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Peter Reilly, *Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, 2015 *BYU L. Rev.* 307 (2014).

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Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions

*Peter R. Reilly*¹

According to the U.S. Department of Justice, deferred prosecution agreements are said to occupy an “important middle ground” between declining to prosecute on the one hand, and trials or guilty pleas on the other. A top DOJ official has declared that over the last decade, the agreements have become a “mainstay” of white collar criminal law enforcement; a prominent criminal law professor calls their increased use part of the “biggest change in corporate law enforcement policy in the last ten years.”

However, despite deferred prosecution’s apparent rise in popularity among law enforcement officials, this Article sets forth the argument that this alternative dispute resolution vehicle makes a mockery of the criminal justice system by serving as a disturbing wellspring of unfairness, double standards, and potential abuse of power. This Article concludes by recommending that Congress pass legislation to halt the DOJ’s ability to use deferred prosecution agreements in the context of corporate criminal law enforcement. The Article suggests that if this goal cannot be realized, these agreements will continue to greatly compromise the pursuit of justice, consistency in the rule of law, and basic notions of fairness.

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INTRODUCTION

On December 12, 2012, the New York Times editorial page stated the following:

It is a dark day for the rule of law. Federal and state authorities have chosen not to indict HSBC, the London-based bank, on charges of vast and prolonged money laundering, for fear that criminal prosecution would topple the bank and, in the process, endanger

the financial system. They also have not charged any top HSBC banker in the case, though it boggles the mind that a bank could launder money as HSBC did without anyone in a position of authority making culpable decisions.¹

Instead of indictment and prosecution, HSBC was invited to join what some call “Club Fed Deferred”²—a club that has a large corporate membership³—by entering into a deferred prosecution agreement with the U.S. Department of Justice wherein the bank would (1) pay money through forfeiture and other penalties, (2) work to enhance its internal controls, and (3) submit to the oversight of an external monitor for a period of five years.⁴ In assessing this end result, the New York Times editorial commented:

When prosecutors choose not to prosecute to the full extent of the law in a case as egregious as this, the law itself is diminished. The deterrence that comes from the threat of criminal prosecution is weakened, if not lost. . . . [O]nce criminal sanctions are considered off limits, penalties and forfeitures become just another cost of doing business, a risk factor to consider on the road to profits.⁵

My own reaction to the disposition of the case was more in line with that of Professor Jimmy Gurulé, a former enforcement official at the U.S. Treasury Department, who said that deferred prosecution in a case like HSBC makes a “mockery of the criminal justice system.”⁶

1. Editorial, *Too Big to Indict*, N.Y. TIMES, Dec. 12, 2012, at A38.

2. Janet Novack, *Club Fed, Deferred*, FORBES (Aug. 24, 2005, 8:40 AM), http://www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz_jn_0824beltway.html.

3. See Pub. Citizen’s Cong. Watch, *Justice Deferred: The Use of Deferred and Non-Prosecution Agreements in the Age of ‘Too Big To Jail’*, PUB. CITIZEN 7–23 (July 8, 2014), available at <http://www.citizen.org/documents/justice-deferred-too-big-to-jail-report.pdf> (discussing how the U.S. Department of Justice has entered into deferred prosecution and/or non-prosecution agreements with numerous corporate entities, including Barclays Bank PLC, UBS, Credit Suisse, Deutsche Bank, MetLife, the Royal Bank of Scotland Group PLC (“RBS”), and JPMorgan Chase & Co.).

4. See Press Release, U.S. Dep’t of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), available at <http://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations>.

5. *Too Big to Indict*, *supra* note 1.

6. Ashley Post, *HSBC Might Pay \$1.8 Billion Fine in Money-Laundering Settlement*, INSIDE COUNSEL, (Dec. 6, 2012), <http://www.insidecounsel.com/2012/12/06/hsbc-might-pay-18-billion-fine-in-money-laundering>. Professor Gurulé suggested that law enforcement agencies would have a stronger impact if they indicted individuals. As Gurulé put

At the time, I thought the HSBC agreement would surely be the final low point in a two-decades-long experiment in deferring prosecution of alleged corporate criminal wrongdoing.⁷ I thought the case would be the proverbial straw that broke the camel's back, prompting swift and resolute reform, including bringing corporate deferred prosecutions to a well-deserved end. Since that time, however, deferred prosecution has been applied across the full spectrum of corporate conduct, generally falling into six categories of violations or statutes, including various types of fraud and trade offenses; the Foreign Corrupt Practices Act; the Controlled Substances Act; the False Claims Act; and the Food, Drug & Cosmetic Act.⁸

We know “that criminal charges or potential criminal charges against corporations are almost always resolved by a negotiated resolution rather than through litigation.”⁹ While these negotiations can result in guilty pleas,¹⁰ prosecutors may also choose to resolve the matters using Deferred Prosecution Agreements (“DPAs”) and Non-Prosecution Agreements (“NPAs”). While DPAs and NPAs are largely similar in form and substance,¹¹ this Article will focus on

it, “That would send a shockwave through the international finance services community. It would put the fear of God in bank officials that knowingly disregard the law.” *Id.*

7. *See, e.g.*, David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1295–1300 (2013) (discussing DOJ's use of a non-prosecution agreement in the Upper Big Branch mining disaster, a case where twenty-nine miners died and where the Mine Safety and Health Administration found more than 300 violations of the Mine Safety and Health Act). NPAs are similar in many respects to deferred prosecution agreements. *See infra* note 11.

8. *2013 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)*, GIBSON DUNN 19–21 (July 9, 2013), available at <http://www.gibsondunn.com/publications/Pages/2013-Mid-Year-Update-Corporate-Deferred-Prosecution-Agreements-and-Non-Prosecution-Agreements.aspx>.

9. Barry J. Pollack & Annie Wartanian Reisinger, *Lone Wolf or the Start of a New Pack: Should the FCPA Guidance Represent a New Paradigm in Evaluating Corporate Criminal Liability Risks?*, 51 AM. CRIM. L. REV. 121, 125 (2014).

10. “95% percent of all federal criminal cases (and well over 90% of cases involving organizational defendants) are resolved by guilty pleas.” JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 37 (5th ed. 2012); *see also* Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 562 (2014); Robert P. Burns, *What Will We Lose if the Trial Vanishes?*, 37 OHIO N.U. L. REV. 575 (2011); *Criminal Cases*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CriminalCases.aspx> (last visited Jan. 31, 2015).

11. One important difference is that DPAs are filed by the DOJ in federal court with a charging document and are subject to judicial approval. NPAs, on the other hand, are simply letter agreements between the DOJ and the entity subject to the agreement. Regarding NPAs,

DPA, with the understanding that the observations and conclusions put forth herein are applicable to both.

In a September 2012 speech before the New York City Bar Association, then-Assistant Attorney General Lanny Breuer declared that over the last decade DPAs have “become a mainstay of white collar criminal law enforcement.”¹² Professor Julie O’Sullivan appears to concur, calling their increased use part of the “biggest change in corporate law enforcement policy in the last ten years”¹³ Moreover, federal prosecutors have come to rely heavily on such agreements:¹⁴ since 2000, the U.S. Department of Justice has entered into 283 publicly disclosed agreements.¹⁵ The U.S. Securities and Exchange Commission also uses deferred prosecution in its corporate enforcement regime, having entered into seven such agreements since 2010.¹⁶ Of the 290 agreements that the DOJ and the SEC have entered into since 2000, more than half (152) have been made since January 1, 2010. These agreements have led to monetary penalties totaling more than \$42 billion.¹⁷

there is no public filing of charges, and they are not subject to judicial review. See Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., Dep’t of Justice, to Heads of Dep’t Components & U.S. Attorneys, U.S. Dep’t of Justice 1 n.2 (Mar. 7, 2008), available at <http://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf>.

12. Lanny A. Breuer, Assistant Attorney Gen., Dep’t of Justice, Address at the New York City Bar Association (Sept. 13, 2012), transcript available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html>.

13. Julie R. O’Sullivan, *How Prosecutors Apply the “Federal Prosecutions of Corporations” Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29, 77 (2014) (“The biggest change in corporate law enforcement policy in the last ten years has been the plunge in criminal convictions of large organizations, and the DOJ’s consistent use of [deferred prosecution] agreements to dispose of criminal wrongdoing.”).

14. See Morford, *supra* note 11. Typically, both DPAs and NPAs require the corporate entities to (1) fully cooperate in the government investigation by disclosing all relevant facts; (2) pay a fine; (3) put into place (or bolster existing) policies and procedures to ensure compliance; (4) self-monitor to ensure adherence to the DPA or NPA provisions, or retain an external monitor that ensures adherence thereto; (5) waive any and all possible legal defenses; and (6) in the case of a DPA, to not deny the “Statement of Facts” appended to the agreement. See Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23, 47 (2010).

15. *2014 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)*, GIBSON DUNN (July 8, 2014), available at <http://www.gibsondunn.com/publications/Documents/2014-Mid-Year-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf>.

16. *Id.*

17. *Id.*; see also Uhlmann, *supra* note 7, at 1311.

According to the DOJ, DPAs are said to occupy an “important middle ground” between the stark, binary choice of either *prosecution* (i.e., going to trial or accepting some kind of plea agreement) or *declination* (i.e., walking away and doing nothing).¹⁸ Moreover, it is important that DPAs not be confused with plea bargaining. A plea bargain is essentially a negotiated deal between the government and a defendant: if the government agrees to reduce the charges or the severity of the sentence (or both), the defendant will then agree to plead guilty.¹⁹ The key difference is that in plea bargains, defendants ultimately accept guilt²⁰ and conviction.²¹ With DPAs, on the other hand, there are neither guilty pleas nor convictions.

Instead, DPAs are negotiated contracts²² between the government and targeted entities.²³ In most agreements, the

18. See U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-28.200 (2014), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.200; see also Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1869 (2005) (“Deferred prosecution offers prosecutors an intermediate option between declination and plea bargaining, as deferrals exact sanctions while circumventing the collateral consequences of a conviction.”).

19. See Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3607 (2013) (“Plea bargaining occurs before the start of the trial and usually takes the form of a series of offers and counteroffers between a prosecuting attorney and the defendant and his attorney. There are two broad categories of plea negotiations, each of which general entails concessions on the part of both the prosecution and the defendant: charge bargaining and sentence bargaining. In charge bargaining, the defendant agrees to plead guilty in exchange for the dropping of some charges or the decrease in their severity. In sentence bargaining, the prosecution agrees to recommend a lesser sentence in return for the guilty plea. These categories are not mutually exclusive, and many plea agreements will contain elements of both.”) (citations omitted).

20. Note, however, that an *Alford* plea involves a “no-contest” plea where the defendant does *not* admit guilt, but nevertheless accepts a conviction. See generally Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (2003).

21. See Greenblum, *supra* note 18 (“A guilty plea [in a plea bargain] results in a conviction and collateral consequences attach no differently than if the offender had been convicted in a trial.”).

22. See Wilson Meeks, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?*, 40 COLUM. J.L. & SOC. PROBS. 77, 80 n.16 (2006) (“DPAs are essentially contracts between the government and a corporate criminal in which the government agrees not to prosecute a corporation in return for a list of concessions.”).

23. See Kathleen F. Brickey, *Perspectives on Corporate Criminal Liability* 25 (Wash. Univ. in St. Louis Sch. of Law, Legal Studies Research Paper Series, Paper No. 12-01-02, 2012),

company agrees: (1) to an admission of wrongdoing; (2) to cooperate with the government and disclose all relevant facts in ongoing investigations, including those in which corporate agents and employees might be a target; (3) to pay monetary fines and penalties; (4) to put into place (or bolster existing) compliance programs; (5) to implement a self-monitoring program in order to ensure adherence to various provisions of the agreement, or to retain an external monitor that ensures adherence thereto; (6) to agree to a waiver of the statute of limitations, as well as the right to a speedy trial; and (7) to agree to a provision stating (a) that if the company breaches the agreement, it will then be subject to prosecution, and (b) that the agreement's statement of facts (including admission of guilt) will be admissible.²⁴ In exchange for all this, the DOJ agrees to hold off on prosecution. In the end, if all elements of the DPA are successfully achieved, the initially accused party can move forward without fear of further legal consequences regarding the matter in question.²⁵

This Article is divided into four parts: Part I will discuss (1) the history of DPAs; and (2) the possibility that DPAs, by foreclosing opportunities for trials, jury verdicts, and appellate court decisions,

available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1980346 (“DPAs do not ordinarily result in an immediate agreement to refrain from criminally prosecuting the corporation. Instead, they effectively place the corporation under government supervision for a specified period of time and defer the decision whether to actively pursue criminal charges pending a determination whether the corporation will successfully fulfill the terms and conditions of the agreement. . . . Although [DPAs] almost invariably involve exacting some concession from the corporation such as payment of a fine or restitution, these exactions are a product of ad hoc decisions by prosecutors about the most effective and efficient means to resolve a case through negotiated agreement rather than through formal punishment imposed by a court upon conviction.”).

24. See O’Sullivan, *supra* note 13, at 53. Note that many agreements go beyond these more basic provisions. See F. Joseph Warin & Peter E. Jaffe, Commentary, *The Deferred-Prosecution Jigsaw Puzzle: A Modest Proposal for Reform*, 19 ANDREWS WHITE COLLAR CRIME REP., Sept. 2005, at 3, 5 (suggesting that “[o]ne of the most appealing aspects [of deferred prosecution agreements] is the ability to tailor each one according to the specific needs of the respective parties, with both sides bargaining for what they hold most dear”).

25. See William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 645–47 (2002). Professor Laufer suggests that law enforcement within the corporate context oftentimes translates into “a brand of negotiated compliance” where “reciprocal promises” are made, and where companies cooperate and accept responsibility “in exchange for mitigation, exculpation, or absolution.” The professor uses language of negotiation theory as he refers to this “bargained-for exchange” or “trading of favors[] with an arsenal of sanctions in the background.” *Id.*

might interfere with the important process of clarifying the boundaries of the law.

Part II will discuss (1) the collateral consequences surrounding traditional criminal conviction, including suspension, debarment, and exclusion; (2) to what extent prosecutors should, in making charging and other decisions, anticipate and/or attempt to prevent those collateral consequences; and (3) a brief history of respondeat superior liability and why companies tend to favor DPAs over going to trial.

Part III will discuss (1) whether prosecutors have too much power, leverage, and control in deciding whether, when, and how DPAs will be used to resolve a given matter; (2) the issue of a “revolving door” between criminal enforcement agencies and private law practice, and its possible impact on prosecutorial charging decisions; and (3) the extent to which prosecutors are (a) deciding to pursue *companies* instead of *individuals*, (b) are focusing on reforming corporate “culture” instead of punishing misbehavior, and (c) are using DPAs to extract a “pound of flesh” from an alleged wrongdoer in instances where such action might not be warranted.

Part IV concludes with the recommendation that Congress should pass legislation to halt the DOJ’s ability to use DPAs in the context of corporate criminal law enforcement.

I. THE RISE OF DPAS

A. DPAs: From 1914 to the Present

DPAs emerged in the early 1900s as a way to address non-serious misdemeanor charges, such as retail theft, especially when committed by juveniles or first-time offenders.²⁶ As one commentator notes, their use “is rooted in small measures to protect vulnerable persons in society.”²⁷ The Chicago Boys’ Court implemented deferred prosecution in 1914 in the hope that juvenile offenders would not be labeled and stigmatized as “criminals,”²⁸ and the Judicial Conference formally endorsed the use of DPAs beginning in 1947.²⁹

26. Kristie Xian, Note, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 631, 642–43 (2014).

27. *Id.* at 642.

28. Greenblum, *supra* note 18, at 1866.

29. Center for Health and Justice at TASC, *No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives* 16 (Dec. 2013).

It was common to combine deferred prosecution with community-based counseling, training, and job-placement programs to further assist the offender and help him or her avoid a future life of crime.³⁰

In 1976, the Law Enforcement Assistance Administration issued a grant to the National Association of Pretrial Services Agencies (NAPSA) in order to develop national standards for programs that administer pretrial diversion programs.³¹ The following year, the DOJ promulgated standards for deferral of prosecution, citing three principal objectives: “[(1)] To prevent future criminal activity among certain offenders by *diverting them from traditional processing into community supervision and services*; [(2)] To save prosecutive and judicial resources for concentration on *major* cases; and [(3)] To provide, where appropriate, a vehicle for restitution to communities and victims of crime.”³²

In analyzing the first two of these three objectives, a plain reading would suggest that the DOJ designed the deferrals for application to *individuals* rather than organizations or entities (see objective (1)), and for application to small or medium-sized cases rather than “major” cases (see objective (2)). Nevertheless, it is clear that, over time, the DOJ decided to utilize the agreements to resolve possible criminal misconduct involving corporate and other business entities (i.e., something other than “individuals”), and matters that could be considered “major” cases, as will be discussed below.

One of the earliest uses of DPAs in the corporate context occurred in 1994 when Mary Jo White, then the United States Attorney for the Southern District of New York, entered into a DPA

30. Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827, 827 (1974) (“Pretrial diversion is a formalized procedure authorized by legislation, court rule, or, most commonly, by informal prosecutorial consent, whereby persons who are accused of certain criminal offenses and meet preestablished criteria have their prosecution suspended for a three month to one year period and are placed in a community-based rehabilitation program. The rehabilitation program may include counseling, training, and job placement. If conditions of the diversion referral are satisfied, the prosecution may be nolle prossed or the case dismissed; if not, the accused is returned for normal criminal processing.”).

31. Center for Health and Justice at TASC, *supra* note 29.

32. U.S. ATTORNEYS’ MANUAL, *supra* note 18, § 9-22.010 (emphasis added); *see also* Model Penal Code: Sentencing § 6.02A (Discussion Draft No. 4 2012) (stating that the “primary purposes of deferred prosecution are to facilitate the offender’s rehabilitation and reintegration into the law-abiding community and the restoration of crime victims and communities, while avoiding the stigma and collateral consequences associated with criminal charges and convictions”).

with Prudential Securities.³³ While that agreement helped blaze a trail for other prosecutors to negotiate pretrial diversion agreements, the DOJ initially used the agreements quite sparingly: from 2000 through 2004, the DOJ entered into an average of approximately four agreements per year.³⁴ Starting in 2005, however, the number of agreements increased to an average of twenty-eight agreements per year,³⁵ with peak years in 2007 (with thirty-nine filings), 2010 (with thirty-nine filings), and 2012 (with thirty-seven filings).³⁶

This dramatic increase is likely due to the many positive effects of resolving matters through a DPA, including (1) allowing companies to avoid the stigma (and other negative consequences) that might flow from a criminal indictment or trial;³⁷ (2) minimizing the likelihood of collateral damage to innocent third parties (such as job losses resulting from company closures, etc.);³⁸ (3) enabling the collection of large fines, thereby leading to punishment for the alleged wrongdoer and restitution for victims;³⁹ (4) mandating specific reforms within the company and controlling how future business is conducted;⁴⁰ and (5) monitoring company behavior to ensure conformity with the terms of the agreement.⁴¹ Indeed, some commentators suggest that prosecutors can achieve through DPAs, “all that they could win at trial . . . without the significant expenditure of time and resources.”⁴²

33. Greenblum, *supra* note 18, at 1873.

34. *2013 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON DUNN 1 (Jan. 7, 2014), available at <http://www.gibsondunn.com/publications/Documents/2013-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf>.

35. *Id.*

36. *2014 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)*, GIBSON DUNN 2 chart 1 (July 8, 2014), available at <http://www.gibsondunn.com/publications/Documents/2014-Mid-Year-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf>; see also Uhlmann, *supra* note 7, at 1311.

37. See Court E. Golumbic & Albert D. Lichy, *The “Too Big to Jail” Effect and the Impact on the Justice Department’s Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1314 (2014).

38. *Id.*

39. *Id.* at 1315.

40. *Id.*

41. *Id.*

42. See Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 AM. CRIM. L. REV. 1481, 1483 (2007).

Despite these advantages of DPAs, however, there are certain drawbacks to both the agreements themselves and to the way in which they are negotiated. U.S. District Court Judge Jed S. Rakoff, who has handled numerous high-profile cases that have been resolved through the use of deferred prosecution, provides an accurate (and, to some, disturbing) picture of how the DPA negotiation process moves forward, from beginning to end, from the vantage point of the government. According to Judge Rakoff, once you—you being the federal government—come to believe that misbehavior may have occurred within a given company, counsel to that company then

responds by assuring you that the company wants to cooperate and do the right thing, and to that end the company has hired a former Assistant U.S. Attorney, now a partner at a respected law firm, to do an internal investigation. The company's counsel asks you to defer your investigation until the company's own internal investigation is completed, on the condition that the company will share its results with you. In order to save time and resources, you agree. Six months later the company's counsel returns, with a detailed report showing that mistakes were made but that the company is now intent on correcting them. You and the company then agree that the company will enter into a deferred prosecution agreement that couples some immediate fines with the imposition of expensive but internal prophylactic measures. For all practical purposes the case is now over. You are happy because you believe that you have helped prevent future crimes; the company is happy because it has avoided a devastating indictment; and perhaps the happiest of all are the executives, or former executives, who actually committed the underlying misconduct, for they are left untouched.⁴³

The judge concludes that such a process “is not the best way to proceed” and states that “the future deterrent value of successfully prosecuting individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing.”⁴⁴ I strongly agree; indeed, addressing

43. Jed S. Rakoff, *Why Have No High Level Executives Been Prosecuted In Connection With The Financial Crisis?*, CLS BLUE SKY BLOG (Nov. 15, 2013), <http://clsbluesky.law.columbia.edu/2013/11/15/why-have-no-high-level-executives-been-prosecuted-in-connection-with-the-financial-crisis>; see generally Elkan Abramowitz & Jonathan Sack, *The ‘Civil-izing’ of White-Collar Criminal Enforcement*, N.Y. L.J., May 7, 2013, at 3.

44. Rakoff, *supra* note 43.

possible corporate wrongdoing through DPAs has serious negative implications for justice and fairness, many of which will be described and analyzed in this article. My end goal is to convince readers that DPAs—as well as the process through which they are negotiated and implemented—make a mockery of the criminal justice system, and it is therefore time to end our failed experiment in using them in the context of corporate criminal wrongdoing.

B. Do DPAs Short Circuit the Process of Clarifying the Boundaries of the Law?

The jurisprudence of a given area of law is developed primarily through litigation—meaning trials, jury verdicts, and appellate court decisions. Importantly, litigated cases

provide judicial opinions regarding what conduct violates the criminal laws and what does not. Thus, in addition to the criminal statutes themselves, corporations and individuals . . . would have guidance available to them in the form of judicial opinions providing elaboration as to what specific fact patterns constituted criminal behavior and, likewise, what fact patterns did not.⁴⁵

Obviously, when cases are resolved through DPAs, there *is* no litigation, nor instructive legal precedent resulting therefrom.⁴⁶ As Professor Carrie Menkel-Meadow warns us: “When an authoritative rule is necessary, . . . *the courts must adjudicate and provide clear guidance for all . . .*”⁴⁷

While examining the text of previous DPAs can provide companies with some guidance in clarifying the boundaries of permissible legal conduct, such agreements do not provide binding judicial precedent that can be legally relied upon by companies facing similar circumstances.⁴⁸ Nevertheless, when the DOJ

45. Pollack & Reisinger, *supra* note 9, at 123–24.

46. One commentator suggests the DOJ has an incentive to use deferred prosecution agreements in place of formal prosecution because, among other reasons, doing so “strategically *keep[s] the law underdeveloped* in order to place more pressure on corporations.” Allen R. Brooks, Comment, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J. L. ECON. & POL’Y 137, 139 n.22 (2010) (emphasis added).

47. Carrie Menkel-Meadow, Essay, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 500 (1985) (emphasis added).

48. In addition to reviewing deferred prosecution agreements, interested parties can glean guidance in different areas of the law from sources such as: (1) opinion procedure releases in the area of the Foreign Corrupt Practices Act; (2) business review procedures

announces a deferred prosecution, the agency is thereby setting forth guidance to the general public on how it might approach similar cases in the future. If a company enters into a DPA based on a particular set of facts, other individuals and companies will thereafter know that the particular fact pattern “will be deemed by the DOJ to cross the line of what is criminal.”⁴⁹ Of course, because the DPA fails to provide any kind of binding judicial precedent, “the DOJ is under no obligation to treat the same conduct by different corporations with any consistency, increasing the challenges of corporate compliance and risk reduction.”⁵⁰

(“BRP”) in the antitrust context; and (3) advisory opinions in dealing with Medicare, Medicaid, and the Health Insurance Portability and Accountability Act (“HIPAA”). All of these forms of guidance are similar to deferred prosecution agreements in that, while they can be helpful and instructive, they do not have any precedential value. *See* Pollack & Reisinger, *supra* note 9, at 144–47.

49. *Id.* at 126, 135 (discussing the lack of judicial opinions in the context of Foreign Corrupt Practices Act enforcement, the authors state, “Due to the limited number of litigated FCPA cases, the relatively small number of opinion procedure releases, and the lack of information regarding enforcement policies from the Layperson’s Guide, FCPA corporate settlement documents became the true bread and butter of de facto agency ‘jurisprudence’ guiding corporate conduct”).

50. *Id.* at 127. In addition, the language set forth in these DPAs fails to give insight regarding actions that do *not* cross the line into criminal activity. As Pollack and Reisinger put it:

Assume, for example, that the DOJ investigates corporation *A* for six different potential criminal violations. Or, more likely in the modern world described above, a corporation is so concerned about the possibility of criminal prosecution, it voluntarily discloses to the DOJ six potential criminal violations. The company takes the position that of these six arguable violations, three are, in fact, violations of the law and three are not. The DOJ takes the position that five of the six constitute criminal violations. Ultimately, as a product of negotiation, the DOJ agrees that the fifth fact pattern did not cross the line and the corporation agrees that the fourth fact pattern did. The DOJ and corporation *A* then enter into a deferred prosecution agreement. Corporation *A* admits that it engaged in four sets of behavior that were criminal, pays a large monetary penalty and agrees to increase its compliance measures. The public reads this resolution and knows of four fact patterns that the DOJ believes cross the line. The public does not learn of the fifth and sixth fact patterns that the DOJ agreed, for the purposes of the negotiation, did not cross the line. Had the cases been litigated, the public would have learned that the DOJ charged the fifth fact pattern, but that this charge was dismissed by the court as failing to state an offense or that corporation *A* was acquitted of this charge and therefore that that fact pattern is not illegal, or, at a minimum, not likely to be prosecuted again.

Id. at 126; *see also* F. Joseph Warin & Peter E. Jaffe, *Rolling the Dice in Corporate Fraud Prosecutions*, LITIG., Spring 2007, at 12, 15 (concluding “there is no rhyme or reason to the DOJ’s application of [DPAs and NPAs] to corporate entities”); Alyssa Ladd, Comment, *The Catch-22 of Corporate Cooperation in Foreign Corrupt Practices Act Investigations*, 51 HOUS. L. REV. 947, 960 (2014) (pointing out that the DOJ has “no concrete guidelines” for entering DPAs).

II. COLLATERAL CONSEQUENCES AND RESPONDEAT SUPERIOR: FORCES DRIVING DECISION MAKERS TO OPT FOR DPAs

A. Collateral Consequences: Suspension, Debarment, and Exclusion

Scholars John Gallo and Daniel Greenfield argue that “[t]he characteristics of corporate criminal law result in an unusual state of affairs: neither a corporation nor a federal prosecutor has an incentive to take a corporate criminal case to trial.”⁵¹

These authors suggest that, “[f]rom the corporation’s perspective, respondeat superior may render remote the odds of a not-guilty verdict.”⁵² And “[f]rom the prosecutor’s perspective, debarment and exclusion upon conviction risk substantial injury to innocent third parties—i.e., employees, stockholders, and consumers—and to the national economy as a whole.”⁵³ They conclude that it is “no mystery” why the usage of DPAs has “exploded” in the last two decades: “[B]oth corporations and the government are virtually required to rely upon them in order to circumvent the unfairness created by the combination of respondeat superior liability and the collateral consequences of a conviction, including disbarment and exclusion.”⁵⁴

If a corporation decides to go to trial and loses, it might face debarment or exclusion. Debarment and exclusion occur in different ways: First, a corporation can be debarred at the discretion of a federal agency pursuant to the Federal Acquisition Regulations.⁵⁵ Sometimes called an “administrative debarment,”⁵⁶ this kind of debarment is carried out “to protect the Government’s interest” by ensuring that federal agencies conduct business only with companies

51. John N. Gallo & Daniel M. Greenfield, *The Corporate Criminal Defendant’s Illusory Right to Trial: A Proposal for Reform*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 525, 536 (2014).

52. *Id.*

53. *Id.*

54. *Id.* at 537; *see also* Pollack & Reisinger, *supra* note 9 (“[A]s reluctant as the DOJ has become post-Arthur Andersen to prosecute criminal charges against corporations, corporations have become even more reluctant to defend against such charges. The result is that criminal charges or potential criminal charges against corporations are almost always resolved by a negotiated resolution rather than through litigation.”).

55. 48 C.F.R. § 99.402 (2013).

56. Rena Steinzor & Anne Havermann, *Too Big to Obey: Why BP Should Be Debarred*, 36 WM. & MARY ENVTL. L. & POL’Y REV. 81, 97 (2011) (discussing how administrative debarments and suspensions “are meant to protect the public interest, not to punish”).

that are “responsible.”⁵⁷ Second, a company might face a “statutory debarment,” wherein a particular statute mandates that a convicted corporation be debarred. Consider, for example, the Clean Air Act, 42 U.S.C. § 7606 (a), which states:

No federal agency may enter into any contract with any person who is convicted of any offense under section 7413(c) of this title for the procurement of goods, materials, and services to perform such contract at any facility at which the violation which gave rise to such conviction occurred if such facility is owned, leased, or supervised by such person.⁵⁸

Clearly, if a company relies on government contracts as a source of projects and profits, such statutory debarment could dramatically impact its bottom line, if not put it out of business altogether.⁵⁹

Finally, a company might be excluded from participating in certain federal programs. Consider, for example, 42 U.S.C. § 1320a-7, dealing with exclusion from participation in Medicare and other health programs, where there is “[m]andatory exclusion” (i.e., “The Secretary *shall* exclude the following individuals and entities from participation”) for serious transgressions such as patient abuse, felony health care fraud, and felony controlled substance convictions, but merely “[p]ermissive exclusion” (i.e., “The Secretary *may* exclude the following individuals and entities from participation”) for less serious transgressions, including misdemeanor health care fraud, obstruction of an investigation or audit, or misdemeanor-controlled substance conviction.⁶⁰

Debarment and exclusion can be devastating for a company. With an estimated \$460 billion spent in fiscal year 2013 alone,⁶¹ the United States government is the world’s largest purchaser of goods and services.⁶² For companies that depend heavily on contracts with

57. See 48 C.F.R. § 9.402(a), (b) (2013).

58. 42 U.S.C. § 7606(a) (2012).

59. Joel Androphy et al., *The Intersection of the Dodd-Frank Act and the Foreign Corrupt Practices Act: What All Practitioners, Whistleblowers, Defendants, and Corporations Need to Know*, ADVOC., Summer 2012 at 19, 23 (“All the disadvantages of plea agreements, DPAs, and NPAs pale in comparison to debarment from participation in . . . government programs.”).

60. 42 U.S.C. § 1320a-7 (emphasis added) (2012).

61. Danielle Ivory, *Federal Contracts Plunge, Squeezing Private Companies*, N.Y. TIMES, Jan. 16, 2014, at B1.

62. Steinzor & Havermann, *supra* note 56, at 111.

the federal government, exclusion and debarment can amount to a corporate “death penalty.”⁶³

But is it reasonable for criminal convictions to result in automatic (and oftentimes quite large) civil sanctions? Moreover, does debarment and similar sanctions have to be so rigid and one-size-fits-all? Elizabeth Ainslie, an experienced corporate compliance and criminal defense litigator, suggests that laws imposing “mandatory, automatic, and drastic civil sanctions in the wake of criminal convictions are unnecessarily harsh and rigid.”⁶⁴ According to Ainslie, such laws also give federal prosecutors tremendous power over companies, particularly those that are smaller in scale within their respective industry, or that are not sole-source producers of crucial goods or services.⁶⁵ She opines:

This regime gives government, and especially the federal government, vast and irrationally shaped areas of power. . . . Defendant corporations . . . often feel forced to pay exceedingly large settlements on the civil side, and to plead guilty to a carefully orchestrated charge on the criminal side, simply to avoid “betting the company” in a criminal trial, the outcome of which might mean automatic exclusion from a federal program that provides a significant portion of the company’s livelihood. Moreover, the smaller a portion of the relevant market the defendant occupies, the disproportionately smaller its bargaining power with the government. A major aircraft manufacturer, or even a small pharmaceutical company which is the sole source of an important drug, is much less susceptible to a disastrous criminal outcome than is its much smaller or more generic competitor.⁶⁶

All of this begs the question, to what extent might we revisit the rules and processes governing sanctions such as automatic debarment? Perhaps there could be multi-layered processes

63. See Pollack & Reisinger, *supra* note 9 (“Conviction may lead to debarment, the death penalty for a company that relies on government contracts, or exclusion, the death penalty for a health care provider who receives payments from Medicare or Medicaid.”).

64. Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 110, 118 (2006) (“This coupling is most frequently found in the government contracts arena, where Congress has in general decreed that those who are convicted of defrauding the government will automatically be debarred from contracts with the government. This may appear to be a rational decree at first blush, but . . . in practice it leads to vast dislocations of power as between the Department of Justice and businesses that deal with the government . . .”).

65. *Id.*

66. *Id.* at 118.

regarding how such decisions are made and implemented, with opportunities for more discretion on the part of regulators, and opportunities for businesses to appeal civil sanctions before they go into effect.⁶⁷

B. Should Prosecutors Attempt to Anticipate and Prevent Collateral Consequences?

There is a valid regulatory interest in debarring and de-licensing companies for serious corporate transgressions: it ensures that the federal government does business only with “responsible” business partners.⁶⁸ But, unfortunately, it is not only the irresponsible business partners that are impacted when a company is debarred. Numerous other parties face collateral consequences, including employees, stockholders, and, of course, customers who rely on the products and services produced or provided by those businesses. Consider, for example, a drug and medical device company that engages in misconduct, resulting in the company’s disbarment. When the company can no longer receive reimbursements from Medicare or Medicaid, that company’s customers will be forced to find the lifesaving and life-sustaining drugs and devices elsewhere. But what if no other company produces the drugs or devices? Or what if other companies step in to fill the market void but cannot ramp up production quickly enough to meet consumer demand? Could it be considered immoral or unconscionable to make completely innocent consumers suffer such collateral consequences—consequences that could even result in death?

I argue that it should not be the responsibility of federal prosecutors to anticipate and prevent these kinds of consequences when carrying out their duty of upholding the law and applying it

67. O’Sullivan, *supra* note 13, at 32 (“Prosecutors . . . don’t want to be responsible, for example, for the debarment from Medicare or Medicaid of companies that offer life-saving drugs or medical devices. But the point is that the prosecutors are *not* responsible: the rules governing the application of these collateral consequences are the problem. In short, if collateral consequences create real concerns, they should be addressed on their own terms by permitting regulators additional discretion in their administration or otherwise altering the rules.”).

68. See 48 C.F.R. § 9.103 (“Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.”). See also § 9.104-1 (listing factors that define a responsible contractor); § 9.402 (a)–(b). See generally, Jessica Tillipman, *Suspension and Debarment: The Congressional War on Contractors*, 45 GEO. WASH. INT’L L. REV. 235 (2013).

equally and fairly. Rather, I believe that such problems should be addressed by the *legislators* who create the rules and laws surrounding this issue, or by the *regulators* who work to implement those rules and laws. Perhaps regulators could be given more discretion to forego debarring or de-licensing companies that have committed bad acts.⁶⁹ Or perhaps the current laws, rules, and policies setting forth the various terms of suspension, debarment, and/or de-licensing (e.g., the length and severity of the actions and penalties) need to be reassessed and possibly changed by lawmakers.⁷⁰

When we rely on prosecutors to attempt to prevent these kinds of consequences, a double standard or “dual system of justice” is thereby created in terms of which companies will be spared prosecution.⁷¹ Specifically, it is only for those select companies that can potentially cause serious collateral damage to innocent third parties (e.g., large companies with great numbers of employees that could potentially be laid off, large banks that are considered pivotal to the national or international economy, or companies that are the sole or nearly sole providers of vital services or products like life-saving drugs or devices) that the DOJ will place a thumb on the scale in favor of deferred prosecution rather than indictment. A U.S. Government Accountability Office (GAO) study discussed the importance of this factor to prosecutors as they made charging decisions:

[P]rosecutors explained . . . that the potential harm that prosecution and conviction of health care companies can have on innocent third parties may be a key factor in their decision on entering into a DPA or NPA with these kinds of companies. Federal law provides for health care companies convicted of certain crimes to be debarred from—or no longer eligible to participate

69. Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006 (“[T]eams of state and federal regulators *are now duty-bound to suspend the licenses and permits* under which the corporation does business. Thus, the corporation that has strong protections against false convictions—proof beyond a reasonable doubt of the elements of the crime, the ability to examine evidence or cross-examine witnesses—is helpless to protect itself.”) (Emphasis added).

70. O’Sullivan, *supra* note 13, at 32.

71. See Xian, *supra* note 26, at 661 (“The continued use of deferred prosecution in the corporate context creates a dual system of justice. . . . If you are an individual or small business owner, you will be prosecuted However, if you are a bank official of a large, international bank, you will be granted prosecutorial leeway and avoid criminal sanctions altogether.”).

in—federal health care programs. Prosecutors in one office said that they chose to enter into DPAs and an NPA simultaneously with five orthopedic device companies that provided kickbacks to physicians because, combined, these companies comprised the vast majority of the market for hip and knee replacements; therefore, conviction and debarment of these companies would have severely limited doctor and patient access to replacement hips and knees.⁷²

And yet not all companies get this kind of treatment. Consider the case of G&A Check Cashing, a small store in Los Angeles. In the fall of 2012 (just prior to the HSBC settlement discussed at the beginning of this article), the DOJ obtained guilty pleas from G&A Check Cashing and two of its senior officers. G&A and its officers were charged with laundering eight million dollars—a miniscule amount compared to the billions of dollars allegedly laundered by HSBC. Following their guilty pleas, both G&A officers were sent to prison.⁷³ As one scholar notes, “[t]he dramatically different treatment of HSBC and G&A and their respective senior officers can hardly be squared with any meaningful concept of ‘equal justice under the law.’”⁷⁴

Professor O’Sullivan concludes that the *only* advantage to using DPAs (instead of relying upon criminal indictment and a possible conviction) is that deferring prosecution “permit[s] the government to avoid blame for whatever collateral consequences may flow from a corporate guilty plea—be it debarment from government contracting, the de-licensing of the firm, or losses in revenue, jobs, or shareholder value.”⁷⁵ O’Sullivan states that such a “singular focus

72. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-636T, CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ’S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS 9 (2009) (footnote omitted).

73. Press Release, U.S. Dep’t of Justice, Los Angeles Check Cashing Store, Head Manager and Compliance Officer Sentenced for Violating Anti-money Laundering Laws (Jan. 14, 2013), <http://www.justice.gov/usao/cac/Pressroom/2013/008.html> (stating that G&A Check Cashing paid a one million dollar fine, a manager was sentenced to five years, and the compliance officer was sentenced to eight months).

74. Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1375 (2013).

75. O’Sullivan, *supra* note 13, at 77. See also Barry A. Bohrer & Barbara L. Trencher, *Symposium: Corporate, Criminality: Legal, Ethical, and Managerial Implication: The Challenge of Cooperation: Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 AM. CRIM. L. REV. 1481, 1483 (2007) (suggesting that prosecutors seek DPAs because, among other reasons, the prosecutors “escape the criticism that would likely flow from the destruction of the corporate entity.”).

on collateral consequences” undermines the “fair and even-handed administration of criminal justice.”⁷⁶

Moreover, this strong focus on collateral consequences might be misplaced altogether, as scholars and experts now begin to question the degree to which a company is truly harmed from the collateral consequences that flow from indictment and conviction. In other words, is the sky really falling? Do companies truly have legitimate and compelling reasons to be afraid of indictment, or are their fears somehow overblown? Our knowledge surrounding this question seems to be quickly increasing. In 2012, then Assistant Attorney General Lanny Breuer stated:

We are frequently on the receiving end of presentations from defense counsel, CEOs, and economists who argue that the collateral consequences of an indictment would be devastating for their client. . . . I personally feel that it’s my duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if we indict the corporation. In large multi-national companies, the jobs of tens of thousands of employees can be at stake. And, in some cases, the health of an industry or the markets are a real factor. Those are the kinds of considerations in white collar crime cases that literally keep me up at night, and which must play a role in responsible enforcement.⁷⁷

Less than a year later, in 2013, Gabriel Markoff published an article entitled *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*,⁷⁸ in which he challenged prevailing notions regarding the collateral consequences of convicting corporate entities. Using a database of organizational convictions, Markoff comes to the arguably surprising conclusion that, in the years 2001 to 2010, no publicly traded company failed due to a conviction,⁷⁹ and thus “the

76. O’Sullivan, *supra* note 13, at 77.

77. Breuer, *supra* note 12.

78. Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 802 (2013).

79. *Id.* But see Elkan Abramowitz & Barry A. Bohrer, *The Debate About Deferred and Non-Prosecution Agreements*, 248 N.Y. L.J., Nov. 6, 2012, at 3 (“While the reality is that corporations may not face the type of collateral consequences suffered by Arthur Andersen, there is no question that fighting criminal charges can have a tremendous impact on a corporation’s reputation and pocketbook.”).

risk of driving companies out of business through prosecutions has been radically exaggerated.”⁸⁰

I will leave it to historians and political scientists to help determine why the DOJ seemed to turn a corner in its thinking on this matter, but it is interesting to see the very different tone and message delivered in a speech in early 2014, just months after the publishing of Markoff’s article, by Manhattan U.S. Attorney Preet Bharara, who stated:

What I have found typically is that, in reality, as we had suspected, the sky does not fall . . . And so, this repeated Chicken Little routine, I will tell you, begins to wear thin. And the result is that we view with more and more skepticism and with more and more doubt all the breathless claims of catastrophic consequences made by companies both large and small.⁸¹

A cynic (or realist?) might contend, then, that corporations are well aware that they could successfully survive indictment and even conviction. Indeed, Archer Daniels Midland, Chevron, Exxon, General Electric, Georgia Pacific, Hoffman LaRoche, Pfizer, and Tyson are just a few of many U.S. companies that have been convicted of serious violations, and yet still flourish.⁸² It could be argued, however, that it is nevertheless strategically wise for a company to do or say whatever has to be done or said—including making “breathless claims of catastrophic consequences”—in order to obtain a DPA.⁸³

80. Markoff, *supra* note 78.

81. Halah Touryalai, *This Preet Bharara Speech Should Scare All Big Banks, Especially Citi*, FORBES (Apr. 3, 2014, 1:41 PM), <http://www.forbes.com/sites/halahtouryalai/2014/04/03/this-preet-bharara-speech-should-scare-all-big-banks-especially-citi/>. See also Mark Gongloff, *Eric Holder: Actually, I Meant to Say No Banks are Too Big to Jail*, HUFFINGTON POST (May 15, 2013, 3:31 PM), http://www.huffingtonpost.com/2013/05/15/eric-holder-too-big-to-jail_n_3280694.html (describing testimony of Attorney General Holder at a congressional hearing; specifically, in responding to the question of whether some banks were “too big to jail,” Mr. Holder stated: “Let me be very, very, very clear. Banks are not too big to jail. If we find a bank or a financial institution that has done something wrong, . . . those cases will be brought”).

82. See Russell Mokhiber, *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, CORP. CRIME REP. (2005) (discussing numerous major U.S. companies that survived and thrived after having been convicted of serious crimes). See also Randall D. Eliason, *We Need to Indict Them: Deferred Prosecution Agreements Won’t Deter Enough Corporate Crime*, 31 LEGAL TIMES, Sept. 22, 2008, at 54.

83. But see Joseph G. Block & David L. Feinberg, *Look Before You Leap—DPAs, NPAs, and the Environmental Criminal Case*, 9 ENVTL. ENFORCEMENT & CRIMES COMMITTEE NEWSL., Apr. 2008, at 5, 7 (noting that while a deferred prosecution agreement “saves the

C. Respondeat Superior: Why Companies Avoid Trial and Seek Out DPAs

If a company is facing potential criminal liability, might it make more sense to accept a DPA than to risk going to trial in the matter? The standard for proving “[c]orporate criminal liability developed as courts struggled to overcome the problem of assigning criminal blame to fictional entities in a legal system based on the moral accountability of individuals.”⁸⁴ In 1909, the U.S. Supreme Court decided *New York Central & Hudson River Railroad Company v. United States*, a case in which a railroad company was appealing its conviction based on the conduct of an employee who violated federal law while acting within the scope of his employment.⁸⁵

In holding the company responsible, the Court stated: “[W]e see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. If it were not so, many offenses might go unpunished. . . .”⁸⁶ The Court noted that “the great majority of business transactions in modern times are conducted through [corporations, and to] give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.”⁸⁷

The Court then affirmed the conviction based on the tort doctrine of respondeat superior liability:

Applying the principle governing civil liability, we go only a step further in holding that the act of an agent, while exercising the authority delegated to him . . . may be controlled, in the interest of public policy, by imputing his acts to his employer and imposing penalties upon the corporation for which he is acting⁸⁸

Professors Gallo and Greenfield suggest that the doctrine of respondeat superior makes a quick and near-certain link between the

client from *mandatory* statutory debarment, . . . it may not protect against federal *discretionary* debarment or suspension”).

84. Michael Viano & Jenny R. Arnold, *Corporate Criminal Liability*, 43 AM. CRIM. L. REV. 311, 312 (2006).

85. *New York Central v. United States*, 212 U.S. 481, 490–92 (1909).

86. *Id.* at 494–95.

87. *Id.* at 495–96.

88. *Id.* at 494.

behavior of the agent and the corporation, stating, “Once there is evidence that an employee engaged in criminal activity on the job, the criminal case against the company may be ‘virtually bulletproof.’”⁸⁹ Indeed, according to Gallo and Greenfield, the doctrine of respondeat superior can expose the corporate defendant to criminal liability even where:

- (a) the criminal behavior was perpetrated by a low-level, rogue employee;
- (b) the transgression took place without the knowledge of upper-level management;
- (c) the employee was explicitly instructed by the corporation not to engage in the conduct;
- (d) the conduct directly violated established company policy;
- (e) the conduct failed to benefit the company;
- (f) the company had in place a robust compliance program at the time the transgression occurred; and
- (g) the conduct was exposed by the compliance program.⁹⁰

Professor O’Sullivan sums up the situation thusly: “the respondeat superior standard has been expanded through common law adjudication to the point where it is less a standard than a *guarantor of liability*.”⁹¹ Such a situation, of course, can be problematic for any company wishing to contest a criminal matter through litigation, and some practitioners in this area of law argue

89. Gallo & Greenfield, *supra* note 51, at 529 (citing Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 76 (2007)).

90. *Id.* (citing Lucian E. Dervan, *Reevaluating Corporate Criminal Liability: The DOJ’s Internal Moral Culpability Standard for Corporate Criminal Liability*, 41 STETSON L. REV. 7 (2011); Bharara, *supra* note 89).

91. O’Sullivan, *supra* note 13, at 33 (emphasis added). *See id.* at 33–34 (“[I]ntent may be imputed to the corporation from a person distinct from the individual who committed the actus reus of the crime Prosecutors need not identify the actual wrongdoer, as long as it can be inferred that some person ‘did it’ within the organization. Inconsistent verdicts are tolerated, under which corporations are convicted when all conceivable culpable agents have been acquitted. And courts accept a ‘collective knowledge’ theory, under which no one person knew all the facts demanded by statute, and the required knowledge can be pieced together from what various people within the corporation knew [C]orporations can be held liable even if they had in place good faith and generally effective (but not necessarily foolproof) compliance systems designed to prevent and punish such wrong-doing.”) (citations omitted).

that the current doctrine is flawed. One such critic is criminal defense litigator Elizabeth Ainslie, who argues:

There is . . . no reason why the doctrine of *respondeat superior* should be imported in its totality into the criminal law. The purpose of the doctrine on the civil side of the law is fairly clear: if an employee injures a third party in the course of his duties on behalf of an employer, that injured party should be able to obtain economic compensation from the employer on whose behalf the economic conduct occurred. On the criminal side, however, it makes absolutely no sense to enable a jury to convict an entire organization on the basis of conduct of a lower-level employee, nor does it make sense to convict an organization on the basis of a rogue employee's conduct where that conduct was contrary to a genuine corporate policy.⁹²

Ainslie believes that one important fix could be for the Judicial Conference of the United States to adopt a federal jury instruction based on the American Law Institute's Model Penal Code ("MPC") § 2.07(1)(c),⁹³ which states: "[T]he commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment."⁹⁴

92. Ainslie, *supra* note 64, at 120.

93. *Id.* at 119–120, 123 (pointing out that the law of the Fifth Circuit, where the Arthur Andersen firm was prosecuted, essentially incorporated the rules of respondeat superior from civil cases into criminal cases without significant modification. Moreover, the jury instruction given by the judge in the Andersen case was derived from the federal common law, rather than from a statute. Thus, according to Ainslie, the judge in the case instructed the jury that "(1) Andersen was legally bound by the acts and statements of its agents made within the scope of their employment; (2) although the agent in question must be acting with the intent, at least in part, to benefit the partnership, it was not necessary that the agent's primary motive was to benefit the partnership; (3) although the agent's criminal act must have related directly to the performance of the agent's general duties for the partnership, it was not necessary for the particular act itself to have been authorized by the partnership; (4) indeed, a partnership may be held responsible for its agents' acts performed within the scope of their employment even though the agents' conduct is contrary to the partnership's actual instructions or stated policies; and (5) the agent in question need not be a high level or managerial agent in order for his or her act to be attributable to the firm." Upon reflection, Ainslie's reaction to such a jury instruction was, "This is the law, but in this respect, to quote Dickens' Mr. Bumble, the law is an ass."). *See generally* Court's Instructions to the Jury at 4–5, *United States v. Arthur Andersen*, No. 02-121 (S.D. Tex. June 5, 2002).

94. MODEL PENAL CODE § 2.07(1)(c).

The MPC defines “high managerial agent” as an officer “or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.”⁹⁵ Moreover, the Code provides an affirmative defense if a corporate defendant can show, by a preponderance of the evidence, “that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.”⁹⁶

Ainslie argues that adopting the MPC language, and incorporating that language into federal jury instructions, would make the federal government’s position conform more closely with the majority of states that have addressed the issue themselves, whether through state statutes⁹⁷ or through common law doctrine.⁹⁸ Ainslie further argues that the federal judiciary, having allowed the respondeat superior doctrine to “metastasize from the civil side onto the criminal side,” could and should work to “reverse the growth.”⁹⁹

Professors Joshua Greenberg and Ellen Brotman set forth criticisms in a similar vein, opining that federal appellate courts do not allow a corporation “to defend itself by showing that the employee’s conduct violated its compliance policy or a directive from a superior.”¹⁰⁰ These scholars declare that, for numerous reasons, strict vicarious criminal liability for corporations is “unfair, is bad public policy, and should be abolished.”¹⁰¹

95. *Id.* § 2.07(4)(c).

96. *Id.* § 2.07(5).

97. *See, e.g.*, ALASKA STAT. § 11-16-130 (2004); ARIZ. REV. STAT. ANN. § 13-305 (2004); MONT. CODE ANN. § 45-2-311 (2009).

98. *See, e.g.*, State v. Smokey’s Steakhouse, Inc., 478 N.W.2d 361, 362 (N.D. 1991). Note that some states have adopted standards that are even more strict than those set forth in the Model Penal Code. *See, e.g.*, State v. Adjustment Dep’t Credit Bureau, 483 P.2d 687, 691 (Idaho 1971) (adopting a standard modeled after the Model Penal Code but refusing to adopt the respondeat superior liability provision set forth in § 2.07(1)(a) of the Code). In other jurisdictions, the state legislature has limited corporate criminal liability to very specific circumstances or crimes. *See, e.g.*, State v. St. Paul Fire & Marine Ins. Co., 835 So.2d 230, 233–34 (Ala. Crim. App. 2000).

99. Ainslie, *supra* note 64, at 123.

100. Joshua D. Greenberg & Ellen C. Brotman, *Strict Vicarious Criminal Liability for Corporations and Corporate Executives: Stretching the Boundaries of Criminalization*, 51 AM. CRIM. L. REV. 79, 84 (2014).

101. The reasons include the following:

First, it subjects a corporation to criminal liability when a single rogue employee engages in misconduct—even if the misconduct directly violates the corporation’s policies and occurs despite a rigorous compliance program. As a result, “a single

errant employee can cause the downfall of a multi-national corporation and the loss of thousands of jobs.”

Second, it treats responsible corporations the same as corporations that fail to take reasonable efforts to prevent misconduct. The two are not similarly situated, however. Insofar as a corporation can be blameworthy, a corporation that has implemented a robust compliance policy is less deserving of blame than is a corporation that has failed to adopt a compliance policy. Yet strict vicarious criminal liability treats the two equally.

Third, it reduces corporations’ incentives to implement vigorous and effective compliance policies, as the absence of such policies has no effect on whether a corporation is subject to strict vicarious liability for its employees’ criminal acts. Indeed, strict vicarious criminal liability may actually deter corporations from having robust compliance policies. When a compliance policy yields information about criminal acts, that information can end up being used by the government to indict the corporation. Corporations may decide that they are better off without compliance policies that could produce evidence that would support strict vicarious criminal liability.

Fourth, it does not serve any legitimate deterrent or retributive purpose because it punishes corporations that not only did nothing wrong, but also took reasonable steps to prevent misconduct by their employees. When a corporation whose employee committed a criminal act had in place a robust compliance policy, subjecting the corporation to strict vicarious criminal liability based on that act does not serve to deter insufficiently vigorous compliance efforts. Likewise, a corporation with a robust compliance policy in place did not do anything wrong, so no retributive purpose is served by holding it criminally liable for its employee’s misconduct.

Fifth, it punishes innocent shareholders and employees, whereas the persons who are actually responsible for the crimes could be punished without the unfair consequences of holding the corporation criminally liable.

Sixth, when the employee who committed the misconduct is convicted of a crime, convicting the corporation as well results in duplicative liability. This is inconsistent with the doctrine of respondeat superior that underlies vicarious corporate criminal liability. In the civil context, a tort plaintiff cannot obtain a full recovery from an agent of a corporation and also recover from the corporation itself under a respondeat superior theory; the corporation’s “obligation is discharged when full satisfaction is obtained against the agent.” With strict vicarious criminal liability, however, the corporation and the offending employee can each be punished for the same crime.

Seventh, it gives prosecutors too much power, as the threat of a prosecution based on one employee’s misconduct can force a corporation to enter into a deferred prosecution agreement or a non-prosecution agreement, which itself may have substantial consequences. Given “the profound impact of an indictment and the lack of a defense to vicarious liability, the mere threat of criminal sanctions based on the actions of an individual employee has been enough to compel corporations to settle non-meritorious claims.”

Eighth, and finally, civil liability for the corporation and prosecution of the offending employee are sufficient to remedy the harm caused by an employee’s misconduct. Any physical or financial injury caused by an employee’s misconduct can be adequately compensated by holding the corporation liable in a civil case. There is no need to take the additional step of subjecting the corporation to strict vicarious criminal liability. *Id.* at 85–86 (citations omitted).

I will leave it to other scholars to put forth proposals to reform criminal liability in the context of corporate law.¹⁰² My objective today is to attempt to convince the reader that the current state of the law could easily lead counsel to believe that attempting to defend a corporate client against criminal liability at trial is a risky proposition indeed and that accepting an offer of deferred prosecution might be very wise, even if it means agreeing to steep demands placed from a hard-bargain-driving prosecutor on the other side of the negotiation table.¹⁰³

III. UNCONSTRAINED PROSECUTORIAL POWER, REVOLVING DOORS, AND LACK OF PUNISHMENT

A. Unconstrained Prosecutorial Power

Beginning in 1999, the DOJ issued four key memoranda setting forth prosecution guidelines or principles underlying prosecutors' charging decisions with respect to corporate enforcement.¹⁰⁴ Each

102. See, e.g., Gallo & Greenfield, *supra* note 51, at 544 (putting forth a proposal for reform wherein an employee's malfeasance would "expose the corporation to criminal liability only where the current common law elements are satisfied *and* at least some member of senior management possessed the mens rea set forth in the underlying criminal statute. Our proposal also incorporates an improved affirmative-compliance-program defense, permitting the corporation to establish by a preponderance of the evidence that the body of individuals comprising senior management maintained and oversaw a robust compliance program designed to prevent the type of conduct charged"); see also Greenberg & Brotman, *supra* note 100, at 95 (arguing that the doctrines of strict vicarious criminal liability for corporations and corporate executives have "unfair and pernicious consequences" which could be mitigated by "(i) requiring that a statute clearly mandate strict vicarious criminal liability before such liability is imposed and (ii) allowing an affirmative defense that the corporation had a reasonable compliance policy and that the responsible corporate officer made reasonable efforts to implement that policy").

103. O'Sullivan, *supra* note 13, at 34 ("It is exceedingly difficult to conceive of the criminal process that applies to corporations today as truly 'adversarial.' In reality, a variety of circumstances make it very difficult for public companies, especially those in regulated industries or those who do significant business with the government, to mount any meaningful resistance to a criminal investigation.") (citation omitted).

104. See Memorandum from the Dep't of Justice, Eric H. Holder, Deputy Attorney Gen., Bringing Charges Against Corporations (June 16, 1999), available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF> ["Holder Memo"]; Memorandum from the Dep't of Justice, Larry D. Thompson, Deputy Attorney Gen., Principles of Fed. Prosecution of Bus. Orgs. (Jan. 20, 2003), available at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf ["Thompson memo"]; Memorandum from the Dep't of Justice, Paul J. McNulty, Deputy Attorney Gen., Principles of Fed. Prosecution of Bus. Orgs., available at http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf ["McNulty

memo built upon and refined the reasoning and arguments of its predecessor, finally culminating in the so-called “Filip Memorandum,” issued by then Deputy Attorney General Mark R. Filip. Officially titled “Principles of Federal Prosecution of Business Organizations” (“Principles of Prosecution”), the memo was codified in the United States Attorney’s Manual on August 28, 2008.¹⁰⁵ The Principles of Prosecution instruct federal prosecutors to consider the following nine factors when determining whether or not to charge a corporation or business entity:

- (1) The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
- (2) The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- (3) The corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
- (4) The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
- (5) The existence and adequacy of the corporation’s pre-existing compliance program;
- (6) the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
- (7) collateral consequences, including disproportionate harm to shareholders, pension holders, and employees not proven

memo”]. For a thoughtful discussion of the various revisions made by the DOJ to each successive memorandum, see Dane C. Ball & Daniel E. Bolia, *Ending a Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision*, 9 WYO. L. REV. 229, 239–49 (2009).

105. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL §§ 9-28.000 through 9-28.1300 (2008), available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

personally culpable, as well as impact on the public arising from the prosecution;

(8) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

(9) the adequacy of remedies such as civil or regulatory enforcement actions.¹⁰⁶

Reading the Principles of Federal Prosecution of Business Organizations might lead one to believe that much of the harm caused by the respondeat superior corporate criminal liability regime has been mitigated—that the government has found a way, through its practice of making charging decisions, to consider factors other than the principles of vicarious liability set forth in the *New York Central* case, discussed previously. To a certain extent, that is true; the government has provided a way to ensure that other factors will be *considered* during the charging process.

But these factors will be incorporated only if the prosecutor chooses to do so, and only to the extent that he or she wishes. This is because while federal prosecutors are obligated to review the Principles of Prosecution to see how they might apply within a particular case, the U.S. Attorneys' Manual states explicitly that the Principles do not serve to create any legal rights whatsoever for the parties involved: "The Manual provides only internal Department of Justice *guidance*. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in a matter civil or criminal."¹⁰⁷

Moreover, the Filip Memo makes it clear that federal prosecutors retain significant charging discretion, notwithstanding the various factors set forth in the Principles of Prosecution: "In making a decision to charge a corporation, the prosecutor generally has substantial latitude in determining when, whom, how, and even

106. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL: PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS §§ 9-28.300 through 9-28.1100 (2008) [hereinafter PRINCIPLES OF PROSECUTION], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

107. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 1-1.100 (updated May 2009) (emphasis added), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/1mdoj.htm/.

whether to prosecute for violations of federal criminal law.”¹⁰⁸ Indeed, the last sentence of the Filip Memo states, “Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice,” thereby emphasizing yet again the wide and largely unconstrained discretion given to prosecutors in carrying out their charging duties.¹⁰⁹

The bottom line is that, given the current respondeat superior corporate criminal liability regime, it would be quite understandable for a defense attorney to be wary if a client has been targeted by the DOJ regarding possible criminal liability. Despite the seemingly reasonable and fair guiding principles set forth in the Principles of Federal Prosecution of Business Organizations, there is no way of knowing to what extent those principles will influence prosecutors’ decisions.

Moreover, if the doctrine of respondeat superior gives companies the incentive to dispose of a given matter by agreeing to a DPA, the system thereby loses one of the strongest elements in place to ensure that prosecutors behave in a fair and judicious manner toward the accused: the trial by jury. As the U.S. Supreme Court tells us, “The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor.”¹¹⁰ Thus, with the highly decreased likelihood of cases going to trial, what protections are in place to prevent the negative impacts that can result from a prosecutor’s wrongful accusation, or overly-aggressive charge?

Finally, if a company believes that going to trial is too risky due to the doctrine of respondeat superior, this severely weakens the company’s “BATNA,” or Best Alternative to a Negotiated

108. See Memorandum from Mark Filip, Deputy U.S. Att’y Gen., to Heads of Dep’t Components & U.S. Att’ys, at 4 (Aug. 28, 2008), available at <http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf>.

109. See *id.* at 21. See also Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1778 (2011) (“Federal prosecutors possess extraordinarily wide discretion as compared to their counterparts around the globe.”).

110. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citing *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968)). See also Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1457 (2007) (“Without the fear of trial. . .there is no assurance that the prosecutor is acting in a judicious manner.”).

Agreement.¹¹¹ In other words, the option of going to trial would ordinarily present companies with a reasonable alternative to the prospect of accepting a DPA offer from the government. However, if a company believes it realistically *cannot* go to trial because doing so would have devastating consequences for the company, then the government has substantial (if not overwhelming) power not only in convincing the company to *agree* to a DPA, but also in negotiating the *terms* of the DPA—power that could potentially result in arbitrary or unfair deal terms for the company.¹¹²

B. The “Revolving Door” and Its Possible Impact on Prosecutorial Charging Decisions

As one example of how prosecutors might have too much discretion in the area of charging, consider the question of whether prosecutors might be influenced in their charging decisions by their post-DOJ job prospects.

It is difficult to answer this question with much certainty; former Department of Justice litigator Joseph Covington has spoken candidly of what he perceives to be a revolving door between the DOJ and private law practice. Commenting on his particular area of expertise, the Foreign Corrupt Practices Act, Covington says, “this is good business for law firms . . . for accounting firms . . . for

111. ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 100 (1991) (defining BATNA as “the standard against which any proposed agreement should be measured. That is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept”); *see generally* CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT (6th ed. 2009).

112. *See* Greenblum, *supra* note 18 at 1885 (“The corporate offender’s unique vulnerability to adverse publicity and collateral consequences . . . calls into question whether the choice to enter into deferral is really a choice at all.”). *See also* Paulsen, *supra* note 110, at 1436 (“It has become increasingly clear that the government holds all the cards in negotiations over these [deferred prosecution] agreements. As long as the threat of prosecution lingers over a company, the corporation is compelled to agree to the prosecutor’s terms, vesting nearly absolute power in the government’s hands. Unable to risk a potential indictment, the corporation is thus left at the mercy of the prosecutor.”); Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of Citizens United*, 65 U. MIAMI L. REV. 1, 26 (2010) (“Commentators generally express concern regarding the government’s use of DPAs and NPAs. One significant and frequently raised issue is the bargaining imbalance between corporations and the government. Many scholars argue that ‘prosecutors abuse their powerful bargaining position’ in forcing organizations to agree to ‘overly intrusive—and in some cases arguably arbitrary—terms.’”) (citation omitted).

consulting firms . . . and Justice Department lawyers who create the marketplace and then get [themselves] a job.”¹¹³

It is difficult to know exactly how much the door might “revolve” between the DOJ and private law firms, or how big the pay differential can be between the two types of jobs, as this information is rarely made public (at least with respect to the law firm positions). One example is the case of Mark Mendelsohn, who was Deputy Chief of the DOJ Fraud Section and the attorney responsible for overseeing all DOJ investigations and prosecutions under the Foreign Corrupt Practices Act (FCPA) from 2005 to 2010.¹¹⁴ Upon leaving DOJ in 2010, Mendelsohn began building an FCPA practice with a private law firm in Washington, D.C. for a reported annual salary of \$2.5 million.¹¹⁵

William M. Palmer, an attorney practicing in Boston, Massachusetts, who was a federal prosecutor in the 1990s, argues the current situation demonstrates that there has been “regulatory capture by the elites . . . in part instantiated by the fact that many DOJ attorneys plan to take white-shoe law firm jobs that pay extraordinarily well.”¹¹⁶ Palmer suggests that because nearly all the future clients will be companies and company executives, “[i]t is hard to get potential clients to warm up to you when you have a history of aggressively putting their contemporaries in prison.”¹¹⁷

Finally, there is Judge Jed Rakoff, who wrote an article entitled, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*¹¹⁸ Judge Rakoff says he “completely discount[s]” the argument that “no such prosecutions have been brought because the top prosecutors were often people who previously represented the financial institutions in question and/or were people who expected to be representing such institutions in the

113. Nathan Vardi, *The Bribery Racket*, FORBES, June 7, 2010, available at <http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html>.

114. Mark F. Mendelsohn, Partner Profile, Law Firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP, available at <http://www.paulweiss.com/professionals/partners-and-counsel/mark-f-mendelsohn.aspx>.

115. Vardi, *supra* note 113.

116. William M. Palmer, Esq., Comment to *Too Big to Indict*, N.Y. TIMES (Dec. 11, 2012), <http://www.nytimes.com/2012/12/12/opinion/hsbc-too-big-to-indict.html>.

117. *Id.*

118. Rakoff, *supra* note 43.

future: the so-called ‘revolving door.’”¹¹⁹ However, he subsequently makes an argument as to why a prosecutor might be influenced by that very revolving door when deciding between two different kinds of cases to prosecute:

I would venture to guess that the cases involving the financial crisis were parceled out to Assistant [US attorneys] who [were also responsible for] insider-trading cases. Which do you think an assistant would devote most of her attention to: an insider-trading case that was already nearly ready to go to indictment and that might lead to a high-visibility trial, or a financial crisis case that was just getting started, would take years to complete, and had no guarantee of even leading to an indictment? Of course, she would put her energy into the insider-trading case, and if she was lucky, it would go to trial, she would win, and, in some cases, *she would then take a job with a large law firm*. And in the process, the financial fraud case would get lost in the shuffle.¹²⁰

I believe Judge Rakoff sets forth a strong case for how prosecutors might in fact let post-DOJ job prospects impact their prosecution decisions, i.e., how the so-called revolving door might be influencing prosecutors’ decisions. He cites an example of how a prosecutor’s decision might be influenced in order to make his or her resume look more appealing to prospective employers, which some might say is less pernicious than having a decision influenced because the prosecutor used to represent the institutions in question or because the prosecutor expected to represent the institutions in the future. However, in all three scenarios, the idea of a “revolving door” appears to be playing a role.¹²¹

C. Pursuing Companies Instead of Individuals? Reforming Corporate ‘Culture’ Instead of Punishing Misbehavior?

1. Pursuing companies

In his article, Judge Rakoff offers several “influences” that he believes have had the effect of limiting prosecutions of high-level executives. Of the factors he mentions, he suggests the one that is the “most subtle . . . the most systemic . . . and arguably the most

119. *Id.*

120. *Id.* (emphasis added).

121. *Id.*

important . . . is the shift that has occurred, over the past thirty years or more, from focusing on prosecuting high-level individuals to focusing on prosecuting companies and other institutions.”¹²² Specifically, Rakoff points out that while prosecutors have charged companies with various crimes for more than a century, “until relatively recently, such prosecutions were the exception, and prosecutions of companies *without simultaneous prosecutions of their managerial agents* were even rarer.”¹²³

This is an aspect of recent corporate criminal cases that one might find quite disturbing: in going after the company, where are the simultaneous prosecutions of managerial agents? As Judge Rakoff notes: “In recent decades, . . . prosecutors have been increasingly attracted to prosecuting companies, often even without indicting a single individual.”¹²⁴

Judge Rakoff points out that this shift in focus is often “rationalized as part of an attempt to transform ‘corporate cultures,’” thereby (hopefully) leading to reduced future criminal activity. As a result, the government has turned to using DPAs, which the judge believes “has led to some lax and dubious behavior

122. *Id.*

123. *Id.* (emphasis added).

124. *Id.* See also, Jesse Eisinger, *Seeking Tough Justice, but Settling for Empty Promises*, N.Y. TIMES, May 7, 2014, <http://dealbook.nytimes.com/2014/05/07/seeking-tough-justice-but-settling-for-empty-promises/> (pointing out that charges were not brought against individuals in either of two highly-publicized cases involving HSBC and Toyota, both of which were resolved through DPAs. The writer relies on the research of Professor Brandon Garrett to suggest that “follow-up charges against executives are rare. Disturbingly, in the biggest corporate convictions, which are ostensibly more serious actions, charges against individual executives are even rarer.” The writer concludes that the current situation provides incentives for top company executives who see or suspect wrongdoing within their organization to “[d]evelop a powerful case of incuriosity, cancel meetings with the auditors, send the compliance officers on vacation to the Aleutian Islands. Revel in ignorance. And you stand an excellent chance of skating”); Ben Protess & Jessica Silver-Greenberg, *BNP Paribas Admits Guilt and Agrees to Pay \$8.9 Billion Fine to U.S.*, N.Y. TIMES, June 30, 2014, <http://dealbook.nytimes.com/2014/06/30/bnp-paribas-pleads-guilty-in-sanctions-case> (pointing out that while BNP agreed to plead guilty to various crimes and to pay an \$8.9 billion penalty, no BNP employees had been criminally charged in the matter); and *Deferred Prosecution Agreements: A Better Option Than Indictment?*, METROPOLITAN CORPORATE COUNSEL (NORTHEAST EDITION), May 2008, <http://www.nmmlaw.com/pdf/prosagr.pdf> (in an interview with the Editor, former U.S. Attorney Bryan Blaney states that DPAs are most often “used by prosecutors to obviate criminal indictments against individuals when the government sought to obtain financial restitution and restrict conduct, but did not view imprisonment as a necessary penalty.”).

on the part of prosecutors, with deleterious results.”¹²⁵ Clearly, the judge seems to favor prosecutions over DPAs:

Just going after the company is . . . both technically and morally suspect. It is technically suspect because, under the law, you should not indict or threaten to indict a company unless you can prove beyond a reasonable doubt that some managerial agent of the company committed the alleged crime; and if you can prove that, why not indict the manager? And from a moral standpoint, punishing a company and its many innocent employees and shareholders for the crimes committed by some unprosecuted individuals seems contrary to elementary notions of moral responsibility.¹²⁶

Interestingly, even the DOJ’s Principles of Federal Prosecution of Business Organizations suggest that prosecution of individuals is to be a priority over prosecuting companies:

Where a decision is made to charge a corporation, it does not necessarily follow that individual directors, officers, employees, or shareholders should not also be charged. *Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals* within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. *Only rarely should provable individual culpability not be pursued . . .*¹²⁷

This language begs the question, why, in recent years, has the DOJ seemed to go against its own charging guidelines by shifting the focus of enforcement action from high-level individuals to companies?¹²⁸ Judge Rakoff states that if the financial crisis was caused by fraudulent misconduct, then “the failure of the government to bring to justice those responsible . . . bespeaks weaknesses in our prosecutorial system that need to be addressed.”¹²⁹ It appears that a key factor in causing such

125. Rakoff *supra* note 43.

126. *Id.*

127. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.200.B (2008) (emphasis added).

128. Indeed, former Assistant Attorney General Lanny Breuer states unequivocally that “the strongest deterrent against corporate crime is the prospect of prison time for individual employees.” Breuer, *supra* note 12.

129. Rakoff, *supra* note 43.

weaknesses in the prosecutorial system—whether in prosecuting crimes of fraud or crimes in other areas—might be the shift from targeting high-level individuals to targeting companies and reforming corporate culture.¹³⁰

2. *Reforming Corporate Culture*

What is the fundamental role of a federal prosecutor in the context of corporate criminal law? Is it to “seek justice”?¹³¹ Is it to somehow reform “corporate culture” so that companies and the people who run them will be less likely to commit crimes in the future? Is it to prosecute and punish illegal activity? Is it a combination of all three of these?

Attorneys Peter Spivack and Sujit Raman suggest that the DOJ’s view of the role of corporate criminal enforcement has undergone a fundamental shift: “In a post-Enron world, DOJ officials appear to believe that the principal role of corporate criminal enforcement is to reform corrupt corporate cultures—that is, *to effect widespread structural reform*—rather than to indict, to prosecute, and to punish.”¹³² The authors add that “[b]y focusing more on prospective questions of corporate governance and compliance, and less on the retrospective question of the [company]’s criminal liability, federal prosecutors have fashioned a new role for themselves in policing, *and supervising*, corporate America.”¹³³

130. *But see* Elkan Abramowitz & Jonathan Sack, *Why So Few Individuals? Government’s Prosecution of Corporate Misconduct*, N.Y. L.J., Mar. 5, 2013 (“Whatever the specifics in a given case, individuals should often not be charged with offenses to which a company has pleaded guilty—either because the government’s legal theory was flawed, the government lacked sufficient proof or the individuals were simply not guilty. . . . [I]n the majority of cases in which corporations settle charges, individuals are most likely not charged because the government has reasonably concluded that its theory and evidence are not sufficiently strong to establish individual liability.”).

131. *See generally* Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 642 (1998) (“[A] prosecutor is a representative of, as well as a lawyer for, a government entity that has several different, sometimes seemingly inconsistent, objectives in the criminal context. Of these, convicting and punishing lawbreakers is only one, and it is no more important than the others, such as avoiding the punishment of innocent people and ensuring that people are treated fairly. As the government’s surrogate, the prosecutor’s job is to carry out all these objectives and resolve the tension among them.”).

132. Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 161 (2008) (emphasis added).

133. *Id.* (emphasis added). *See generally* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 886–87 (2007) (“Like the explosion of public interest law firms in the late 1960s and early 1970s pursuing structural reform, the DOJ has now consciously adopted a structural reform

To decide whether or not to charge a corporate entity, federal prosecutors are advised to “ensure that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities—are adequately met.”¹³⁴ As Professor Peter Henning explains, however, the approach taken toward *individuals*, as compared to that taken toward corporations, seems to be different in at least one important aspect:

The criminal law is retrospective in nature, asking whether proof of the defendant’s act and mental state *at the time of the offense* are sufficient to establish guilt beyond a reasonable doubt. For corporations, however, simply assessing past conduct is not as important as determining whether the organization is in *need of reform to ensure future compliance*.¹³⁵

This is related to what Professor Julie O’Sullivan calls “galvanizing deterrence,” which she says

requires forward-looking rehabilitation and incapacitation in the form of disciplining the wrongdoing agents, reforming the policies and procedures that promoted or sanctioned wrongdoing, implementation or improvement of a compliance program that will prevent and deter future crimes, and a revamping of the corporate culture that encouraged or tolerated criminal wrongs.¹³⁶

Practically speaking, what does this mean for a corporate entity? It can result in DPAs that contain provisions requiring a company to (1) change compensation or sales practices and/or incentive structures; (2) modify (or even bring to an end) consulting and/or contracting agreements previously made with other businesses, individuals, and entities; (3) change the membership and/or structure of the company’s board of directors; (4) replace certain company officers, auditors, or other employees; (5) establish new (or improve already-existing) compliance and ethics programs within the

litigation strategy in the wake of Enron and dozens of other high-profile corporate malfeasance scandals. A structural reform paradigm is different from the traditional role of prosecutors, which focuses on seeking convictions.”) (footnote omitted).

134. U.S. ATTORNEYS’ MANUAL, *supra* note 18, § 9-28.300(B).

135. Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1435 (2009) (second emphasis added).

136. O’Sullivan, *supra* note 13, at 44.

company; and (6) terminate certain lines of business.¹³⁷ Some legal experts wonder aloud if such provisions go too far or if the prosecutors demanding the changes have adequate expertise in business as well as law.¹³⁸ Indeed, Professor John Coffee argues that DPAs have “intruded deeply into corporate governance” and that many of the changes required of companies amount to “experimentation in corporate governance by a prosecutor who lacks any empirical basis for believing that these reforms will reduce the risk of future recidivism.”¹³⁹

Top DOJ officials suggest that changes mandated through DPAs result in much-needed culture reform. As one official put it, “along with the other tools we have, DPAs have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe.”¹⁴⁰

The question is do we really want our federal prosecutors to focus on reforming corporate culture rather than on indicting, prosecuting, and punishing? Moreover, how do we currently ensure that federal prosecutors have the necessary training and experience to effectively carry out that mission? Are all of them trained in business as well as the law? After all, the role of the prosecutor “is generally understood to be limited to determining whether a given case merits federal prosecution and, if so, which charges should be brought.

137. See John C. Coffee, Jr., *Deferred Prosecution: Has It Gone Too Far?*, NAT'L L. J., July 25, 2005, at 13; Garrett, *supra* note 133, at 936 (“Federal prosecutors have stepped far outside of their traditional role of obtaining convictions, and, in doing so, seek to reshape the governance of leading corporations, public entities, and ultimately entire industries.”); Paul E. McGreal, *Corporate Compliance Survey*, 64 BUS. LAW. 253, 260–61 (2008) (discussing how DPAs can force governance reforms upon companies, including requiring additional independent directors on the company board, or requiring the creation of a new board committee or the reconfiguring of an already-existing board committee); P.J. Meitl, *Who's the Boss? Prosecutorial Involvement in Corporate America*, 34 N. KY. L. REV. 1, 12–13 (2007) (describing how DPAs “go to the heart of corporate governance matters, normally reserved for the Board of Directors” with examples such as requiring a company to add an independent board member, to cease private client compensation and benefits practices, to change the management of the company, and to require the addition of new seats on the board); Dennis J. Ventry, Jr., *Cooperative Tax Regulation*, 41 CONN. L. REV. 431, 475–76 (2008) (describing DOJ's DPA “with KPMG as part [of a] multi-billion dollar criminal tax fraud investigation. . . . The . . . agreement . . . impose[d] . . . restrictions on KPMG's tax practice, including requiring the firm to[(1)] cease (with limited exceptions) its private client tax practice as well as its compensation and benefits practice; [(2)] refrain from developing, marketing, selling, or implementing pre-packaged tax products; and [(3)] restrict severely its tax preparation services”).

138. See Daniel R. Alonso, *Use Caution in Negotiating Deferred Prosecution Agreements*, N.Y. L.J., Mar. 1, 2006, at 4.

139. Coffee, *supra* note 137.

140. Breuer, *supra* note 12.

With deferred prosecutions, however, prosecutors have been tempted ‘to experiment with corporate governance in ways that exceed their competence or entitlement.’”¹⁴¹

Moreover, while the DOJ is touting the ability of DPAs to transform corporate culture “across the globe,”¹⁴² the U.S. Government Accountability Office (GAO) has come to the conclusion that the DOJ is simply not in a position to evaluate DPA effectiveness in combating crime.¹⁴³ The GAO concluded that the “DOJ cannot evaluate and demonstrate the extent to which DPAs and NPAs . . . contribute to the department’s efforts to combat corporate crime because it has no measures to assess their effectiveness,”¹⁴⁴ and “therefore, it could be difficult for DOJ to justify its increasing use of these tools.”¹⁴⁵ In a similar vein, a report issued by the Organisation for Economic Co-operation and Development (OECD) that addressed Foreign Corrupt Practices Act enforcement issues stated that the “actual deterrent effect” of DPAs “has not been quantified.”¹⁴⁶

If these assessments by the GAO and the OECD are accurate and the DOJ is neither in a position to evaluate the effectiveness of DPAs nor to measure how much such agreements lead to real and lasting corporate reform, then it seems that the DOJ’s contention that deferred prosecution has had a “transformative effect” on corporate culture throughout the world is speculative at best.

Finally, critics argue that DPAs simply do not offer the same deterrent effect as do criminal prosecutions, that “the approach of letting corporations escape with monetary fines as long as they promise to self-regulate creates no disincentives for corporations to

141. Golumbic & Lichy, *supra* note 37, at 1312–13 (footnote omitted) (quoting Coffee, *supra* note 137, at 13); *see also* O’Sullivan, *supra* note 13, at 69–70 (“[DPAs] transform prosecutors into regulators, raising serious questions of competency and legitimacy (not to mention over-deterrence and waste of scarce government resources).”).

142. Breuer, *supra* note 12.

143. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS (2009).

144. *Id.* at 20.

145. *Id.*

146. OECD WORKING GRP. ON BRIBERY, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES para. 54 (2010).

abstain from fraud or white-collar crime.”¹⁴⁷ It seems reasonable to arrive at the conclusion that if the threat of criminal liability is essentially removed, then corporate decision makers will be more willing to engage in criminal misconduct.¹⁴⁸ As one commentator sums it up: “DPAs may make it financially viable for corporations to bear the risk of criminal business practices due to financial gains made from such practices without the threat of an indictment.”¹⁴⁹

D. Are Prosecutors Extracting a Pound of Flesh When it's Not Warranted?

From a defense perspective, a deferred prosecution is preferable to indictment, but companies would nonetheless prefer a declination. The question is whether prosecutors will offer deferred prosecution when they otherwise would have declined to prosecute.¹⁵⁰ SEC Chair Mary Jo White, during her previous tenure as partner at a private law firm, was clear in her position that DPAs should be limited “to situations where [the government] *certainly* would have indicted otherwise for all the right reasons on their part.”¹⁵¹

While one can only speculate as to whether or not that is always what occurs, it seems that many people believe the worst: “Most observers . . . contend that diversion agreements actually have replaced declinations, providing prosecutors with an opportunity to extract a pound of flesh when previously they would have had to settle for nothing.”¹⁵² And a top DOJ official bolsters this contention when he states publicly, “Companies now know . . . that they will be answerable *even for conduct that in years*

147. Ellis W. Martin, Comment, *Deferred Prosecution Agreements: 'Too Big to Jail' and the Potential of Judicial Oversight Combined with Congressional Legislation*, 18 N.C. BANKING INST. 457, 468 (2014).

148. Eliason, *supra* note 82 (“With the threat of criminal liability effectively off the table, corporate executives may be more willing to skate aggressively close to the line—or to jump over it. If the prospect of real criminal sanctions against the company is removed, then engaging in criminal activity becomes just another dollars-and-cents decision.”).

149. Martin, *supra* note 147, at 469; *see also* Eric Lichtblau, *In Justice Shift, Corporate Deals Replace Trials*, N.Y. TIMES, Apr. 9, 2008, at A1.

150. *See* Eugene Illovsky, *Corporate Deferred Prosecution Agreements: The Brewing Debate*, 21 CRIM. JUST., Summer 2006, at 36, 37 (“[S]ome question whether the government is getting deferred prosecution agreements in cases it would otherwise decline.”).

151. *Interview with Mary Jo White, Partner, Debevoise & Plimpton LLP, New York, New York*, CORP. CRIME REP., Dec. 12, 2005, at 11, 14 (emphasis added).

152. Spivack & Raman, *supra* note 132, at 188.

past would have resulted in a declination."¹⁵³ Surely this official was not trying to suggest that the government would try to take advantage of the situation by "extracting an unjustified pound of flesh," but, nevertheless, the possibility for such an occurrence seems quite real and deeply troubling.

The question then becomes how do we know whether this is actually taking place? While we cannot read the minds of prosecutors, the next best thing might be to get an honest reading of the situation from current or former highly placed, experienced prosecutors within the DOJ. Mark Mendelsohn, who was Deputy Chief of the DOJ Fraud Section and the attorney responsible for overseeing all DOJ investigations and prosecutions under the Foreign Corrupt Practices Act from 2005 to 2010, is just such a person. Mendelsohn stated in an interview that there is a "danger" posed by DPAs because it can be "tempting" for DOJ attorneys "to seek to resolve cases through DPAs or NPAs that don't actually constitute violations of the law."¹⁵⁴ When asked if the DOJ did not have the option of deferred prosecution, but instead had to choose between prosecution and declination, Mendelsohn stated, "If the Department only had the option of bringing a criminal case or declining to bring a case, you would certainly bring fewer cases."¹⁵⁵

Moreover, former U.S. Deputy Attorney General Larry Thompson stated in a speech that, "While I believe that most government officials are fair and high-minded in making these sorts of determinations [to prosecute], there are forces at work that can create a temptation for even the most sensible of these prosecutors to deviate sometimes."¹⁵⁶ And what are these "forces" at play? Thompson suggests they vary and can include prosecutors who wish to "make names for themselves through highly publicized prosecutions,"¹⁵⁷ as well as prosecutors who are "stupid, malevolent, or a cowboy or cowgirl who just wants to try a case and does not want to be reasonable."¹⁵⁸

153. Breuer, *supra* note 12 (emphasis added).

154. *Interview with Mark Mendelsohn, Partner, Paul Weiss, Washington, D.C.*, CORP. CRIME REP., Sept. 13, 2010, at 11, 14 (print edition only).

155. *Id.* at 15.

156. Larry D. Thompson, *Keynote Speech: The Reality of Overcriminalization*, 7 J.L. ECON. & POL'Y 577, 582 (2011).

157. *Id.*

158. Larry D. Thompson, *The Blameless Corporation*, 47 AM. CRIM. L. REV. 1251, 1254 (2010).

Considering how much discretion prosecutors have through the Principles of Prosecution, the insights that these former high-ranking DOJ officials provide are troubling indeed. Thompson confirms this notion with his conclusion that while “these problems afflict only a very small minority of federal prosecutors, . . . it only takes one bad apple in one big prosecution to have a significant, deleterious effect on the justice system.”¹⁵⁹

And this is especially troubling given that, if a case ultimately ends up going to trial for whatever reason, prosecutors can use a previously-signed DPA to secure a conviction as the vast majority of DPAs require the company to admit to misconduct.¹⁶⁰ As two practicing attorneys, both former federal prosecutors, observe, “the government . . . [is] armed with the company’s admission and all the evidence obtained from its cooperation, making conviction virtually a foregone conclusion.”¹⁶¹ And this power is compounded by the fact that most DPAs include a provision giving the government the *exclusive and non-reviewable* right to determine whether a breach of the agreement has occurred.¹⁶² For example, the government’s DPA with Saena Tech Corporation reads:

159. Larry D. Thompson, *In-Sourcing Corporate Responsibility for Enforcement of the Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 199, 210 n.79 (2014).

160. Mythili Raman, the acting chief of DOJ’s Criminal Division, appeared before the Oversight and Investigations Subcommittee of the House Financial Services Committee in 2013 and stated that “regardless of the resolution—deferred prosecution, non prosecution or a guilty plea—the company must fully acknowledge it’s [sic] criminal wrongdoing and may not retract that.” Russell Mokhiber, *Raman Defends Deferred and Non Prosecution Agreements for Major Corporate Crime Cases*, CORPORATE CRIME REPORTER, May 22, 2013, <http://www.corporatecrimereporter.com/news/200/ramanhousetestimony05222013/>. Despite that testimony, Professor Brandon Garrett contends that, of the 232 corporate DPAs and NPAs he reviewed, 12 percent failed to admit guilt to or accept responsibility for the wrongdoing. *Id.*

161. Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1105 (2006); see Michael Yangming Xiao, Note, *Deferred/non Prosecution Agreements: Effective Tools to Combat Corporate Crime*, 23 CORNELL J.L. & PUB. POL’Y 233, 241 (2013) (“[S]hould a case ultimately go to trial, prosecutors can use previous DPAs and NPAs as unfair shortcuts to secure a conviction.”).

162. See Xian, *supra* note 26, at 644–45 (“These agreements often include provisions in which the government is listed as the sole decider as to whether a breach has occurred. As a result, the question of whether a company actually breached the agreement is not subject to an objective trier-of-fact’s judgment, but posed to the government, which might have an ancillary interest in protecting the status of ‘successful’ deferred prosecution agreements.”) (footnote omitted); see also Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 14 (2007) (“Although negotiated resolutions offer enormous economic

If, during the Term of this Agreement, the Office determines, in its sole discretion, that the Company or Mr. Kim have (a) committed any felony under U.S. federal law subsequent to the signing of this Agreement, (b) at any time provided in connection with this Agreement deliberately false, incomplete, or misleading information, or (c) otherwise breached the Agreement, the Company and Mr. Kim shall thereafter be subject to prosecution for any federal criminal violation of which the Office has knowledge, including the charges in the Information described in Paragraph 1. . . . In the event that the Office determines that the Company or Mr. Kim has breached this Agreement, the Office agrees to provide the Company and Mr. Kim with written notice of such breach prior to instituting any prosecution resulting from such breach. . . . In the event that the Office determines that the Company has breached this Agreement: (a) all statements made by or on behalf of the Company to the Office or to the Court, including the attached Statement of Facts, and any testimony given by or on behalf of the Company before a grand jury, a court, or any tribunal, or at any legislative hearings, whether prior or subsequent to this Agreement, and any leads derived from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings brought by the Office against the Company.¹⁶³

Obviously, the government's ability to—unilaterally and in its sole discretion—revoke a DPA and proceed with prosecution, increases the leverage exercised by prosecutors.¹⁶⁴ Indeed, one commentator argues that the “unfairness and one-sidedness” of the situation must surely be the product of economic duress, stating, “There is no other reason for a corporate entity to subject itself to the final determination of an authority that opposes its interests.”¹⁶⁵

benefit, the omission of judicial oversight raises concerns when the determination of whether there is a breach of the agreement rests within the exclusive province of one party, and that party is the government, a party with extraordinary power.”).

163. Deferred Prosecution Agreement at para. 12–14, *U.S. v. Saena Tech Corp.*, No. 1:14-cr-00066 (D.D.C. Apr. 16, 2014).

164. See Paulsen, *supra* note 110 at 1464; see also Greenblum, *supra* note 18, at 1864 (“Deferral is a powerful prosecutorial tool because it is negotiated and implemented exclusively by the prosecutor.”).

165. See Matt Senko, *Prosecutorial Overreaching in Deferred Prosecution Agreements*, 19 S. CAL. INTERDISC. L.J. 163, 178 (2009); see also Zierdt & Podgor, *supra* note 162, at 3 (“[T]he government acquires total power over the alleged corporate offender. The net result is that deferred prosecution agreements are reached without considering theories of duress and unconscionability.”).

1. *The ‘Innocence Problem’ for DPAs*

This article has attempted to tease out various factors and forces tending to cause a company to be interested in obtaining a DPA when faced with a possible corporate criminal violation, and economic duress might be one of those factors—especially if a company believes, accurately or not, that indictment and/or trial could mean the equivalent of a death sentence for the company. But whatever the specific factors involved, the larger issue is one of power, leverage, and fairness in a dispute resolution process involving the government and the accused, and in that respect, there seems to be a clear parallel between issues surrounding DPA use in resolving corporate criminal matters, and what has come to be called the “innocence problem” in plea bargaining more generally.

The innocence problem “is the recognition that when a prosecutor offers a defendant the opportunity to plead guilty in exchange for a more lenient punishment, the offer may lead an innocent defendant to plead guilty.”¹⁶⁶ Evidence suggests that the availability of *nolo contendere*¹⁶⁷ and *Alford*¹⁶⁸ pleas act as encouraging forces upon the accused, thereby increasing the likelihood that an innocent party will engage in a plea agreement.¹⁶⁹ As one scholar notes, the innocence problem “strikes at the center of the criminal justice system, the integrity of which depends on the reliability of convictions.”¹⁷⁰

I would suggest that being offered a DPA by a prosecutor places a company squarely into the center of the innocence problem: the forces described in this article can work to convince an innocent company to accept the deal. Moreover, I disagree with the notion that such a scenario would be likely to unfold only when a “bad apple” prosecutor is driving such an outcome, as Thompson suggests above. Instead, I believe a system has been created, through the workings of the DOJ, wherein even good, honest prosecutors who are trying to be reasonable and fair, could mistakenly decide to offer

166. See Adam N. Stern, Note, *Plea Bargaining, Innocence, and the Prosecutor’s Duty to “Do Justice,”* 25 GEO. J. LEGAL ETHICS 1027, 1027 (2012) (citation omitted).

167. In a *nolo contendere* or “no contest” plea, the plea is similar to a guilty plea, but the defendant does not actually admit guilt. See Bibas, *supra* note 20, at 1370.

168. In an *Alford* plea, a defendant is permitted to plead guilty while proclaiming his or her innocence. See *North Carolina v. Alford*, 400 U.S. 25, 38 (1970).

169. See Stern, *supra* note 166, at 1028.

170. See *id.* (citation omitted).

a DPA to a company that has *not* violated the law. Furthermore, any rationally minded company placed in that position, even if completely innocent, might reasonably choose to accept the offer.¹⁷¹ In essence, then, I would argue that DPAs provide the government with power that can potentially be unfair and exploitative in the enforcement of corporate criminal law,¹⁷² and currently there do not seem to be legal, legislative, or administrative systems or mechanisms in place to act as a set of checks and balances upon that power.

IV. CONCLUSION

The evidence put forth in this Article suggests that DPAs serve as a disturbing wellspring of unfairness, double standards, and potential abuse of power. I urge Congress to pass legislation halting the DOJ's ability to use DPAs in the context of corporate criminal law enforcement—to formally eliminate what the DOJ refers to as the “middle ground” between declining to prosecute on the one hand, and trials or guilty pleas on the other.¹⁷³

171. See Bohrer & Trencher, *supra* note 75, at 1483–84 (“With few rational business organizations willing to risk the consequences of an indictment, in the past few years we have seen a significant upswing in the number of investigations that culminated in a DPA.”); Golumbic & Lichy, *supra* note 37, at 1313 (“[T]he risk of collateral consequences of a criminal indictment—that is, the risk of an Arthur Andersen-style collapse—leaves corporations with no choice but to settle at all costs.”) (citation omitted).

172. Indeed, I would argue that just as the prosecutor in a plea bargain serves “not only as prosecutor but [also] as quasi-judge and jury,” so too does the prosecutor in a DPA negotiation. See Stern, *supra* note 166, at 1035 (2012) (“Because the judge and jury are absent in the plea bargaining context, the prosecutor must bear the burden of avoiding punishing the innocent. This burden is made more difficult to bear because the plea bargaining process lacks the protections that contribute to the accuracy of trial convictions, in particular the beyond-a-reasonable-doubt standard, cross-examination, and witness impeachment. These protections guard the integrity of the criminal justice process and tend to expose weaknesses in the government’s case which may not be apparent during plea bargaining. *In order to comply with the duty to do justice in plea bargaining, the prosecutor must be far more sensitive to the possibility that the defendant is innocent than in the trial context.* Making an offer that would be so enticing as to lead the defendant to plead guilty even if were in fact innocent would clearly be incompatible with the prosecutor’s burden of heightened sensitivity.”) (citations omitted) (emphasis added); see also Wesley MacNeil Oliver, *Toward a Common Law of Plea Bargaining*, 102 Ky. L.J. 1, 1 (2013/2014) (in discussing plea bargaining, the author describes a situation that is nearly identical to that of a prosecutor negotiating a DPA with the accused: “The prosecutor-judges who resolve these cases do so without necessarily referring to how any other case was resolved and do not follow any particular procedure, formal or informal, in deciding how to make offers. Their decisions are not subject to review and largely avoid public scrutiny”) (citations omitted).

173. See U.S. ATTORNEYS’ MANUAL, *supra* note 18; see also Greenblum, *supra* note 18.

In a speech before the New York Bar Association, former Assistant Attorney General Lanny Breuer stated that DPAs result in “far greater accountability for corporate wrongdoing” than existed before their use and that in many ways DPAs have “the same punitive, deterrent, and rehabilitative effect as a guilty plea.”¹⁷⁴ Yet evidence put forth in this Article suggests that such comparisons cannot accurately be made, simply because we do not yet have the ability to accurately measure the effectiveness of each tool separately and independently (i.e., “DPA” versus “criminal conviction”), let alone the ability to *compare* the crime-fighting efficacy of these tools in order to determine whether one is superior. Thus, it appears that the assertions made by Breuer have not been proven to be accurate and correct.

Moreover, when faced with a possible corporate crime, what if the government decided it would be easier, cheaper, faster, etc., to resolve the matter using a DPA, even when the law and facts of the case clearly indicated that the most appropriate course of action would be immediate prosecution? Or, in another situation, what if the government decided to use the *threat* of prosecution in order to secure a DPA, even when the law and facts clearly dictated a decision to decline any enforcement action whatsoever?¹⁷⁵ In both instances, the pursuit of justice, consistency in the rule of law, and basic notions of fairness would be greatly compromised.¹⁷⁶

As set forth in this Article, the reasons for prohibiting the use of DPAs in the context of corporate criminal law enforcement are manifold, including:

- (1) DPAs make it appear that companies are essentially buying their way out of a prosecution;
- (2) Current DOJ policy gives prosecutors too much power and discretion regarding when, why, and how agency attorneys will (or will not) use DPAs, translating directly into

174. Breuer, *supra* note 12.

175. While there is no similar provision with respect to deferred prosecution agreements, it is well understood that “[c]riminal prosecution shall not be used as a threat to obtain civil settlement.” See ENRD Directive 0802: Parallel Proceedings Policy 8 (2008).

176. See Uhlmann, *supra* note 7, at 1344 (“Deferred prosecution and non-prosecution agreements, if they occur at all, should be limited to relatively minor cases . . . where other non-criminal alternatives are inadequate.”). *But see id.* at 1342 (suggesting that DPAs should be allowed in “exceptional cases” where the government can “demonstrate that innocent third parties would suffer unacceptable harm”).

increased power and leverage while negotiating the agreements with alleged corporate wrongdoers;

(3) DPAs weaken the deterrence that comes from the threat of criminal prosecution;

(4) In cases in which the DOJ declines to move forward with prosecution, DPAs can be used to nevertheless extract a 'pound of flesh' from the alleged wrongdoer, when previously the prosecutors would have been forced to walk away with nothing;

(5) Because the government has the *exclusive* and *non-reviewable* right to determine whether a breach of the DPA has occurred, targeted individuals and companies likely feel a strong sense of pressure to adhere to all DOJ requests and demands throughout the agreement's deferral period, even if such requests and demands become unreasonable, unfair, and unjust;

(6) Because DPAs do not involve a trial, their use forecloses the most effective means for any criminal justice system to rein in overly aggressive prosecutors;¹⁷⁷ without the threat of trial, prosecutors might be less likely to act in a manner that is reasonable, fair, and just;

(7) Because DPAs resolve matters without trials, jury verdicts, appellate court decisions, and without establishing binding judicial precedent, the agreements are not particularly useful in clarifying the boundaries of permissible legal conduct;

(8) DPAs help explain why, in recent years, DOJ seems to be going against its own internal charging guidelines by shifting the focus of enforcement action from *individuals* to *companies*, and

(9) DPAs allow federal prosecutors to shift their focus toward reforming corrupt corporate cultures and away from indicting, prosecuting, and punishing criminal transgressors.

177. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citing *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968)) (“The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.”).

The Department of Justice is the agency responsible for enforcing federal laws, many of which clearly define certain behaviors as *criminal* in nature. It seems beyond disingenuous for the DOJ to sometimes decide, based upon internally generated memos and policies,¹⁷⁸ to employ DPAs and thereby address potential serious criminal violations as if they were less serious, civil violations.¹⁷⁹ After all, the work of Congress in writing and passing federal law is conducted through painstaking and time-consuming processes, including countless hours of expert testimony, research and discussion, committee and floor debate, and, finally, voting.¹⁸⁰ And the labels that Congress decides to use when putting forth various laws—“criminal” versus “civil”—matter a great deal.¹⁸¹

We label matters as criminal because we, as a society, strongly condemn the behavior and we wish to protect people from it.¹⁸²

178. See U.S. ATTORNEYS' MANUAL, *supra* note 18 (“In certain instances, it may be appropriate, upon consideration of the factors set forth herein, to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation.”); see also Memorandum from the Dep’t of Justice, Eric H. Holder, Deputy Attorney Gen., Bringing Charges Against Corporations (June 16, 1999), available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF> [“Holder Memo”]; Memorandum from the Dep’t of Justice, Larry D. Thompson, Deputy Attorney Gen., Principles of Fed. Prosecution of Bus. Orgs. (Jan. 20, 2003), available at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf [“Thompson memo”]; Memorandum from the Dep’t of Justice, Paul J. McNulty, Deputy Attorney Gen., Principles of Fed. Prosecution of Bus. Orgs., available at http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf [“McNulty memo”].

179. Indeed, the U.S. Attorneys’ Manual states that, “Since the primary function of a Federal prosecutor is to enforce the criminal law, he/she should not routinely or indiscriminately enter into non-prosecution agreements, which are, in essence, *agreements not to enforce the law* under particular conditions.” U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9.27.620 (emphasis added).

180. See Barbara Sinclair, *Symposium the Most Disparaged Branch: The Role of Congress in the Twenty-First Century: Panel I: Is Congress ‘The Broken Branch’?: Question: What’s Wrong with Congress? Answer: It’s a Democratic Legislature*, 89 B.U. L. REV. 387, 397 (“[W]e need to remember that what we ask of Congress is really hard; and with all its failings, it is still our most democratic branch.”).

181. See Uhlmann, *supra* note 7, at 1343–44 (discussing how the DOJ “prosecutes criminally because labels matter, and we communicate far more about our condemnation of wrongdoing when we call conduct criminal”).

182. See Irwin Schwartz, *Toward Improving the Law and Policy of Corporate Criminal Liability and Sanctions*, 51 AM. CRIM. L. REV. 99 (2014) (“We prosecute criminal cases to protect the public. By prosecuting, we seek to deter offenders, specifically and generally. We seek recompense for victims and we recognize the public demand for ‘just punishment.’”) (citations omitted).

Part of the motive in choosing to label something “criminal” rather than “civil” is to engender more severe public shaming, thereby further reinforcing law-conforming standards of behavior throughout society.¹⁸³ While top DOJ officials suggest that acknowledging wrongdoing as part of a DPA agreement can, in some measure, be similar to acknowledging wrongdoing through a guilty plea,¹⁸⁴ this Article suggests that is not the case. Indeed, one is left to wonder how much public shaming and overall accountability are taking place through the use of DPAs when a former federal prosecutor tells us that, “Companies are *happy* to enter into these deferred prosecution agreements because it’s become so commonplace now. . . . They take a bath in the press for a finite period of time. The stock markets don’t even seem to punish them.”¹⁸⁵ While the theorists tell us that punishment “must match, or be equivalent to the wickedness of the offense,” that does not seem to be what occurs when DPAs are used.¹⁸⁶

In a speech entitled *The Importance of Trials to the Law and Public Accountability*, SEC Chair Mary Jo White extolls the virtues of trials by proclaiming, “How we [Americans] resolve disputes and *how we decide the guilt or innocence of an accused* are the true measure of our democracy.”¹⁸⁷ Sadly, when the DOJ uses DPAs to address alleged corporate crimes, it thereby fails to decide the guilt or innocence of the accused, even though carrying out that duty has historically been a core function of criminal law enforcement. Using DPAs is essentially a way of imposing a term of *probation before conviction*. I believe this makes a mockery of the criminal justice system—something that

183. *U.S. Department of Justice Soft on Corporate Crime*, PRISON LEGAL NEWS, July 2012, at 22.

184. Breuer, *supra* note 12 (“[I]n many ways, a DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea: when a company enters into a DPA with the government . . . it almost always must acknowledge wrongdoing, agree to cooperate with the government’s investigation, pay a fine, agree to improve its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement. All of these components of DPAs are critical for accountability.”).

185. Danielle Douglas, *Royal Bank of Scotland to Pay \$612 Million to Resolve Labor Case*, THE WASH. POST, Feb. 6, 2013, available at http://www.washingtonpost.com/business/economy/rbs-to-pay-612m-to-resolve-libor-case/2013/02/06/2c0cc42c-6fd3-11e2-aa58-243de81040ba_story.html. (emphasis added).

186. Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 602 (1878).

187. Mary Jo White, Chairwoman, Sec. & Exchange Comm’n, 5th Annual Judge Thomas A. Flannery Lecture, Washington, D.C. (Nov. 14, 2013) (emphasis added).

cannot be fixed through reform ideas such as additional legislative¹⁸⁸ or judicial¹⁸⁹ oversight of the current system.

DPAs provide a useful and productive tool to quickly, cheaply, and efficiently dispose of cases involving low-level, first-time, mostly juvenile offenders of misdemeanor crimes—the category of people and crimes for whom the tool was created in the early 1900s.¹⁹⁰ Clearly, DPAs were neither designed nor intended for the disposition of potentially serious criminal law matters involving sophisticated corporate entities and the white collar professionals engaged in running those entities.

Federal Appeals Court Judge Harry T. Edwards told us nearly thirty years ago that settling matters through alternative dispute resolution is not always “*fair* and *just*,”¹⁹¹ and I believe the judge’s warning certainly applies to the use of DPAs in the corporate criminal context. Given that “the primary function of federal prosecutors is to enforce the criminal law,”¹⁹² and, furthermore, given DOJ’s admission that DPA-type agreements “are, in essence, agreements *not to enforce the law* under particular conditions,”¹⁹³ it is somewhat astounding that the DOJ leadership has, in the last two decades, permitted DPAs to become such a common and routine manner of addressing corporate wrongdoing.

188. See, e.g., Ved P. Nanda, *Corporate Criminal Liability in the United States: Is a New Approach Warranted?*, 58 Am. J. Comp. L. 605, 627–28 (2010) (discussing the “Accountability in Deferred Prosecution Act,” legislation introduced in the U.S. House of Representatives in 2009 and again in 2014, requiring the Attorney General to set forth written guidelines concerning DPAs and NPAs).

189. See Anthony S. Barkow & Matthew D. Cipolla, *Increased Judicial Scrutiny of Deferred Prosecution Agreements*, N.Y. L.J., Aug. 20, 2013 (discussing a study wherein “a majority of prosecutors, company representatives, independent monitors and judges interviewed reported more disadvantages than advantages to increased judicial involvement in the DPA process Some respondents believed DPAs to be sufficiently analogous to plea discussions such that Rule 11 barred substantive judicial oversight. Others raised broader constitutional concerns, particularly related to separation of powers. They contend that the decision to enter into a DPA and to shape its contents are executive rather than judicial functions, and changes made by a judge would interfere with prosecutorial discretion”).

190. Xian, *supra* note 26, at 643 (discussing how DPAs, in their “original capacity,” were limited to non-serious, first-time misdemeanor charges such as marijuana possession and retail theft, especially if committed by a juvenile).

191. Harry T. Edwards, *Commentary: Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986).

192. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9.27.620, *supra* note 179.

193. *Id.* (emphasis added).

It is time to end this failed experiment in alternative dispute resolution. And in the end, if DPAs are not eradicated as a tool of corporate criminal law enforcement, perhaps we can at least change their name to something that more accurately describes the benefit that the vast majority of recipients obtain through their current use: Avoiding Prosecution Agreements (APAs). Individuals and companies avoid prosecution, and the rest of America pays a certain and costly price for that avoidance. Justice deferred for a select group of individuals and companies means justice denied for the rest of us.

Some readers will surely ask, “But if Congress eliminates DPAs in the corporate criminal context, *what will replace them?*” Nothing need replace them. Rather, the two choices that were available to prosecutors before DPAs arrived on the scene—namely, prosecution or declination—were, and still are, more than adequate to address potential violations. As in every other area of criminal law, the defendant facing prosecution would then decide to put the government to its burden of proof at trial, or the defendant would decide to opt for a plea bargain (I imagine most defendants would opt for the latter, given that ninety-five percent of all federal criminal cases, and well over ninety percent of cases involving organizational defendants, are currently resolved through guilty pleas).¹⁹⁴ Moreover, it is clear that the advantages currently flowing from the use of DPAs could also be achieved through plea bargaining, including (1) quick and efficient payment of restitution to victims; (2) requiring companies to cooperate with the government in the prosecution of culpable individuals within their respective organizations; (3) requiring companies to implement (or augment) internal ethics and/or compliance programs; and (4) providing guidance to other companies on what constitutes improper conduct, or what constitutes conduct that “crosses the line” in the eyes of the DOJ.¹⁹⁵

Of course, proponents of deferred prosecution might, at this point, turn to the one remaining argument favoring DPAs over plea bargaining: Namely, that using DPAs can avoid the collateral consequences that sometimes flow from conviction by trial or plea

194. See O’SULLIVAN, *supra* note 10.

195. See Statement of Gary G. Grindler, Deputy Assistant Att’y Gen. for the Criminal Div., U. S. Dep’t of Justice, *Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements: Hearing Before the Subcomm. on Commercial & Admin. Law*, 111th Cong., 5–6 (2009) (discussing the advantages that flow from the use of DPAs in addressing corporate criminal matters).

bargain, as discussed at length above. However, this Article strongly suggests not only that the existence and severity of collateral consequences have heretofore been exaggerated, but also that such consequences can and should be addressed by the policies, processes, rules, and regulations of institutions *other* than the DOJ, and by individuals other than prosecutors. In the end, the fear of and/or potential for collateral consequences should not have the power to persuade the DOJ and federal prosecutors to turn to the less *fair* and less *just* alternative dispute resolution vehicle of DPAs to address potential corporate criminal wrongdoing.