has a measure of direction and control over the protective order process unlike attaching conditions to bail where the victim is more often than not completely shut out of the process. Victims are more likely to report the violation of a protective order because the victim is armed with a copy of the order that can be shown to peace officers, and local law enforcement agencies are notified of the entry of the protective order. Thus, the violation of a final protective order is likely to lead to immediate arrest of the violator; whereas, a violation of bond conditions will not generally lead to immediate arrest because a court order must be obtained before arrest. Because a protective order that expires while an offender is incarcerated is automatically extended for one year post-release, a protective order gives comfort and a measure of security to victims who are concerned about retaliation. Bond conditions offer no such protection. When the merits and disadvantages are weighed, protective orders prevail as a superior means of promoting the safety of victims. Those jurisdictions that prefer attaching bond conditions should strongly consider entering a protective order prior to conclusion of the criminal proceedings so that victims are afforded the full, long-term protection they deserve.

Note

Drawing Sensible Borders for the Definition of "Foreign Official" Under the FCPA

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I. Introduction

Recent high-profile scandals like the wiretapping by News Corp.,[1] Wal-Mart's business practices in Mexico,[2] and Ralph Lauren Corp.'s admitted bribery of Argentine customs officials[3] have brought renewed attention to the 1977 Foreign Corrupt Practices Act (FCPA).[4] Efforts to stamp out corruption have become increasingly common over the past decade in the wake of the adoption of the Organization for Economic Co-operation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[5] Aggressive enforcement of the FCPA by the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) has resulted in a boom in investigations and prosecutions.[6] The SEC's focus has resulted in the creation of a separate group within the Division of Enforcement dedicated to prosecuting FCPA cases.[7] This newly invigorated enforcement of the FCPA by U.S. law enforcement agencies has gone hand-in-hand with

1. *See* David Folkenflik, *News Corp.'s U.K. Actions Under Scrutiny In U.S.*, NAT'L PUB. RADIO (Sept. 27, 2011), http://www.npr.org/2011/09/27/140829858/news-corp-s-u-k-actions-under-scrutiny-in-u-s (explaining the possible FCPA liability of News Corp. related to payments made to British police officials).

2. *See* David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, at A1, *available at* http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all (detailing alleged bribes of Mexican government officials by Wal-Mart with the purpose of securing permits).

3. *See* James O'Toole, *Ralph Lauren Admits Bribery at Argentina Subsidiary*, CNNMONEY (Apr. 22, 2013), http://money.cnn.com/2013/04/22/news/companies/ralph-lauren-bribery/ (describing Ralph Lauren Corp.'s settlement agreements with the DOJ and SEC based on findings that its Argentine subsidiary "repeatedly bribed customs officials").

4. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1–78ff (2006). For a comprehensive discussion of the FCPA's legislative history, see Declaration of Professor Michael J. Koehler in Support of Defendants' Motion to Dismiss Counts One Through Ten of the Indictment, United States v. Carson, 8:09-cr-00077 (C.D. Cal. Feb. 21, 2011).

5. ORG. FOR ECON. CO-OPERATION & DEV., CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (1997), *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf.

6. *See* GIBSON, DUNN & CRUTCHER LLP, 2011 YEAR-END FCPA UPDATE 2 (2012), *available at* http://www.gibsondunn.com/publications/Documents/2011YearEndFCPAUpdate.pdf (providing a graph illustrating the trend in FCPA enforcement from 2004 to 2011); *see also* Lanny A. Breuer, Ass't Att'y Gen., Address at the 24th National Conference on the Foreign Corrupt Practices Act, (Nov. 16, 2010) (transcript available at http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html) (boasting that the DOJ's "FCPA enforcement is stronger than it's ever been—and getting stronger"); Robert Khuzami, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009) (transcript available at http://www.sec.gov/news/speech/2009/spch080509rk.htm) (outlining his strategy for employing the newly formed Foreign Corrupt Practices Act unit).

7. Khuzami, *supra* note 6. Conversely, some might argue that expanding the SEC's role to include tasks like combating foreign bribery is outside of the scope of its traditional role as market regulator and deleterious to that mission. *Cf.* Henry T. C. Hu, *Too Complex to Depict? Innovation, "Pure Information," and the SEC Disclosure Paradigm*, 90 TEXAS L. REV 1601, 1606 (2012) (stating that the original purpose behind its establishment was such that "[t]he SEC would not venture beyond the realm of information to that of substantive decision making").

legislation across the globe to bolster anti-corruption laws, with even unexpected players like Russia jumping on the bandwagon.[8]

Because of increased global competition and uneven enforcement among nations, many in the American business community say they are placed at a competitive disadvantage vis-a-vis Chinese rivals wholly unconstrained by laws like the FCPA.[9] In 2010, the U.S. Chamber of Commerce called for amendments to the FCPA to bring greater clarity to the law and place U.S. businesses in a position more in line with the laws of other countries.[10]

This effort to limit the FCPA's scope has been fought by organizations like the Open Society Foundations who claim that weakening the world's flagship anti-corruption law would seriously hinder efforts to fight corruption across the globe.[11] In the summer of 2011, the U.S. House Subcommittee on Crime, Terrorism, and Homeland Security considered possible amendments to the FCPA.[12] Despite hints that amendments may be forthcoming, none have yet been proposed.[13] The focus of any amendments would most likely address the lack of a *de minimis* exception, limiting successor and subsidiary liability, introducing a compliance defense, and clarifying the definition of who is a "foreign official,"[14] the latter of which is the focus of this paper.

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8. Bribery Act, 2010, c. 23 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf; FEDERAL'NYJ ZAKON O vnesenii izmenenij v Ugolovnyj kodeks ROSSIJa FEDERACII I Kodeks ob administrativnyh pravonarušenijah ROSSII V Svjazi s soveršenstvovaniem gosudarstvennogo upravlenija v Oblasti protivodejstvija korrupcii [Federal law on inclusion of changes to the Criminal Code of Russian Federation and to the Code of Administrative Offences in Connection with the Improvement of Government Administration in the Area of Fighting Corruption] SOBRANIE ZAKONODATEL'STVA ROSSIIKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2011, No. 97-FZ; Press Release, Org. for Econ. Coop. & Dev., OECD Invites Russia to Join Anti-Bribery Convention (May 25, 2011), *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/oecdinvitesrussiatojoinanti-briberyconventi on.htm.

9. *See, e.g.*, Jason Subler, *China Business Culture Means Countless Bribery Risks for U.S. Businesses*, REUTERS (Apr. 29, 2012), http://www.huffingtonpost.com/2012/04/29/china-business-culture_n_1463406.html (reporting that non-Chinese business people privately complain that local companies face less scrutiny in the application of anti-bribery laws in China).

10. U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT (2010) [hereinafter RESTORING BALANCE], *available at* http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf.

11. *See, e.g.*, OPEN SOC'Y FOUND., BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 6 (2011), [hereinafter BUSTING BRIBERY], *available at* http://www.soros.org/initiatives/washington/articles_publications/publications/busting-bribery-20110916 (stating that weakening the FCPA would signal a decreased commitment to fight corruption on the part of the U.S. resulting in a stalling of anti-corruption measures worldwide).

12. *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter *FCPA Hearing*].

13. Christopher M. Matthews, *Clinton Defends FCPA, as US Chamber Lobbys for Changes to Law*, WSJ BLOGS (Mar. 23, 2012), http://blogs.wsj.com/corruption-currents/2012/03/23/clinton-defends-fcpa-as-us-chamber-lobbys-for-changes-to-law/ (describing support for amendments to the FCPA but noting that none have yet been proposed).

14. *See* RESTORING BALANCE, *supra* note 10.

The FCPA was originally passed in 1977 to combat what was seen as widespread bribery among American corporations doing business internationally.[15] Despite having been in force for over thirty-five years, the FCPA has scant case law defining its contours; fewer than forty circuit-level opinions and no Supreme Court opinions have been rendered dealing with its application.[16] This lack of case law is a major reason why the precise boundaries of the FCPA are undefined and uncertain.

Because of the staggering disincentives corporations face in litigating FCPA cases—including, but not limited to, debarment[17]—it is very rare for FCPA cases to go to trial.[18] In the place of case law, a body of shadow precedent has arisen as a result of big-dollar settlement agreements that defendant corporations have entered into with the DOJ and SEC.[19] Notably, this reliance on non-prosecution (NPA) and deferred prosecution agreements (DPA) was sharply criticized by former U.S. Attorney General Alberto Gonzales at the Dow Jones/Wall Street Journal Global Compliance Symposium held in Washington, D.C. in April 2013.[20] However, with the recent rise in individual prosecutions by the DOJ, the cost–benefit calculus has changed for the parties involved such that more cases may actually be tried.[21]

The vast majority of controversy surrounding FCPA enforcement has been centered on the definition of instrumentality and, by extension, foreign official.[22] In fact, the first judicial opinions attempting to define a "foreign official" came in 2011 as the result of certain defendants

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15. *Foreign Corrupt Practices Act*, U.S. DEP'T OF JUSTICE, *available at* http://insct.syr.edu/wp-content/uploads/2013/02/lay-persons-guide.pdf.

16. This figure was reached by searching Westlaw for "Foreign Corrupt Practices Act" and restricting results to U.S. Supreme Court and courts of appeals opinions.

17. U.S. DEP'T OF JUSTICE, *supra* note 15; Federal Acquisition Regulation 48 C.F.R. § 9.406-2(a) (2010) (providing agencies with the discretionary power to debar FCPA violators from contracting with the United States); *see also* Jessica Tillipman, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, 11-9 BRIEFING PAPERS 1, 9–17 (2011) (detailing the potential domestic and foreign collateral consequences faced by contractors who violate the FCPA).

18. *See* GIBSON, DUNN & CRUTCHER LLP, *supra* note 6, at 10–11 ("In 2011, we saw a new all-time high of four FCPA trials.").

19. *See id.* at 2–10.

20. *Former Attorney General Alberto Gonzales Criticizes Various Aspects of DOJ FCPA Enforcement*, FCPA PROFESSOR (Apr. 4, 2013), http://www.fcpaprofessor.com/former-attorney-general-alberto-gonzales-criticizes-various-aspects-of-doj-fcpa-enforcement (stating Gonzales's critique that because of NPAs and DPAs "legitimate wrongdoing is not being prosecuted as it should" and that "these resolution vehicles do not necessarily reflect instances of companies violating the FCPA, but rather companies feel[] compelled to agree to the agreements"). For further critique of the overuse of NPAs and DPAs, see Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PENN. J. BUS. L. 797 (2013) (explaining the "Andersen Effect" and analyzing the flawed assumptions driving current DOJ DPA policy through empirical analysis of organizational convictions between 2001 and 2010).

21. GIBSON, DUNN & CRUTCHER LLP, *supra* note 6, at 2–4. Because individuals do not have the same business risks related to fighting an FCPA charge, they are more likely to take the case to trial.

22. *See, e.g.*, BUSTING BRIBERY, *supra* note 11, at 7 (attacking the Chamber of Commerce's effort to narrow the definition of "foreign official").

challenging whether or not the individuals they allegedly bribed were truly employees of an "instrumentality" of a foreign government.[23] Additionally, in February 2012, the U.S. Chamber of Commerce's Institute for Legal Reform sent a letter to the DOJ requesting clarification of the Department's guidance on who qualifies as a foreign official.[24] After receiving this letter, but prior to issuing the requested guidance, the DOJ surprisingly issued an opinion release in September 2012 saying that royal family members are not per se foreign officials so long as they do not hold an official post in the government or hold themselves out as governmental representatives.[25] Arguably, this "clarification" does little to assuage the fears of companies doing business in foreign countries, and it further muddies the waters of who exactly is a foreign official under the FCPA.

The FCPA Resource Guide that was finally jointly released by the DOJ and SEC in November 2012 is hardly better in terms of adding clarity, devoting just three of its one-hundred twenty pages to discussion of who qualifies as a foreign official and what qualifies as an instrumentality under the FCPA.[26] The DOJ and SEC make it clear that any employee can be a foreign official then simply state that "[t]he term 'instrumentality' is broad and can include state-owned or state-controlled entities."[27] They then go on to decline the opportunity to delineate a clear standard, instead stating that "[w]hether a particular entity constitutes an 'instrumentality' under the FCPA requires a fact-specific analysis of an entity's ownership, control, status, and function."[28] This did little to bring any real certainty to companies' exposure to FCPA liability, prompting the Chamber of Commerce to send another letter in February 2013.[29] In this letter the

23. *See* PAUL T. FRIEDMAN & RUTI SMITHLINE, MORRISON FOERSTER, FCPA: REGULATORS' EXPANSIVE "FOREIGN OFFICIAL" DEFINITION UNDER ATTACK (2011), *available at* http://www.mofo.com/files/Uploads/Images/110520-FCPA-Foreign-Official.pdf (discussing the lack of case law addressing the definition of "foreign official").

24. Brian Glaser, *U.S. Chamber Asks DOJ and SEC for Clear Guidance on FCPA Compliance*, CORPORATE COUNSEL (Feb. 23, 2012), *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202543167877.

25. U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, OPINION PROCEDURE RELEASE NO. 12-01 at 5 (Sep. 18, 2012).

26. U.S. DEP'T OF JUSTICE, CRIMINAL DIV. & U.S. SEC. & EXCH. COMM'N, ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 19–21 (2012), http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [hereinafter FCPA RESOURCE GUIDE]. Furthermore, any reliance on SEC guidance may be an exercise in futility, due in no small part to the Commission's less-than-stellar record of getting its rules upheld by the D.C. Circuit. *See* James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEXAS L. REV. 1811 (2012) (detailing the difficulties faced by SEC rules when reviewed by the D.C. Circuit).

27. FCPA RESOURCE GUIDE, *supra* note 26, at 20.

28. *Id.*

29. Letter from U.S. Chamber of Commerce et al., to Hon. Lanny A. Breuer, Ass't Atty. Gen., Criminal Div., U.S. Dept. of Justice & George S. Canellos, Acting Dir. of Enforcement, U.S. Sec. & Exch. Comm'n (Feb. 19 2013) (available at http://www.instituteforlegalreform.com/sites/default/files/Coalition%20Letter%20to%20DOJ%20and%20SEC%20re%20Guidance_v2.pdf) [hereinafter U.S. Chamber Letter].

Chamber expresses, among other things, how it "find[s] it regrettable that . . . the discussion of the definitions of 'foreign official' and 'instrumentality' does not contain a single hypothetical to help illustrate the enforcement agencies' approach to this critical issue"—something the Chamber predicts will "perpetuate uncertainty in the business community."[30]

The cases that have addressed the FCPA—specifically the definition of foreign official—have done little to help bring the clarification that the DOJ and SEC both essentially punted on when issuing the above guidance. These cases have repeatedly come down in favor of squishy, fact-intensive balancing tests for determining an entity's status as an instrumentality of a foreign government, a fact cited by the DOJ and SEC in support of their decision not to declare a firm standard.[31] These cases are instructive as a starting point, but they ultimately fail to give the certainty that multinational corporations crave.[32]

The main thrust of this Note is to develop a clear, easily applied test for determining whether a particular entity is an instrumentality of a foreign government and its employees qualify as foreign officials for the purposes of the FCPA. Though corruption and graft are unfortunate realities in some countries, these practices are generally bad for business.[33] Accordingly, this new test is not intended to make it easier to bribe and be bribed.[34] Without clear guidance, however, companies are left to make potentially costly judgment calls when conducting business in foreign countries where

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30. *Id.* at 3. Additionally, as noted by former SEC General Counsel David M. Becker, this lack of transparency may end up contributing to a further erosion of the effectiveness of NPAs and DPAs due to the uncertainty potential defendants have as to what benefits are gained by cooperating with the government. *See* David M. Becker, *What More Can Be Done to Deter Violations of the Federal Securities Laws?*, 90 TEXAS L. REV. 1849, 1873–74 (2012) (discussing the difficulties of inducing cooperation when the incentives are opaque, focusing particularly on FCPA enforcement).

31. FCPA RESOURCE GUIDE, *supra* note 26, at 109 n.119 ("To date, consistent with the approach taken by DOJ and SEC, all district courts that have considered this issue have concluded that this is an issue of fact for a jury to decide.").

32. Glaser, *supra* note 24.

33. *See, e.g.*, *Corruption and Governance*, THE WORLD BANK GROUP, http://lnweb90.worldbank.org/eca/eca.nsf/1f3aa35cab9dea4f85256a77004e4ef4/e9ac26bae82d37d685256a940073f4e9?OpenDocument ("Corruption has a direct impact on the size of the informal economy. It increases the cost of creating new businesses and staying in business within the formal economy—unofficial payments and unpredictability of their size and frequency drive the costs and risks so high that the entrepreneurs prefer to move their businesses underground to avoid bribes that they have to pay for services such as registration licensing, permits.").

34. As Chairman Sensenbrenner recognized,

> There is no question in my mind that we have to bring this law up to date. Nobody here is in favor of bribery, but there has to be more []certainty. And I must say I was a bit befuddled at the statement that the former Chairman of the Committee, Mr. Conyers, made, saying that corporations should know what is illegal. I think while a corporation is not a human being, but everybody has a right to know what is illegal, and there has to be much more certainty in the law.

FCPA Hearing, *supra* note 12, at 73 (statement of F. James Sensenbrenner, Jr., Chairman, Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary).

corruption is often accepted.[35] In many cases, companies may simply decline to do business in the emerging markets most likely to suffer from problems of public corruption rather than risk liability under the FCPA or other anti-corruption laws.[36] Furthermore, unlike the general anti-corruption focus of the U.K.'s Bribery Act of 2010,[37] the FCPA is only intended to criminalize the bribery of actual foreign public officials.[38] Attempting to sweep private bribery under the FCPA's umbrella of criminality stretches the Act far beyond its intended scope and ultimately dulls the luster of the "world's flagship anti-corruption legislation."[39]

To illustrate how the FCPA's broad definition of foreign official creates uncertainty, examining a hypothetical situation will be helpful. Before tackling the hypothetical, it is worth noting that the prototypical FCPA case involves a company funneling bribe money to a foreign official in order to receive a contract with that official's government.[40] Per the OECD, the industries most commonly affected by foreign bribery are those tied to infrastructure, defense, and medical services and supplies.[41] Due to the FCPA's broad language, however, the type of person who qualifies as a "foreign official" may be somewhat surprising, as the following hypothetical will illustrate.

John and Bill were classmates at business school. John is an American citizen and has never lived outside the United States. He works as an asset manager for a sovereign wealth fund (SWF)[42] in New York City. His classmate, Bill, who is also an American citizen, founded his own

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35. Glaser, *supra* note 24.

36. *See* D. Michael Crites & Mark A. Carter, *Why the Foreign Corrupt Practices Act Is Hurting Our Businesses and Needs to Be Reformed*, NAT'L L. REV. (May 15, 2011), http://www.natlawreview.com/article/why-foreign-corrupt-practices-act-hurting-ourbusinesses-and-needs-to-be-reformed ("The real effect of DOJ's aggressive enforcement is that it is stifling American companies from doing business abroad and here at home. Companies themselves have to bear the burden of conducting extensive internal investigations if faced with FCPA charges. Many businesses would rather end operations with foreign countries than risk expansive DOJ investigations and spend resources to fight FCPA charges.").

37. Bribery Act 2010, c. 23 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

38. *See generally* WORLD COMPLIANCE, U.S. FOREIGN CORRUPT PRACTICES ACT POCKET HANDBOOK 13 (2012) (comparing the U.S. FCPA with the U.K. Bribery Act of 2010).

39. Ann Hollingshead, *A Critical Juncture for the FCPA*, TASK FORCE ON FIN. INTEGRITY & ECON. DEV. (June 15, 2011), http://www.financialtaskforce.org/2011/06/15/a-critical-juncture-for-the-fcpa/.

40. U.S. DEP'T OF JUSTICE, *supra* note 15.

41. *Foreign Bribery Factsheet*, OECD (Apr. 17, 2012), *available at* http://www.oecd.org/dataoecd/0/10/45790915.pdf.

42. Although there is no universally accepted definition for what SWFs are, Morgan Stanley's Clay Lowery defining a SWF as "a government investment vehicle which is funded by foreign exchange assets, and which manages these assets separately from official reserves" is a strong definition. Stephen Jen, *The Definition of a Sovereign Wealth Fund*, MORGAN STANLEY (Oct. 26, 2007), http://www.morganstanley.com/views/gef/archive/2007/20071026-Fri.html. For a more thorough discussion of FCPA issues as they specifically apply to SWFs, see Court E. Golumbic & Jonathan P. Adams, *The "Dominant Influence" Test: The FCPA's "Instrumentality" and "Foreign Official" Requirements and the Investment Activity of Sovereign Wealth Funds*, 39 AM. J. CRIM. L. 1 (2011).

technology company, "BILLCO." Bill is looking to raise money through a private placement and takes John on an all-expenses-paid ski vacation to Aspen. While on the trip, Bill discusses his business plan with John, who becomes intrigued by the possibilities of BILLCO. When John returns from the vacation, he discusses Bill's business plan with his superiors, and they decide to have the SWF make a $1 million investment in BILLCO.

Given these facts, is John a foreign official? If so, did Bill taking John on the ski trip constitute Bill and BILLCO giving value to John in order to secure an improper advantage, thereby violating the FCPA? Furthermore, if the SWF makes this investment in BILLCO and a third company wines and dines Bill so that he will retain the company's services, has Bill become a foreign official causing this third company's conduct to violate the FCPA?

After analyzing the statute's plain language and recent cases dealing with the definition of foreign official, this Note addresses the key questions raised by this hypothetical. First, should there be a certain threshold requirement of an individual's responsibility for decision making within an organization for that individual to qualify as a foreign official? Second, can an American citizen qualify as a foreign official, or would that render "foreign" mere surplusage? Finally, what level of government control and connection to state functions should be necessary for an entity to qualify as an instrumentality of a foreign government? After answering these questions, this Note will propose a four-factor test for determining whether an entity qualifies as an instrumentality of a foreign government under the FCPA, thereby making its employees foreign officials for the purposes of the statute.

II. Who is a Foreign Official?

A. Broad language of the statute

One of the major issues contributing to the amount of discretion in determining who is a foreign official under the FCPA is the statute's broad language. As summarized by the DOJ, "The anti-bribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person."[43] Additionally, the FCPA contains accounting provisions intended

43. U.S. DEP'T OF JUSTICE, *supra* note 15; *see also* 15 U.S.C. § 78dd-1 (2006). Section 78dd-1 states:

> It shall be unlawful for any issuer which has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of

to augment these anti-bribery provisions. These provisions basically require a company to record a bribe as a bribe in its ledgers in order to comply,[44] but this paper's focus will be on the anti-bribery provisions.

The statute defines a foreign official as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of [the same]."[45] Curiously, the statute goes on to define what "public international organization" means,[46] but it neglects to define instrumentality—a term that is also contained in and defined by the Foreign Sovereign Immunities Act (FSIA).[47]

The lack of clarity as to what qualifies an entity as an instrumentality of a foreign government is compounded by the lack of a compliance defense[48] and the broad judicial interpretation for what qualifies as giving value in furtherance of business under the statute as established by *United States v. Kay*.[49] The DOJ has said that actions as trivial as paying for a taxi ride could be actionable under the FCPA, but it asserted that the DOJ would "never" bring a case on those grounds.[50] Furthermore, the DOJ and SEC are responsible for both interpreting and enforcing the law due to the lack of case law, which is a direct result of the huge disincentives for companies to actually fight the cases. This fact skews the scales in favor of over-enforcement of the statute and threatens to stretch the definition of foreign official past its logical breaking point. In addition, the creation of whistleblower bounties by Dodd-Frank[51] will most likely lead to an increase

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anything of value to—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

44. *See* 15 U.S.C. § 78m (2006).

45. *Id.* at § 78(f)(1)(A).

46. *Id.* at § 78(f)(1)(B).

47. 28 U.S.C. § 1603(b)(3) (2006).

48. *See* Stephen Fraser, *Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty*, 91 TEXAS L. REV. 1009 (2012) (discussing the benefits that creating a compliance defense for the FCPA would confer on both the DOJ and corporations).

49. United States v. Kay, 359 F.3d 738, 743, 755–56 (5th Cir. 2004) (rejecting arguments that the FCPA's language is unconstitutionally vague and supporting a broad definition of "giving value" under the statute, holding that it includes "both the kind of bribery that leads to discrete contractual arrangements and the kind that more generally helps a domestic payor obtain or retain business for some person in a foreign country").

50. *FCPA Hearing*, *supra* note 12, at 56 (statement of Greg Andres, Deputy Assistant Att'y Gen., U.S. Dep't of Justice Criminal Div.).

51. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat 1376, 1841–42 (2010).

in cases being brought initially under the books and records provision of the FCPA[52] and then followed up with a DOJ investigation.

As a result of increased enforcement by the SEC and DOJ due to the high-dollar value of FCPA settlements,[53] the government has begun bringing more individual prosecutions.[54] In connection with the increase in individual prosecutions is an increase in cases actually going to trial[55] and challenging the validity of the prosecutions on the grounds that the individuals who were allegedly bribed were not foreign officials under the FCPA because the entities that employed them did not qualify as instrumentalities.

B. *United States v. Noriega* (*Lindsey*)

In *United States v. Noriega* (commonly referred to as *Lindsey*), executives of Lindsey Manufacturing were charged with a scheme to bribe officials of the Comisiòn Federal de Electricidad (CFE), a Mexican state-owned utility.[56] The defendants filed a motion to dismiss based on the argument that CFE was not an instrumentality as a matter of law, and therefore employees of CFE were not foreign officials under the FCPA.[57] The court rejected the defendants' contention, and Judge A. Howard Matz of the Central District of California came up with the following non-exhaustive list of factors that would qualify an entity as an instrumentality:

> [1] [t]he entity provides a service to the citizens . . . [or] inhabitants of the jurisdiction; [2] [t]he key officers and directors of the entity are, or are appointed by, government officials; [3] [t]he entity is financed . . . in large measure [by the government]; [4] [t]he entity is vested with and exercises exclusive or controlling power to administer its designated functions; [and 5] [t]he entity is widely perceived and understood to be performing [governmental] functions.[58]

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52. 15 U.S.C. § 78m (2006).

53. SHEARMAN & STERLING LLP, *FCPA Digest – Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*, vii–xii (2012); *see also* Tillipman, *supra* note 17, at 7 ("[T]he top 10 FCPA corporate settlements of all time were imposed between 2008–2011, with Siemens AG holding the title of 'most expensive FCPA violation' to date. . . . The top 10 corporate settlements total nearly $3.2 billion in fines and penalties.").

54. SHEARMAN & STERLING LLP, *supra* note 53, at vi–vii.

55. *See* GIBSON, DUNN & CRUTCHER LLP, *supra* note 6, at 10–11 ("In 2011, we saw a new all-time high of four FCPA trials.")

56. Indictment at 6–22, United States v. Noriega, 2:10-cr-01031 (C.D. Cal. Sept. 15, 2010).

57. Order Denying Motion to Dismiss at 9, United States v. Noriega, 2:10-cr-01031 (C.D. Cal. Feb. 28, 2011).

58. Order Denying Motion to Dismiss at 9, United States v. Noriega, 2:10-cr-01031 (C.D. Cal. Apr. 20, 2011).

Although *Lindsey* resulted in the first FCPA-related conviction of a corporation by a jury,[59] Judge Matz ultimately dismissed the case based on prosecutorial misconduct.[60] Nevertheless, *Lindsey* poignantly illustrates the danger of an ill-defined statute and misplaced prosecutorial zeal.[61]

C. *Carson*

In *Carson*, a valve manufacturing company—Control Components Inc. (CCI)—was charged with a conspiracy to bribe officials of state-owned utility companies in Korea, Malaysia, the United Arab Emirates, and China.[62] In a replay of *Lindsey*, the defendants filed a motion to dismiss based on the contention that the allegedly bribed individuals were not foreign officials under the FCPA.[63] Once again, the court rejected the argument that various state-owned enterprises are not instrumentalities of foreign governments.[64] Judge James V. Selna provided his own non-exhaustive list of factors, including:

> [1] [t]he foreign state's characterization of the entity and its employees; [2] [t]he foreign state's degree of control over the entity; [3] [t]he purpose of the entity's activities; [4] the entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions; [5] [t]he circumstances surrounding the entity's creation; and [6] [t]he foreign state's extent of ownership of the entity, including the level of financial support by the state . . . .[65]

As of this writing, all but one of the defendants has pled guilty.[66] The sole remaining defendant—Han Yong Kim, the former president of CCI's Korean office—has not appeared in the U.S. to face trial.[67]

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59. Press Release, U.S. Dep't of Justice, California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011), *available at* http://www.justice.gov/opa/pr/2011/May/11-crm-596.html.

60. Edvard Pettersson, *Lindsey Manufacturing Wins Dismissal of Foreign Bribery Case*, BLOOMBERG BUSINESSWEEK (Dec. 02, 2011), http://www.businessweek.com/news/2011-12-02/lindsey-manufacturing-wins-dismissal-of-foreign-bribery-case.html.

61. *Id.*

62. Indictment at 12–13, United States v. Carson, 8:09-cr-00077 (C.D. Cal. Apr. 8, 2009).

63. Motion to Dismiss, United States v. Carson, 8:09-cr-00077 (C.D. Cal. Feb. 21, 2011).

64. Order Denying Motion to Dismiss at 5, United States v. Carson, 8:09-cr-00077 (C.D. Cal. May 18, 2011).

65. *Id.* The DOJ cited favorably to this test in its September 2012 FCPA Opinion Release regarding the status of royals as foreign officials. U.S. DEP'T OF JUSTICE, *supra* note 25, at 6.

66. Richard L. Cassin, *CCI's Edmonds Pleads Guilty*, THE FCPA BLOG (June 15, 2012, 11:22 PM), http://www.fcpablog.com/blog/2012/6/15/ccis-edmonds-pleads-guilty.html.

67. *Id.*

D. SHOT Show

In the single largest FCPA-related investigation and prosecution effort directed at individuals in the DOJ's history, the FBI constructed an elaborate scenario that culminated in the arrest of one individual in Miami and twenty-one individuals from a variety of defense contractors at the 2010 Shooting, Hunting, Outdoor Trade Show (SHOT Show) in Las Vegas.[68] The undercover investigation had no involvement from any actual foreign official, but the defendants nonetheless allegedly engaged in a scheme to pay bribes to the minister of defense for a country in Africa.[69] The scheme involved the defendants allegedly agreeing to pay a 20% "commission" to an undercover FBI agent, who they believed to be a sales agent representing Gabon's Minister of Defense, in order to win a portion of a $15 million deal to outfit the country's presidential guard.[70]

According to the DOJ, "[t]he defendants were told that half of that 'commission' would be paid directly to the minister of defense," and the defendants agreed to create two different price quotations for the deal—one reflecting the actual cost, and the second containing the additional "commission."[71] Additionally, the defendants allegedly agreed to engage in a small test run of the deal to ensure the minister that he would in fact receive his 10% portion of the bribe.[72] This sting garnered a good number of headlines and was heralded by the DOJ as a shot across the bow for would-be FCPA violators.[73]

Initially, it seemed to be business as usual for the DOJ, with several defendants entering guilty pleas for their alleged crimes.[74] However, due in large part to credibility issues plaguing the government's main cooperating witness[75] combined with the practical difficulty posed by the fact that there was no actual foreign official involved in the conduct, one jury panel ended up deadlocked, and Judge Richard Leon granted the defendants' Rule 29 motion for judgment of acquittal in a second case.[76] These setbacks eventually led the DOJ to file a motion to dismiss.[77] Judge Leon granted

68. Press Release, U.S. Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *available at* http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.

69. *Id.*

70. *Id.*; *see also* Tom Schoenberg, *Bribery Defendants were Eager to Join Corrupt Gabon Deal, Jury is Told*, BLOOMBERG, May 17, 2011, http://www.bloomberg.com/news/2011-05-17/bribery-defendants-were-eager-to-join-corrupt-gabon-deal-jury-is-told.html ("The government said the defendants agreed to pay $3 million in kickbacks for the business, half of which they were told would be paid to [Gabon's] defense minister.").

71. U.S. Dep't of Justice, *supra* note 68.

72. *Id.*

73. *Id.*

74. GIBSON, DUNN & CRUTCHER, LLP, *supra* note 6, at 11.

75. *Id.* at 11–12.

76. *Id.*

77. Motion to Dismiss, United States v. Goncalves, 1:09-cr-00335-RJL (D.D.C. Feb. 21, 2012).

this motion and dismissed all charges against the defendants, including the ones who had originally pled guilty.[78] Despite the DOJ's failure in prosecuting these cases, it notably signaled a shift in tactics by the DOJ to include proactive undercover investigations alongside the sector sweeps and reactive FCPA enforcement measures that had previously been the norm.[79]

E. *O'Shea*

In a situation very similar to *Lindsey*, John O'Shea was charged with funneling bribes to officials in Mexico's CFE in order to secure contracts for the Swiss engineering firm ABB.[80] ABB pled guilty to the FCPA charges and expected that O'Shea would follow suit.[81] Instead, O'Shea elected to fight the case at trial.[82] Like the defendants in *Lindsey*, O'Shea challenged the definition of foreign official as applied to employees of CFE.[83] Judge Lynn Hughes denied this motion, but he declined to issue a written opinion.[84]

Although Judge Hughes did not opine on the definition of foreign official, he granted the motion for acquittal due to the DOJ's failure to prove that any alleged bribes actually took place during its case in chief.[85] This dismissal illustrates the difficulty the DOJ faces in proving actual bribery and intent: the majority of witnesses in FCPA cases live outside the subpoena power of the government.[86] This may change with the introduction of the Dodd-Frank whistleblower bounties,[87] but it may simply embolden more corporate defendants to actually take their cases to trial instead of settling.

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78. Order Granting Motion to Dismiss, United States v. Goncalves, 1:09-cr-00335-RJL (D.D.C. Feb. 24, 2012).

79. U.S. Dep't of Justice, *supra* note 59.

80. Indictment at 7–9, United States v. O'Shea, 4:09-cr-00629 (S.D. Tex. Nov. 16, 2009).

81. Nathan Vardi, *The FCPA Fiasco: Pressure Tactics In Corruption Cases Backfiring*, FORBES (Jan. 17, 2012, 1:41 PM), http://www.forbes.com/sites/nathanvardi/2012/01/17/the-fcpa-fiasco/.

82. *Id.*

83. Motion to Dismiss at 1–2, United States v. O'Shea, 4:09-cr-00629 (S.D. Tex. Mar. 7, 2011).

84. Order Denying Motion to Dismiss, United States v. O'Shea, 4:09-cr-00629 (S.D. Tex. Jan. 3, 2012).

85. Order on Acquittal, United States v. O'Shea, 4:09-cr-00629 (S.D. Tex. Jan. 17, 2012); *see also* Vardi, *supra* note 81 (discussing the government's failure to prove the allegations).

86. *See* Robert W. Tarun & Peter P. Tomczak, Response, *A Brief Comment on Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty*, 90 TEX. L. REV. SEE ALSO 183, 191–92 (2012) (discussing the difficulties inherent in investigating and prosecuting FCPA cases).

87. *See* Ben Kerschberg, *The Dodd-Frank Act's Robust Whistleblowing Incentives*, FORBES (Apr. 14, 2011), http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/ (explaining how the Dodd-Frank whistleblowing incentives work and discussing the impact they will have on FCPA compliance).

F. *Haiti Teleco/United States v. Esquenazi* and *United States v. Rodriguez*

The *Haiti Teleco* case is the largest FCPA enforcement action in the statute's history that does not spring from a scenario manufactured by the DOJ.[88] In the *Haiti Teleco* case, the DOJ charged Cinergy Telecommunications, Inc., several of its executives, intermediaries, and former Haitian government officials with involvement in a scheme to obtain telecommunications contracts in Haiti and launder money.[89] In contrast to the narrow scope found in the vast majority of FCPA enforcement actions, the *Haiti Teleco* investigation has yielded twelve total defendants—eleven of which are individuals.[90]

Just as in *Lindsey* and *Carson*, the court denied a motion to dismiss premised on the claim that the employees of the state-owned Haiti Teleco were not foreign officials.[91] Unlike the other cases, however, no guidance as to what factors should be weighed in determining whether an entity is an instrumentality were given in the order denying the motion to dismiss.[92] Instead, jury instructions were given on what the jury should consider in determining whether Haiti Teleco qualified as an instrumentality.[93] These instructions were extremely similar to the multi-factor tests in *Lindsey* and *Carson*, and once again included a non-exhaustive list that required a fact-based determination balancing factors against one another.[94]

As observed by the authors of the FCPA Compliance Blog, there is a great deal of overlap between the factors taken into consideration by the

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88. *The Case That Just Keeps On Giving*, FCPA PROFESSOR (July 20, 2011), http://www.fcpaprofessor.com/the-case-that-just-keeps-on-giving.

89. *Id.*

90. *Id.*

91. Amended Order Denying Motion to Dismiss, United States v. Esquenazi, 1:09-cr-21010-JEM (S.D. Fla. Nov. 19, 2010).

92. *Id.*

93. Jury Instructions, United States v. Esquenazi, 1:09-cr-21010-JEM (S.D. Fla. Aug. 5, 2011).

94. *Id.* Specifically, the instructions stated,

> An "instrumentality" of a foreign government is a means or agency through which a function of the foreign government is accomplished. State-owned or state-controlled companies that provide services to the public may meet this definition. To decide whether [Haiti Telecom] is an instrumentality of the government of Haiti, you may consider factors including but not limited to: (1) whether it provides services to the citizens and inhabitants of Haiti; (2) whether its key officers and directors are government officials or are appointed by government officials; (3) the extent of Haiti's ownership of Teleco, including whether the Haitian government owns a majority of Teleco's shares or provides financial support such as subsidies, special tax treatment, loans, or revenue from government-mandated fees; (4) Teleco's obligations and privileges under Haitian law, including whether Teleco exercises exclusive or controlling power to administer its designated functions; and (5) whether Teleco is widely perceived and understood to be performing official or government functions. These factors are not exclusive, and no single factor will determine whether [Teleco] is an instrumentality of a foreign government. In addition, you do not need to find that all the factors listed above weigh in favor of Teleco being an instrumentality in order to find that Teleco is an instrumentality.

Id.

three courts.[95] Although this overlap may offer companies some level of predictability when dealing with entities abroad, it is still far from uniform across all jurisdictions. Additionally, all of these tests for instrumentality are overbroad—all are non-exhaustive lists of factors—and include entities that should not be considered instrumentalities of foreign governments.

One interesting wrinkle to the *Haiti Teleco* case is that Haitian Prime Minister Jean Max Bellerive signed a declaration stating that Haiti Teleco was *not* a state enterprise a few days before the jury reached its verdict.[96] Less than a month later, Bellerive signed a new declaration to "clarify" the previous declaration.[97] This new declaration stated that Teleco was owned by the Bank of the Republic of Haiti (BRH)—an institution of the Haitian state—and that Bellerive only intended the prior declaration for internal use and was unaware that it would be used in criminal proceedings.[98] Whether this "clarification" resulted from pressure by the U.S. Government is unclear,[99] but it would certainly be puzzling to find that an entity specifically disclaimed as a state institution by its home government—even if only internally—was an instrumentality of that government for the purposes of the FCPA.[100]

The most interesting progeny of the *Haiti Teleco* case are the pending appeals to the Eleventh Circuit that have been initiated by Carlos Rodriguez and Joel Esquenazi.[101] These appeals will mark the first opportunity for a circuit court to weigh in on the proper definition of instrumentality, and therefore foreign official, under the FCPA.[102] There is the real possibility that the challenges will succeed either on the grounds that the district court erred in its instructions relating to the definition of instrumentality or in its failure to take the declarations by Prime Minister

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95. *Reading a Crystal Ball? Guidance on Instrumentality Under the FCPA-Part II*, FCPA COMPLIANCE & ETHICS BLOG (Aug. 19, 2011), http://tfoxlaw.wordpress.com/2011/08/19/reading-a-crystal-ball-guidance-on-instrumentality-under-the-fcpa-part-ii/.

96. Declaration by Jean Max Bellerive, Minister a.i. of Justice and Public Safety, Republic of Haiti, Legal Status of Teleco (July 26, 2011), *available at* http://www.scribd.com/doc/63464626/Haitian-Government-Declaration-Re-Haiti-Teleco (although Bellerive was also Prime Minister at the time of this declaration, he signed it in his capacity as Minister of Justice and Public Safety).

97. Statement of Jean Max Bellerive, Prime Minister, Republic of Haiti (Aug. 25, 2011), *available at* http://www.scribd.com/doc/63599157/Declaration-of-Haitian-Prime-Minister-in-Haiti-Teleco-Case.

98. *Id.*

99. *See Haiti Teleco – From Stunning To Strange*, FCPA PROFESSOR (Aug. 31, 2011), http://www.fcpaprofessor.com/haiti-teleco-from-stunning-to-strange (evaluating the circumstances leading to Prime Minister Bellerive's new declaration).

100. This second declaration by Mr. Bellerive and the U.S. Government's subsequent "explanation" were described as being "nothing short of disingenuous, border[ing] on the nonsensical, and are expressly contradicted by the previous correspondence" in the brief filed by the Haitian defendant—and alleged "foreign official"—Jean Rene Duperval on appeal. Initial Brief of the Appellant at 43–44, United States v. Duperval, No. 12-13009-CC (11th Cir. Feb. 4, 2013).

101. United States v. Esquenazi, 1:09-cr-21010-JEM (S.D. Fla. Oct. 26, 2011), *appeal docketed*, No. 11-15331 (11th Cir. May 9, 2012).

102. *Historic "Foreign Official" Appeals Filed*, FCPA PROFESSOR (May 10, 2012), http://www.fcpaprofessor.com/historic-foreign-official-appeals-filed.

Bellerive into consideration as exculpatory evidence.[103] These appeals provide the Eleventh Circuit with a unique opportunity to establish common-sense boundaries to the definition of "instrumentality" under the FCPA, and this paper contains a blueprint for what that definition should be.[104]

III. Key Questions

Before establishing a test to evaluate whether an entity should be considered an instrumentality of a foreign government under the FCPA, there are a few questions worth considering. By addressing these questions first, the test will benefit from greater clarity and a more-directed focus.

A. Should There Be a Threshold Level of Organizational Responsibility for an Individual to Qualify as a Foreign Official?

With the plain language of the statute, there is no threshold for who can be a foreign official so long as the entity that employs the person qualifies as an instrumentality.[105] Thus, even a janitor can potentially be a foreign official for the purposes of the FCPA. On its face, this identification seems absurd and cannot be what Congress intended when passing the Act.[106] However, for a court to create a standard requiring a baseline of responsibility for an individual to qualify as a foreign official, it would require ignoring the plain language of the statute and would be a form of often-criticized judicial activism.[107] On the other hand, it is well within Congress's authority to amend the statute to include this baseline level of responsibility.

Doing so makes sense because it is doubtful that a lower-level employee like a janitor or security guard could have sufficient prestige within an organization to influence any award or benefit. The counterpoint is that because the employee is of such a low level, no company would approach the employee in order to obtain an unfair advantage, thus there is no need to change the statute. While this contention has some merit, there is always the threat that an overzealous prosecutor could use the broad scope of the statute to scoop in misguided but ultimately harmless conduct and coerce a large settlement.

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103. *Id.*; *see also* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that withholding exculpatory evidence violates due process "where the evidence is material either to guilt or to punishment").

104. *See infra* Part IV.

105. 15 U.S.C. § 78dd-1(f)(1)(A) (2006) (defining foreign official as "any employee or official of a foreign government . . .").

106. *Cf.* U.S. DEP'T OF JUSTICE, *supra* note 15 (discussing the circumstances leading to the FCPA's initial passage).

107. *See, e.g.*, Randy Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275 (2002) (describing how the term "judicial activism" is used and the types of actions that attract the label).

The real reason that not having a baseline responsibility requirement for the employee to be considered a foreign official is troublesome is that the statute just requires the *intent* to secure an improper advantage[108]—not the actual securing of it—a distinction that allowed the SHOT Show cases to proceed in the first place. By requiring an individual to have a certain amount of responsibility in the organization in order to be considered a foreign official, Congress could help ensure that prosecutions brought under the FCPA have real merit and are not just being used as a tool to coerce corporations into settling out of fear of the heavy consequences associated with an FCPA conviction.[109]

B. Can an American Citizen Be a Foreign Official, or Would that Render "Foreign" to Be Mere Surplusage?

The FSIA is instructive on the question of whether an American citizen can be a foreign official insofar as it defines an instrumentality of a foreign government as being "neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country."[110] Under this definition, it seems that the instrumentality must be a citizen of *only* the country for which it is claiming sovereign immunity.

Extending this to the FCPA, it seems to make sense to require that a particular individual who is being alleged to be a foreign official must be a citizen of the country wherein the alleged misconduct is happening. Additionally, it makes sense to require that the alleged instrumentality be based in the country wherein the alleged misconduct was directed. For example, if an American oilfield services company were to bribe officials of a Chinese state-owned oil company to secure business with that company in Iraq, it hardly seems that this is the type of conduct at which the FCPA was originally directed.[111] This is because the company is operating more like a typical multinational corporation in a foreign land than as an organ of the state in any domestic concerns. The fact that the entity is PetroChina instead of ExxonMobil should not change the calculus faced by a company when it is dealing with that entity in a third country unrelated to either the United States or China.

Furthermore, if an American citizen is bribed to obtain a benefit, that seems to be outside the original intent of a statute enacted to deal with *foreign*—rather than *domestic*—corruption.[112] The statute does appear to

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108. *See supra* note 43 and accompanying text. Liability is predicated on the payment's purpose, not its result. *See supra* note 43 and accompanying text.

109. *See supra* Part I.

110. 28 U.S.C. § 1603(b)(3) (2006).

111. *See* U.S. DEP'T OF JUSTICE, *supra* note 15 (describing the reasons underpinning the FCPA's initial passage, namely, a concern about American corporations bribing officials of foreign governments).

112. *Compare* 15 U.S.C. § 78dd-1 (2006) (criminalizing the bribery of foreign public officials),

cover an American citizen who works for a foreign state-owned enterprise, however, due to the "any employee" language.[113] Still, as held by the Supreme Court in *Bailey v. United States*,[114] language of a statute will be read to have a purpose and not as mere suplusage.[115] So, must a foreign official actually be a foreigner, or can an American still be a foreign official without rendering "foreign" to be surplusage?

The Department of State's guidance regarding § 349(a)(4) of the Immigration and Nationality Act (INA)[116] is helpful in drawing a conception of what level of involvement in a foreign government would be necessary for an individual to risk forfeiting his American citizenship.[117] Basically, if an individual is in a policy-level position or is required to take an oath of allegiance in connection with the position within a foreign government, he runs the risk of losing his American citizenship.[118] At least in a citizenship context, the U.S. draws the line at an intimate connection with the foreign government—giving a presumption that the individual did *not* intend to renounce his citizenship unless those thresholds are met.[119]

This standard goes hand-in-hand with the previous discussion about a threshold level of responsibility within an organization for that individual to qualify as a foreign official.[120] So it would make sense that if an American citizen is in a position with a high enough level of responsibility and/or loyalty to that foreign government, then, and only then, that American should qualify as a foreign official under the FCPA. Still, the FCPA's plain language says *any* employee.[121] Which controls in this struggle of non-surplusage? Does *foreign* control—requiring the individual to have non-American citizenship or, at the very least, risk losing his American citizenship by virtue of holding the position—or does *any* control—meaning that even if an American citizen is the janitor at a foreign embassy located in Washington D.C., making him an employee of that government, he qualifies as a foreign official under the FCPA? This is an interesting question worth considering that arguably merits the attention of Congress but is ultimately beyond the scope of this note.

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with 18 U.S.C. § 201 (2006) (criminalizing the bribery of domestic public officials).

113. *See supra* note 45 and accompanying text.

114. 516 U.S. 137 (1995).

115. *Id.* at 144–46 (explaining principles of statutory interpretation that weigh against viewing words as surplusage).

116. 8 U.S.C. § 1481(a)(4) (2006).

117. *Advice About Possible Loss of U.S. Citizenship and Seeking Public Office in a Foreign State*, U.S. DEP'T OF STATE (Jan. 1, 2013), http://travel.state.gov/law/citizenship/citizenship_779.html.

118. *Id.*

119. *Id.* That being said, the government does *not* give such a presumption when an individual chooses to "voluntarily engage in conduct to which Acts of Congress attached the consequence of denationalization irrespective of—and, [potentially] absolutely contrary to—the intentions and desires of the individual[]." Perez v. Brownell, 356 U.S. 44, 61 (1958). Additionally, the Supreme Court "reject[s] the notion that the power of Congress to terminate citizenship depends upon the citizen's assent." *Id.*

120. *See supra* Part II.A.

121. 15 U.S.C. § 78dd-1(f)(1)(A) (2006).

C. Level of Control to Be an Instrumentality

1. FSIA Definition

Providing a gloss to the statutory definition of instrumentality under the FSIA, the Supreme Court's opinion in *First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*[122] laid out factors to be considered in assessing if an entity qualifies as a government instrumentality.[123] These factors include being created by an enabling statute that prescribes its powers and duties; existing as a separate juridical entity with property rights and the power to sue and be sued; and being run as a distinct economic enterprise not subject to budgetary and personnel restrictions common to government agencies.[124]

The key to understanding this definition and its relation to the FCPA is that the FSIA is meant to carve out an exception to sovereign immunity when the entity is an "instrumentality" rather than an actual organ of the foreign government.[125] On the other hand, the FCPA lists instrumentality in the same provision as department and agency of a foreign government,[126] indicating a closer relation to central governmental functions. Additionally, this definition under FSIA seems to be specifically directed at the types of state-owned enterprises that the challengers in the previously discussed cases claim the FCPA is not meant to encompass.[127]

The Supreme Court goes on to hold in *Banco* that "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other."[128] In light of the above discussion and considering that the FCPA's goals are different from those of the FSIA, this is the type of control—principal–agent relationship—that makes more sense to assess in determining whether the entity is an instrumentality under the FCPA.[129]

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122. 462 U.S. 611 (1983).

123. *Id.* at 624.

124. *Id.*

125. *See Foreign Sovereign Immunities Act*, U.S. DEP'T OF STATE, http://travel.state.gov/law/judicial/judicial_693.html (explaining the scope of the FSIA for individuals interested in effecting service on a foreign government).

126. 15 U.S.C. § 78dd-1(f)(1)(A) (2006).

127. *See, e.g.*, Motion to Dismiss at 6–22, United States v. Noriega 2:10-cr-01031 (C.D. Cal., Feb. 28, 2011) (arguing that state owned corporations do not meet the FCPA's definition for "instrumentality").

128. 462 U.S. at 629–30.

129. The principal–agent relationship is defined in § 2 of the Restatement (Second) of Agency as follows:

> (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
>
> (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is

2. OECD Definition

The OECD Convention defines "public enterprise"—its version of instrumentality—using the term "dominant influence."[130] The OECD says this dominant influence exists "*inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board."[131] Just like the formulas laid out by the district courts that have addressed the definition of instrumentality under the FCPA, this test is non-exhaustive, indefinite, and potentially extremely expansive in its scope. Accordingly, it deprives companies of the predictability that would be afforded by a clear-cut definition, and it should not be the sole basis for any definition of instrumentality under the FCPA.[132]

IV. Creating a Test to Determine Whether an Entity Qualifies as an Instrumentality Under the FCPA

Unlike the non-exhaustive lists of factors laid out in *Lindsey*, *Carson*, and *Esquenazi*, or the indeterminate language of the OECD standard, this list of factors will be exhaustive and allow companies to have a real measure of consistency and predictability in dealing with companies overseas. This bright-line test incorporates four factors, and it requires each to be met in order for an entity to qualify as an instrumentality under the FCPA.

First, the foreign government must own more than 50% of the enterprise. Majority ownership is a logical and easily-defined and observed benchmark for determining control of an entity. Additionally, as codified by the FSIA, an instrumentality is defined as "any entity . . . a *majority of whose shares or other ownership interest is owned by a foreign state* or political subdivision thereof."[133] Because this is a place in the U.S. Code where an instrumentality of a foreign government is actually defined, this

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subject to the right to control by the master.

(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

RESTATEMENT (SECOND) OF AGENCY §2 (1958). If we analogize instrumentalities of a government to agents of that government, the definitions in (1) and (2) bring valuable guidance. Additionally, an enterprise that a government uses to achieve some of its goals but retains a degree of autonomy in executing tasks related to those goals—like the private military corporations employed by the U.S. in Iraq and Afghanistan—could be understood as acting like an independent contractor.

130. ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 5, at 15.

131. *Id.*

132. *Contra* Golumbic & Adams, *supra* note 42 (arguing that the OECD's "dominant influence" test should be the test adopted by courts tasked with interpreting the FCPA).

133. 28 U.S.C. § 1603(b)(2) (2006) (emphasis added).

ownership percentage is easily supported by referring to existing law and carries the added benefit of uniformity. Furthermore—in what was hailed as a "welcome clarification" by the U.S. Chamber of Commerce[134]—the DOJ and SEC state in their FCPA Resource Guide that "as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares."[135] Making this a hard and fast standard rather than one piece of a multifaceted balancing test would go a long way towards bringing the FCPA the type of predictable enforcement that the Chamber and others have been asking for all along.

Second, the entity must perform traditional government functions related to health, safety, and welfare.[136] Remaining in the context of sovereign immunity, government employees traditionally can only assert a defense of immunity when acting both within the scope of their authority *and* not outside the traditional role of government.[137] Following the same logic applied above in the ownership context, if an individual is acting in a manner that would afford him immunity due to its official nature, this is the type of activity that would render that individual an official of that government. Thus, if an individual cannot claim immunity for acts outside the scope of the traditional role of government, an entity should not be considered an instrumentality of a foreign government if its activities fall outside that traditional role as well. This hurdle is admittedly fairly easy to overcome. It is not difficult to successfully argue that an activity is directed at health, safety, or welfare—as Supreme Court precedent addressing the issue shows.[138] Still, certain activities would require some extremely creative definitions of this traditional role. Thus, this factor would serve to give a court the discretion to limit the scope of the statute if it felt that application in a particular case would be absurd or unjust without allowing it to run wild.

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134. U.S Chamber Letter, *supra* note 29, at 3.

135. FCPA RESOURCE GUIDE, *supra* note 26, at 21.

136. To help conceptualize this "traditional role of government," case law applying the "state action" doctrine in the context of 42 U.S.C. § 1983 and the Fourteenth Amendment is very instructive. *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 302–11 (2001) (explaining how performing a "traditional and exclusive public function" weighs in favor of "state action"). The U.S. Chamber of Commerce has also expressed support for this factor, stating they "continue to believe that if the entity does not perform a governmental function, it should not be considered a government instrumentality." U.S Chamber Letter, *supra* note 29, at 3.

137. *See, e.g.*, Minger v. Green, 239 F.3d 793, 801 n.5 (6th Cir. 2001) ("[T]he defense of immunity can only be asserted by state employees performing discretionary functions within the scope of their authority or ministerial functions within the scope of their authority and not outside the traditional role of government.").

138. *See, e.g.*, Kelley v. Johnson, 425 U.S. 238, 247 (1976). In *Kelley*, the Court stated,

> The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments employ a uniformed police force to aid in the accomplishment of that purpose. Choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power.

Id.

Third, the foreign government must have the sole power to appoint and remove upper-level officials. This power may be delegated to other governmental appointees or be achieved by popular election, since these are generally consistent with the concept of agency and governmental function. If a foreign government is not the only entity with the power to appoint and remove upper-level officials of the entity, it does not follow that the organization is an instrumentality of that government.

Without the capacity to choose who is in charge of the entity, the government lacks any real power over its operation, and it would be a stretch of the imagination to conceptualize such an organization as an instrumentality of that government. Just as it is impossible to use a hammer to drive a nail unless one is holding the hammer or can compel the person who is holding it to do the driving for him (barring sheer luck), it is impossible for a government to use an entity to achieve its goals—essentially the dictionary definition of instrumentality[139]—unless it can exert control over that entity either directly or indirectly. This analogy is imperfect because a government can coerce some actions through legislation and regulation without actually controlling the entity,[140] but the general point holds true.

As an example of how this appointment power is central to an entity's status as an instrumentality, one can look to the United States Postal Service (USPS). The USPS is a government-owned corporation in the U.S. despite not directly receiving taxpayer dollars.[141] The board of governors is appointed by the President of the United States with the advice and consent of the Senate.[142] These nine governors then select a postmaster general to serve as the tenth member of the board.[143]

In addition to being explicitly authorized by the Constitution—one of very few agencies with this distinction—the USPS is subject to Congress's power to change postal rates as it sees fit, unlike UPS or FedEx, who may change rates at their sole discretion.[144] Although Congress

139. OXFORD ENGLISH DICTIONARY (2d. ed. 1989) ("The quality or condition of being instrumental; the fact or function of serving or being used for the accomplishment of some purpose or end; agency.").

140. *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 268 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("*Political Power* then I take to be a *Right* of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of such Laws . . . for the Publick Good.").

141. *Postal Facts*, U.S. POSTAL SERV. (2012), http://about.usps.com/who-we-are/postal-facts/welcome.htm.

142. *About the Board of Governors*, U.S. POSTAL SERV. (2012), http://about.usps.com/who-we-are/leadership/board-governors.htm.

143. *Id.*

144. 39 U.S.C. § 3622 (2006) (establishing standards for postal rate regulation by the Postal Regulatory Commission); *see also* Brad Tuttle, *Post Office Wants to Raise Prices 11%, to 50¢ per Stamp*, TIME MONEYLAND (Feb. 17, 2012), http://business.time.com/2012/02/17/post-office-wants-to-raise-prices-11-to-50%C2%A2-per-stamp (reporting the difficulty the USPS has had in lobbying Congress to raise postal rates); *UPS Sets 2012 Rates*, UPS (Nov. 18, 2011), http://www.pressroom.ups.com/Press+Releases/Archive/2011/Q4/ci.UPS+Sets+2012+Rates.print

arguably *can* set the maximum rates charged by UPS and FedEx under its power to regulate commerce,[145] it would be just as odd to argue that either company is an instrumentality of the U.S. Government as it would be to argue that the USPS is not. The major difference is the fact that the USPS has its board appointed by the government, while UPS and FedEx have their boards chosen by private individuals.[146] Through this appointment power, the government can exercise direct rather than indirect control over the USPS's actions. This measure of control is what makes the USPS an instrumentality of the U.S. when the other parcel carriers are not.

Fourth and finally, the entity *cannot* be publicly traded. This factor plays two roles. First, it limits the application of the FCPA to entities that SWFs take a majority interest in that are otherwise private corporations. Second—despite what opponents of *Citizens United*[147] might claim—there is not a single government on earth that can be traded openly on the market. If a government cannot be traded, it follows that its instrumentalities cannot be traded either. Adding the requirement that the entity cannot be publicly traded adds additional protection to companies doing business with the entity. There is potential for the first three factors to be in a constant state of flux in a scenario where the government's ownership interest hovers between 49% and 51%, and this would deprive American companies of the predictability that this four-factor test intends.

Additionally, major players on the global energy stage, such as Petrobras and PetroChina, are publicly traded but have the majority of their shares owned by their governments—either directly or through subsidiaries.[148] Furthermore, contrary to popular expectations, the International Energy Agency found that China's national oil companies actually exert a high degree of independence from the Chinese government

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(announcing UPS's 2012 rates and discussing the increase in terms of market forces).

145. *See* Gonzales v. Raich, 545 U.S. 1, 17 (2005) ("We have never required Congress to legislate with scientific exactitude. When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class.").

146. *Compare* 39 U.S.C. § 202(a)(1) (2006) (establishing the procedures for the President to nominate members to the Postal Service's Board of Governors with the advice and consent of the Senate), *with* UNITED PARCEL SERVICE, INC., CORPORATE GOVERNANCE GUIDELINES (Nov. 2, 2011), *available at* http://www.investors.ups.com/phoenix.zhtml?c=62900&p=irol-govhighlights (providing for annual elections of directors by shareholders).

147. Citizens United v. Fed. Election Comm'n, 558 U.S. 50 (2010) (holding that limiting campaign expenditures by corporations constitutes an unconstitutional abridgement of their First Amendment rights).

148. *2009 Sustainability Report*, PETROBRAS (2010), http://www.petrobras.com.br/rs2009/en/relatorio-de-sustentabilidade/apresentacao-forma-de-gestao-e-transparencia/perfil/estrutura-societaria/ (disclosing the Brazilian federal government as owning 55.6% of voting shares); PETROCHINA CO. LTD., FORM 20-F at 89 (2009), *available at* http://www.petrochina.com.cn/resource/EngPdf/annual/20-f_2009.pdf (disclosing that China National Petroleum Corporation—a Chinese state-owned oil and gas corporation—owns 86% of PetroChina's shares). Additionally, as of March 31, 2011, Petrobras and PetroChina were the fifth- and second-largest corporations in the world as measured by market capitalization, respectively. *FT Global 500*, FIN. TIMES (Mar. 31, 2011), http://www.petrochina.com.cn/resource/EngPdf/annual/20-f_2009.pdf.

in their actions.[149] This supports the idea that entities competing in fields dominated by non-governmental companies will act in a manner similar to other companies in that field rather than merely as a vassal of the government holding the majority of their shares.[150]

Furthermore, if the government has elected to raise funds for the company's activities by allowing a percentage of the company to be traded publicly, the government has made a conscious choice to surrender a measure of control over the entity. A government would not freely choose to surrender control—no matter how little—over a ministry it deemed to be central to its national interests.[151] Therefore, if a government decides to cede complete control over an enterprise by allowing any portion of its shares to be publicly traded, this should serve as a signaling mechanism that the enterprise is not deemed as central to its national interest and should not be an instrumentality under the FCPA.

Several benefits spring from requiring that a company not be publicly traded for it to qualify as an instrumentality under the FCPA. First, it provides an easy method to screen out entities that are acting like traditional corporations rather than government agencies. Second, it gives American businesses a simple, bright-line rule for choosing what entities they wish to conduct business with abroad and what activities will be permissible with said entities. These two benefits provide American businesses with the predictability they crave so much and allow them to deal with partially-government-owned companies in the same manner that they would deal with any other company in the same scenario.

Referring to the circumstances surrounding the entity's creation, as is done by the other tests,[152] is unnecessary and not necessarily determinative, so it has been left out of this calculus. For example, Telemex began its history as a private company, spent some time as a government utility, then was once again privatized.[153] Focusing on the circumstances surrounding its creation during the years when Telemex was a government utility would have led to the conclusion that it was not an instrumentality of Mexico, despite all of the other factors pointing in the opposite direction.[154] Moreover, any fully-privatized company that began its existence as a state-owned enterprise or a full-blown government agency would give a false positive for being an instrumentality of a foreign

149. JULIE JIANG & JONATHAN SINTON, INT'L ENERGY AGENCY, OVERSEAS INVESTMENTS BY CHINESE NATIONAL OIL COMPANIES 7–25 (2011).

150. *Id.* at 12–24.

151. *Cf.* Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in Their Electoral Processes, G.A. Res. 50/172, U.N. Doc. A/RES/50/172 (Feb. 27, 1996) (reaffirming previous resolutions supporting the rights of Member States to self-determination and freedom from external interference).

152. *See supra* Part I.

153. *Telefonos de Mexico S.A. de C.V.*, FUNDINGUNIVERSE, http://www.fundinguniverse.com/company-histories/Telefonos-de-Mexico-SA-de-CV-company-History.html.

154. *See id.* (describing the characteristics of Telemex); *supra* Part I (explaining the multi-factor tests established by lower courts).

government using this factor. For these reasons, the "circumstances factor" adds nothing at best and misleads at worst, and it is therefore not included in this proposed test.

V. Conclusion

Now that we have established a bright-line test for evaluating whether an entity qualifies as an instrumentality, let us revisit our hypothetical to determine if John and Bill would be foreign officials under this standard. Despite the above discussion of citizenship and responsibility thresholds in assessing whether an individual qualifies as a foreign official, we will proceed on the assumption that "any employee" means exactly that and focus entirely on whether the respective entity would qualify as an instrumentality of a foreign government.

First, we have John. John is an American citizen with no ties to a foreign government outside of his employment by the SWF. Using the tests established by the district courts and the OECD's "dominant influence" test, the SWF would likely qualify as an instrumentality. However, due to the open-ended nature of those tests, we cannot come to a hard conclusion. With the proposed bright-line test, we can have a greater degree of certainty when making our decision.

Beginning with the first factor—greater than 50% ownership by a foreign government— the SWF is 100% owned by the foreign government, so that box may be checked. Skipping the second factor for the time being, the third factor is easily met, because the SWF is not publicly traded. Furthermore, the fourth factor is also met because the foreign government controls 100% of the SWF; as such, the foreign government retains full power to appoint and remove the SWF's upper officials. Returning to the second factor, the SWF would only qualify under this test if the concepts of health, safety, and welfare were very broadly interpreted. Although the financial health of a government could qualify under these concepts, the sometimes speculative investment activities of SWFs[155] render this argument more difficult to sustain. Although it would plausibly be within a judge's discretion to hold that an SWF is an instrumentality as a matter of law, the more prudent and logical choice would be that it does not qualify as an instrumentality under this test.

With Bill,we have an individual who started his own company that is tied to the foreign government only by virtue of the SWF's investment of $1 million in BILLCO. Under the tests established by the district courts and the OECD, it is unlikely that BILLCO would qualify as an instrumentality. However, because these tests are all non-exhaustive, this

155. *See, e.g.*, *MGM Mirage and Dubai World Reach CityCenter Deal*, N.Y. TIMES DEALBOOK (Apr. 29, 2009), http://dealbook.nytimes.com/2009/04/29/mgm-mirage-and-dubai-world-reach-citycenter-deal/ (detailing the terms reached by Dubai World—Dubai's SWF—and MGM Mirage in financing CityCenter, an $8.5 billion mixed-use development on the Las Vegas Strip that began construction during the height of the housing bubble).

cannot be said with certainty, and it would not be completely unfathomable for either a court to hold or a jury to find that BILLCO qualifies as an instrumentality of a foreign government under the FCPA.

With the proposed bright-line test, however, we can have definite answers. Whether the first and third factors would be met is dependent on the total value of BILLCO and what agreement the SWF made regarding director appointment as a condition of its investment, but a definitive answer can be reached the moment those facts are ascertained. In this case, it would not be unreasonable to assume that Bill retained at least some measure of control over appointment of top officials in BILLCO and that BILLCO has a value of more than $2 million. Under these assumptions, these factors would not be met.

The fourth factor would be met in this case because BILLCO is still a private enterprise. However, if BILLCO were to begin publicly trading its shares, the fourth factor would no longer be met. Either way, we once again have a definitive answer. Finally, the factor requiring the assessment of whether BILLCO performs traditional government functions related to the health, safety, and welfare of its citizens would almost certainly not be met. Looking at American history as an example—outside of certain sectors, such as national defense—technological innovation is not a traditional government function related to the health, safety, and welfare of the citizenry.[156] Assuming BILLCO makes typical consumer electronics, this activity would not be related to traditional government functions unless those terms were very broadly interpreted. For this reason, it is doubtful that BILLCO would meet the second factor; therefore, BILLCO would not be an instrumentality of a foreign government under the FCPA using the proposed bright-line test.

As the application of the proposed bright-line test to the facts of the hypothetical illustrates, the second factor, assessing whether the entity serves in a capacity dealing with traditional government functions related to health, safety, and welfare, does allow some discretion. Nonetheless, this discretion is not so extreme as to completely negate the benefits of predictability of application offered by the other three factors. Because factors one, three, and four offer hard and fast standards for a company doing business with foreign entities to take into account when assessing its conduct, this test is superior to the open-ended balancing tests provided by the district courts and the OECD. Additionally, this test provides common-sense limits to the extent of the FCPA's application—something that is sorely needed in light of the increased emphasis on its enforcement by the DOJ and SEC—and, therefore should be adopted as the standard for

156. *See generally* National Inventors Hall of Fame, *Browse Inventors by Last Name*, INVENT NOW, INC. (2012), http://www.invent.org/hall_of_fame/1_1_2_listing_inventor.asp?vAlpha= (listing individuals who "hold a United States Patent that has contributed significantly to the nation's welfare and the advancement of science and useful arts," a vast majority of whom are private citizens).

evaluating what qualifies an entity as an instrumentality of a foreign government under the FCPA.

Note

A Principled Approach to the Standard of Proof for Affirmative Defenses in Criminal Trials

Jonathan Levy*

I. Introduction

This Note addresses shifting the burden of proof to criminal defendants for affirmative defenses. An affirmative defense is distinct from other defenses in part because it typically assumes the truth of other elements of the crime.[1] Thus, instead of "I didn't shoot him," it is "I shot

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1. Affirmative defenses that do not assume the truth of the other elements include a claim that the statute of limitations has run and a claim of diplomatic immunity.

him but in self-defense" or "I shot him but I was insane at the time." It is clear that proof beyond a reasonable doubt is required for defenses such as "I didn't shoot him" or "I wasn't there"—in order to get a conviction, the prosecution must prove beyond a reasonable doubt that the defendant *was* there and *did* shoot the victim. Like the defendant asserting an alibi, the defendant asserting an affirmative defense claims he did not commit the crime he is charged with. Saying "I shot him in self-defense" is a specific way of contending, "I did not commit murder." But while the prosecution must prove the absence of an alibi beyond a reasonable doubt, states may relieve the prosecution of that burden and shift it to the defendant while lowering the standard of proof for affirmative defenses.[2]

This Note argues that such burden-shifting and lowering of the standard of proof is improper. Part II begins the argument by discussing the broad principles that guide the analysis. Part III reviews significant United States Supreme Court precedent regarding the standard of proof and affirmative defenses, and shows how the reasonable doubt standard's robust protection has been subverted. Part IV addresses the need for a principled approach due to epistemic problems surrounding criminal law, and Part V provides such an approach. Part VI addresses objections and Part VII makes recommendations. Part VIII concludes.

II. First Principles

Any theoretical analysis of affirmative defenses—or indeed of criminal law in general—must begin with first principles, or at least early ones. This Part will discuss the requirement of proof beyond a reasonable doubt in criminal trials and the fundamental principle that underlies it: the belief that erroneously convicting an innocent person is more costly than erroneously acquitting a guilty one.

The right to be free from conviction absent "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged" is constitutionally required.[3] Indeed, the reasonable doubt standard is "a fundamental normative precept of the Anglo-American conception of justice."[4] Under this standard, it is necessary for the prosecution to convince the jury that there is no reasonable doubt as to the defendant's guilt—if the prosecution's case does not meet this standard, the defendant cannot be convicted without violating the Constitution.[5] Shifting the burden of proof to the defendant and

2. When this Note speaks of shifting the burden to the defendant and lowering the standard of proof, it means lowering the standard from beyond a reasonable doubt to something less. Thus, it is akin to raising the standard for the defendant from the burden of raising a reasonable doubt to something greater (typically preponderance of the evidence).

3. *In re* Winship, 397 U.S. 358, 364 (1970).

4. John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1327 (1979).

5. *See Winship*, 397 U.S. at 364.

lowering the standard of proof violates that principle.[6] When a law does this, a jury may convict even if there is a reasonable doubt as to the truth of the affirmative defense—and it may convict with even greater doubt unless the affirmative defense is more likely than not true (assuming that the standard of proof that governs the affirmative defense is preponderance of the evidence).

The reason this lowering of the standard of proof is improper is that the requirement of finding guilt beyond a reasonable doubt stands for the fundamental principle that a false conviction is much worse than a false acquittal.[7] One of the most famous iterations of this principle is Blackstone's assertion that "it is better that ten guilty persons escape, than one innocent suffer."[8] This broad principle underlies the concept of proof beyond a reasonable doubt: "Above all else, a standard of proof is a mechanism for distributing the errors that are likely to occur."[9] Society has determined that the reasonable doubt standard is the appropriate mechanism for arriving at the proper ratio of false acquittals to false convictions.[10] Because this standard is a high standard for the prosecution to meet, if we assume an equal number of actually-guilty and actually-innocent defendants, there will be more false acquittals than false convictions. By contrast, under a preponderance standard, the ratio would be close to, if not exactly, 1:1. Because the preponderance standard does not presume the truth of one side's story or the other's (ignoring the burden of production), it "implicitly but unequivocally denies that one sort of error is more egregious than the other."[11]

By drafting affirmative defenses that relieve the prosecution of the duty to prove guilt beyond a reasonable doubt, lawmakers violate the

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6. Even if the burden shifts to the defendant but is not lowered, i.e., if the defendant must only introduce doubt to secure an acquittal, this violates the presumption of innocence and still may result in a higher false conviction rate. *See* Larry Laudan, The Anamoly of Affirmative Defenses 12 (July 28, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1183363 (asserting that "imposing a burden of production . . . makes it less likely that an innocent defendant will be able to win an acquittal").

7. *See* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 509 (1989) (asserting that the reasonable doubt rule "in effect tells the jury that when deciding if the defendant has violated the criminal law, the greater injustice would be in wrongfully condemning someone who was not criminally responsible").

8. SIR WILLIAM BLACKSTONE, THE COMMENTARIES OF SIR WILLIAM BLACKSTONE, KNIGHT, ON THE LAWS AND CONSTITUTION OF ENGLAND 463 (Am. Bar Ass'n 2009) (1769). This Note does not endorse or reject Blackstone's thesis but merely asserts it for the purpose of the forthcoming analysis.

9. Laudan, *supra* note 6, at 7 (emphasis omitted).

10. This Note does not endorse or reject the reasonable doubt standard (aside from calling for consistency in its application). It is also important to mention that this standard cannot realistically produce the Blackstone ratio in American criminal trials. *See* Larry Laudan, The Elementary Epistemic Arithmetic of Criminal Justice 5 (June 29, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1152882 (showing that a 5% false conviction rate and more than a two-thirds overall conviction rate—realistic numbers—cannot produce a false-acquittal-to-false-conviction ratio of 10:1). But again, this Note applies the Blackstone thesis for consistency in the numbers, not because it is necessarily correct.

11. Laudan, *supra* note 6, at 6.

consensus regarding the respective costs of errors. Because the reasonable doubt standard seeks to reach the appropriate ratio of false acquittals to false convictions, lowering the standard "fl[ies] in the face of the Blackstonian thesis that false acquittals are less costly than false convictions."[12]

That is true not just regarding innocence versus guilt, but also regarding the particular crime committed.[13] The Supreme Court has stated, for example, that "it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter."[14] In other words, in order to find that the defendant's actions constitute murder and not merely manslaughter requires that a higher standard of proof be employed than preponderance of the evidence in order to respect the relative costs of errors. According to the spirit of case law interpreting the Due Process Clause, this finding requires proof beyond a reasonable doubt.[15]

III. Case Law

Like an accordion, the Supreme Court expanded the scope of the reasonable doubt standard and then contracted it. While arguably the Court merely interpreted the standard narrowly, consistent with precedent, this Part will show how the Court retreated from the expansive spirit of the holding of *In re Winship*.[16] First, Part III discusses how *Winship* constitutionalized the reasonable doubt standard for criminal trials.[17] Second, Part III discusses *Mullaney v. Wilbur*,[18] which enforced the reasonable doubt requirement with respect to affirmative defenses and which represents the closest the Court has come to instituting an expansive procedural approach to the burden of proof for affirmative defenses.[19] Finally, Part III analyzes both sides of *Patterson v. New York*,[20] which reduced the constitutional protection from conviction based on less than reasonable doubt to a formalistic shell game.[21]

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12. *Id.* at 8.

13. *See* Mullaney v. Wilbur, 421 U.S. 684, 697–98 (1975) (recognizing that criminal law "is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability").

14. *Id.* at 703–04 (paraphrasing Justice Harlan's *Winship* concurrence).

15. *See* Patterson v. New York, 432 U.S. 197, 223 (1977) (Powell, J., dissenting) ("Perhaps the Court's interpretation of *Winship* is consistent with the letter of the holding in that case. But little of the spirit survives.").

16. 397 U.S. 358 (1970).

17. *See id.*

18. 421 U.S. 684 (1975).

19. Sundby, *supra* note 7, at 466. This Article states that under a procedural approach, "the reasonable doubt rule[] attaches to all facts included within the legislature's definition of a crime," *id.* at 463, and that expansive proceduralism [sic] "would attach the [reasonable doubt] rule to every fact affecting the defendant's criminal liability," *id.* at 465.

20. 432 U.S. 197 (1977).

21. *See id.*

A. *In re Winship*

In *Winship*, a New York family court judge determined that the defendant was a delinquent because he committed what would have been larceny if he were an adult.[22] While the judge acknowledged that there might have been reasonable doubt, he made the determination under a state statute requiring only a preponderance of the evidence in a juvenile adjudicatory hearing.[23] Both the Appellate Division and the New York Court of Appeals affirmed.[24] Reversing, the Supreme Court held that juveniles are entitled to the same protections as adult criminal defendants and that the Constitution requires proof beyond a reasonable doubt for conviction.[25] The Court made the latter point clear: "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[26]

In so holding, the Court reiterated the principles that guide this analysis. The majority wrote that "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."[27] Justice Harlan, concurring, invoked the underlying principle: "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[28]

B. *Mullaney v. Wilbur*

Before the Court reined in the scope of the reasonable doubt standard in *Patterson*, it interpreted it broadly in *Mullaney*. In *Mullaney*, the jury convicted the defendant of murder, though he claimed that the homicide in question was manslaughter at most.[29] The Maine murder statute stated: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life."[30] The manslaughter statute stated: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be

22. *In re* Winship, 397 U.S. 358, 359–60 (1970).

23. *Id.* at 360.

24. *Id.*

25. *Id.* at 364, 368.

26. *Id.* at 364.

27. *Id.* at 363–64.

28. *Id.* at 372 (Harlan, J., concurring). It is important to note that one can accept a lower standard of proof and still comply with the value determination Harlan cites. Again, this Note does not accept or reject the reasonable doubt standard as the best choice.

29. 421 U.S. 684, 685 (1975).

30. *Id.* at 686 n.3 (quoting ME. REV. STAT. ANN. tit. 17, § 2651 (1964) (repealed 1975)).

punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years . . . ."[31] Assuming the prosecution proved the other elements of murder beyond a reasonable doubt, the trial court required Wilbur to prove by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to get a verdict for manslaughter instead of murder.[32] A federal district court granted Wilbur's petition for a writ of habeas corpus, recognizing that under Maine law "[m]alice aforethought is made the distinguishing element of the offense of murder, and it is expressly excluded as an element of the offense of manslaughter."[33] The Court of Appeals for the First Circuit affirmed.[34]

The Supreme Court affirmed, relying on the principle of relative costs of errors:

> Under [a preponderance standard] a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter.[35]

The Court further suggested that this principle was constitutionally enshrined by *Winship*: "By drawing this distinction [between murder and manslaughter], while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*."[36] Responding to the argument that the *Winship* mandate should extend only to "those facts that constitute a crime as defined by state law," the Court stated, "*Winship* is concerned with substance rather than this kind of formalism."[37] But that is exactly the kind of formalism upon which *Patterson* turned.

C. *Patterson v. New York*

The salient facts in *Patterson* were much the same as those in *Mullaney*.[38] The jury convicted Patterson of murder, but he sought a manslaughter conviction instead by asserting the defense of extreme emotional disturbance.[39] The elements of the relevant New York murder

31. *Id.* (quoting ME. REV. STAT. ANN. tit. 17, § 2551 (1964)).
32. *Id.* at 686.
33. *Id.* at 688 (quoting Wilbur v. Robbins, 349 F. Supp. 149, 153 (Me. 1972)).
34. *Id.* at 689.
35. *Id.* at 703–04 (citing *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).
36. *Id.* at 698.
37. *Id.* at 698–99.
38. *See generally* Patterson v. New York, 432 U.S. 197, 197–98, *Mullaney*, 421 U.S. at 684–85.
39. *Patterson*, 432 U.S. at 199–200.

statute were the intent to cause the death of another person and the result of the death of that person or another.[40] The statute also provided for an affirmative defense, separate from the elements of the crime, where "[t]he defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse."[41] A person was guilty of only manslaughter when he killed someone "under circumstances which d[id] not constitute murder because he act[ed] under the influence of extreme emotional disturbance."[42] New York required Patterson to prove by a preponderance of the evidence that he acted under extreme emotional disturbance.[43] The state appellate courts and U.S. Supreme Court affirmed the conviction.[44]

The Court relied on both precedent and politics in its decision. The Court cited *Leland v. Oregon*[45] and *Rivera v. Delaware*,[46] which held that a state can require a criminal defendant to prove the affirmative defense of insanity.[47] Further, the Court expressed concern that requiring proof beyond a reasonable doubt for the affirmative defense of extreme emotional disturbance would encourage the legislature to abandon the defense altogether: New York "was willing to [provide the affirmative defense of extreme emotional disturbance] only if the facts making out the defense were established by the defendant with sufficient certainty."[48] The Court stated in its opinion, "To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate."[49]

Justice Powell, dissenting, recognized that the distinction the majority drew between *Mullaney* and this case was improperly formalistic.[50] Powell warned that the majority's holding "allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the

40. *Id.* at 198 (quoting N.Y. PENAL LAW § 125.25 (McKinney 1975)).

41. *Id.* (quoting N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1975)).

42. *Id.* at 199 (quoting N.Y. PENAL LAW § 125.20(2) (McKinney 1975)).

43. *Id.* at 200.

44. *Id.* at 200–01.

45. 343 U.S. 790 (1952).

46. 429 U.S. 877 (1976).

47. *Rivera*, 429 U.S. at 877 (dismissing summarily for want of a substantial federal question, thereby upholding a law that required a defendant to prove insanity by a preponderance of the evidence); *Leland*, 343 U.S. at 792, 802 (upholding a law that required a defendant to prove insanity beyond a reasonable doubt).

48. *Patterson*, 432 U.S. at 207. This argument will be further discussed *infra* Part VI.A.

49. *Id.* at 209.

50. *Id.* at 221 (Powell, J., dissenting) ("The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's. It does so on the basis of distinctions in language that are formalistic rather than substantive.").

crime."[51] Indeed, let us hypothesize that the Maine murder statute in *Mullaney* had been redrafted as follows: "Whoever intentionally kills a human being is guilty of murder and shall be punished by imprisonment for life. It is an affirmative defense that the defendant acted without malice aforethought." Under *Patterson*, simply by eliminating malice aforethought as an element of murder and making its absence an affirmative defense, Maine could constitutionally shift the burden of proof to the defendant and lower the standard of proof for the prosecution. That is too easy a shift for a standard that society has determined renders the best approximation of the proper distribution of errors in criminal trials.

It also denigrates the spirit of *In re Winship*.[52] Justice Powell stayed true to the principles established in *Winship*:

> Explaining *Mullaney*, the Court says today, in effect, that society demands full confidence before a Maine factfinder determines that heat of passion is missing—a demand so insistent that this Court invoked the Constitution to enforce it over the contrary decision by the State. But we are told that society is willing to tolerate far less confidence in New York's factual determination of precisely the same functional issue. One must ask what possibly could explain this difference in societal demands.[53]

Whatever the explanation, it is not based on a principled approach to the standard of proof.

IV. The Need for a Principled Approach

This Note proceeds on the assumption that a principled approach to the standard of proof for affirmative defenses is one that gives full effect to the principles discussed in Part II. The drafting game that a legislature can play makes clear the need for such an approach. The prevalence of affirmative defenses also raises the stakes.[54] Significantly, the epistemic problems surrounding criminal law in general also necessitate a principled approach to affirmative defenses. Because we are not omniscient beings and because society has accepted the reasonable doubt standard as the best way to approximate the proper distribution of errors in criminal trials, it is essential to apply that standard robustly.[55] Part IV illustrates that contention

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51. *Id.* at 223.

52. *See id.* ("Perhaps the Court's interpretation of *Winship* is consistent with the letter of the holding in that case. But little of the spirit survives. Indeed, the Court scarcely could distinguish this case from *Mullaney* without closing its eyes to the constitutional values for which *Winship* stands.").

53. *Id.* at 224.

54. *See* Laudan, *supra* note 6, at 2 (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 221 (1966)) ("Fully one third of all criminal trials alleging violent acts turn on an affirmative defense.").

55. *Cf.* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive

in two ways. First, Part IV explains how the political argument in *Patterson* can cut both ways and how our lack of knowledge demands stronger application of the reasonable doubt standard. Second, Part IV illustrates how synching the standard of proof for affirmative defenses with the Blackstonian thesis carries undesirable implications.

A. The Political Argument in *Patterson*

The majority in *Patterson* suggested that requiring proof of the absence of mitigating factors beyond a reasonable doubt may convince legislatures to abandon the affirmative defense of extreme emotional disturbance because they may "fear[] that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state."[56] Essentially, the Court was predicting that legislatures would determine that under a reasonable doubt standard, the ratio of manslaughter convictions for murderers to murder convictions for manslaughterers would be too high.[57] The Court was correct in saying that "more subtle balancing of society's interests against those of the accused ha[s] been left to the legislative branch."[58] But balancing the costs of errors in criminal trials had already been done by society, and the Court in *Winship* found the resulting balance reached by society to be of constitutional significance.[59] While it is impossible to know exactly how many errors will be committed in either direction, American criminal law fundamentally incorporated the reasonable doubt standard into criminal trials to best approximate the proper ratio. Absent proof that the false mitigation to false aggravation ratio would be too high, legislatures should be held to society's determination by application of the reasonable doubt standard to affirmative defenses. The New York legislature did not have such proof at the time of *Patterson*, and we do not have it now.

Moreover, allowing state legislatures to subvert the reasonable doubt standard risks that they will do so even when it is unnecessary for political purposes. While the *Patterson* Court was worried that legislatures would abandon affirmative defenses,[60] it is at least equally worrisome that legislatures will take advantage of the opportunity to ease the burden on the prosecution even if they would not otherwise abandon the affirmative defense. As one example, Ohio requires a defendant to prove self-defense

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guarantee. . . . The Clause thus reflects a judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined.").

56. *Patterson*, 432 U.S. at 207.

57. *See id.*

58. *Id.* at 210.

59. *See In re* Winship, 397 U.S. 358, 363–64 (1970) ("[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.").

60. *See Patterson*, 432 U.S. at 207.

by a preponderance of the evidence.[61] It is difficult to imagine that, were proof beyond a reasonable doubt required, Ohio would disallow self-defense as a defense to prosecution. Because we do not—and perhaps cannot—know which defenses would be abandoned were proof beyond a reasonable doubt required and which would be used to ease the burden on the prosecution were it not required, the prudent approach is to stick to first principles and apply the reasonable doubt standard.

B. The Blackstonian Thesis

Blackstone insinuated that there should be at least ten false acquittals for every false conviction.[62] It is possible that shifting the burden to the defendant for affirmative defenses brings the ratio of errors closer to that number, but acting on that possibility without more knowledge comes at a great cost. To illustrate, assume that the reasonable doubt standard does in fact create the Blackstone ratio in criminal trials that do not include claims of affirmative defenses. Specifically, imagine 100 criminal trials in which there are eighty actually-guilty defendants and twenty actually-innocent ones.[63] Then suppose that there are forty-four convictions, four of which are false. Thus, there would be forty false acquittals to four false convictions—a truly Blackstonian outcome. These numbers are shown in Table 1.

Table 1: 100 Criminal Trials Under a Reasonable Doubt Standard Without Affirmative Defense Claims

	Total	Acquittals	Convictions	False Acquittals to False Convictions = 10:1
Actually Guilty	80	40 (50% error)	40	
Actually Innocent	20	16	4 (20% error)	

61. *See* OHIO REV. CODE ANN. § 2901.05(A) (West 2011) ("The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused."); *id.* § 2901.05(D)(1)(b) ("An 'affirmative defense' is . . . [a] defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence."); State v. Goff, 942 N.E.2d 1075, 1082 (Ohio 2010) ("Self-defense is an affirmative defense . . . ."). The Supreme Court upheld this practice in *Martin v. Ohio*, 480 U.S. 228 (1987).

62. *See* BLACKSTONE, *supra* note 8.

63. These numbers and the ones that follow are unrealistic but were chosen to make the math easier.

Next, assume that in 100 criminal trials including claims of affirmative defenses, there are ninety actually-guilty defendants and ten actually-innocent defendants. Following the same rate of error as in Table 1 (because we are employing the same standard of proof), there would be forty-five false acquittals to two false convictions—a ratio of 22.5:1. These numbers are shown in Table 2. Under a Blackstonian approach, it would be prudent to lower the standard of proof. That would raise the number of convictions by easing the burden on the prosecution. Thus, in the affirmative defense hypothetical, a preponderance of the evidence standard would yield sixty-three convictions, three of which are false. That would be thirty false acquittals to three false convictions—a perfect 10:1 ratio. These numbers are shown in Table 3.

The problem is the assumption that this analysis requires. In order to bring the too-high ratio in affirmative defense cases closer to the proper ratio in non-affirmative defense cases, we must lower the standard of proof. That reflects the fact that out of the 100 defendants who did not claim an affirmative defense and the 100 that did claim one, there were more actually-guilty defendants in the group asserting affirmative defenses. In other words, lowering the standard of proof for affirmative defenses is proper only if we know that those defendants who assert affirmative defenses are more likely to be actually guilty.

Table 2: 100 Criminal Trials Under a Reasonable Doubt Standard With Affirmative Defense Claims

	Total	Acquittals	Convictions	False Acquittals to False Convictions = 22.5:1
Actually Guilty	90	45 (50% error)	45	
Actually Innocent	10	8	2 (20% error)	

Table 3: 100 Criminal Trials Under a Preponderance of the Evidence Standard With Affirmative Defense Claims

	Total	Acquittals	Convictions	False Acquittals to False Convictions = 10:1
Actually Guilty	90	30 (33% error)	60	
Actually Innocent	10	7	3 (30% error)	

If we were omniscient, it might make sense to manipulate the standard of proof depending on the circumstances.[64] For example, if we knew that burglary defendants were more often actually guilty than arson defendants, it might be prudent to assign a relatively lower standard of proof for burglary defendants in order to reach the ideal ratio of false acquittals to false convictions. But we do not possess such knowledge;[65] thus, the reasonable doubt standard, with its robust procedural protection, is the appropriate standard for approximating the proper distribution of errors.

V. A Principled Approach

Knowing that there exists a need for a principled approach to affirmative defenses, and knowing what broad principles must underlie such an approach, fashioning a proper approach is simple. First, assume the truth of the affirmative defense asserted. Second, ask whether the defendant nonetheless committed the crime assuming that the prosecution proved all other elements beyond a reasonable doubt. If so, then the prosecution need not prove the absence of the affirmative defense at all, let alone beyond a reasonable doubt.[66] If not, then the reasonable doubt standard should apply to the affirmative defense. This approach is illustrated in Figure 1.

This approach avoids the formalistic shell game created by *Patterson* because it is "label neutral in that it views the constitutional threshold not as resting on how the state uses the factor—as a defense, a presumption, or as part of the crime's definition—but on the state's decision to use the factor as a basis for determining criminal guilt and punishment."[67] For example, *Mullaney* turned on the fact that malice aforethought was the distinguishing factor between murder and manslaughter.[68] If we assume the truth of the defense—that the defendant lacked malice aforethought—then it is clear that the defendant committed manslaughter at most, not murder. Thus, the prosecution should have to prove malice aforethought beyond a reasonable doubt to get a murder

64. An appropriate challenge for further investigation is to compare the false conviction rates for cases involving affirmative defense in jurisdictions requiring the prosecution to prove the absence of the defense beyond a reasonable doubt versus jurisdictions requiring the defendant to prove the existence of the defense by a preponderance of the evidence. One should expect that the false conviction rate is higher in those jurisdictions requiring the defendant to meet the preponderance standard.

65. For some data on false acquittal rates, see Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1175–86 (2005); KALVEN & ZEISEL, *supra* note 54. While there is some knowledge out there, it has not been sorted by case type.

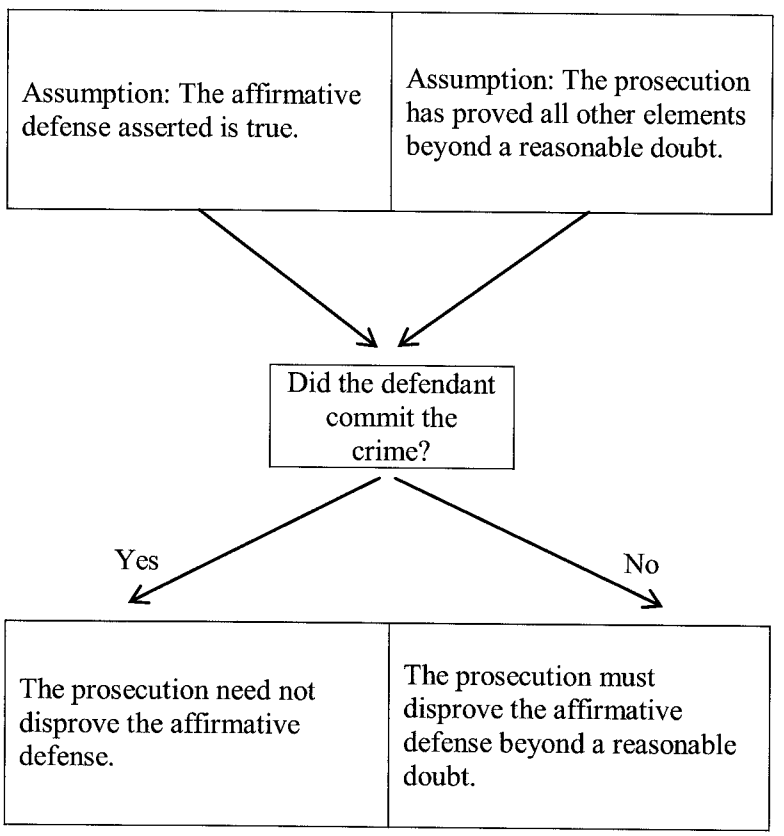
66. It is debatable whether claims of affirmative defenses that do not assume the truth of the other elements such as the running of the statute of limitations or diplomatic immunity ought to trigger the reasonable doubt standard. For an argument that they should not, see Laudan, *supra* note 6, at 13–15. For the purposes of the test explained above, it depends on whether the truth of the affirmative defense asserted negates the commission of a crime or merely the liability for the crime. That is beyond the scope of this Note.

67. Sundby, *supra* note 7, at 465.

68. *See* Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

conviction. That analysis holds true even if the absence of malice aforethought, like the presence of extreme emotional disturbance in *Patterson*,[69] had been listed as an affirmative defense rather than as an element of the crime. If we assume the absence of malice aforethought, it is still clear that the defendant committed manslaughter, not murder. The reasonable doubt standard should apply. Another way of making the same point is that a defendant asserting an affirmative defense "is not admitting the allegations and asserting exculpating extrinsic matter. Rather, such a person is denying having done that which the statute prohibits."[70]

Figure 1: A Principled Approach to the Standard of Proof for Affirmative Defenses in Criminal Trials



As another illustration of this approach, consider self-defense. A defendant claiming self-defense is simply claiming that he did not commit murder. Because he would be correct if the killing were in fact in self-defense, regardless of where that defense was written in the code, the

69. *See* Patterson v. New York, 432 U.S. 197 (1977).

70. John Quigley, *The Need to Abolish Defenses to Crime: A Modest Proposal to Solve the Problem of Burden of Persuasion*, 14 VT. L. REV. 335, 354 (1990).

reasonable doubt standard should apply. Even if the defense were listed as an affirmative defense, there is no substantive difference between claiming self-defense and claiming that the killing was an accident—both are denials of a killing committed with a necessary state of mind.[71] Because the prosecution would be required to prove beyond a reasonable doubt that the killing was not an accident, the same burden should apply for the claim of self-defense.

The approach laid out here squares with the prosecutorial burden of proving guilt beyond a reasonable doubt and with the underlying analysis of the relative costs of errors because the approach requires a standard of proof that society has accepted as the best method of achieving the ideal ratio of false acquittals to false convictions.

VI. Objections

Part VI considers and responds to objections to the approach laid out in Part V. After considering traditional arguments that turn on the defendant's particular knowledge and proving a negative, Part VI addresses the political argument discussed in *Patterson*[72] and developed by Professors Jeffries and Stephan. Part VI then addresses Professor Stein's objection with respect to excusatory affirmative defenses.

A. Particular Knowledge and Proving a Negative

Two arguments often advanced for why the defendant should be required to prove an affirmative defense by the preponderance of the evidence are that such defenses concern facts within his particular knowledge and that it is unfair to require the prosecution to prove a negative. Because these arguments have been effectively dispensed with elsewhere,[73] it suffices to discuss them only briefly.

First, the defendant's particular knowledge should not, and does not, justify placing the burden on him and lowering the standard for the prosecution. If particular knowledge determined the burden of proof, then defendants should be required to prove, for example, alibis (they have particular knowledge of where they were) or, especially, states of mind (they have particular knowledge of their own thoughts). Indeed, under this rationale, perhaps "to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much."[74] The burden should be the prosecution's regardless of the defendant's particular knowledge.

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71. *See id.* ("There is no distinction in principle between an assertion of self-defense and an assertion of lack of *mens rea* based on any other reason . . . .").

72. *See* discussion *infra* Part IV.

73. *E.g.*, Laudan, *supra* note 6, at 11–12.

74. Tot v. United States, 319 U.S. 463, 469 (1943).

Second, it is not unfair—and indeed it is commonplace—to require the prosecution to prove a negative. For example, *Mullaney* pointed out that Maine itself required (at the time) that the prosecution prove the absence of self-defense.[75] More fundamentally, proving a negative is no more difficult than proving a positive[76]: "I was not there at the time of the crime" (negative) is just as easy to prove as "I was somewhere else" (positive), and proving "He did not act in the heat of passion" (negative) is the same as proving "He acted with malice aforethought" (positive).

B. The Political Objection

The argument that lowering the standard of proof is necessary for keeping some affirmative defenses available at all merits more attention. Present in *Patterson*, this argument was developed later by Professors Jeffries and Stephan.[77] Like the *Patterson* majority, Jeffries and Stephan argue that requiring proof beyond a reasonable doubt for affirmative defenses is illogical because it "would allow the government to abolish a given ground of exculpation, but not to retain it as an affirmative defense."[78] Further, "a rule barring reallocation of the burden of proof would thwart legislative reform of the penal law and stifle efforts to undo injustice in the traditional law of crimes" by discouraging legislatures from adding new affirmative defenses.[79]

Aside from the responses discussed in Part IV.A, *supra*, there are at least three other responses. First, there are competing principles at stake. While Jeffries and Stephan make a consequential argument, the *Patterson* dissent points out that allowing states to lower the standard of proof "surrenders to the legislative branch a significant part of [the Court's] responsibility to protect the presumption of innocence."[80] Second, the consequences Jeffries and Stephan worry about would be rare: "[I]t is unlikely that more than a few factors—although important ones—for which a shift in the burden of persuasion seriously would be considered will come within the *Mullaney* holding."[81] In other words, most ameliorative factors proposed by a legislature would be those for which a shift in the burden of proof is permissible. One example would be a statute allowing for lesser punishment if an armed robber proves by a preponderance of the evidence that he used an unloaded or inoperative gun.[82] This approach is consistent with that proposed in Part V: because the defendant still committed armed

75. Mullaney v. Wilbur, 421 U.S. 684, 702 (1975).

76. *See* Laudan, *supra* note 6, at 11 ("Having to prove a negative, as legal vernacular conceives it, is no different epistemically from having to prove a positive and sometimes it is much easier.").

77. Jeffries & Stephan, *supra* note 4.

78. *Id.* at 1345.

79. *Id.* at 1353.

80. Patterson v. New York, 432 U.S. 197, 216 (1977) (Powell, J., dissenting).

81. *Id.* at 229.

82. *Id.* (citing N.Y. PENAL LAW § 160.15 (McKinney 1975)).

robbery regardless of whether the gun he used was operative, the legislature is justified in requiring him to bear the burden of mitigating the offense.[83] Additionally,

> [F]actors that currently result in acquittal are not legislative flights of fancy likely to be cast away in a huff simply because the burden of proof has been changed. When a legislature decides that a factor should justify or excuse certain behavior from criminal responsibility, such a decision reflects a studied view that society would not condemn such behavior.[84]

Finally, there is the Miles Davis response: So what?[85] Even if legislatures cannot reduce the standard of proof, they can "tighten the substantive requirements for the factor to operate as a justification or excuse. For example, a legislature may require an objective standard for self-defense and add requirements that an individual must avail himself of a safe retreat."[86] Or the legislature could simply abolish the defense.[87] That might not be so bad: "[M]uch can be said for requiring a legislature to decide if a particular factor is so important to societal perceptions of criminal responsibility that an individual should not be convicted if a reasonable doubt exists that the factor was present."[88]

C. The Justification–Excuse Distinction

Another objection comes from Professor Stein, who argues that while justificatory defenses are granted as a matter of entitlement and should require proof beyond a reasonable doubt of their absence, excusatory defenses—such as insanity—are granted as a matter of leniency and may subject the defendant to a burden-shift and lower the standard of proof.[89]

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83. *See* discussion *supra* Part V.

84. Sundby, *supra* note 7, at 503; *see also supra* text accompanying note 61 (arguing that self-defense would not be abandoned if the reasonable doubt standard were required).

85. *Cf.* MILES DAVIS, *So What*, *on* KIND OF BLUE (Columbia Records 1959).

86. Sundby, *supra* note 7, at 502.

87. *See* Patterson v. New York, 432 U.S. 197, 228 (1977) (Powell, J., dissenting) ("[N]othing in *Mullaney* or *Winship* precludes a State from abolishing the distinction between murder and manslaughter and treating all unjustifiable homicide as murder.").

88. Sundby, *supra* note 7, at 504. The considerations in the above paragraph should comfort politicians who worry that were proof beyond a reasonable doubt required, they would be voted out of office if they did not abolish a particular defense altogether. First, as noted above, legislatures can take steps to constrain the use of defenses while still applying the reasonable doubt standard when they are used. Second, if the reasonable doubt standard were required for any defense that exists at all, legislatures that decide that particular defenses in fact negate criminal responsibility can shift the blame for what voters may consider an excessively high burden. But when politicians can choose among the whole gamut of standards of proof, they have an incentive to compromise by making defenses available with a lower standard for the prosecution. That is another reason it is important to reinvigorate the constitutional principles from *Winship*—politicians should not have that choice given the choices society has made regarding the standard of proof and distribution of errors in criminal trials.

89. ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 180–83 (2005).

Stein argues that assigning a preponderance of the evidence standard would "minimize[] the incidence of errors in fact-finding and produce[] the greatest possible number of correct decisions."[90] Assuming the truth of that statement,[91] this is true as applied to *any* legal issue. Thus, under that rationale preponderance of the evidence should *always* be the standard of proof. But *Winship* made sure that was not the case decades ago.[92]

Stein also worries that excusatory defenses could turn into norms if the reasonable doubt standard applies: "[S]uch verdicts must not crystallize into norms upon which individuals can rely and plan their actions. If the benefit of doubt were granted to every criminal defendant invoking an excuse, the excuse would then rapidly transform into a norm, which would dilute deterrence to the detriment of society."[93] But the norms argument cuts both ways: The *Winship* opinion asserted, "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[94] Use of any lesser standard than reasonable doubt would fail to "command the respect and confidence of the community in applications of the criminal law."[95]

More fundamentally, "What matters for our purposes is [whether] one is legally blameless. . . . There is, in other words, no criminal liability associated with such actions."[96] Whether one claims a justification or an excuse, the dispositive question is whether the defendant, assuming the truth of the asserted defense, committed the crime in question. If the defense negates the crime, then the reasonable doubt standard should apply.

VII. Recommendations

A. Reconsider First Principles

This Note's analysis rests on the assumption that the reasonable doubt standard is the proper mechanism for reaching an ideal distribution of errors in criminal trials. While it is an assumption that society has accepted and implemented, it is one that may fairly be questioned. If it is found that a lower standard of proof would be more appropriate, then it would also be appropriate to overturn *Winship* and impose a lower standard of proof for affirmative defenses and for all crimes in general.

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90. *Id.* at 181–82.

91. It is certainly true when there are an equal number of actually guilty defendants and actually innocent ones, but it may not be when the balance of actually guilty and innocent defendants is skewed. For example, imagine if *all* criminal defendants were actually guilty. The best way to minimize fact-finding errors in that case would be to require zero proof and just convict everyone as a matter of course.

92. *See In re* Winship, 397 U.S. 358 (1970).

93. STEIN, *supra* note 89, at 182.

94. *Winship*, 397 U.S. at 364.

95. *Id.*

96. Laudan, *supra* note 6, at 6.

B. Close the Knowledge Gap

Determining the actual rates of error in criminal trials with respect to convictions of actually-innocent defendants and acquittals of actually-guilty defendants would represent a step toward discovering appropriate standards of proof in different circumstances. In the meantime, the reasonable doubt standard, currently believed to yield the best approximation regarding error distribution, must suffice for affirmative defenses as well as for proving the elements of offenses.

C. Overturn *Patterson*

Given that only a robust application of the reasonable doubt standard to affirmative defenses adheres to the spirit of *Winship*, the Court should overturn *Patterson* and reinvigorate the reasonable doubt standard.

D. State Constitutional Amendments

Even if the Supreme Court does not extend *Winship*'s level of protection, states may extend it themselves. States should constitutionalize the reasonable doubt standard (if the standard is not replaced altogether) with respect to affirmative defenses.

E. Legislation

Even though legislatures currently can shift the burden of proof to defendants for affirmative defenses, "constitutional authority is one thing; good reasons are quite another."[97] Legislatures should address whether they believe a particular defense is exculpatory, and, if the answer is yes, the reasonable doubt standard should necessarily follow.

Moreover, even if some affirmative defenses currently are tethered to a preponderance of the evidence standard, and even if they would not have come into existence had their required standard of proof been beyond a reasonable doubt, it is time to raise the standard of proof for affirmative defenses.

VIII. Conclusion

The requirement of proof beyond a reasonable doubt for criminal trials, and the underlying belief that convicting the innocent is far worse than acquitting the guilty, requires that the prosecution bear the burden of proving the absence of an affirmative defense beyond a reasonable doubt. Allegiance to that conclusion would prevent legislatures from resorting to formalistic escape tactics in order to ease the prosecution's burden. Further,

97. Laudan, *supra* note 6, at 9–10.

the reasonable doubt standard has been determined to be the best way to approximate the appropriate distribution of errors in criminal trials given the lack of complete knowledge in this arena. Specifically, the reasonable doubt standard should apply to any affirmative defense the truth of which would negate the commission of the crime. The Supreme Court should constitutionalize that approach; if not, then states should. If states do not, then legislative bodies should maintain the reasonable doubt standard with respect to affirmative defenses.

Note

Fishing with Landmines: Healthcare Fraud and the Civil False Claims Act—Where We Are, How We Got Here, and the Case for More Trials

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I. Introduction

According to the Kaiser Family Foundation, the United States spent almost $2.6 trillion on healthcare in 2010.[1] The FBI estimates that 3%–10% of that spending went towards what might be loosely described as

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1. KAISER FAMILY FOUNDATION, HEALTH CARE COSTS: A PRIMER 1 (2012), *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7670-03.pdf.

"healthcare fraud."[2] If those figures are accurate, then the losses to fraud are nothing short of staggering. In light of this fact, it is no surprise that policy makers are eager to get this money back. President Obama and the Democrats must fund their massive and extremely expensive new healthcare plan, and the Republicans want to slash the deficit. These facts make healthcare fraud one of the few subjects upon which policymakers from both major political parties can agree. As a result of this consensus, Congress has endowed federal agencies with a number of tools to wage war on healthcare fraud. Of those tools, one in particular stands out—the civil False Claims Act (FCA). Indeed, prosecutors are using the FCA to bring in record recoveries, most of which come through settlements.

It is not a coincidence that the government's biggest recoveries come from settlements rather than trials. When dealing with healthcare companies, the government possesses unique powers that they can deploy to coerce opposing parties to waive their right to a trial. Specifically, federal prosecutors can threaten defendants with exclusion from Medicare and Medicaid.[3] For a healthcare company, exclusion amounts to a death sentence—"large organizations have such a large stake in avoiding exclusion from Medicare that they readily settle pending charges, making much of fraud control resemble a rebate program more than a law enforcement exercise."[4]

This Note seeks to explore three central questions relating to the civil False Claims Act: (1) Where are we? (2) How did we get here? and (3) Where should we go? This Note's central argument is that the present FCA enforcement regime hinders the development of the common law and punishes the innocent due to a number of factors that, when combined, preclude even innocent parties from fighting an FCA accusation. After exploring why the present state of affairs harms the innocent and distracts government attention away from egregious law breakers, this Note makes a simple but important suggestion for how Congress might remedy this situation—encourage more jury trials. In particular, this Note argues that Congress should make the government choose whether to bring a civil or criminal case, amend the exclusion rules to permit exclusion only of entities convicted of a felony or companies that have lost three separate civil FCA cases to the government over a fifteen year period, and, finally, limit available damages in instances where the government opts not to intervene in a *qui tam* case. These changes will not adversely affect the government's ability to leverage the threat of criminal charges against entities that have acted in ways that leave those entities open to criminal liabilities, nor will they hinder the government's ability to convince companies that have clearly violated the civil FCA to settle. However, these changes will permit

2. *Healthcare Matters: Fighting Fraud and Abuse, Funding Reform*, THOMPSON REUTERS, http://info.thomsonhealthcare.com/?elqPURLPage=475.

3. *See* 42 U.S.C. § 1320a-7 (2006); *see infra* Part IV.A.

4. William M. Sage, *Fraud and Abuse Law*, 282 J. AM. MED. ASS'N 1179, 1180 (1999).

parties that do not believe they have done anything wrong to fight accusations in court. In doing so, this revised system will encourage the development of the common law, which will have the effect of making the law clearer to the law's enforcers and subjects.

II. Where Are We?

When the government closed the books on its 2011 fiscal year on September 30, 2011, the feds happily reported staggering FCA recoveries to the tune of over $3.03 billion.[5] When one combines the 2011 fiscal recoveries with the FCA recovery figures dating back to January 2009, the sum comes out to almost $9 billion.[6] And while 2011's haul was only the third highest recovery of all time, it marked the second straight year that recoveries cracked the $3 billion mark.[7] Adding in the recoveries paid to the states under the Medicaid program, 2011's recovery total moves north of the $4 billion mark.[8]

These figures reflect more than an increase in government scrutiny; whistleblower activity is at an all-time high.[9] Technically referred to as *qui tam* "relators," the FCA empowers (indeed, encourages) whistleblowers to bring actions on behalf of the government.[10] In return for "blowing the whistle," the FCA entitles whistleblowers to up to 30% of any recovery.[11] In 2011, such recoveries added up to $558 million in share awards.[12] At the time, 2011 qualified as the highest yearly recovery for *qui tam* relators in the long history of the FCA, and it outpaced the 2010 figure by over $166 million.[13] The private relators were hardly the only beneficiaries of the complaints they brought to the attention of federal and state investigators. The government recovered $2.8 billion in 2011 from cases initiated under the FCA's *qui tam* provisions.[14] In fact, whistleblowers brought more new

5. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Justice Department Recovers $3 Billion in False Claims Act Cases in Fiscal Year 2011 (Dec. 19, 2011) [hereinafter $3 Billion Press Release], *available at* http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html.

6. U.S. Dep't of Justice, *Fraud Statistics - Overview* (Dec. 7, 2011) [hereinafter *Fraud Statistics*], http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

7. *Id.*

8. *See FY 2011 False Claims Act Settlements (As of July 8, 2011)*, TAXPAYERS AGAINST FRAUD, http://www.taf.org/total2011.htm.

9. *See infra* notes 13, 30–31 and accompanying text.

10. *See* 31 U.S.C. § 3730(b)–(d) (2006) (providing that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government" and that "[t]he action shall be brought in the name of the Government," and allowing such an individual to retain up to 30% of any recovery); Joan H. Krause, *"Promises to Keep": Health Care Providers and the Civil False Claims Act*, 23 CARDOZO L. REV. 1363, 1371 (2002) ("[T]he FCA qui tam provisions allow private 'whistleblowers' who sue on the government's behalf to retain fifteen to thirty percent of the proceeds of the suit, creating a powerful incentive for private parties to police their neighbors in the health care market.").

11. 31 U.S.C. § 3730(d); *see supra* note 10.

12. *Fraud Statistics*, *supra* note 6.

13. *Id.*

14. $3 Billion Press Release, *supra* note 5.

matters in 2011 than in any prior year on record.[15] Since Congress amended the FCA in 1986,[16] whistleblowers have filed almost 8,000 *qui tam* actions.[17] To date, recovery from these post-amendment *qui tam* actions has been more than $3.8 billion.[18]

In addition to the incentives that the FCA provides for private parties to bring *qui tam* actions, the FCA includes a fee-shifting provision that makes bringing these cases lucrative business for the lawyers who bring them for a living.[19] Sometimes, courts hold that prevailing relators should receive an award of attorney's fees and costs *on top* of whatever fee arrangement the private party struck with counsel. For example, in *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*,[20] a Colorado district court awarded $2.18 million in statutory attorney's fees (roughly 28.8% of the actual damage award) to three different law firms *in addition to* the 55% contingency fee that the attorneys collected.[21]

A change in the political environment is also spurring the growth in FCA actions. In June 2011, the Obama Administration rolled out an initiative called the "Campaign to Cut Waste" designed to increase transparency and accountability in government spending.[22] Since the campaign began, federal prosecutors have recovered more than $5.6 billion in criminal and civil fraud-related proceeds.[23] That total made 2011 the single most lucrative year in the history of DOJ fraud recovery (prior to 2012), and the figure more than doubled the DOJ's 2008 recoveries.[24] Assistant Attorney General Tony West publicly boasted that "[t]wenty-eight percent of the recoveries in the last 25 years were obtained since President Obama took office," which "reflect[s] the extraordinary determination and effort that this administration, and Attorney General Eric Holder in particular, have put into rooting out fraud, recovering taxpayer money and protecting the integrity of government programs."[25]

During the first quarter of fiscal year 2012 (October through December 2011), the DOJ announced more than $1 billion in FCA

15. *Fraud Statistics*, *supra* note 6 (reporting that 638, or 84%, of the 762 total new FCA claims were brought by whistleblowers).

16. In 1986, Congress amended the False Claims Act to provide that whistleblowers who brought successful cases were entitled to 15%–30% of the government's total recovery. *See* 31 U.S.C. § 3730(d) (2006). After the 1986 amendments, defendants found guilty of violating the FCA were liable for $5,000–$10,000 per claim, plus treble damages. *Id.*

17. $3 Billion Press Release, *supra* note 5.

18. *Fraud Statistics*, *supra* note 6.

19. 31 U.S.C. § 3730(d)(2) (2006).

20. 793 F. Supp. 2d 1260 (D. Colo. 2011).

21. *Id.* at 1268.

22. Press Release, Office of the Press Sec'y, Campaign to Cut Waste: Vice President Biden Announces U.S. will Halt Production of Excess Dollar Coins and Department of Justice Recovered a Record $5.6 billion in Fraud in 2011 (Dec. 13, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/12/13/campaign-cut-waste-vice-president-biden-announces-us-will-halt-productio.

23. *Id.*

24. $3 Billion Press Release, *supra* note 5.

25. *Id.*

recoveries, including an eye-popping $950 million criminal and civil settlement ($628.36 million of which represents the civil FCA portion) with pharmaceutical behemoth Merck to dispose of allegations involving improper off-label promotion of Vioxx.[26] In October 2011, the government reeled in yet another settlement exceeding a billion dollars when Abbott Laboratories reserved $1.5 billion and agreed to pay at least $1.3 billion in civil and criminal fines to atone for alleged violations of the law related to its drug sales and marketing practices.[27] The federal government added to its October tally when it agreed to accept a $780 million check from Amgen to resolve allegations that it improperly marketed its drugs.[28] Then, in November, GlaxoSmithKline disclosed an agreement in principle to pay $3 billion to the federal government to resolve civil and criminal investigations arising out of allegations concerning its sales and marketing practices.[29] According to a pro-FCA organization called Taxpayers Against Fraud, the government recovered over $9 billion in fiscal year 2012.[30] Thus, 2012's recovery total almost tripled 2011's recovery total.[31]

III. How Did We Get Here?

Congress passed the FCA in 1863.[32] Since its enactment, the FCA has expanded far beyond its original scope, now covering "virtually any individual or entity that transacts business with the federal government."[33]

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26. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, U.S. Pharmaceutical Company Merck Sharp & Dohme to Pay Nearly One Billion Dollars Over Promotion of Vioxx® (Nov. 22, 2011), *available at* http://www.justice.gov/opa/pr/2011/November/11-civ-1524.html.

27. *See* Press Release, Abbott Laboratories, Abbott Reports Strong Ongoing Third Quarter Results; Confirms Double-Digit Ongoing Earnings Growth Outlook for 2011 (Oct. 19, 2011), *available at* http://www.abbott.com/news-media/press-releases/2011-oct19.htm.

28. Press Release, Amgen, Inc., Amgen's Third Quarter 2011 Revenue and Adjusted Earnings Per Share (EPS) Each Increased 3 Percent to $3.9 Billion and $1.40 (Oct. 24, 2011), *available at* http://www.amgen.com/media/media_pr_detail.jsp?year=2011&releaseID=1620695.

29. Press Release, GlaxoSmithKline plc, GlaxoSmithKline Reaches Agreement in Principle to Resolve Multiple Investigations with US Government (Nov. 3, 2011), *available at* http://www.gsk.com/media/press-releases/2011/glaxosmithkline-reaches-agreement-in-principle-to-resolve-multiple-investigations-with-us-government.html.

30. *FY 2012 is Record Year for FCA Recoveries*, TAXPAYERS AGAINST FRAUD (Oct. 10, 2012), http://www.taf.org/blog/fy-2012-record-year-fca-recoveries; *see also* Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), *available at* http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html ("The Justice Department secured $4.9 billion in settlements and judgments in civil cases involving fraud against the government in the fiscal year ending Sept. 30, 2012."). The difference between Taxpayer's Against Fraud's $9 billion figure and the Justice Department's announced figure is due to the fact that the Justice Department's figure does not include criminal fines or state recoveries. *See DOJ Hides Its Light Under a Barrell*, TAXPAYERS AGAINST FRAUD (Dec. 4, 2012), http://www.taf.org/blog/doj-hides-its-light-under-barrel ("When DoJ announces a False Claim Act recovery, they put the *total recovery* into their headline; a recovery that includes state Medicaid recoveries and criminal penalties . . . . When DoJ announces recoveries at the end of the year, however, they leave the criminal fines off the table, as well as the state recoveries.").

31. *Id.*

32. *See* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS, ch. 1 (2010) (chronicling the passage and development of the False Claims Act); *see also* Krause, *supra* note 10, at 1369 ("The

The most commonly deployed theory of FCA liability extends to any person or company that "[1] knowingly [2] presents, or causes to be presented, [3] a false or fraudulent claim for payment or approval."[34] To act "knowingly" does not require actual knowledge—recklessness or deliberate ignorance may also give rise to liability.[35] Furthermore, the statute does not require a "specific intent" to defraud the government.[36]

But the reach of the FCA does not stop here; it also applies to the making or use of false records "material to a false or fraudulent claim,"[37] bans conspiracies to "knowingly present[] . . . a false or fraudulent claim for payment or approval,"[38] and prohibits "reverse false claims"—using false records "to conceal[,] . . . avoid[,] or decrease[] an obligation to pay or transmit money or property to the Government."[39]

In *Allison Engine Co. v. United States ex rel. Sanders*,[40] the Supreme Court interpreted the FCA to require plaintiffs to prove that the defendant submitted a false claim with the intent of inducing the government to approve or pay a false or fraudulent claim, rather than merely defrauding a contractor.[41] Writing for a unanimous Court, Justice Alito emphasized the importance of this reading of the statute:

> Eliminating this element of intent, as the Court of Appeals did, would expand the FCA well beyond its intended role of combating "fraud against the *Government*." As the District of Columbia Circuit pointed out, the reach of § 3729(a)(2) would then be "*almost boundless*: for example, liability could attach for any false claim made to any college or

FCA was enacted in 1863 in response to 'rampant fraud' perpetrated on the Union Army during the civil war.").

33. Krause, *supra* note 10, at 1369–70.

34. 31 U.S.C. § 3729(a)(1)(A) (2006) ; *see also* Joan H. Krause, *Health Care Providers and the Public Fisc: Paradigms of Government Harm Under the Civil False Claims Act*, 36 GA L. REV. 121, 142–44 (2001) [hereinafter Krause, *Paradigms*] (describing the origins of the FCA and calculation of damages under the FCA).

35. 31 U.S.C. § 3729(b)(1)(A)(i)–(iii) (2012) ("[T]he terms 'knowing' and 'knowingly' . . . mean that a person, with respect to information . . . has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or falsity of the information . . . ."); *see also* Krause, *Paradigms*, *supra* note 34, at 139 ("Such "knowledge" includes deliberate ignorance and reckless disregard of the truth or falsity of the claim.").

36. *Id.* § 3729(b)(1)(B) ("[T]he terms 'knowing' and 'knowingly' . . . require no proof of specific intent to defraud.").

37. *Id.* § 3729(a)(1)(B).

38. *Id.* § 3729(a)(1)(A), (C).

39. *Id.* § 3729(a)(1)(G) ("[A]ny person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable . . . .").

40. 553 U.S. 662 (2008), *superceded by statute*, Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111–21, 123 Stat. 1617 (2009).

41. *Id.* at 669 ("[A] defendant must intend that the Government itself pay the claim.").

> university, so long as the institution has received some federal grants—as most of them do."[42]

In a move reflective of trends further explored in this Note,[43] Congress explicitly overruled *Allison Engine* when it passed FERA in 2009.[44] In doing so, the legislature made into statute the interpretation that the Supreme Court warned against.[45] Individuals who bring an action under the FCA's *qui tam* provisions are entitled to retain 15%–30% of any payout arising from the lawsuit.[46]

Given the myriad of potential applications of the FCA, it helps to break the kinds of false claims cases into six categories: (1) mischarges; (2) false negotiations; (3) false certifications of entitlement; (4) substandard products and services; (5) reverse false claims; and (6) indirect reverse false claims.[47] This Note briefly explores each category below.

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42. *Id.* (second emphasis added) (internal citations omitted).

43. *See infra* Parts III.A–E.

44. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111–21, 123 Stat. 1617 (2009) (codified as amended in scattered sections of 18 U.S.C. and 31 U.S.C.); *see also* S. REP. NO. 111–10, at 4 (2009). The Senate Report states:

> Lastly, FERA improves one of the most potent civil tools for rooting out waste and fraud in Government—the False Claims Act (18 U.S.C. S 3729 et seq.). The effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law and, in some cases, allow subcontractors paid with Government money to escape responsibility for proven frauds. The False Claims Act must be corrected and clarified in order to protect from fraud the Federal assistance and relief funds expended in response to our current economic crisis.

Id. The Justice Department recognized the statutory reversal of *Allison Engine* as well. *See* Letter from M. Faith Burton, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to Patrick J. Leahy, Chairman, Comm. on the Judiciary, U.S. Senate (April 1, 2009), *available at* http://www.justice.gov/ola/views-letters/111-1/040109-s386-fraud-enforcement-recovery-act.pdf. Burton's letter states:

> [T]he changes to the FCA proposed in section 4 are both necessary and timely. These changes include language clarifying that neither proof of presentment to a U.S. official nor ownership by the federal government of the relevant funds is required. The legislation would also supersede the United States Supreme Court's recent decision in Allison Engine Co. v. United States *ex rel.* Sanders, [553] U.S. [662], 128 S. Ct. 2123 (2008), and expand the scope of the reverse false claim provision. The Department welcomes these changes, with several refinements.

Id.

45. 31 U.S.C. § 3729(b)(1)(B) ("[T]he terms 'knowing' and 'knowingly' . . . require no proof of specific intent to defraud.").

46. *Id.* § 3730(d)(1)–(2); *see supra* note 10. If the government intervenes, the relator recovers 15%–25%; if the government declines to intervene, recovery is 25%–30% of the overall proceeds. § 3730(d)(1)–(2).

47. *See* BOESE, *supra* note 32, § 1.06 (identifying "five categories of affirmative false claims cases[:] 1. [t]he 'mischarge' case; 2. [t]he 'fraud-in-the-inducement, promissory fraud,' or 'false negotiation' case; 3. [t]he 'false certification' case; 4. [t]he 'substandard product or service' case; and 5. [t]he 'reverse false claim' case").; *see also* Krause, *supra* note 10, at 1372 (utilizing Boese's five categories as "a framework for traditional application of the FCA [that] . . . may prove useful for understanding the Act's rebirth as a health care fraud enforcement tool").

A. Mischarges

The first category of false claims cases generally involves charging for a good or service not provided.[48] This includes billing for services not provided as well as charging the government for more than was actually provided.[49] These types of false claims are precisely what Congress originally intended the False Claims Act to cover when it passed the law in 1863.[50]

In the healthcare context, this type of FCA violation covers so-called "upcoding"[51] (submitting a reimbursement code that covers a more expensive procedure than was actually performed) as well as billing for medical services never actually performed.[52]

A more subtle variant of the traditional "mischarge" FCA case includes situations in which a "defendant delivers [the] good[] or service[] as promised, but charges . . . an inflated price" for that good or service.[53] Charging an inflated price damages the government in a similar way to how a company is damaged when one of its employees overstates her expenses and pockets the difference. Consequently, the government calculates the base level of damages by subtracting what it should have paid from what it actually paid.[54]

B. Negotiating in Bad Faith

If a party misleads the government during the course of negotiations for a government contract, that party leaves itself open to FCA

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48. CLAIRE SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 4:27 (West 2012); Krause, *supra* note 10, at 1372.

49. SYLVIA, *supra* note 48, § 4:27; Krause, *supra* note 10, at 1372–73; *see also* United States v. Northrop Corp., 59 F.3d 953, 956 (9th Cir. 1995) (alleging "double charging").

50. *See* SYLVIA, *supra* note 48, § 4:27 ("Congressional committees investigating fraud against the government prior to the adoption of the False Claims Act in 1863 reviewed countless examples of this type of conduct."); *id.* § 4:27 n.3 (providing several examples of mischarging investigated by Congress, including cases in which "'the price paid for arms was inexcusably exorbitant,'" as well as one case where "'vouchers [were] totally or partially false'" (quoting Report of the Select Comm. to Inquire into the Contracts of the Gov't, H.R. REP. NO. 2, pt. 1, 37th Cong., 2d Sess.)).

51. *See, e.g.*, United States v. Krizek, 111 F.3d 934 (D.C. Cir. 1997) (holding that an HCFA Form 1500 request for payment for more expensive services than those provided constitutes a claim); SYLVIA, *supra* note 48, § 4:27 ("'Upcoding,' or assigning a Medicare reimbursement code for a more expensive service than the service actually provided when submitting a claim, is a common form of overcharging."); Krause, *supra* note 10, at 1383 (describing and providing examples of "upcoding"). *But see* United States *ex rel.* Willard v. Humana Health Plan of Tex. Inc., 336 F.3d 375, 380 (5th Cir. 2003) (dismissing for failure to state a claim an allegation of overcharging based on "cherry picking" where the alleged selection of enrollees was not based on the population for which rates were determined).

52. *See, e.g.*, United States v. NHC Healthcare Corp., 115 F. Supp. 2d 1149, 1152 (W.D. Mo. 2000); United States v. Jointer, 910 F. Supp. 279 (S.D. Miss. 1995); United States v. Pani, 717 F. Supp. 1013 (S.D.N.Y. 1989); *see supra* notes 48–50 and accompanying text.

53. Krause, *supra* note 10, at 1373.

54. *See id.* ("[D]amages in such cases generally are limited to the amount by which the government was *overcharged*, rather than the entire payment.").

liability for all claims submitted under that particular contract *even if the claims fulfill the terms of the contract itself.*[55] By misleading the government at the negotiation stage, the defendant "taints" each and every claim that arises out of that contract irrespective of subsequent performance on any initial guarantees.[56] The government's argument is that the contract would have never been agreed to in the first place had the defendant not been misleading during negotiation.[57]

"[D]amages in these cases should be equal to the difference between what the government actually paid for the goods and services and what the government should have paid."[58] However, courts often struggle in arriving at damages figures because of the ambiguity introduced by the fact that the fraud occurred prior to the existence of a contract.[59] As a result, there is a possibility that the final damage tally may be artificially inflated.

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55. *See* Krause, *supra* note 10, at 1373–76 ("These cases posit that when a defendant provides false information during contract negotiations, *all* claims submitted under that contract are false—even when the claims accurately reflect the goods and services provided.").

56. *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 543–44 (1943), *superceded by statute*, Act of Dec. 23, 1943, Pub. L. No. 78-213, 57 Stat. 608, *as recognized in* Schindler Elevator Corp. v. U.S. *ex rel.* Kirk, 131 S. Ct. 1885 (2011). The Court stated:

> This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid .... The initial fraudulent action and every step thereafter taken, pressed ever to the ultimate goal-payment of government money to persons who had caused it to be defrauded.

Id. Similarly, the Senate Report accompanying the 1986 amendments to the FCA explained:

> [E]ach and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim. For example, all claims submitted under a contract obtained through collusive bidding are false and actionable under the act."

S. REP. NO. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274. For additional information on the evolution of tainted-claims cases from bid-rigging cases into the healthcare context, see Krause, *supra* note 10 at 1374–75.

57. Krause, *supra* note 10, at 1375 ("Despite the fact that the defendant adhered to the letter of the agreement, the government argues that it never would have approved the contract ... had the misrepresentations been known."); *see also* BOESE, *supra* note 32, § 3.01 ("The 'false claim' in these cases is based on the *assumption* that the government never would have agreed to that price without the false statement or corruption and would have paid a lower price.").

58. Krause, *supra* note 10, at 1375.

59. *Id.* at 1375–76 ("[I]t may be difficult to establish the price the government *would* have been willing to pay had the truth been known: for example, would the negotiations have been called off, or would the government merely have insisted on a lower price?"); *see also* BOESE, *supra* note 32, § 3.01 ("In many of the false negotiation cases, the calculation of damages is difficult because the government generally receives the price it has contracted to pay.").

C. False Certifications

First explored in *United States v. Hibbs*,[60] false certification theory includes instances in which a defendant who does business with the government certifies that it has complied with certain laws and regulations.[61] If it turns out that the defendant did not comply with *all* of the laws and regulations that it suggested it did when it certified that it was in full compliance, it may be subject to liability under the FCA.[62] In *United States ex rel. Hendow v. University of Phoenix*,[63] the Ninth Circuit explained:

> That the theory of liability is commonly called "false certification" is no indication that "certification" is being used with technical precision, or as a term of art; the theory could just as easily be called the "false statement of compliance with a government regulation that is a precursor to government funding" theory, but that is not as succinct.[64]

This theory can easily be used to prosecute healthcare entities because providers sign a large number of compliance forms in the course of doing business with the government.[65] Additionally—and this is

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60. 568 F.2d 347 (3d Cir. 1977).

61. *Id.* at 349–52 (finding liability, but remanding on the measure of damages, when a real estate broker "submitted certifications to the Federal Housing Administration misrepresenting the condition of certain residential properties" and "th[e] agency then insured mortgages on the homes and was later required to pay the mortgages when defaults occurred"); SYLVIA, *supra* note 48, § 4:33. Sylvia explains:

> The term "false certification," which appears to have originated with *United States v. Hibbs*, generally refers to a case in which a defendant who makes a claim for payment from the United States submits a form or document expressly certifying compliance with a law, contract term, or regulation, when the defendant did not in fact comply with the requirement, rendering the certification, and therefore the claim for payment, "false."

Id. (footnotes omitted).

62. *See* Hibbs, 568 F.2d at 349–52 (holding a real estate broker liable who misrepresented the condition of certain plumbing, electrical, and heating systems liable for "the decrease in worth of the security that was certified as being available, measured by the difference in value between the houses as falsely represented, and as they actually were"); *see also supra* note 61.

63. 461 F.3d 1166 (9th Cir. 2006).

64. *Id.* at 1172; *see also* SYLVIA, *supra* note 48, § 4:33 (analyzing the *Hendow* opinion to explain false certification liability under the FCA).

65. One such form is the CMS-1500. *See* United States *ex rel.* Smith v. Yale Univ., 415 F. Supp. 2d 58, 91 (D. Conn. 2006). In *Smith*, the court stated:

> It is clear that "a claim under the [FCA] is legally false only when a party certifies compliance with a statute or regulation as a *condition* to governmental payment." The Medicare Regulations and the CMS (formerly HCFA)-1500 and HCFA-1450 forms expressly provide that certification is a precondition to governmental reimbursement. In order to obtain reimbursement and as a condition to governmental payment, providers must certify that they are in compliance with the terms on the form.

particularly true in healthcare—"some certifications state compliance with a general [and often sweeping] category of laws rather than a particular law."[66]

Occasionally, plaintiffs argue that simply by submitting a claim for payment to the government, the defendants "impliedly" certify compliance with all relevant laws and regulations.[67] Allowing plaintiffs, particularly *qui tam* relators, to use the implied certification theory risks opening the door to suits attaching liability to minor regulatory violations only tangentially related to defrauding the government.[68]

D. Substandard Products and Services

Based on a very aggressive reading of the statute, these suits claim that when a provider bills the government for "substandard" goods or services, the provider has in some sense defrauded the government of the difference between what it paid for (a product meeting a certain standard) and the substandard product actually delivered.[69] This theory may permit plaintiffs to bring an FCA claim for money damages against a

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Id. Indeed, for Medicare claims the sample CMS-1500 makes clear that the signature of a physician or supplier on the form indicates compliance with the following certification:

> I certify that the services shown on this form were medically indicated and necessary for the health of the patient and were personally furnished by me or were furnished incident to my professional service by my employee under my immediate personal supervision, except as otherwise expressly permitted by Medicare or CHAMPUS regulations.

CMS-1500 Health Insurance Claim Form (Sample), CTRS. FOR MEDICARE & MEDICAID SERVS., http://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/CMS1500805.pdf.

66. SYLVIA, *supra* note 48, § 4:33. Sylvia explains that, in such cases, some "courts have been reluctant to conclude that the certification indicates that the particular violation was material to the Government." *Id.* For a sampling of cases evidencing this reluctance, as well as cases where liability was found on the basis of such a broad certification, see *id.* § 4:33 n.8.

67. *See* SYLVIA, *supra* note 48, § 4:33 ("[I]n some cases plaintiffs have not identified a document or form falsely certifying compliance with a law or regulation, but have argued that the certification of compliance was "implied" in the defendant's request for payment."); Krause, *supra* note 10, at 1396–99 (describing the concept, prevalence, and implications of the "implied certification theory," and noting that "[b]oth the government and *qui tam* relators have argued that participation in Medicare and Medicaid entails an implied certification that the claimant will abide by all relevant program statutes, rules, and regulations").

68. *See* SYLVIA, *supra* note 48, § 4:33 & n.10 (declaring that "concerns about the potential use of the False Claims Act to impose liability for minor regulatory violations that are unrelated to defrauding the Government are heightened in implied certification cases" and referencing a case where the government had argued "that a loan application was false because the applicant had bribed a federal official in order to obtain the loan" (citing United States v. Shaw, 725 F. Supp. 896 (S.D. Miss. 1989))); Krause, *supra* note 10, at 1399 ("Demanding total compliance with such sweeping provisions may be unrealistic, and is a questionable basis for imposing multi-million dollar damage and penalty awards under the FCA.");.

69. *See* BOESE, *supra* note 32, § 1.06 ("The 'substandard product' case is one in which a supplier of goods or services provides an inferior substitute in place of the service or product contracted for."); *id.* § 3.01 ("[T]he issue of damages in substandard product cases is the same as in all others: calculating the difference between what the government paid and what the government should have paid."); Krause, *supra* note 10, at 1379 ("[D]amages are generally equal to the difference between what the government *actually* paid for the product, and what it *would* have paid for a product of lower quality.").

pharmaceutical manufacturer for marketing off-label drugs where the manufacturer knowingly caused a false statement to be made for the purpose of having a claim paid or approved by the government *despite the fact that Congress has not provided for such a cause of action.*[70] Hospitals may also face FCA suits for requesting payment for services without having taken all of the appropriate precautions to provide a reasonably safe environment for patients.[71]

Nursing homes have faced these types of FCA suits for nearly twenty years now.[72] In one case, a US Attorney in Pennsylvania brought an action against a nursing home after an investigation by the Pennsylvania Department of Health revealed that patients were suffering from advanced decubitus ulcers, dehydration, and malnutrition.[73] The DOJ claimed that the nursing home billed the government for quality care and that because it provided substandard care, all of its claims were false.[74] In addition, the DOJ asserted that the nursing home failed to monitor water temperature, though the facility was aware of a problem with the boiler, allegedly causing a patient's death after the individual was placed in a tub of 138 degree water for a bath.[75] While the case settled out of court quickly,[76] it

70. *See* United States *ex rel.* Franklin v. Parke–Davis, Div. of Warner–Lambert Co., 147 F. Supp. 2d 39 (D. Mass. 2001) ("[T]he failure of Congress to provide a cause action for money damages against a pharmaceutical manufacturer for marketing off-label drugs does not preclude an FCA claim where the manufacturer has knowingly caused a false statement to be made to get a false claim paid or approved by the government in violation of 31 U.S.C. § 3729(a)."), *abrogated by* United States *ex rel.* Nowak v. Medtronic, Inc., 806 F. Supp. 2d 310, (D. Mass. 2011). For a thorough treatment of the issue of liability under the FCA for marketing off-label drugs, see David S. Stone, *Off-Label Marketing as a Predicate for False Claims Act liability*, 51 FALSE CLAIMS ACT AND QUI TAM Q. REV., Feb. 2009, at 9.

71. *See* United States *ex rel.* Aranda v. Cmty. Psychiatric Ctrs. of Okla., Inc., 945 F. Supp. 1485 (W.D. Okla. 1996) (denying the defendant psychiatric center's motion to dismiss on allegations that it "knowingly fail[ed] to provide the government insured patients with a reasonably safe environment"); SYLVIA, *supra* note 48, § 4:28 ("A number of cases have been brought against healthcare facilities for substandard care, based on the theory that the services provided were not of the quality for which the Government contracted." (citing *Aranda*, 945 F. Supp. 1485)); *see also* Joan H. Krause, *Medical Error as False Claim*, 27 AM. J.L. & MED. 181 (2001) (observing that "using the FCA to address medical errors, particularly in hospitals, would indeed be a logical extension of the government's current focus on quality of care," and arguing that the FCA may not be the best way to improve the quality of care); Patrick A. Scheiderer, *Medical Malpractice as a Basis for a False Claims Action?*, 33 IND. L. REV. 1077 (2000) (arguing against the use of the FCA to police malpractice).

72. Krause, *supra* note 10, at 1403 (asserting that "[t]he U.S. Attorney for the Eastern District of Pennsylvania has taken the lead in these cases, beginning with a 1996 case against a nursing home operator and management company" (citing David R. Hoffman, *The Role of the Federal Government in Ensuring Quality of Care in Long-Term Care Facilities*, 6 ANNALS HEALTH L. 47 (1997))).

73. *See* United States v. Chester Care Ctr., No. 98-CV-139, 1998 U.S. Dist. LEXIS 4836 (E.D. Pa. Feb. 2, 1998).

74. *Id.* at *2.

75. Complaint at 9–10, U.S. v. Chester Care Ctr., 1998 U.S. Dist. LEXIS 4836 (E.D. Pa. Feb. 2, 1998) (No. 98-CV-139).

76. *See Chester Care Ctr.*, No. 98-CV-139, 1998 U.S. Dist. LEXIS 4836 (filed less than a month after the complaint, the *Consent Order and Judgment* required the defendant nursing home to pay $500,000 to the United States in settlement of the FCA claim, as well as adopt several policies and procedures meant to ensure proper patient care).

proved to be just one of many rather startling nursing home lawsuits.[77] In one case, the Inspector General was so appalled at the facts that he actually recounted the story for the members of the Senate Subcommittee on Federal Financial Management, Government Information, and International Security:

> In one example, OIG investigated and participated in the prosecution of a matter that led to Federal indictments of a nursing facility and its administrators on local and Federal charges involving the death of a resident. The resident, a person with Alzheimer's Disease who needed supervision, wandered out of the nursing home and froze to death. Prior to reporting the death, employees of the nursing home brought her body back into the home, dressed her, put her into a bed, and reported to the family that the woman had died of natural causes while asleep.[78]

Fed up with being hit with FCA claims based on a rapidly growing and difficult-to-pin-down number of issues, one nursing home moved to have an FCA claim dismissed on the grounds that the Medicaid statute was so vague that it presented no objective quality standard with which to comply.[79] While the district court agreed that the statute was vague,[80] it refused to dismiss because "a problem of measurement should not pose a bar to pursing an FCA claim against a provider of substandard healthcare services under appropriate circumstances."[81]

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77. *See, e.g.*, United States v. NHC Healthcare Corp., 115 F. Supp. 2d 1149 (W.D. Mo. 2000). In *NHC*, it was alleged that two nursing home residents died as a result of inadequate care. *Id.* at 1151. The court presented the facts as follows:

> Essentially the Government argues in this case that the Defendant had such woefully low staff numbers at its facility that it could not possibly have rendered all the care that it billed the Medicare and Medicaid programs. Specifically, the Government presents evidence as to two unnamed residents who it alleges were inadequately cared for by the Defendant. The Government claims that these residents developed pressure sores, incurred unusual weight loss, were in unnecessary pain, were generally not given care up to the standards required under the Medicare and Medicaid programs, and ultimately died because of this care.

Id.

78. *Hearing before the Subcomm. on Fed. Fin. Mgmt, Gov't Info., and Int'l Sec. of the S. Comm. On Homeland Sec. and Governmental Affairs*, 109th Cong. 8 (2006) (testimony of Daniel R. Levinson, Inspector Gen.), *available at* oig.hhs.gov/testimony/docs/2006/SenateDHS3-28-06.pdf.

79. United States *ex rel.* Aranda v. Cmty. Psychiatric Ctrs. of Okla., Inc., 945 F. Supp. 1485, 1488 (W.D. Okla. 1996) ("Essentially, CPC asserts: (1) the government has not identified any Medicaid statute or rule that imposes an objective standard of safety or quality of care as a billing requirement; (2) absent an objective standard, CPC could not knowingly fail to comply with it . . . .")

80. *Id.* ("The Court finds no merit in CPC's arguments that it could not knowingly violate such vague standards.).

81. *Id.*; *see also* Krause, *supra* note 10, at 1402–06 (describing "quality-based FCA cases in the institutional health context," with a particular focus on nursing home cases).

Consistent with the overall thesis of this Note, both the government and relators have used this theory to obtain a significant number of settlements.[82] That said, commentators have pointed out that on those few occasions when providers opt to go to trial, most courts do not find the nexus between the failed quality and the false claims to be significant enough to give rise to liability under the FCA.[83] In *United States ex rel. Landers v. Baptist Memorial Healthcare Corporation*,[84] a former hospital employee filed a *qui tam* suit in which she alleged that the hospital violated the FCA by falsely certifying compliance with the Medicare conditions of participation while suffering "severe staffing shortages."[85] The court granted summary judgment in favor of the hospital, noting that the plaintiff had not demonstrated that the violations of the applicable standards of care were "'so deficient that for all practical purposes it is the equivalent of no performance at all.'"[86] Furthermore, the court observed, "Even assuming Plaintiff has demonstrated that Defendants failed to conform with Medicare's Conditions of Participation or other applicable standards of care, this alone is not enough to create a genuine issue of material fact as to a worthless services claim."[87]

E. Reverse False Claims

The government and private relators are increasingly using the reverse-false-claims provision of the FCA to go after healthcare providers.[88]

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82. *See* ALICE G. GOSFIELD, MEDICARE AND MEDICAID FRAUD AND ABUSE § 5:10 (2011) (discussing several FCA cases brought on a theory of substandard services, many of which were settled); Krause, *supra* note 10, at 1406 ("[M]ost quality-of-care cases—similar to most health care FCA cases in general—settle rather than proceeding to trial.")

83. GOSFIELD, *supra* note 82, § 5:10 ("[A] recent analysis of government success in this arena reveals that when scrutinized by the courts, the government notions of the nexus between failed quality and false claims is not so significant or accepted by the courts." (citing M. Reagan, *'Quality of Care' Claims Under the False Claims Act: A Focus on Long Term Care*, *in* HEALTH LAW HANDBOOK (A. Gosfield ed., 2008))).

84. 525 F. Supp. 2d 972 (W.D. Tenn. 2007).

85. *Id.* at 974–76.

86. *Id.* at 980 (quoting Mikes v. Straus, 274 F.3d 687, 703 (2d Cir. 2001)). The court analyzed the facts under both a false certification theory of liability and a worthless services theory of liability. *Id.* at 977–80. With regard to the false certification theory of liability, the court declined to find liability on the basis of a certification of compliance with conditions of participation in a government program, as distinguished from conditions of payment for services rendered. *Id.* at 978–79. The court stated:

> The HCFA forms in which Defendants agreed to abide by applicable Medicare laws and regulations do not expressly or impliedly condition payment upon compliance. Conditions of Participation are not the equivalent of Conditions of Payment .... Conditions of Participation are quality of care standards directed towards an entity's continued ability to participate in the Medicare program rather than a prerequisite to a particular payment.

Id. at 978.

87. *Id.* at 980.

88. *See* BOESE, *supra* note 32, § 1.06 ("As use of the FCA grows, many more cases are filed based on ... the so-called 'reverse false claims' provision. ... These types of cases may indeed begin to predominate because of the 'overpayments' provisions in the 2009 FERA amendments ...."');

Under a reverse false claims theory, a defendant may be liable for making a false statement to avoid, conceal, or decrease an obligation to the government.[89] Because reverse false claims do not involve a request for payment, courts first addressing the issue struggled to pin down what does and does not give rise to liability.[90] However, the Senate Report accompanying the 1986 amendments to the FCA made clear "that an individual who makes a material misrepresentation to avoid paying money owed the Government would be equally liable under the Act as if he had submitted a false claim to receive money."[91]

Courts have dealt with reverse false claims cases in different ways. Some courts have held that failing to disclose regulatory obligations in a cost report can trigger liability under 31 U.S.C. § 3729(a)(1)(G).[92] However, other courts have held that § 3729(a)(1)(G) does not cover obligations that *might* arise out of potential but not yet assessed penalties.[93]

GOSFIELD, *supra* note 82, § 5:10 ("The 'reverse false claims' provision ... has been asserted with increasing frequency in health care false claims cases.").

89. 31 U.S.C. § 3729(a)(1)(G) (2006) ("[A]ny person who ... knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable ...."); SYLVIA, *supra* note 48, § 6:21 ("In a reverse false claim case under section 3729(a)(1)(G), the plaintiff alleges that the defendant improperly conceals, avoids or decreases an obligation to pay the Government."); *2011 Midyear False Claims Act Update*, GIBSON DUNN, 12 (July 14, 2011), http://www.gibsondunn.com/publications/Documents/2011Mid-YearFalseClaimsActUpdate.pdf ("Under a reverse false claims theory, a person may be liable for making a false statement to conceal, avoid, or decrease an obligation to the government.").

90. *See* SYLVIA, *supra* note 48, § 4:12 ("Prior to 1986, courts had disagreed whether a false or fraudulent effort to avoid a payment *to* the United States (as distinguished from an effort to obtain payment *from* the United States) constituted a false or fraudulent claim within the meaning of the Act."); Krause, *supra* note 10, at 1381 ("[R]everse false claims do not involve a request for payment *from* the government, but rather an attempt to reduce or avoid payment *to* the government .... [P]rior to the 1986 Amendments, several courts had held that these cases did not meet the statutory definition of a 'claim' at all.").

91. S. REP. NO. 99–345, at 18 (1986). This was the theory advanced by the relator in *United States ex rel. Thompson v. Columbia/HCA Healthcare Corporation*, 20 F. Supp. 2d 1017 (S.D. Tex. 1998). *See* GOSFIELD, *supra* note 82, § 5:10 (noting that "in *Thompson v. Columbia HCA*, the *qui tam* relator argued that annual cost reports submitted by Columbia concealed the obligations that Columbia owed the government because of its violation of the fraud and abuse laws" and discussing the ambiguities presented by the court's holding); Krause, *supra* note 10, at 1407–09 (discussing *Thompson* in the context of explaining "Cost Report fraud").

92. *See* GOSFIELD, *supra* note 82, § 5:10 ("[T]here is some authority for the proposition that [31 U.S.C. § 3729](a)(7) liability can be created by reports that fail to disclose regulatory obligations ...." (citing Pickens v. Kanawha River Towing, 916 F. Supp. 702 (S.D. Ohio 1996); United States *ex rel* Stevens v. McGinnis, Inc., No. C-1-93-442, 1994 WL 799421 (S.D. Ohio Oct. 26, 1994))). Section 3729(a)(7) was recodified as § 3729(a)(1)(G). *See* Christopher C. Burris, Michael E. Paulhus & Louisa B. Childs, *Converging Events Signal a Changing Landscape in False Claims Act and Whistle-blower Litigation and Investigations*, FED. LAW., Nov./Dec. 2009, at 59, 60–61 ("[T]he FCA includes 'reverse false claims' provision, 31 U.S.C. § 3729(a)(7), *recodified at* 31 U.S.C. § 3729(a)(1)(G)—that focuses on fraud in reducing liability to pay money to the government.").

93. *See* GOSFIELD, *supra* note 82, § 5:10 ("[S]ome cases hold that (a)(7) only applies to cases where an existing, determinate debt to the government exists, and not merely a potential obligation to pay penalties." (citing cases)); Krause *supra* note 10, at 1408–09 (noting the view of some commentators that "it is inappropriate to use the reverse false claims provisions" for mere violations of

Instead, these courts hold that § 3729(a)(1)(G) liability only applies when there is an existing, concrete obligation to pay the government.[94]

F. Indirect Reverse False Claims

In *United States v. Caremark, Inc.*,[95] the Fifth Circuit held that a defendant may be charged with violating the FCA via an *indirect* reverse-false-claims theory of liability.[96] *Caremark* involved administered pharmacy-benefit plans for "dual-eligible" individuals—individuals eligible for coverage under both private health plans and Medicaid.[97] In *Caremark*, "[t]he government argued . . . that Caremark violated the FCA by falsely stating that certain individuals were not covered by private plans and denying requests for reimbursement from state Medicaid agencies."[98] As the court noted, "This, in turn, would cause the States to receive and to keep federal funds to which they would not otherwise be entitled."[99] Furthermore, "States have a legal duty to return federal funds if they are able to recover from third parties . . . ."[100] And, "States also have a legal duty to seek reimbursement from a third party for dual-eligible individuals."[101] Under the court's analysis, "Caremark's actions therefore could have impaired the States' obligation to the Government under 42 U.S.C. § 1396a(a)(25)," and FCA liability can attach "for knowingly making a false statement that will cause a third party to impair its obligation to the federal government."[102] Thus, at least according to the Fifth Circuit, it does not matter whether the obligation belongs directly to the defendant; all that matters is whether the defendant impaired "*an* obligation."[103]

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statutes or regulations until the defendant is found liable for a penalty for the violation). Krause sums up this argument as follows:

> Commentators have argued that it is inappropriate to use the reverse false claims provision where the defendant's liability to the government is conditioned on further government action, such as an audit or subsequent prosecution. Because no money is "owed" to the government for violations of regulatory provisions unless the provider is audited, prosecuted, and found to be liable, these commentators argue that the provider has no existing "obligation" to the government that can be avoided by submitting a reverse false claim.

Id. at 1408 (footnote omitted). As noted, when courts and commentators refer to (a)(7) liability, they are referring to liability for reverse false claims under § 3729(a)(7), now recodified in § 3729(a)(1)(G). *See supra* note 92.

94. *See supra* note 93.

95. 634 F.3d 808 (5th Cir. 2011).

96. 634 F.3d at 817; GIBSON DUNN, *supra* note 89, at 12.

97. 634 F.3d at 811; GIBSON DUNN, *supra* note 89, at 12.

98. GIBSON DUNN, *supra* note 89, at 13.

99. 634 F.3d at 817

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* ("The statute does not require that the statement impair the *defendant's* obligation; instead, it requires that the statement impair '*an* obligation to pay or transmit money or property to the Government.'" (quoting 31 U.S.C. § 3729(a)(7))).

IV. Fishing with Landmines?

If the history of healthcare in the United States since 1963 teaches any lesson, it is that individuals respond to incentives. This lesson applies with equal, and perhaps greater, force to the institutions and individuals responsible for policing healthcare. Multiple scholars have observed that the statutory scheme in place to govern healthcare fraud encourages federal prosecutors to aggressively interpret and apply the statutes that they are charged with enforcing.[104] Expansive statutes like the FCA encourage prosecutors to "bring previously undefined conduct to trial in the hope that the court will criminalize it."[105] And, true to form, prosecutors have done exactly that. Today, prosecutors play a role traditionally reserved for Congress—defining the contours of the law.[106] This is not a new phenomenon, but the effects of Congress's quasi-delegation of its lawmaking power become more pronounced with each passing year. This abdication is problematic for a number of reasons, some more obvious than others. For instance, the public does not elect Attorneys General[107] or the Assistant United States Attorneys charged with policing healthcare fraud.[108] This fact issue is exacerbated by the reality that federal prosecutors have tremendous power that they are undoubtedly tempted to use in furtherance of their own personal agendas.[109] Indeed, many public figures in America have launched their public careers while serving as a United States Attorney. A few that come immediately to mind include current New Jersey Governor Chris Christie,[110] former New York Mayor Rudy Giuliani,[111] and Supreme Court Justice Samuel Alito.[112] As one scholar

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104. *See* Krause, *supra* note 10, at 1411; Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1228 (1977).

105. Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 179 (1994); *see also* Krause, *supra* note 10, at 1411 (discussing the "broad contours" of the FCA and quoting Moohr for the proposition that "[w]here a statute leaves room for flexibility as to the prohibited conduct, prosecutors are motivated to 'bring previously undefined conduct to trial in the hope that the court will criminalize it'" (quoting Moohr, *supra*)).

106. *See* Krause, *supra* note 10, at 1411 ("When courts and prosecutors use such a mechanism to expand the reach of federal statutes, however, they assume what is essentially a legislative role: defining the contours of prohibited public behavior.").

107. 28 U.S.C. § 503 (2006) ("The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States.").

108. *Id.* § 542 ("The Attorney General may appoint one or more assistant United States attorneys in any district when the public interest so requires.").

109. *See* Krause, *supra* note 10, at 1411–12 ("[F]ederal prosecutors—particularly the United States Attorneys—have strong personal incentives to apply the law in ways that benefit their personal agendas . . . . An individual U.S. Attorney may target a particular sector . . . in hopes of gaining support for a future political career.").

110. *See* Geoff Mulvihill, *Unusual Paths for Candidates in NJ Governor Race*, OMAHA WORLD-HERALD, Oct. 1, 2009, http://www.omaha.com/article/20091001/AP09/310019830 (discussing Christie's transition from private practice to U.S. Attorney, where he gained a reputation for fighting corruption, which he later touted in his campaign for governor).

111. *See A Biography of Mayor Rudolph W. Giuliani*, NYC.GOV, http://www.nyc.gov/html/records/rwg/html/bio.html (chronicling Giuliani's path from private practice to Associate Attorney General and then U.S. Attorney before becoming mayor of New York City in 1993, and touting that

observed, "[i]ndividual U.S. Attorneys internalize the political benefits and externalize the practical and human costs of adventurous readings of federal criminal law,"[113] particularly when they are called upon to discern the thin red line within "statutes that mark the boundary line between socially desirable and socially undesirable behavior."[114] As a result, one scholar has warned that "enforcement must not be allowed to become a self-fulfilling prophecy that alienates the provider community and distracts us from our underlying policy goals."[115] Another scholar warned that "care should be taken so that the mystique of the health care fraud law enforcement machine does not seduce the regulator into becoming a hunter when there is no prey."[116]

The risk that prosecutors might use anti-fraud laws in ways that "border[] on extortion"[117] is compounded by the confluence of several external factors. First, when discussing the FCA, "prosecutor" includes not only state and federal prosecutors, but also private relators who file *qui tam* suits.[118] Whatever one thinks about the government prosecutors who enforce the FCA, at least they are paid to advance the interests of the public. With the possible exception of the plaintiffs' bar, few would deny that the vast majority of whistleblowers are motivated by financial gain. Even the Supreme Court has commented that "[*q*]*ui tam* relators are . . . motivated primarily by prospects of monetary reward rather than the public good."[119] By enabling private persons to sue corporations for violations of often ambiguous and highly technical fraud statutes and regulations *irrespective of whether the government decides to intervene*, Congress destroyed prosecutorial discretion.

Furthermore, while the Supreme Court almost never uses the non-delegation doctrine, it is possible to construct an argument that the FCA presents meaningful delegation issues. In *Misretta v. United States*,[120] Justice Blackmun explained, "So long as Congress 'shall lay down by

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"[f]ew US Attorneys in history can match his record of 4,152 convictions with only 25 reversals"); *see also* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 487 (1996) (describing Rudy Giuliani's "reign of terror" against insider trading on which he would later campaign when he ran for mayor).

112. *See Biographies of Current Justices of the Supreme Court*, U.S. SUP. CT., http://www.supremecourt.gov/about/biographies.aspx (noting significant events in Justice Alito's career, including his stints as Assistant U.S. Attorney from 1977 to 1981, Deputy Assistant Attorney General from 1985 to 1987, and U.S. Attorney from 1987 to 1990).

113. Kahan, *supra* note 111, at 487–88.

114. *Id.* at 485; Krause, *supra* note 10, at 1412.

115. Krause, *supra* note 10, at 1415–16.

116. Pamela H. Bucy, *The PATH from Regulator to Hunter: The Exercise of Prosecutorial Discretion in the Investigation of Physicians at Teaching Hospitals*, 44 ST. LOUIS U. L.J. 3, 50 (2000).

117. GEN. ACCT. OFF., REP. NO. B-279893, at 15 n.30 (1998) ("The Association has said that DOJ's use of sanctions under the False Claims Act for what the Association calls mere billing errors 'borders on extortion.'"); Krause, *supra* note 10, at 1412–13.

118. *See supra* notes 10–21 and accompanying text.

119. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 940 (1997).

120. 488 U.S. 361 (1989).

legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'"[121] While the government has since changed its position, the Office of Legal Council had previously asserted that it believed the 1986 amendments to the FCA violated the non-delegation doctrine.[122]

A. The Looming Threat of Exclusion

The overlap of a number of criminal statutes makes FCA investigations uniquely susceptible to coercive measures. For a healthcare company that relies on its ability to do business with the government, *any* criminal conviction can have potentially life threatening consequences.[123] The Office of the Inspector General governs exclusions. In some instances, exclusion is mandatory:

> OIG is required by law to exclude from participation in all Federal health care programs individuals and entities convicted of the following types of criminal offenses: [1] Medicare or Medicaid fraud, as well as any other offenses related to the delivery of items or services under Medicare[or] Medicaid . . . ; [2] patient abuse or neglect; [3] felony convictions for other health care-related fraud, theft, or other financial misconduct; and [4] felony convictions for unlawful manufacture, distribution, prescription, or dispensing of controlled substances.[124]

OIG also possesses wide discretion to exclude entities or persons for a number of other reasons, including the following:

> misdemeanor convictions related to health care fraud other than Medicare . . . ; misdemeanor convictions relating to the unlawful manufacture, distribution, prescription, or dispensing of controlled substances; suspension, revocation, or surrender of a

121. *Id.* at 372 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

122. *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 OP. O.L.C. 249, 264–65 (1989) (preliminary print) (asserting that provisions of the False Claims Act authorizing *qui tam* suits by private parties violate the Appointments Clause because *qui tam* relators exercise "significant governmental power").

123. *See, e.g.*, 42 U.S.C. § 1320a-7 (2006) (describing exclusion from federal healthcare programs); *id.* § 1320a-7a (civil cash penalties); *id.* § 1320a-7b (criminal penalties for acts involving federal health care programs); Krause, *supra* note 10, at 1413 ("The enormous potential liability under the Act convinces many providers to settle FCA allegations . . . [with] the government's agreement not to pursue program exclusion. . . . Settlements may appear to be win-win propositions for all parties: the government receives compensation for the alleged fraud, and the health care provider assures it can remain in business.").

124. *Background Information*, OFFICE OF INSPECTOR GEN., http://oig.hhs.gov/exclusions/background.asp; *see also* 42 U.S.C. § 1320a-7(a) (addressing mandatory exclusion from federal healthcare programs).

> license to provide health care for reasons bearing on professional competence, professional performance, or financial integrity; provision of unnecessary or substandard services; submission of false or fraudulent claims to a Federal health care program; engaging in unlawful kickback arrangements; and defaulting on health education loan or scholarship obligations . . . .[125]

These regulations mean that *any* criminal conviction could put a major healthcare company out of business.[126]

B. The Big Guns of Criminal Prosecution

While the FCA is a civil statute, it substantially overlaps with many criminal statutes. As one commentator has noted, "It is the full arsenal, the FCA coupled with criminal and administrative sanctions and massive resources, that is truly intimidating."[127]

To give you an idea of just how much overlap exists between the civil FCA and the criminal law, it helps to explore a few examples.[128]

The Medicare and Medicaid Fraud statute, 42 U.S.C. § 1320a-7b(a)(1), makes it a felony to make or cause to be made "any false statement or representation of a material fact" in *any* application for payment or benefit under a federal healthcare program.[129] "Any false statement or representation" of a material fact includes virtually every type of representation to Medicare or Medicaid including, but not limited to, all requests for reimbursement and all cost reports.[130] Section 1320a-7b(a)(1) also requires the recipients of government payments and benefits to disclose all information that would affect "his initial or continued right to any such benefit or payment."[131]

The criminal False Claims Act, 18 U.S.C. § 287, another favorite of prosecutors, makes it a criminal offense to submit any claim "upon or against the United States . . . knowing such claim to be false, fictitious or fraudulent . . . ."[132] Section 287 imposes a slightly less rigorous scienter requirement than 18 U.S.C. § 1001, which covers anyone who "knowingly and *willfully falsifies*, conceals or covers up . . . a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false,

125. *Background Information*, OFFICE OF INSPECTOR GEN., http://oig.hhs.gov/exclusions/background.asp; *see also* 42 U.S.C. § 1320a-7(b) (addressing permissive exclusion from federal healthcare programs).

126. *See supra* notes 123–25 and accompanying text.

127. Bucy, *supra* note 116, at 14.

128. For a thorough discussion of the myriad criminal sanctions that might be brought against an FCA violator, see Bucy, *supra* note 116, at 16–34.

129. 42 U.S.C. § 1320a-7b(a)(1).

130. *See* United States v. Laughlin, 26 F.3d 1523, 1525 (10th Cir. 1994).

131. § 1320a-7b(a)(3).

132. 18 U.S.C. § 287 (2006).

fictitious or fraudulent statement or entry . . . ."[133] Section 287 criminalizes concealing or falsifying any material fact, along with lying to investigators.[134] Furthermore, because § 287 arose out of the same legislation as § 1001, courts treat past precedent interpreting one statute as if it applied with equal force to the other.[135]

A seldom-used example of a statute that could easily cover the same behavior that forms the basis of an FCA violation is 18 U.S.C. § 1516. Applying to any entity or person that receives more than $100,000 from the government in any year, the statute criminalizes behavior that, "with intent to deceive or defraud the United States, endeavors to influence, obstruct, or impede a Federal auditor in the performance of official duties."[136] While seldom employed to date, the statute's plain language ("influence, instruct, or impede") appears to extend to any behavior that impedes a government investigation by confusing or slowing it down in any way.[137]

The statutes described above represent only a few of a laundry list of criminal statutes that a prosecutor could, in good faith, use to deal with behavior that also constitutes violations of the civil FCA. Others not explored in depth but applicable in many instances include: 18 U.S.C. §§ 1341 (mail fraud) and 1343 (wire fraud); 18 U.S.C. §§ 1956 and 1957 (money laundering); 18 U.S.C. §§ 1961–1964 (RICO); 18 U.S.C. §§ 371 and 286 (conspiracy); 18 U.S.C. § 641 (theft of government property); 18 U.S.C. § 1347 (generic healthcare fraud); 18 U.S.C. § 669 (theft or embezzlement in connection with healthcare); 42 U.S.C. § 1320a-7b(b) (anti-kickback); and 42 U.S.C. § 1320a-7b(b)(3) (retaining overpayments).[138] And these are just the *federal* criminal statutes that may apply.

The fact that the civil FCA overlaps with so many criminal statutes creates a profound asymmetry of power between the government and healthcare companies due to the nature of the healthcare business.[139] Prosecutors are very aware that healthcare companies cannot afford to risk exclusion. Additionally, the overlap of the FCA and relevant criminal statutes provides them with tremendous leverage during settlement negotiations because they can implicitly (or sometimes explicitly) threaten criminal prosecution should a company refuse to settle the case. Thus the healthcare company faces two options: (1) fight the FCA charges and hope the government does not actually file a criminal case and seek exclusion; or (2) settle the case by agreeing to abide by the terms of a government compliance initiative and pay a large sum of money in exchange for the

133. *Id.* § 1001 (emphasis added).

134. *See* United States v. Allen, 13 F.3d 105, 107 (4th Cir. 1993).

135. *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 540 n.2 (1943); United States v. Winchester, 407 F. Supp. 261, 271–72 (D. Del. 1975).

136. 18 U.S.C. § 1516 (2006).

137. *Id.*

138. For a more in-depth analysis of each of these statutes, see Bucy, *supra* note 116, at 16–34.

139. *See supra* note 123 and accompanying text.

guarantee that the government will not seek exclusion. As health economist Uwe Reinhardt has explained, the result is predictable: "Rather than engaging in a long, protracted fight to set the record straight, throughout which share prices suffer and business slumps, a health company's best bet may simply be to hand over the fines and get on with business."[140]

At this point, the reader may well wonder why this state of affairs is objectionable. Indeed, most major corporations settle the vast majority of their cases out of court because they either (1) deem the risks of going to trial too great, or (2) they conclude that it would cost more to litigate the case than it would to settle. The difference here is the government's ability to bring "the corporate death penalty" to the negotiating table.[141] When it does, even innocent parties really have no choice but to settle the case because the unknown variables simply present too great a risk to a company's future.

It is also worth mentioning that companies face more than the "risk" of losing. If there were more precedent, many innocent parties may well decide to take their cases to court. However, the nature of the FCA enforcement regime creates a sort of vicious circle of uncertainty; everyone settles because no one knows how the courts will apply the law, and no one knows how the courts will apply the law because everyone settles.

So what, if anything, can be done about it? The pool of potential solutions is limited. One solution might be to reduce the statutory penalties. Another might be to raise the burden of proof to make out a civil FCA violation. But these "fixes" address problems that do not exist. The problem with the current system is not that the guilty are punished too harshly or that the government can prove violations too easily. Instead, the

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140. Uwe E. Reinhardt, *Medicare Can Turn Anyone into a Crook*, WALL ST. J., Jan. 21, 2000, at A18; *see also* Timothy P. Blanchard, *Medicare Medical Necessity Determinations Revisited: Abuse of Discretion and Abuse of Process in the War Against Medicare Fraud and Abuse*, 43 ST. LOUIS U. L.J. 91, 114 (1999) ("[T]hreat of draconian . . . sanctions coerces providers into settlements regarding issues on which providers would likely prevail . . . ."); John T. Boese & Beth C. McClain, *Why Thompson is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 ALA. L. REV. 1, 18 (1999) ("Defendants found to have violated the civil FCA are liable for treble damages and penalties of $5000 to $10,000 per false claim. The potential for high recoveries makes such suits especially attractive to plaintiffs . . . and places great pressure on defendants to settle even meritless suits.").

141. *See* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PENN. J. BUS. L. 797, 806 & n.40 (2013) (discussing the idea of the corporate death penalty in light of the collapse of Arthur Andersen and noting the view among commentators that "Andersen's collapse . . . showed that a mere indictment can destroy even a huge, established company by causing extreme reputational damage and by triggering other collateral consequences, such as disbarment, exclusion from government contracts, or the activation of loan covenants that raise the cost of borrowing"). Notably, though the perception of the corporate death penalty persists, Markoff found that "[n]o public company convicted in the years 2001–2010 went out of business because of a federal criminal conviction" and argued that one of the reasons may be that "the possibility of driving a company out of business through the collateral consequences of prosecution, is generally not a threat to most large public companies." *Id.* at 827–28. Still, as Markoff acknowledged, the perception of the corporate death penalty has given the government leverage to extract settlements in situations where it otherwise might have chosen simply to walk away. *Id.* at 807–08; *see also supra* note 123 and accompanying text.

goal is simply to prevent the innocent from being routinely punished as if they were guilty. So the question is: How can we create a mechanism that encourages truly innocent parties to fight the charges without opening a door through which the guilty parties also might get off? The answer lies in removing the impediments keeping innocent parties out of court.

V. A Modest Proposal for a Fairer, More Efficient FCA

As currently constituted, the present system all but precludes a rational actor that does business with the government from refusing to settle an FCA case, *irrespective of the actor's guilt or innocence.* Many defendants settle because they fear that if they do not, the government will take steps to exclude them from Medicare and Medicaid.[142] Even an innocent party must worry that a jury would convict it of a misdemeanor and the government would seek discretionary exclusion.[143] This state of affairs has pernicious consequences on the entire system. First and foremost, it flagrantly violates even the most basic notions of due process. While companies may not have Fifth or Fourteenth Amendment rights, most would agree that a company should not be forced to settle with the government if it did not break the law. Even if every prosecutor was a saint, the present options available to FCA defendants leave the impression of a system that comes dangerously close to legally sanctioned extortion. What's more, because the biggest companies tend to cough up the largest settlements, the system in place encourages prosecutors to focus disproportionately on successful companies and, in doing so, probably distracts attention from many of the most egregious fraudsters. Finally, as it currently operates, the fraud prevention apparatus dramatically discourages parties from going to trial.[144] Eliminating the trial encourages prosecutors to go "fishing with landmines," because they do not have to worry about having to face a judge's wrath for filing a frivolous claim. Perhaps most importantly, the present enforcement mechanisms impede the development of the common law, thereby depriving all parties of gaining a clearer, more concrete understanding of what the law does and does not require. In doing so, it encourages the continuance of what one prominent commentator has described as "life in the health care speakeasy."[145]

To address these issues, I propose three basic solutions. First, Congress should proscribe the government from bringing a civil FCA case against a party that it has previously charged criminally based on the same

142. *See supra* Part IV.A.

143. *See supra* note 125 and accompanying text.

144. *See supra* notes 123, 140–41 and accompanying text.

145. James F. Blumstein, *The Fraud and Abuse Statute in an Evolving Health Care Marketplace: Life in the Health Care Speakeasy*, 22 AM. J. L. & MED. 205, 218 (1996). Blumenstein argues that the vast amount of discretion that prosecutors have in enforcing anti-kickback statutes leads to certain unlawful behavior being ignored by prosecutors, but almost necessary to engage in due to market forces, thereby potentially subjecting healthcare providers to *qui tam* actions. *Id.* at 224–25.

transaction or series of transactions if the government lost the criminal case. Second, Congress should alter the exclusion rules so as to permit exclusion for (a) a felony conviction or (b) three separate losses in civil FCA cases *to the government* (whether the government intervened in a *qui tam* action or brought the case itself). Finally, where the government chooses not to intervene in a *qui tam* action, the law should only permit a relator/plaintiff to recover double (rather than treble) damages.

A. Make the Government Choose

By forcing the government to choose whether to bring civil or criminal charges, the new system will force prosecutors to evaluate the true strength of their cases prior to taking action. Where the government truly believes an individual or entity has violated the law egregiously, the government ought to be able to obtain a criminal conviction, and after doing so, it would be allowed to ban the criminal entity from participation in government programs *and* to file suit civilly to recover the taxpayers' money. However, we should seek to discourage the government from using frivolous and remote threats of criminal investigation to coerce parties into a large settlement, and limiting the government's ability to "double dip" after losing a criminal case should encourage prosecutors to better distinguish between egregious violations worthy of criminal treatment and those violations better treated through a strictly civil lens.

It is important to understand that this would not affect the vast majority of settlement agreements that the government strikes today. Parties that violate the FCA will still have ample reason to cut a deal and avoid the costs and monetary risks that accompany trial. The same applies to companies that may have violated the criminal law. In these cases, the threat of criminal prosecution will still present a significant enough risk to induce all but the reckless and the innocent to settle their cases and avoid criminal prosecution. This system will force the government to be more cautious with its threats of criminal prosecution. It will also give innocent parties a way to fight their charges without having to wager their companies' futures.

Of course, an important benefit of this proposal is that it will get more FCA cases into the courtroom, and in doing so, it will encourage the development of the common law.

B. One Felony or a Government Strikeout

The second proposal works toward the same goal as the first and simply posits that the government may seek exclusion if either (a) an individual or entity is convicted of a felony or (b) if the government wins three civil FCA cases against the same company over the course of fifteen years. Here, the government can exclude the egregious violators by securing a *felony* (not a misdemeanor) conviction. However, in order to

seek exclusion absent a felony conviction, the government must secure three separate "victories" in civil FCA cases; private-party wins do not count. The three strikes rule gives those accused of borderline violations the option of going to court and contesting the government's theory of liability. Of course, again, it *does not* follow that everyone will go to court. By retaining the current civil damage provisions of the civil FCA, this system ensures that the risks associated with going to trial remain quite high. Cases where the government can demonstrate solid grounds for a civil case will probably settle.

C. For Private Parties, Double Damages

Finally, where the government chooses not to intervene in a *qui tam* action, the relator should only recover double (rather than treble) damages. The *qui tam* provision of the FCA seeks to encourage individuals with valuable information to share it with prosecutors. It does *not* exist to enrich private parties. The FCA explicitly gives the government the right to intervene in *any qui tam* case before a private party may proceed. When the government chooses *not* to intervene, presumably it does so because either (a) there is no violation or (b) if there is a violation, it does not rise to a level warranting government involvement. Where the government does not deem a violation worthy of an enforcement action, recovery should be limited to double (rather than treble) damages. Doing so will have two effects. First, it will discourage attorneys from taking clients with claims that they do not believe the government will intervene in. Without treble damages, plaintiffs' counsels will have less leverage with which to obtain a quick settlement. The possibility of trial should scare off any lawyer considering taking on a weak case for a contingency fee. Second, it will encourage genuinely innocent parties to fight the action in court. As many major companies can attest, nothing invites frivolous claims like settling frivolous claims. Since a loss in court will not count against an organization's "three strikes," companies will be more willing to take weaker cases to court. This, of course, benefits all parties by creating more common law.

VI. Conclusion

When used properly, the civil False Claims Act is an invaluable tool. However, as this Note has explained, the manner in which prosecutors presently deploy the civil FCA does not effectively distinguish between the guilty and the innocent. In fact, it is not altogether clear what the terms guilty and innocent even mean as applied to the civil FCA because courts rarely have a chance to interpret the law. By making the government choose between civil or criminal enforcement, implementing the felony/three government strikes rule, and limiting penalties in cases in which the government chooses not to intervene, Congress would give the

innocent the opportunity to contest borderline charges in the courtroom. In turn, this would develop the common law in ways that will clarify the meaning of the civil FCA for those responsible for enforcing it as well as for those subject to it.