12-2023

Outlawing Corporate Prosecution Deals When People Have Died

Peter Reilly

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Peter R. Reilly*

Two Boeing 737 MAX aircraft crashes, occurring less than five months apart in 2018 and 2019, resulted in 346 deaths—possibly the deadliest corporate crime in U.S. history. The United States Department of Justice ("DOJ") used an alternative dispute resolution tool called a deferred prosecution agreement ("DPA") to resolve criminal charges against Boeing and to immunize the company's senior-level managers from prosecution. In the end, the company admitted to engaging in the criminal behavior, paid a monetary fine, and agreed to cooperate fully with the government—meaning there would be no courtroom trial, no formal adjudication of guilt, and no possibility of jail time or other serious punishment for wrongdoers. DOJ also decided it would not appoint an independent monitor to ensure Boeing's compliance with terms of the DPA agreement. These results are profoundly unjust. In response, the United States Congress should immediately outlaw the use of DPAs in addressing federal allegations of corporate misconduct when the wrongdoing leads to one or more human fatalities. To date, Congress has failed to draw any boundaries limiting DOJ's use of DPAs as a tool in resolving allegations of corporate malfeasance. This Article argues that banning DPAs when there is loss of human life is a legal and moral imperative—a line both reasonable and necessary for Congress to draw, even if legislators wish to continue exploring additional ways of reforming the DPA legal landscape. The Article concludes by proposing specific legislation drawing the boundary needed to address the current problem, and by engaging in a thought exercise, hypothesizing and analyzing how the Boeing case might have turned out if the legislative proposal had been enacted into law before the disastrous airplane crashes occurred.

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* Professor of Law, Texas A&M University School of Law; LL.M., Georgetown University Law Center; J.D., Harvard Law School; A.B., Princeton University; Georgetown-Hewlett Fellow in Conflict Resolution and Legal Problem-Solving (2002–05). I would like to thank the Editors of the *Arizona State Law Journal* for their excellent work in improving this piece. All errors are my own.

I. INTRODUCTION

Twenty-four-year-old Danielle Moore was killed when a Boeing 737 MAX airplane crashed shortly after takeoff from Ethiopia's Addis Ababa Bole International Airport on March 10th, 2019. With respect to criminal charges against the Boeing Company, the U.S. Department of Justice ("DOJ") resolved the matter with a deferred prosecution agreement ("DPA").[1] The agreement, which represents a form of alternative dispute resolution,[2] is essentially a contract: if Boeing agrees to admit wrongdoing, cooperate with the government, pay a monetary fine, and implement internal company reforms to prevent similar wrongdoing from occurring in the future, then DOJ agrees to set aside the charges against Boeing, and to not charge any of its senior managers using the same facts.[3] Danielle Moore's father could hardly fathom this end result: "My first reaction was, people were bought off . . . . The crash that killed my daughter was the biggest engineering failure of the century—textbook don't-do-this-ever . . . . And Boeing walked away with an assembly-line type secret agreement and a minimal fine."[4]

How could such an outcome occur? A leading corporate law scholar notes that "the Trump Administration was eager to wrap up the prosecution of Boeing quickly and on terms that would not be onerous for Boeing, while

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1. Deferred Prosecution Agreement, United States v. Boeing Co., No. 4:21-CR-005-O (N.D. Tex. Jan. 7, 2021) [hereinafter Boeing DPA], https://www.justice.gov/opa/press-release/file/1351336/download [https://perma.cc/C2UK-9X4F].

2. Arguments made in this Article regarding DPAs also apply to corporate prosecution deals made using any alternative dispute resolution vehicle that operates in a like manner. For example, DOJ sometimes uses Non-Prosecution Agreements ("NPAs"), instead of DPAs, to resolve allegations of corporate misconduct. *2013 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)*, GIBSON DUNN (July 9, 2013) [hereinafter *2013 Mid-Year Update*], https://www.gibsondunn.com/2013-mid-year-update-on-corporate-deferred-prosecution-agreements-dpas-and-non-prosecution-agreements-npas/ [https://perma.cc/DY88-BFM3]. NPAs operate nearly identically to DPAs, except they are not subject to the federal court approval process required for DPAs. *See id.* at n.1. For this reason, arguments put forth in this Article would also apply to NPAs.

3. 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, 53 (2014)*; see also* F. Joseph Warin & Peter E. Jaffe, *The Deferred Prosecution Jigsaw Puzzle: A Modest Proposal for Reform*, 19 ANDREWS LITIG. REP. 1, 4 (2005) (noting "the ability to tailor each [DPA agreement] according to the specific needs of the respective parties, with both sides bargaining for what they hold most dear"). *See generally* Boeing DPA, *supra* note 1.

4. Sydney P. Freedberg et al., *As U.S-Style Corporate Lenience Deals for Bribery and Corruption Go Global, Repeat Offenders Are on the Rise*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Dec. 13, 2022), https://www.icij.org/investigations/ericsson-list/as-us-style-corporate-leniency-deals-for-bribery-and-corruption-go-global-repeat-offenders-are-on-the-rise/ [https://perma.cc/7B9Z-8WVN].

also maintaining the appearance that the U.S. Government was committed to airline safety."[5] Although the resulting DPA was both convenient and efficient, did it achieve justice? This Article argues that using DPAs to resolve allegations of corporate malfeasance when people have died is diametrically opposed to carrying out justice.

DPAs do have certain advantages over courtroom trials: they are faster, less expensive, and less formal.[6] These same advantages are spurring an alternative dispute resolution movement worldwide,[7] and they influence U.S. courts and judicial systems to use various tools and processes (including DPAs, plea bargaining, settlement agreements, and consent decrees) to help avoid courtroom battles. DPAs are used to address a wide range of alleged crimes, from fraud and trade offenses, to violations of the Foreign Corrupt Practices Act, the False Claims Act, and the Controlled Substances Act.[8] Thus, DPAs are used to address cases in many different U.S. Attorneys' and

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5. John C. Coffee, Jr., Nosedive: Boeing and the Corruption of the Deferred Prosecution Agreement 8 (May 6, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4105514 [https://perma.cc/9CAS-32UF] (select "Open PDF in Browser").

6. *See* Kristen M. Blankley et al., *ADR Is Not a Household Term: Considering the Ethical and Practical Consequences of the Public's Lack of Understanding of Mediation and Arbitration*, 99 NEB. L. REV. 797, 799 (2021) (noting the advantages of various alternative dispute resolution processes, including "cost and time efficiencies, creative problem-solving, confidentiality, party autonomy and control over the process and outcome," as well as accessibility and flexibility).

7. *See* BAKER MCKENZIE, THE YEAR AHEAD: DEVELOPMENTS IN GLOBAL LITIGATION AND ARBITRATION IN 2021, at 17–22, 27 (2021), https://www.globalarbitrationnews.com/wp-content/uploads/sites/42/2021/01/yearahead2021_english.pdf [https://perma.cc/V2BC-UNZE] (noting the increasing use of mediation in Brazil; the increasing judicial reform in Chile; the growing use of pre-litigation mediation in Vietnam; the expansion of dispute resolution services in Japan, including the opening of the Japan International Dispute Resolution Center; the opening of the Singapore International Mediation Centre, which resolves disputes through an expedited mediation process; and the creation of the Singapore Mediation Convention—signed by more than fifty jurisdictions worldwide and entered into force in 2020, which helps to recognize and enforce cross-border mediated settlement agreements). Louise Woods et al., *The UK To Sign The Singapore Convention—The New "New York Convention" for Mediation?*, VINSON & ELKINS (Mar. 7, 2023), https://www.velaw.com/insights/the-uk-to-sign-the-singapore-convention-the-new-new-york-convention-for-mediation/ [https://perma.cc/HU94-NSSG]; *see also* BAKER MCKENZIE, THE YEAR AHEAD: GLOBAL DISPUTES FORECAST 2023, at 27, 30–31 (2023), https://www.bakermckenzie.com/-/media/files/insight/publications/2023/theyearaheadreport2023.pdf [https://perma.cc/5VKC-45BP] (noting that in Brazil, arbitration has become the preferred way to resolve disputes involving complex contracts; that the Law Commission of England & Wales is currently working at reforming the Arbitration Act 1996 to ensure it remains "state of the art"; and that in Switzerland, Swiss corporations, limited partnerships, and limited liability companies can now resolve disputes under a statutory arbitration clause that binds companies, their shareholders, and their governing bodies).

8. *2013 Mid-Year Update*, *supra* note 2.

DOJ offices—including the Fraud Section, Antitrust Division, National Security Division, and others—underscoring "the broad acceptance of these agreements as a path to resolve complicated fact patterns."[9] Moreover, DPAs have been used in matters involving some of the nation's most well-known companies, including Boeing, General Electric, Johnson & Johnson, Sears, and JP Morgan.[10] During the last fifteen years, the federal government has used DPAs to resolve approximately twenty to thirty-five cases per year;[11] however, the annual number sometimes falls outside that range due to shifts in specific policies and priorities following administration changes.[12] Significantly, experts report that the overall level of corporate enforcement has, historically, "remained largely steady with each change in administration and typically is not politicized in one direction or another."[13] Every year, hundreds of millions of dollars pour into the U.S. Treasury from DPA-imposed fines.[14]

When Congress passed the Speedy Trial Act in 1974,[15] they included deferred prosecution in order to provide a second chance for first-time offenders, drug addicts, sex workers, juvenile offenders, and people arrested for low-level misdemeanors like petty shoplifting.[16] The goal was to provide

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9. GIBSON DUNN, 2021 MID-YEAR UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS 1 (2021), https://www.gibsondunn.com/wp-content/uploads/2021/07/2021-mid-year-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements.pdf [https://perma.cc/C848-JUVU].

10. BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 47–48 (2014).

11. For example, in 2020 the federal government entered into twenty-nine DPA agreements, but in the following year that number dropped to twenty-one. GIBSON DUNN, 2020 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS 3 (2021) [hereinafter 2020 YEAR-END UPDATE], https://www.gibsondunn.com/wp-content/uploads/2021/01/2020-year-end-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements-1.pdf [https://perma.cc/2VAC-XNFU]; *see also* GIBSON DUNN, 2021 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS 3 (2022) [hereinafter 2021 YEAR-END UPDATE], https://www.gibsondunn.com/wp-content/uploads/2022/02/2021-year-end-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements.pdf [https://perma.cc/78B6-DLQM].

12. 2020 YEAR-END UPDATE, *supra* note 11, at 4.

13. *Id.*

14. 2021 YEAR-END UPDATE, *supra* note 11, at 3*; see also* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1311 (2013).

15. 18 U.S.C. §§ 3161–3174.

16. *See* Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 163 (2008).

the social services, rehabilitation, and job training that could help and support these individuals in moving toward a drug-free, productive, and law-abiding life.[17] Somehow that noble idea was transmogrified into using DPAs to give a second chance to help and support some of the wealthiest and most powerful corporate entities and parties in the country.[18] Over time, legal experts expressed alarm that DPAs were being used in such a manner, but the highly critical articles and commentary from across the political spectrum did little to slow their use in addressing corporate malfeasance.[19]

DPAs have now come to be used in resolving serious cases such as the General Motors ("GM") faulty ignition matter, resulting in 174 deaths,[20] and the two Boeing 737 MAX airplane crashes that killed 346, possibly the deadliest corporate crime in U.S. history.[21] In the GM case, nobody was tried for a crime.[22] In the Boeing case, one mid-level company employee was tried and acquitted, but commentators dismissed the prosecution as an exercise in scapegoating.[23] Unfortunately, it appears that DOJ's use of DPAs to address even deadly corporate misconduct is becoming normalized. Leadership in American business has internalized the idea that it is sometimes possible to engage in serious wrongdoing with relative impunity—no job loss, no trial, no guilty verdict, and no jail time or other serious punishment for wrongdoers. Instead, the company agrees to admit misconduct, cooperate with the government, and pay a fine—a process and penalty that can become just another cost of doing business.[24]

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17. *See* Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1866–67 (2005); Spivack & Raman, *supra* note 16.

18. Freedberg et al., *supra* note 4.

19. *See* Richard A. Epstein, Opinion, *The Deferred Prosecution Racket*, WALL ST. J. (Nov. 28, 2006, 12:01 AM), https://www.wsj.com/articles/SB116468395737834160; *see* Editorial, *Too Big To Indict*, N.Y. TIMES (Dec. 11, 2012), https://www.nytimes.com/2012/12/12/opinion/hsbc-too-big-to-indict.html.

20. Drew Harwell, *Why General Motors' $900 Million Fine for a Deadly Defect Is Just a Slap on the Wrist*, WASH. POST (Sept. 17, 2015), https://www.washingtonpost.com/news/business/wp/2015/09/17/why-general-motors-900-million-fine-for-a-deadly-defect-is-just-a-slap-on-the-wrist/ [https://perma.cc/NKU9-BRJN].

21. United States v. Boeing Co., 617 F. Supp. 3d 502, 505–06 (N.D. Tex. 2022).

22. Harwell, *supra* note 20.

23. Dominic Gates, *Why Boeing Pilot Forkner Was Acquitted in the 737 MAX Prosecution*, SEATTLE TIMES (Mar. 25, 2022, 8:04 PM), https://www.seattletimes.com/business/boeing-aerospace/why-boeing-pilot-forkner-was-acquitted-in-the-737-max-prosecution/ [https://perma.cc/LUX4-5WAT].

24. *See* JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES 317–18 (2017).

In addition, court opinions have fortified DPAs against oversight or review from an independent and neutral party—i.e., a judge. Two federal appellate courts have interpreted the Speedy Trial Act as not permitting district courts to engage in any substantive review of DPAs during the approval process,[25] meaning district court judges cannot deny approval simply because they believe the deal is unjust or contrary to public interest. This is potentially harmful for both justice and public safety,[26] yet other federal circuits, when confronted with interpreting the same statute, will likely follow suit given that the two previous appellate rulings will "enjoy heightened stare decisis effect."[27] This means the United States will likely continue to remain an international outlier on this issue, given that countries such as the United Kingdom, Canada, France, and Singapore all empower their courts to halt unjust agreements and protect the public interest.[28] In Ireland, when leaders began considering the implementation of a corporate DPA program, a law reform commission rejected the U.S. model because it "would be difficult to reconcile" with the Irish Constitution.[29]

Given that people who perished in the Boeing disasters hailed from all over the globe, DOJ's handling of the case impacts how the U.S. justice system is viewed worldwide. Consider, for example, Naoise Connolly Ryan, whose husband, Mick, was killed in the Ethiopian MAX crash. She travelled with her young children from Ireland to Washington, D.C. to meet with DOJ officials regarding the Boeing DPA agreement. She describes leaving her D.C. hotel room early in the morning to attend the meeting, taking place at nearby DOJ headquarters, as follows:

> It was dark. It was cold. I'm looking up at these amazing buildings in Washington and the American flag flying. And I'm heading to what really is a building and a department that is supposed to

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25. *See* United States v. Fokker Servs. B.V., 818 F.3d 733, 743 (D.C. Cir. 2016); United States v. HSBC Bank USA, 863 F.3d 125, 138 (2d Cir. 2017).

26. *See* United States v. Orthofix, Inc., 956 F. Supp. 2d 316, 323, 325 (D. Mass. 2013) (noting that the judge's role in reviewing plea deals "is zealously to protect the public interest," and that such concerns are "heightened" in the criminal law context).

27. Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1828 (2015) (noting that, once rendered, "judicial interpretations of statutes . . . enjoy heightened stare decisis effect, sometimes referred to as a 'super-strong' presumption of correctness").

28. *See infra* Part III.

29. LAW REFORM COMM'N OF IRELAND, ISSUES PAPER: REGULATORY ENFORCEMENT AND CORPORATE OFFENCES 38 (2016), https://www.lawreform.ie/_fileupload/Issues%20Papers/Issues%20Paper%20on%20Regulatory%20Enforcement%20and%20Corporate%20Offences%20final.pdf [https://perma.cc/S4T6-6MGF].

> represent everything that is important about civilization, democracy, and justice. And I'm walking up thinking . . . How did I get here? How did it all come to *this*?[30]

In describing her incredulity regarding how DOJ addressed the tragedies, she asks, "What does the Department of Justice stand for if it doesn't see that all of this is an injustice?[31]

This Article proceeds as follows: the remainder of Part I will give a brief history of DPAs, a brief history of the 737 MAX tragedies, and will discuss efforts that family members and loved ones of those killed in the MAX crashes have pursued in seeking justice in the case. Part II will discuss why using DPAs in resolving allegations of serious corporate misconduct is antithetical to basic notions of transparency, fairness, and system-wide checks and balances necessary to establish and consistently carry out equal justice under law. Part III will discuss past attempts to reform the U.S. DPA legal landscape. It will then propose text for a new law addressing the most serious failure of DOJ's current DPA regime, and why such a fix is legally and morally imperative. Part IV, paramount to understanding the calamitous nature of DOJ's handling of the Boeing matter, will present a thought exercise, hypothesizing and analyzing how the case might have turned out if the legislative proposal discussed in Part III had been enacted into law before the MAX disasters occurred.

A. History of DPAs

Once the federal government files an indictment in a criminal matter, the Speedy Trial Act ensures the case is "disposed of with reasonable dispatch, whether or not prosecutors or defendants perceive speed as being in their interest."[32] To achieve that goal, Congress mandates that a defendant's trial begin within seventy days after the indictment is filed.[33] Congress allows for various exemptions from the seventy day deadline, including the following,

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30. Ed Pierson, *Episode 6: Deferred Prosecution—Part II: The Families Fight for Justice*, WARNING BELLS WITH ED PIERSON, at 07:23 (Jan. 14, 2023), https://podcasts.apple.com/us/podcast/warning-bells-with-ed-pierson/id1643346731 [https://perma.cc/T9WE-WAC2]. Ed Pierson is a safety advocate in aviation who testified as a whistleblower in the Boeing 737 MAX crashes before the United State Congress.

31. *Id.* at 10:14.

32. ANTHONY PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 34 (1980). The legislative history of the Speedy Trial Act can be found in numerous Congressional reports, all of which are contained in this single volume legislative history of the Act, published in 1980 by the Federal Judicial Center.

33. 18 U.S.C. § 3161(c)(1).

which empowers the government to defer the prosecution for a set time period: "Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct."[34] The idea behind this exemption is straight forward: a prosecution "is held in abeyance on the condition that the defendant participate in a social rehabilitation program."[35] At its core, a DPA calls for the prosecutor and defendant to negotiate a contract giving the defendant time to demonstrate good conduct. If the defendant successfully adheres to the various agreed upon provisions of the deal, the government will dismiss the charges and close the case.[36]

In 1974, a Senate Committee Report on the Speedy Trial Act made clear the legislative intent behind DPAs was to create pretrial diversion or "intervention" programs where "prosecution of a *certain category* of defendants" would be held off "on the condition that the defendant participate in a *social rehabilitation program.*"[37] Following that, if the defendant succeeded in the program, charges would be dropped. The legislators noted that experimental diversion programs at the state and federal level "have been quite successful with first offenders,"[38] and they specifically referenced the Manhattan Court Employment Project in New York City and the Project Crossroads program in Washington, D.C., both of which served the unemployed and assisted them with counseling, job training, and job placement services.[39] The Report added that "[s]ome success has also been noted in programs where the defendant's alleged criminality is related to a specific social problem such as prostitution or heroin addiction."[40] For years, DPAs were used to address criminal activity involving these kinds of social problems, as well as for juvenile defendants and first-time offenders, particularly when the charges were for non-serious misdemeanors like petty

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34. *Id.* § 3161(h)(2).

35. PARTRIDGE, *supra* note 32, at 117.

36. *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).

37. PARTRIDGE, *supra* note 32, at 117 (emphasis added).

38. *Id.*

39. *See* VERA INST. OF JUST., THE MANHATTAN COURT EMPLOYMENT PROJECT 1–7 (1970), https://www.vera.org/downloads/publications/the-manhattan-court-employment-project.pdf [https://perma.cc/QY8C-9MRH]; *see also* ROBERTA ROVNER-PIECZENIK, NAT'L COMM. FOR CHILDREN AND YOUTH, PROJECT CROSSROADS AS PRE-TRIAL INTERVENTION: A PROGRAM EVALUATION 1–2 (1970), https://files.eric.ed.gov/fulltext/ED113651.pdf [https://perma.cc/7YW3-STP7].

40. PARTRIDGE, *supra* note 32, at 117.

retail theft.[41] In short, the impetus for implementing DPAs was "to protect vulnerable persons in society."[42]

Then in 1994, twenty years after the Speedy Trial Act was passed, the United States Attorney for the Southern District of New York used a DPA to resolve a corporate matter involving Prudential Securities, Inc.[43] One might suggest that Prudential, a powerful corporate entity that can afford top-flight legal representation, was far afield from the socially and economically disadvantaged *individuals* that members of Congress sought to assist through deferred prosecution.[44] However, as the court points out in *United States v. Saena Tech Corp.*,[45] the DPA tool was set forth by Congress "without limiting its use to individual defendants or to particular crimes."[46] Over time, it appears federal courts have come to the conclusion that there are no limits on the government's ability to offer DPAs—that DOJ can employ the agreements "even in response to the most heinous crimes."[47] This Article argues that the recent case involving the awarding of a DPA to the Boeing Company in the aftermath of two 737 MAX airplane crashes suggests it is time for Congress to draw a line on this issue, thereby creating a single, necessary limitation on their use.

B. History of the 737 MAX Cases

Once a decision is made to use a DPA in addressing allegations of criminal misconduct, attention quickly turns to DOJ working collaboratively with the defendant in crafting the agreement.[48] Central to that process is writing the "Statement of Facts," detailing the circumstances surrounding the misconduct. A major criticism of those statements is that they often represent "an incomplete and much negotiated script."[49] Thus, providing a complete and accurate history of the 737 MAX matter requires one to supplement information from the Boeing DPA with information from other investigations

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41. 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); *see also* Spivack & Raman, *supra* note 16, at 163.

42. Xian, *supra* note 41, at 642.

43. Greenblum, *supra* note 17, at 1873, 1873 n.66.

44. *See* PARTRIDGE, *supra* note 32, at 117.

45. United States v. Saena Tech Corp., 140 F. Supp. 3d 11 (D.D.C. 2015).

46. *Id.* at 42.

47. United States v. Boeing Co., No. 4:21-cr-5-O, 2023 WL 5183058, at *15 (N.D. Tex. Feb. 9, 2023).

48. *See generally* Coffee, *supra* note 5.

49. Coffee, *supra* note 5, at 2.

of the crashes, including those that have been conducted by journalists, the U.S. House of Representatives, the U.S. Senate, and the Government of Ethiopia. All of that important research and investigatory work will be discussed at length later in the Article. For now, in reading the events surrounding the 737 MAX crashes, one must keep in mind the investigatory work that *never took place* in this matter: In most cases of this kind, an outside, independent law firm is hired to conduct an "honest down the middle of the road straightforward" investigation, but a firm was never engaged to complete such an investigation in the Boeing matter.[50] With those caveats in mind, following is a brief history of the case.

The Boeing Company began manufacturing and selling the Boeing 737 in the 1960s, and it became one of the company's best-selling aircraft models.[51] In 2011, Boeing introduced its latest version of the 737, called the 737 MAX. This new version was far more fuel efficient and therefore cheaper to operate.[52] As part of the integration process, the Aircraft Evaluation Group ("AEG") within the Federal Aviation Administration ("FAA") had to determine if any *additional* training would be required to pilot the MAX, compared to prior versions—known in the industry as "differences training."[53]

Boeing was well aware that if pilots required "Level B" differences training, it would cost airlines transitioning to the MAX far less money to train pilots than it would if "Level D" differences training were required.[54] This is because while "Level B" could be completed in a few hours by computer or tablet, "Level D" required pilots to attend longer, in-person trainings requiring full-flight simulators.[55] Moreover, in addition to providing the multi-million dollar simulators, airlines would have to absorb the costs of pilots missing work for those periods of time, along with any associated travel, food, and hotel costs.[56] In other words, there were significant cost differences between "Level B" and "Level D" differences training requirements, and one of Boeing's objectives in designing the new MAX was

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50. *Columbia Law Professor John Coffee Says Boeing Deferred Prosecution Agreement One of the Worst*, CORP. CRIME REP. (Feb. 23, 2021, 4:35 PM), https://www.corporatecrimereporter.com [https://perma.cc/U5S5-B8WS] (search in search bar for "Columbia Law Professor John Coffee Says Boeing Deferred Prosecution Agreement One of the Worst") ("No law firm stood up and said—here is a factual statement, going on 100 pages or so, as to everything that happened.").

51. Boeing DPA, *supra* note 1, at attach. A at 2.

52. *See id.*

53. *Id.* at attach. A at 3.

54. *Id.* at attach. A at 5–6.

55. *Id.*

56. *Id.*

for the FAA to make a decision that transitioning pilots would require no greater than "Level B" differences training.[57] Boeing employees who were working with the FAA to determine the differences training level felt pressure on this matter; one worker even stated in an email that a rating higher than "Level B" could "cost Boeing tens of millions of dollars!"[58]

In addition, a larger engine design for the new MAX resulted in different aerodynamics for the aircraft, which caused its nose to pitch up during certain flight maneuvers, an issue that needed to be addressed to meet federal airworthiness standards.[59] Boeing fixed the problem by creating MCAS (or Maneuvering Characteristics Augmentation System), which would automatically cause the MAX's nose to pitch down.[60]

The FAA Aircraft Evaluation Group determined the differences training for the new MAX would be set at "Level B," exactly what Boeing desired, but this determination was based on the understanding that MCAS would activate only during a very narrow scope of operation (i.e., a high-speed wind up turn of the aircraft).[61] However, after additional testing in a simulator, it became clear to two Boeing employees that MCAS would activate during much lower speeds, far beyond the narrow scope of operation to which the FAA thought MCAS was limited.[62] Starting at that point in time, it was known to the two Boeing employees that the FAA's "Level B" determination was based on inaccurate information.[63]

The two Boeing employees did not relay this new information but instead "intentionally withheld and concealed" the information from the FAA.[64] In addition, when the FAA emailed the two employees for their input in producing a particular document (the FSB Report, or Flight Standardization Board Report) used in setting forth training protocols for MAX crew members, one of the two Boeing employees proposed deleting reference to MCAS, stating, "We agreed not to reference MCAS since it's outside normal operating envelope."[65] Importantly, neither of the two Boeing employees shared with the FAA their newly-discovered knowledge that MCAS's operational scope was much larger than the FAA understood it to be; the

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57. *Id.*
58. *Id.* at attach. A at 6.
59. *Id.* at attach. A at 7.
60. *Id.*
61. *Id.* at attach. A at 9.
62. *Id.* at attach. A at 10.
63. *Id.*
64. *Id.* at attach. A at 11.
65. *Id.* at attach. A at 12–13.

Boeing employees let the FAA's misimpression stand uncorrected.[66] Based on the misleading statements and omissions of the two Boeing employees, the FAA deleted all information about the MCAS from the FSB Report.[67]

In the end, due to the deception by the Boeing employees, the FAA's final decision for differences training remained at "Level B."[68] In addition, the final version of the FSB Report for the 737 MAX lacked information about MCAS, which meant aircraft manuals and pilot training materials would also lack information about MCAS.[69]

On October 29, 2018, a 737 MAX crashed soon after takeoff from Indonesia, killing all 189 people onboard.[70] After the crash, the FAA learned that MCAS may have played a role in the crash.[71] Less than five months later, on March 10, 2019, a second MAX crashed soon after taking off from Ethiopia, killing 157.[72] Again, there were no survivors.[73] Airline regulators in forty-two countries acted quickly to ground the 737 MAX after the second crash.[74] The FAA initially said it saw "no systemic performance issues" that would require the MAX to be grounded, but that position changed quickly after the agency collected new information, including satellite-tracking data, suggesting similarities between the two MAX crashes.[75] The plane was grounded in the United States on March 13, 2019, three days after the second crash.[76]

On January 7, 2021, Boeing was charged with one count of conspiracy to defraud the United States, in violation of Title 18, United States Code, Section 371.[77] According to the DPA, the offending behavior was performed exclusively by the two Boeing employees: "At all times during the conspiracy, Boeing Employee-1 and Boeing Employee-2 were acting within the scope of their employment and with the intention, at least in part, to

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66. *Id.*
67. *Id.* at attach. A at 13.
68. *Id.* at attach. A at 14.
69. *Id.*
70. *Id.*
71. *Id.* at attach. A at 15.
72. *Id.* at attach. A at 16.
73. *Id.*
74. Thomas Kaplan et al., *Boeing Planes Are Grounded in U.S. After Days of Pressure*, N.Y. TIMES (Mar. 13, 2019), https://www.nytimes.com/2019/03/13/business/canada-737-max.html.
75. *Id.*
76. *Id.*
77. Boeing DPA, *supra* note 1, at 1.

benefit Boeing."[78] On that same day, the government filed a DPA in which Boeing acknowledged the charges.[79]

The court approved the DPA and suspended the Speedy Trial Act's time requirements for a period of three years, during which time Boeing must fulfill the terms of the DPA, including: Boeing will pay a criminal monetary penalty of approximately $243 million dollars, "which reflects a fine at the low end of the otherwise-applicable Sentencing Guidelines fine range";[80] Boeing will pay approximately $1.8 billion dollars in compensation to its airline customers; Boeing will pay $500 million dollars in compensation to the heirs, relatives, and beneficiaries of those killed in the two MAX aircraft crashes;[81] Boeing will fully cooperate with DOJ's Fraud Section "in any and all matters relating to the conduct described" in the DPA;[82] and Boeing will report periodically to the Fraud Section regarding remediation and testing of its compliance program and internal controls.[83]

In exchange, the DOJ immunized Boeing from criminal prosecution for all conduct described in the DPA's statement of facts.[84] If Boeing complies fully with its obligations under the DPA, the Fraud Section will seek dismissal of the charges at the end of the three year agreement term—meaning January, 2024.[85] However, if the Fraud Section determines during the DPA term that Boeing has breached the agreement, the Fraud Section can, in its sole discretion, decide to extend the agreement term or move forward with prosecuting Boeing pursuant to the charges already filed.[86]

C. 737 MAX Victims Seek Justice

In her book *In Praise of Litigation*, Professor Alexandra Lahav points out the "significant democratic value" of litigation, stating, "Bad things happen and those who believe they have been wronged want and deserve an explanation, a remedy, and a way to prevent the same thing from happening in the future to them or to others."[87] That same sentiment, along with related underlying concerns, have been stated by victim family members who lost

78. *Id.* at attach. A at 5.
79. *Id.* at attach. A at 2.
80. *Id.* at attach. A at 7.
81. *Id.*
82. *Id.*
83. *Id.* at attach. D at 1.
84. *Id.* at 14.
85. *Id.* at 3, 16.
86. *See id.* at 3, 16–19.
87. ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 1 (2017).

loved ones in the two 737 MAX crashes. Through their testimony in a court hearing related to the crashes,[88] calls for justice include the following: They want a thorough investigation of the misconduct that led to the MAX tragedies;[89] if crimes were committed, they want those who committed them to be held accountable through a public trial and appropriate punishment;[90] they want DOJ to use the most effective tools and processes available to secure justice on behalf of the victims and the public,[91] and they believe DOJ's resolution of the case through a DPA has failed in that regard;[92] and, finally, as it relates to 737 MAX airplanes, they want to prevent any additional harm or future loss of life.[93] Naoise Connolly Ryan, whose husband was killed in the Ethiopian MAX crash, travelled with her young children from Ireland to the United States. She testified to the following at the court hearing:

> I had to make this journey so that I could be here today to be heard and make a plea to the Court. The secret sweetheart deal that was hatched between Boeing and the Department of Justice is not justice. I refuse to accept the DPA compensation money for this reason. I do not want their blood money. I want the truth, real justice, and accountability. I believe [Boeing's former CEO David] Muilenburg and [Boeing's current CEO David] Calhoun should face a public trial and be prosecuted for manslaughter.[94]

Catherine Berthet, whose twenty-eight-year-old daughter, Camille, was killed in the Ethiopian MAX crash, testified in the same hearing that in her native France "the culture of prosecution is very strong" and that "from the beginning" of the case, the victim families have had "only one obsession: that justice be done and that those responsible go to prison."[95] Another victim family member, Zipporah Kuria, travelled to the hearing from London. She lost her father, Joseph Kuria Waithaka, and was bewildered that the MAX tragedies did not result in manslaughter or murder charges, but instead were resolved with a "sweetheart deal"[96] composed of "a fine and an immunity

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88. *See* Transcript of Arraignment at 8, United States v. Boeing Co., No. 4:21-cr-00005-O-1 (N.D. Tex. Jan. 26, 2023).
89. *Id.* at 69.
90. *Id.* at 13.
91. *Id.* at 30–31.
92. *Id.* at 62–63.
93. *Id.* at 81.
94. *Id.* at 13.
95. *Id.* at 22–23.
96. *Id.* at 39.

deal for those responsible. How can we believe in justice if this has been categorized as sufficient justice for us?"[97]

Another victim family member, Ike Riffel, whose two sons were killed in the Ethiopian MAX crash, suggested at the hearing that Boeing was unfairly advantaged by being moved "to a different tier of justice" in the case, adding, "Shame on you, DOJ. You did nothing to improve air transport safety. Instead, you made us less safe by empowering the criminals."[98] Paul Kiernan, whose partner, Joanna Toole, died in the Ethiopian MAX crash, underscored at the hearing that it was the justice system's duty to represent the interests of the victims and the general public; he urged the justice system "to stand for us when we cannot stand, to speak for us when we cannot speak, and to act for us when we cannot act."[99] Michael Stumo, whose daughter, Samya Rose, was killed at age twenty-four in the Ethiopian MAX crash, decried the judicial process as a "farce" in which "they pretend this is a simple fraud by two guys and a couple emails" when he believes it was in fact a "top-down multi-year conspiracy" carried out by Boeing.[100] The ideas and criticisms expressed by these victim family members track well with the core thesis in Professor Lahav's book:

> Litigation helps democracy function in a number of ways: it helps to *enforce* the law; it fosters *transparency* by revealing information crucial to individual and public decision-making; it promotes *participation* in self-government; and it offers a form of *social equality* by giving litigants equal opportunities to speak and be heard.[101]

Professor Lahav states that these four "values of litigation" (law enforcement, transparency, participation, and social equality) are central to a well-functioning democracy, and she argues that the U.S. system of justice is effective only to the extent it advances and respects these values through its dispute resolution tools and processes.[102] Measured by such a standard, DPAs would be found to be a grossly ineffective tool for achieving justice. Regarding *enforcement*, the fact that some companies are awarded DPAs again and again suggests the agreements are a poor mechanism for effectively

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97. *Id.* at 37.
98. *Id.* at 45–46.
99. *Id.* at 62–63.
100. *Id.* at 81.
101. LAHAV, *supra* note 87, at 1–2.
102. *Id.* at 2.

enforcing the law and deterring recidivist behavior.[103] Regarding *transparency*, DPAs can be used to assist both DOJ and the defendant company in withholding rather than revealing information surrounding the alleged misconduct.[104] Regarding *participation*, DPAs are usually negotiated behind closed doors, in a process that hinders participation rather than promoting it.[105] Finally, regarding *equality*, although DOJ gives *defendants* the opportunity to "speak and be heard" during the DPA negotiation process, all other interested parties (i.e., victim representatives, the court, the press, the general public, etc.) are not provided that same opportunity.[106]

Of course, the federal Crime Victims' Rights Act does guarantee victims two specific rights: the right "to *confer* with the attorney for the [g]overnment in the case,"[107] and the right "to be informed *in a timely manner* of any plea bargain or deferred prosecution agreement."[108] However, the practical meaning and impact of these rights is not yet clear. What exactly does "confer" mean? Does it involve merely a brief "listening session" with victims, or is something more interactive and substantial required? And at what point in the DPA process can (or must) the "conferring" take place between DOJ and the victims (i.e., must it take place before DPA negotiations begin between DOJ and the defendant?; before an already-negotiated agreement is submitted to the court for approval?; or would the law be satisfied if DOJ waited to confer with victims until *after* a court has approved the agreement and its term has begun?).[109] In addition, what does it mean,

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103. Freedberg et al., *supra* note 4 (noting that Deutsche Bank "escaped prosecution four times—on bribery, tax fraud and antitrust charges . . . . This year, the bank admitted that it had failed to report new allegations of wrongdoing to [DOJ] in a timely manner, another breach. The punishment? Prosecutors extended oversight by a corporate compliance monitor by nearly one year."); *see also* PUBLIC CITIZEN, SOFT ON CORPORATE CRIME: DOJ REFUSES TO PROSECUTE CORPORATE LAWBREAKERS, FAILS TO DETER REPEAT OFFENDERS 4 (2019), https://www.citizen.org/wp-content/uploads/soft-on-corporate-crime-dpa-npa-repeat-offenders-report.pdf [https://perma.cc/7ZMY-ARX3] ("Contrary to the DOJ's theory of corporate rehabilitation, DPAs . . . do not prevent corporate recidivism. This history of large corporations repeatedly avoiding prosecution shows if the DOJ wants to deter corporate crime, a different approach is needed.").

104. *See supra* Section I.B.

105. *See supra* Section I.B.

106. *See supra* Section I.C.

107. 18 U.S.C. § 3771 (emphasis added); *see also Rights of Victims*, ENV'T & NAT. RES. DIV., https://www.justice.gov/enrd/environmental-crime-victim-assistance/rights-victims [https://perma.cc/94UT-W9LM].

108. 18 U.S.C. § 3771 (emphasis added); *see also Rights of Victims*, *supra* note 107.

109. The U.S. Court of Appeals for the Fifth Circuit has held that victims under the Crime Victims' Rights Act "have a right to inform the plea negotiation process by conferring with prosecutors *before* a plea agreement is reached." *In re* Dean, 527 F.3d 391, 395 (5th Cir. 2008) (emphasis added). The U.S. Court of Appeals for the Second Circuit arrived at a similar

exactly, to inform victims about the DPA "in a timely manner"? Does it mean DOJ must inform victims *before* negotiations begin between DOJ and the defendant? *During* those negotiations? *After* an agreement has been achieved and approved by a court? In the end, then, victim rights concerning DPAs, as provided by the Crime Victims' Rights Act, must be further clarified by the courts as to what they mean in practice.[110]

DOJ, in deciding to award a DPA to Boeing, thereby eliminated litigation as an option in resolving the case. Professor Lahav notes that when litigation is not on the table, "the stronger party can take one side of a nuanced normative question and assert that the law is on its side, without the benefit of deliberation or the requirement of justification."[111] Such a scenario unfolded in the Boeing case. Chris Moore, whose daughter was killed in the Ethiopia MAX disaster, testified that "[the] DPA was a tool of judicial expedience, and overlooked many of the salient facts. The public has not even been informed what facts…were used to relieve the criminals of their true punishment if, in fact, there were any. How can we trust the Department of Justice now?"[112] Additional testimony indicates that DOJ was distrusted by victim family members,[113] for at least two reasons. First, DOJ actively opposed—even in arguments directly to the court[114]—the designation of "victim" for those who lost loved ones in the MAX plane tragedies. As Chris Moore testified, "[T]he final insult is to understand that the Department of Justice [which] is supposed to protect the rights of its people and prosecute criminals, does not even recognize you or your loved one as a victim."[115]

Second, trust toward DOJ dwindled because victim family members did not believe DOJ was effectively honing in on important information and facts surrounding the case. The U.S. Supreme Court has said "[t]he basic purpose of a trial is the determination of truth."[116] Yet, instead of using a trial to address the Boeing matter, DOJ used a DPA, a tool that fails to encompass Professor Lahav's four litigation values of law enforcement, transparency,

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conclusion, stating the CVRA requires "that the court provide victims with an opportunity to be heard concerning a *proposed* settlement agreement." *In re* W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 564 (2d Cir. 2005) (emphasis added).

110. Litigation addressing some of these questions is currently taking place before the U.S. Court of Appeals for the Fifth Circuit. *See* Petition for Writ of Mandamus, United States v. Boeing Co., 617 F. Supp. 3d 502 (2022) (No. 23-10168).

111. LAHAV, *supra* note 87, at 5.

112. Transcript of Arraignment, *supra* note 88, at 69.

113. *See* Transcript of Arraignment, *supra* note 88.

114. Second Memorandum Opinion & Order, United States v. Boeing Co., 617 F. Supp. 3d 502 (N.D. Tex. 2022) (No. 4:21-cr-000005-O), at 8.

115. *See* Transcript of Arraignment, *supra* note 88, at 68–69.

116. Tehan v. U.S. *ex rel.* Shott, 382 U.S. 406, 416 (1966).

participation, and social equality. Especially troubling is the fact that DPAs do not offer "the opportunity to present reasoned arguments and proofs before an official adjudicator—a judge or jury."[117] It is that independent and neutral judge or jury that helps engender trust in the final outcome of a case.[118] Litigating the case would also have forced Boeing to publicly defend themselves and justify their conduct;[119] it would have promoted transparency by "forcing information out into the open that would otherwise remain hidden";[120] and it would have provided "a vehicle for participation in government and an example of democracy in action," not just for the litigating parties, but for the public as well, who would be able to view the case in the courtroom or learn about it on the internet or through the media.[121]

Courtroom trials are particularly effective at testing pretrial investigations and at determining whether defendants are guilty.[122] First, judges and jurors, because they do not participate in the pretrial investigation, have a "psychological and often institutional distance" from the pretrial investigation.[123] That distance enables them to reduce the chance that psychological biases, like tunnel vision, might impact their views, their focus, or their decision-making process.[124] Second, because trials are held in public and the judge's opinion can be appealed to a higher court, trials provide increased transparency and "reduce the room for arbitrary, discriminatory, and corrupt decisions."[125] This also encourages officers of the court (including judges, prosecutors, and defense counsel) to apply existing law

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117. LAHAV, *supra* note 87, at 6.

118. *See* Mary D. Fan, *Hacking Qualified Immunity: Camera Power and Civil Rights Settlements*, 8 ALA. C.R. & C.L. L. REV. 51, 51 (2017) ("Establishing what really happened forces courts and juries to wade into a fact-bound morass filled with fiercely conflicting [versions of events] . . . ."); *see also Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States*, 109th Cong. 56 (2005) (statement of J. John G. Roberts, Jr., D.C. Cir.) (noting in his testimony, "I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

119. LAHAV, *supra* note 87, at 8.

120. *Id.*

121. *Id.* at 6.

122. Máximo Langer, *Plea Bargaining as Second-Best Criminal Adjudication and the Future of Criminal Procedure Thought in Global Perspective*, *in* RESEARCH HANDBOOK ON PLEA BARGAINING AND CRIMINAL JUSTICE (Máximo Langer et al. eds., forthcoming 2023) (manuscript at 10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453709 [https://perma.cc/7D8T-NKKQ].

123. *Id.* (citations omitted). *See generally* DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS (2012) (discussing psychological biases in the criminal process).

124. Langer, *supra* note 122.

125. *Id.*

correctly, and to perform their roles ethically.[126] In short, the transparency of the trial process, along with the fact that the resulting legal decision can be appealed, work as important checks and balances within the system to ensure greater accuracy, fairness, and overall ethicality.

II. DPAS ARE ANTITHETICAL TO JUSTICE

Using DPAs to resolve serious allegations of corporate misconduct prevents equal justice under the law because the agreements are antithetical to basic notions of transparency, fairness, and system-wide checks and balances.[127] There are numerous checks and balances built into the U.S. criminal justice system. As one federal court points out, the system "was never intended to place all the power of accuser, judge, and jury into the hands of the government,"[128] but instead was built as "a balanced system that regulates the investigation, formal accusation, adjudication of guilt and innocence, and punishment of crimes."[129] Within this system, different functions are performed by separate individuals or groups: *Prosecutors* investigate alleged crimes and determine if formal charges are warranted.[130] If a matter proceeds to trial,[131] *juries* determine what facts the evidence has established, as well as the guilt (or not) of the accused—meaning, the extent to which the evidence has successfully established the facts needed to satisfy all required elements of the alleged crime.[132] In this way, juries present a check on prosecutors, legislators, and the wider law enforcement and judicial apparatus: a 'not guilty' verdict can serve to rein in overzealous prosecutors or wrongful accusations;[133] jury nullification, though rarely used, can act as a

126. *Id.*

127. *See generally* Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191 (2016).

128. United States v. Stevenson, 425 F. Supp. 3d 647, 657 (S.D.W. Va. 2018).

129. *Id.*; *see also* U.S. CONST. amends. IV, V, VI, & VIII.

130. *Anatomy of a Criminal Case*, CNTY. SANTA CLARA, https://countyda.sccgov.org/prosecution/anatomy-criminal-case [https://perma.cc/HB6M-HBH8].

131. In many instances, of course, the case will be settled through a plea bargain. The prosecutor determines the terms of the bargain, sometimes with the input of defense counsel. *See How Courts Work: Steps in a Trial*, A.B.A (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining/ [https://perma.cc/C8PV-SNWQ].

132. *See* Note, *Court and Jury*, 8 HARV. L. REV. 499 (1895); *see also* Comment, *Must Every Circumstance Necessary for a Conviction Be Proved Beyond a Reasonable Doubt?*, 15 YALE L.J. 192 (1906).

133. *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the

check and balance if jury members decide the law is immoral, is being wrongfully applied, or is being unfairly enforced.[134] Finally, if the jury delivers a guilty verdict, the *judge* determines the most appropriate punishment after considering the U.S. Sentencing Guidelines, mandatory minimum laws, and sentencing factors under 18 U.S.C. § 3553(a).[135]

When DPAs are used to address corporate crime, these checks and balances are largely eliminated, with prosecutors "starting to possess something close to absolute power" in the process.[136] Indeed, according to Professor Richard Epstein, DPAs strip away "the most elementary protections of the criminal law, by turning the prosecutor into judge and jury, thus undermining our principles of separation of powers."[137] As one member of Congress puts it, DPAs give prosecutors "unmitigated power to be the judge, the jury and the sentencer."[138] A federal judge comes to a similar conclusion, pointing out that DPAs permit prosecutors to exercise "the core judicial functions of adjudicating guilt and imposing sentence with no meaningful oversight from the courts."[139] This lack of checks and balances presents a real danger. Although the U.S. Constitution attempts to protect both criminal defendants and the public by separating powers among three distinct branches of government, "the current DPA process places all three powers in the hands of a U.S. Attorney."[140]

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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." (citation omitted)).

134. Suja A. Thomas, *What Happened to the American Jury? Proposals for Revamping Plea Bargaining and Summary Judgment*, 43 A.B.A. LITIG. 1, 4 (2017) ("[J]ury nullification has historical origins, such as checking the prosecution and the legislature in response to the enactment and enforcement of certain laws . . . .").

135. *See* FED. R. CRIM. P. 11(b)(1)(M); *see also* 18 U.S.C. § 3553(a).

136. John C. Coffee, Jr., *Deferred Prosecution: Has It Gone Too Far?*, NAT'L L.J. (July 25, 2005), https://www.law.com/nationallawjournal/almID/1122023111380/ [https://perma.cc/ECC7-W2WB].

137. Epstein, *supra* note 19.

138. *Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?: Hearing Before the Subcomm. on Com. and Admin. L. of the H. Comm. on the Judiciary*, 110th Cong. 319 (2008) (statement of Rep. William Pascrell, Jr.).

139. United States v. HSBC Bank USA, N.A., 863 F.3d 125, 143 (2d Cir. 2017) (Pooler, J., concurring).

140. *See Criminal Law—Separation of Powers—D.C. Circuit Holds That Courts May Not Reject Deferred Prosecution Agreements Based on the Inadequacy of Charging Decisions or Agreement Conditions.*—United States v. Fokker Servs. B.V., *818 F.3d 733 (D.C. Cir. 2016)*, 130 HARV. L. REV. 1048, 1054 (2017) [hereinafter *Criminal Law*].

A. Lack of Judicial Review

Even if a case is resolved through a plea bargain rather than a courtroom trial, there remains an important check on prosecutorial power. Judges are permitted, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, to *reject* a plea deal if the court deems it too lenient or against public interest.[141] Moreover, this oversight by a judge is not limited to trials and plea bargains; judicial review also helps secure fairness and integrity within settlement agreements and consent decrees that can be used to address many kinds of legal disputes, including class actions, shareholder derivative suits, certain kinds of bankruptcy cases, and other matters. Historically, judges have played a key role—as an independent, neutral party—in reviewing these agreements to make certain they are "fair, adequate, and reasonable."[142]

Judicial review, then, is vital to ensuring fairness and integrity in the process—whether that process involves a courtroom trial, plea bargain, settlement agreement, or a consent decree—and it also helps protect the public interest. Unfortunately, when it comes to DPA agreements, judicial review is not permitted. Two federal appellate courts have ruled that district courts cannot consider the substance of the agreement (i.e., the *terms* of the deal) when reviewing DPAs for possible approval.[143] The first appellate ruling, in 2016, held that district courts must limit their inquiry "to examining whether the DPA served the purpose of allowing [the defendant] to demonstrate its good conduct."[144] Legal scholars warned that the decision could undermine important judicial review protections—even suggesting why "other jurisdictions should not follow" the ruling.[145] Nevertheless, one year later, a second appellate court *did* follow the ruling, stating that a district court's role in the approval process "is limited to arraigning the defendant, granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock, and adjudicating motions or disputes as they arise."[146]

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141. FED. R. CRIM. P. 11(c)(3); *see* United States v. Miller, 722 F.2d 562, 563 (9th Cir. 1983) (noting that Rule 11 "contemplates the rejection of a negotiated plea when the district court believes that the bargain is too lenient, or otherwise not in the public interest. This power of review protects against erosion of the judicial sentencing power." (citations omitted)).

142. United States v. City of Miami, 614 F.2d 1322, 1330 (5th Cir. 1980).

143. *See* United States v. Fokker Servs. B.V., 818 F.3d 733 (D.C. Cir. 2016); *see also* United States v. HSBC Bank USA, N.A., 863 F.3d 125 (2d Cir. 2017).

144. *Fokker Servs. B.V.*, 818 F.3d at 747.

145. *Criminal Law*, *supra* note 140, at 1052 ("To the extent that the [appellate court] prohibits judicial review of the adequacy of a DPA's terms, other jurisdictions should not follow [the ruling].").

146. *HSBC Bank USA*, 863 F.3d at 129.

The practical impact of these two appellate rulings is clear: When a DPA is placed before a federal district court in the approval process,[147] powers of judicial review are nonexistent because the court is not permitted to consider the terms of the deal in deciding whether to approve or deny the agreement. Moreover, the hands of a district court are tied by the appellate rulings even if the court believes the DPA will fail to deter similar crimes in the future. This occurred when a district judge stated in a ruling that he "*must* approve the DPA"[148] despite his belief the agreement would "provide insufficient deterrence to companies which otherwise would permit fraud, or fail to prevent fraud, by its senior officials in the future."[149] This result undermines several purposes of the criminal law discussed in the U.S. Justice Manual, including "deterrence of further criminal conduct by the defendant, deterrence of criminal conduct by others, protection of the public from dangerous and fraudulent conduct, [and] rehabilitation."[150]

There are, of course, additional examples of district court judges expressing reluctance to approve a particular DPA, yet ultimately giving approval in order to achieve accordance with the holdings in the appellate court rulings. In *United States* v. *Fokker Services B.V.*,[151] the district court reviewed the DPA agreement terms and determined they were far too lenient, concluding "it would undermine the public's confidence in the administration of justice and promote disrespect for the law for [the public] to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time."[152] However, the court ultimately approved the DPA to conform with the appellate court ruling in the matter.[153]

Second, in *United States* v. *U.S. Bancorp*,[154] the judge said in a hearing that the DPA agreement would likely allow people who committed felonies

147. 18 U.S.C. § 3161(h)(2).

148. Order Approving Deferred Prosecution Agreement at 3, United States v. Transp. Logistics Int'l, Inc., No. 18-CR-00011 (D. Md. Apr. 2, 2018) (emphasis added) (on file with author).

149. *Id.* at 2. The fine agreed upon in the DPA was less than one-tenth of the fine recommended in the United States Sentencing Guidelines. *Id.* In addition, "the corporation did not self-report the violations, and there remain[ed] members of the Board of Directors who oversaw, or failed to oversee, the company during the time period of the fraud." *Id.*

150. U.S. Dep't of Just., Just. Manual § 9-28.200 (2023).

151. United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160 (D.D.C. 2015).

152. *Id.* at 167.

153. United States v. Fokker Servs. B.V., 818 F.3d 733, 740–41, 747 (D.C. Cir. 2016) (finding that "the district court exceeded its authority under the Speedy Trial Act").

154. United States v. U.S. Bancorp, No. 18-CR-00150 (S.D.N.Y. Feb. 22, 2018).

in the case to simply "walk away"[155] and that if the justice system truly wanted to deter crime, it would "make the individuals pay the price for the crimes."[156] The judge ultimately approved the DPA in accordance with the two appellate rulings but lamented, "I have absolutely no choice in this matter, no discretion whatsoever . . . I'm obliged to swallow the pill, whether I like it or not."[157]

Several other countries have established DPA (or similar) programs in the corporate context, and, uniformly, those countries have been careful to incorporate strong elements of judicial review within their programs. In the United Kingdom, courts must find DPAs to be "in the interests of justice," and to be "fair, reasonable and proportionate."[158] In Canada, legislation mandates court approval of the deals, which they call "Remediation Agreements."[159] Agreements are granted only if a court determines they are "in the public interest"[160] and that deal terms are "fair, reasonable, and proportionate to the gravity of the offence."[161] In France, the law includes the *convention judiciaire d'intérêt public* (or public interest judicial agreement), an alternative dispute resolution tool similar to DPAs.[162] Agreements are subject to review by courts, which protect the public interest by ensuring the tool is being used in the appropriate context, and that fines and other measures imposed on the companies are reasonable.[163] Finally, in Singapore, the Criminal Justice Reform Bill includes DPAs,[164] which can be approved only if a court determines they are "in the interests of justice" and their terms are "fair, reasonable and proportionate."[165]

Clearly, when comparing how various countries incorporate judicial review into their corporate deferred prosecution programs, the United States

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155. Transcript of Arraignment at 8, United States v. U.S. Bancorp, No. 18-CR-00150 (S.D.N.Y. Feb. 22, 2018), ECF No. 9.

156. *Id.* at 9.

157. *Id.* at 10.

158. Crime and Courts Act 2013, c.22 (UK), https://www.legislation.gov.uk/ukpga/2013/22/schedule/17.

159. Budget Implementation Act, 2018, No. 1, S.C. 2018, c 12, § 715.3(1) (Can.).

160. *Id.* § 715.37(6)(b).

161. *Id.* § 715.37(6)(c).

162. *See* Loi 2016-1691 du 9 décembre 2016 relative à la transparence, à la lute contre la corruption et à la modernisation de la vie économique [Law 2016-1691 of December 9, 2016 relating to Transparency, the Fight Against Corruption and the Modernization of Economic Life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 10, 2016, art. 22 (Fr.); *see also* CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 41 (Fr.).

163. *See* Law 2016-1691 of Dec. 9, 2016, art. 22 (Fr.).

164. Criminal Justice Reform Bill 2018, Bill No. 14/2018 § 35 (Sing.).

165. *Id.*

is an outlier. Such court oversight is nonexistent in the U.S. but seems to be a high priority in these other countries. Indeed, Sir Brian Leveson, a judge who has ruled on many DPAs in the UK, has said judicial oversight of the agreements is extremely important and that "[t]he disinfectant of transparency in this area is absolutely critical."[166]

B. Lack of Transparency

There are additional checks and balances surrounding courtroom trials that are absent when using DPAs. Trials are fully transparent—they are open to the public and print media for reporting, analysis, and debate. The U.S. Supreme Court has commented on this safeguard, stating that "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."[167] Transcripts of trial proceedings are often made available, and court opinions are almost universally published and made fully accessible to the public. DPAs, on the other hand, are negotiated in a manner not open to public view or scrutiny.[168] Moreover, although many of the final agreements are made available to the public through DOJ's website,[169] rarely does the public learn details of their implementation or final outcome. For example, was the original DPA subsequently breached by the defendant, modified by a court, or terminated for some reason?[170] Without this information, it is difficult for the public to assess long-term DPA outcomes and consequences for offending companies and their leadership; it also makes

166. SELECT COMMITTEE ON THE BRIBERY ACT 2010, BRIBERY ACT 2010: POST-LEGISLATIVE SCRUTINY, 2017-19, HL 303, ¶¶ 268, 370 (UK).

167. *In re* Oliver, 333 U.S. 257, 270 (1948).

168. *See* Frederick T. Davis, *Judicial Review of Deferred Prosecution Agreements: A Comparative Study*, 60 COLUM. J. TRANSNAT'L L. 751, 820 (2022) (noting that DPAs are negotiated "entirely behind closed doors" and are "disclosed to the public only through mutually approved press releases").

169. *See, e.g.*, Deferred Prosecution Agreement, United States v. JPMorgan Chase & Co., No. 20-cr-00175 (D. Conn. Sept. 29, 2020), https://www.justice.gov/media/1096466/dl?inline [https://perma.cc/B6AG-5RFB]. *But see Biden Justice Department Refusing To Release Corporate Deferred and Non Prosecution Agreement Database*, CORP. CRIME REP. (June 23, 2021) (discussing how the University of Virginia School of Law found it necessary to engage in a series of Freedom of Information Act requests in attempt to secure a complete list of DPA agreements issued by DOJ from 2009 onward).

170. *See* GARRETT, *supra* note 10, at 176.

it more challenging for policymakers to develop the most effective policies, strategies, and laws leading to improved corporate compliance.[171]

In contrast, other countries have been careful to implement laws and policies ensuring the greatest transparency possible with respect to DPA content, status, and disposition. For example, in Canada, courts must publish the text of any approved agreement, as well as any court order modifying the agreement, terminating the agreement, or declaring the agreement to be successfully fulfilled.[172] This is similar to the United Kingdom, where courts must publish the text of any approved agreement,[173] as well as information surrounding an agreement's breach, revision, or completion.[174] In those countries, then, the public is able to determine exactly what transpired with respect to the DPA after its full term has run: were all the agreement terms fulfilled, or did the company fall short in any respect? Did a court intervene for some reason to revise the agreement? Did the company ask for DPA revisions but was denied? If so, what were the court's reasons for the denial? In other words, at the end of the DPA term, the general public living in those countries can find out where matters stand with respect to how the DPA was carried out and implemented (or not). In the United States, this information is oftentimes not made available to the public.[175]

C. Do DPAs Obstruct Getting to the Full Truth?

DPAs can sometimes interfere with the process of uncovering the facts and circumstances surrounding a case. Litigation is an adversarial process, with each party vigorously presenting their own side's information and reasoned arguments, and testing that against what is presented by the other side. Both sides are attempting to prevail upon a judge or jury with their respective theories, testimony, and evidence. This litigation process is more likely to accurately determine what occurred in the case, as compared to the DPA process in which the prosecutor and defendant together draft a DPA setting forth an agreed-upon case narrative. In fact, although DPAs nearly always include a "Statement of Facts" describing the actions and events surrounding the misconduct, "this statement tends to be an incomplete and

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171. Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 530 (2018).

172. Budget Implementation Act, 2018, No. 1, S.C. 2018, c 12, § 715.42(1) (Can.).

173. *See* Crime and Courts Act 2013, c. 22, § 8(7), sch. 17 (UK).

174. *Id.* §§ 9–11.

175. GARRETT, *supra* note 10, at 176.

much negotiated script, with the defendant heavily editing it."[176] Indeed, investigators have found that, when defense lawyers work with DOJ in deciding the substance of the agreement, those lawyers can negotiate findings "to avoid calamitous civil collateral consequences,"[177] including "stripping out words that plaintiffs' lawyers would seize upon."[178] The resulting DPAs thus become "stage-managed, rather than punitive."[179]

The Boeing DPA, whether it was stage-managed or not, presents a picture of the case that is less complete than what could be learned through litigation. This is known because after the Boeing DPA was approved in court, it was challenged by a group that lost loved ones in the crashes.[180] These families argued they were victims of Boeing's crime and therefore could challenge the DPA under the Crime Victims' Rights Act ("CVRA").[181] But a critical question remained: did these family members qualify as "victims" in accordance with the CVRA's definition of that category? The court noted that the Act's definition "imposes dual requirements of cause in fact and foreseeability"[182] and thus determined that family members who lost loved ones in the tragedy had standing to assert rights under the CVRA only if they "were '*directly* and *proximately* harmed as a result of' Boeing's conspiracy to defraud the United States based on the facts admitted by Boeing."[183] The court scheduled an evidentiary hearing to address that narrow question, making clear the hearing would not provide an opportunity for the families to relitigate the substance of the DPA; the court specifically stated it would "not permit testimony that contradicts or repeats facts admitted by Boeing in the DPA."[184]

Even with that limitation, the evidentiary hearing resulted in a good deal of testimony, delivered under adversarial conditions, eventually leading the

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176. Coffee, *supra* note 5, at 2.

177. EISINGER, *supra* note 24, at 197.

178. *Id.*

179. *Id.*

180. Madlin Mekelburg & Greg Farrell, *Boeing DOJ 'Sweetheart Deal' Decried by Victim's Wife (Correct)*, BLOOMBERG NEWS (Jan. 26, 2023), https://news.bloomberglaw.com/esg/boeing-pleads-not-guilty-in-fraud-case-over-737-max-crashes [https://perma.cc/H2KP-RC9A].

181. Caroline Donovan et al., *Foley Hoag LLP, Boeing's Deferred Prosecution Agreement in Question After Victims' Families May Assert Rights Under the Crime Victims' Rights Act*, JD SUPRA (Nov. 3, 2022), https://www.jdsupra.com/legalnews/boeing-s-deferred-prosecution-agreement-7906259/#:~:text=On%20October%2021%2C%202022%2C%20however,deferred%20prosecution%20agreement%20Boeing%20and [https://perma.cc/U4DU-FSAS].

182. United States v. Boeing Co., 617 F. Supp. 3d 502, 513 (N.D. Tex. 2022) (quoting *In re* Fisher, 640 F.3d 645, 648 (5th Cir. 2011)).

183. *Id.* (quoting 18 U.S.C. § 3771(e)(2)(A)).

184. *Id.* at 516.

court to rule that the family members *did* qualify as victims under the CVRA.[185] Both direct and proximate causation were established, supporting the holding that without Boeing's conspiracy to defraud the United States, the crashes would not have occurred.[186] The court did not mince words, stating that:

> Boeing's fraud is the *sine qua non* of the harmful result. Had Boeing's employees not concealed their knowledge about MCAS, the [FAA's Aircraft Evaluation Group] would have certified a more rigorous level of training, pilots around the world would have been adequately prepared for MCAS activation, and neither crash would have occurred.[187]

Moreover, the hearing led to the same kind of argumentation and deliberation that occurs in a full-scale trial. So even though the victims' family members did not receive their "day in court" with respect to the entire Boeing matter, they did so in answering one key question: Were they victims of the MAX tragedies as defined by law? The answer is yes. The victims' family members, in observing the evidentiary hearing, were permitted to witness firsthand the advantages of litigation over DPAs as it relates to truth-seeking, transparency, participation, and justice. As Professor Marc Galanter points out, opposition to trials:

> involves an aversion to the determination of corporate accountability in public forums. The trial is a site of 'deep accountability' where facts are exposed and responsibility assessed, a place where the ordinary politics of personal interaction are suspended and the fictions that shield us from embarrassment and moral judgment are stripped away.[188]

DPAs appear to have the exact opposite effect of a trial: they work to impede the exposure of facts, to limit deep accountability, and to shield defendants from moral judgment. What would have come to light regarding the MAX tragedies if the *entire* matter had been resolved through litigation rather than a DPA? Unfortunately, the DPA process tends to limit the kinds of activities that unearth information—activities that take place as a matter of course in litigation, through presenting evidence, providing sworn testimony, asking questions (and follow-up questions), challenging, rebutting, etc. In

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185. United States v. Boeing Co., No. 4:21-cr-5-O, 2022 WL 13829875, at *9 (N.D. Tex. Oct. 21, 2022).

186. *Id.* at *6–9.

187. *Id.* at *7.

188. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 22 (2006).

short, in addressing the MAX tragedies, *DOJ failed to use the process that is most effective at getting to the full truth* as that process uncovers the facts of what took place, when, by whom, who was negatively impacted, and to what degree. There must be a full rendering of the facts before any process can successfully move forward in determining if laws were broken or if punishment is warranted.

Even a brief evidentiary hearing to determine if the family members qualified for victim status under the CVRA yielded vital information and conclusions regarding direct and proximate harm being caused by Boeing's conspiracy. If, one might wonder, a full trial had taken place in the Boeing case, what witnesses could have been called to testify? What evidence could have been unearthed, and unworn paths explored? What other facts could have become known? The late Secretary of Defense Donald Rumsfeld once spoke in a press conference, in the context of military strategy, about *unknown-unknowns*, which he defined as information that "we don't know we don't know."[189] In other words, there can be important issues left uncharted because it does not occur to the investigators that those issues "could exist."[190] If a legal matter is resolved using a DPA, the *unknown-unknowns* will more likely remain hidden from the public, from accountability, and ultimately from punishment. If that same legal matter is addressed through litigation, on the other hand, there are more opportunities for *unknown-unknowns* to be brought to light and further probed; and the facts and information springing therefrom can, in the end, lead to greater justice.

III. PROPOSED NEW LAW

In the past, two pieces of legislation have been proposed within the United States Congress to mandate judicial review of DPAs. The first bill, the "Accountability in Deferred Prosecution Act," was introduced three times between 2008 and 2014, but garnered only limited support.[191] The heart of

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189. Donald Rumsfeld, U.S. Sec'y of Def., Dep't of Def. News Briefing (Feb. 12, 2002) ("There are known knowns. There are things we know we know. And we also know there are known unknown. If that is to say we know there are some things we do not know. But there are also unknown unknowns the ones we don't know. We don't know."); *see also* José Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 881 (2003).

190. *See* MIKAEL KROGERUS & ROMAN TSCHÄPPELER, THE DECISION BOOK FIFTY MODELS FOR STRATEGIC THINKING 85 (W.W. Norton & Co., 2017).

191. *See 2014 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON DUNN (July 8, 2014), https://www.gibsondunn.com/2014-mid-year-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/ [https://perma.cc/2UFY-4YKT]; *see also*

the bill was mandating judicial review of DPAs to ensure agreements are "in the interests of justice."[192] The second bill, the "Ending Too Big to Jail Act," was introduced in 2018 to create a permanent federal agency to investigate financial institution crimes, as well as to mandate judicial oversight of DPAs.[193] That bill also achieved very limited support.[194] The bill mandated that judicial review would ensure DPAs are "in the public interest" with respect to their approval, implementation, and termination.[195] The bill also mandated that all DPAs would be made available for public scrutiny through DOJ's website (unless a judge found "good cause" to exclude an agreement).[196] If these two bills had become law, they would have introduced into the nation's DPA program the bulk of the protections that are provided by programs in the U.K., Canada, France, and Singapore.[197]

The main goal of both failed bills was the same: to pass legislation requiring courts to institute judicial review during the DPA approval process. Since this approach failed in numerous Congressional sessions, this Article suggests a more targeted fix to the problem: a bill drawing a much-needed bright line regarding when the government is (or is not) permitted to use corporate DPAs. The text of the legislation could read as follows: "*The federal government is not permitted to offer a company or its employees (including full-time, part-time and contract workers) a Deferred Prosecution Agreement (DPA) to resolve a legal case if it appears any of the employees were involved in corporate criminal misconduct leading to the loss of human life as it relates to the case*." The government might still turn to DPAs in resolving cases where nobody died—yet even *those* cases might provoke outrage by some commentators, such as was expressed by the New York Times in 2012 with respect to the HSBC matter:

> 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

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Accountability in Deferred Prosecution Act of 2008, H.R. 6492, 110th Cong. (2008); Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. (2009); Accountability in Deferred Prosecution Act of 2014, H.R. 4540, 113th Cong. (2014).

192. Accountability in Deferred Prosecution Act of 2014, H.R. 4540, 113th Cong. § 7(a) (2014).

193. Ending Too Big To Jail Act, S. 2544, 115th Cong. (2018).

194. *See* 164 CONG. REC. S1735 (daily ed. Mar. 14, 2018). The bill was introduced with no cosponsors, and it was never referred to a Subcommittee for further consideration. *See id.*; GIBSON DUNN, 2018 MID-YEAR UPDATE CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS 6 (2018), https://www.gibsondunn.com/wp-content/uploads/2018/07/2018-mid-year-npa-dpa-update.pdf [https://perma.cc/7NT7-LFP7].

195. Ending Too Big To Jail Act, S. 2544, 115th Cong. § 4(2) (2018).

196. *Id.*

197. *See* discussion *supra* Part II.

> vast and prolonged money laundering . . . . 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.[198]

The difference is that the HSBC case centers around *money* rather than loss of human life. Contrast that with a 2015 legal case in which at least 174 people died due to a faulty ignition switch in cars manufactured by General Motors ("GM"). The company was charged with wire fraud and concealing material facts from the National Highway Traffic Safety Administration ("NHTSA").[199] Although the company knew about the dangerous defect, they waited nearly *twenty months* before notifying NHTSA, and thus, according to DOJ, "egregiously disregarded NHTSA's five-day regulatory reporting requirement for safety defects."[200] Ultimately, the matter was resolved through a DPA.[201] The agreement included a $900 million fine, but nobody at GM was charged with a crime[202]—an outcome one federal judge in a similar case called "a shocking example of potentially culpable individuals not being criminally charged."[203]

While using a DPA to address the HSBC case made a "mockery of the criminal justice system,"[204] it could be argued that using one to resolve the GM case was immoral and unconscionable. This idea was well expressed by Chris Moore, whose daughter, Danielle, was killed in the Ethiopia MAX disaster. Moore states the following in hearing testimony related to the Boeing case: "Deferred Prosecution Agreements may work when a corporation has defrauded people, the government, or any other corporations

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198. Editorial, *Too Big To Indict*, N.Y. TIMES, Dec. 12, 2012, at A38.

199. Press Release, U.S. Att'y's Off., S. Dist. of N.Y., Manhattan U.S. Attorney Announces Criminal Charges Against General Motors and Deferred Prosecution Agreement with $900 Million Forfeiture (Sept. 17, 2015), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred [https://perma.cc/2S8A-VSC8].

200. *Id.*

201. Harwell, *supra* note 20.

202. *Id.*

203. United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 41 (D.D.C. 2015).

204. Carrick Mollenkamp & Brett Wolf, *HSBC Might Pay $1.8 Bln Money Laundering Fine*, REUTERS (Dec. 5, 2012, 6:36 PM) (quoting Jimmy Gurule), https://www.reuters.com/article/hsbc-moneylaundering-settlement/exclusive-hsbc-might-pay-1-8-bln-money-laundering-fine-sources-idINDEE8B501120121206/ [https://perma.cc/YXP6-V87P].

of money, because the fine is to repay the victims what was rightfully theirs. It should not be used for corporate mass murder."[205]

The central thesis of this Article is that a line should be drawn by Congress, outlawing the federal government from using DPAs in certain cases: specifically, anytime the government wants to pursue corporate misconduct that resulted in the loss of human life, the case must either go to trial or be resolved by a plea bargain. The key to this reform is that trials and plea bargains include judicial review; in either case there would be a judge—meaning an independent, neutral third party—to ensure procedural and substantive fairness. If a trial ends with a guilty verdict, the judge can then dispense appropriate punishment. Or, if the prosecutor and defendant decide to negotiate a plea bargain, the judge can then review the deal to make sure it is neither too lenient nor opposed to public interest.[206] Best practices will exhort the judge to "reach an independent decision on whether to grant charge or sentence concessions"[207] contained in the plea agreement, and there are times when judges might decide to reject the deal.[208]

IV. A THOUGHT EXERCISE

As a thought exercise, briefly assume that the law proposed in Part III had been in place when the 737 MAX tragedies occurred (thus forbidding the government's use of DPAs). If that were the case, how might the misconduct surrounding the plane crashes have been addressed by prosecutors? In such a scenario, prosecutors would have three options: they could decline to take any action at all; they could move forward with a trial; or they could engage in plea bargaining with the accused. Given those three possibilities, following is a brief sketch theorizing and analyzing how the case would likely have unfolded differently.

First, prosecutors would likely have engaged in a more thorough investigation, which likely would have led to more severe charges, against greater numbers of people. A more comprehensive investigation by DOJ

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205. Transcript of Arraignment at 69, United States v. Boeing Co., No. 4:21-cr-00005-O-1 (N.D. Tex. Jan. 26, 2023).

206. *See* United States v. Miller, 722 F.2d 562, 563 (9th Cir. 1983) ("[Fed. R. Crim. P.] 11 contemplates the rejection of a negotiated plea when the district court believes that the bargain is too lenient, or otherwise not in the public interest. This power of review protects against erosion of the judicial sentencing power." (citation omitted)).

207. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 9 (3d ed. 1999); *see also* FED. R. CRIM. P. 11(c)(3).

208. *See* United States v. Stevenson, 425 F. Supp. 3d 647, 648 (S.D.W. Va. 2018) (the judge discusses rejecting plea agreements in previous cases because they were against public interest).

would likely have led to the kind of detailed findings and conclusions resulting from investigations by the U.S. House of Representatives,[209] the U.S. Senate,[210] and the Ethiopian government.[211] The Boeing DPA focused narrowly on one specific system in the MAX airplanes (the Maneuvering Characteristics Augmentation System, or "MCAS"), as well as the misconduct of two mid-level Boeing employees. In contrast, the investigations conducted by Congress and the Ethiopian government all conclude there was an extensive list of issues that likely contributed to the tragedies—including multiple system and technical failures, as well as numerous instances of misconduct surrounding the design of the aircraft, the production of the planes, and the interactions that took place with Boeing customers and regulators.

For example, the U.S House investigation concluded there may have been highly consequential impacts from: (1) the MCAS system being tied to a single angle of attack sensor (rather than multiple sensors) on the 737 MAX;[212] (2) not having a synthetic airspeed system onboard the planes;[213] and (3) the impact of repetitive MCAS activations on the ability of pilots to maintain control of the planes.[214] The committee report states that "Boeing's design and development of the 737 MAX was marred by technical design failures, lack of transparency with both regulators and customers, and efforts to downplay or disregard concerns about the operation of the aircraft."[215]

The U.S. Senate issued two separate reports, one from the Democratic staff of the Senate Committee on Commerce, Science, and Transportation, and one from the Republican staff of that same committee. Both reports concluded there was a long list of issues that could have contributed to the MAX tragedies.[216] The Democratic staff investigation reported that: (1)

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209. *See* MAJ. STAFF OF H. COMM. ON TRANSP. & INFRASTRUCTURE, 116TH CONG., FINAL COMM. REP. ON DESIGN, DEVELOPMENT & CERTIFICATION OF BOEING 737 MAX (Comm. Print 2020).

210. *See* S. COMM. ON COM. SCI. & TRANSP., AVIATION SAFETY WHISTLEBLOWER REP., (Comm. Print 2021); MAJ. STAFF OF S. COMM. ON COM. SCI. & TRANSP., INVESTIGATION REP. ON AVIATION SAFETY OVERSIGHT (Comm. Print 2020).

211. *See* AIRCRAFT ACCIDENT INVESTIGATION BUREAU, FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA MINISTRY OF TRANSPORTATION & LOGISTICS, INVESTIGATION REPORT ON ACCIDENT TO THE B737-MAX8 REG. ET-AVJ OPERATED BY ETHIOPIAN AIRLINES 248 (2022).

212. MAJ. STAFF OF H. COMM. ON TRANSP. & INFRASTRUCTURE, 116TH CONG., FINAL COMM. REP. ON DESIGN, DEVELOPMENT & CERTIFICATION OF BOEING 737 MAX 30 (Comm. Print 2020).

213. *Id.*

214. *Id.*

215. *Id.*

216. *See* S. COMM. ON COM. SCI. & TRANSP., AVIATION SAFETY WHISTLEBLOWER REP. (Comm. Print 2021); MAJ. STAFF OF S. COMM. ON COM. SCI. & TRANSP., INVESTIGATION REP. ON AVIATION SAFETY OVERSIGHT (Comm. Print 2020).

"relentless" schedule pressures were in effect when 737 MAX airplanes were being built;[217] (2) line engineers with specialized technical training and expertise were ignored during the 737 MAX certification process;[218] (3) the FAA failed to provide enough safety engineers—just twenty-five engineers and technical project managers to supervise approximately 1,500 Boeing engineers—to oversee the Boeing Organization Designation Authorization;[219] and (4) flaws in the MAX aircraft's crew alerting system were "creatively hidden or outright withheld" during the FAA certification process.[220]

The Republican staff from that same Senate committee conducted its own investigation.[221] Especially troubling are findings with respect to how FAA management behavior and practices appear to hinder rather than advance passenger safety, including the following: (1) there are indications that FAA senior leadership might have obstructed a Department of Transportation Office of Inspector General review of the 737 MAX crashes;[222] (2) FAA managers were "in many cases" reluctant to support requests from inspectors for compliance and enforcement actions;[223] (3) FAA managers sometimes retaliated against Aviation Safety Inspectors "for conducting diligent oversight";[224] and (4) the FAA sometimes "failed to hold employees accountable for lapses in oversight and certification of the 737 MAX."[225]

Finally, the Ethiopian government investigation also discusses a wide array of possible civil and criminal violations surrounding the MAX crashes. For example, the report refers to the doomed airplanes as having: (1) "unexplained electrical and electronic faults within weeks of entering service, and in the weeks and days prior to their accidents";[226] (2) "failure of the sensors due to the production quality defects;"[227] and (3) an "[a]bsence of AOA DISAGREE warning flag on the flight display panels."[228]

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217. S. COMM. ON COM. SCI & TRANSP., AVIATION SAFETY WHISTLEBLOWER REP. 4–5 (Comm. Print 2021).

218. *Id.* at 5.

219. *Id.*

220. *Id.* at 6.

221. MAJ. STAFF OF S. COMM. ON COM. SCI. & TRANSP., INVESTIGATION REP. ON AVIATION SAFETY OVERSIGHT 2 (Comm. Print 2020).

222. *Id.* at 12.

223. *Id.*

224. *Id.* at 13.

225. *Id.*

226. AIRCRAFT ACCIDENT INVESTIGATION BUREAU, *supra* note 211.

227. *Id.* at 250.

228. *Id.* at 255 (AOA stands for "angle of attack").

The point of listing the findings and conclusions from the U.S. House, U.S. Senate, and Ethiopian government investigations is to underscore that there appear to be numerous factors, involving mechanical systems, production processes, and employee conduct within Boeing and the FAA, that might have played a role in the MAX plane crashes. That contrasts sharply with the two specific factors—the MCAS system and the two Boeing employees who engaged in deceptive behaviors—that were, according to the Boeing DPA, exclusively and entirely to blame for the tragedies. Based on the many factors put forward by the Congressional and Ethiopian investigations, it seems likely that if DOJ had conducted a more thorough investigation, there would have been additional charges, more serious charges, and a greater number of people charged, than was agreed upon in the Boeing DPA.

Second, federal prosecutors likely would not have granted immunity to senior-level managers at Boeing, as was provided through the Boeing DPA. The DPA states that "the misconduct [by Boeing] was neither pervasive across the organization, nor undertaken by a large number of employees, *nor facilitated by senior management*."[229] Two law professors and a former federal prosecutor indicate they have never seen an affirmative exculpating statement of that sort in any other DPA agreement.[230] The agreement also contains a "Conditional Release from Liability" paragraph, wherein DOJ's Fraud Section agrees "it will not bring any criminal or civil case" against Boeing related to conduct described in the agreement.[231] In combination, these two statements in the DPA seem to effectively immunize senior Boeing managers from prosecution.[232] This begs the question, why were these statements included in the DPA? The action of immunizing a large group of individuals because they are part of "senior management"—a term never defined in the DPA—seems to go against guidance directed at federal prosecutors from the U.S. Justice Manual, which states, "Absent extraordinary circumstances or approved departmental policy such as the

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229. Boeing DPA, *supra* note 1, at 6 (emphasis added).

230. Ankush Khardori, *The Trump Administration Let Boeing Settle a Killer Case for Almost Nothing*, INTELLIGENCER (Jan. 23, 2021), https://nymag.com/intelligencer/2021/01/boeing-settled-737-max-case-for-almost-nothing.html; *see Columbia Law Professor John Coffee Says Boeing Deferred Prosecution Agreement One of the Worst*, CORP. CRIME REP. (Feb. 23, 2021), https://www.corporatecrimereporter.com/ [https://perma.cc/9QUZ-2UZB] (Professor Coffee notes the statement is "without precedent").

231. Boeing DPA, *supra* note 1, at 14.

232. Khardori, *supra* note 230 (suggesting the unusual statements could also make it more difficult for victims' families and Boeing shareholders to engage in lawsuits against the company).

Antitrust Division's Corporate Leniency Policy, no corporate resolution should provide protection from criminal liability for any individuals."[233] So, what are the 'extraordinary circumstances' that would justify the immunity language in the DPA? If such circumstances exist, they have not been made known to the general public.

The typical reason for DOJ to provide immunity through a non-prosecution agreement[234] is to receive cooperation in return. The U.S. Justice Manual states the following regarding such an exchange: "Since such an agreement forecloses enforcement of the criminal law against a person who otherwise may be liable to prosecution, it should not be entered into without a clear understanding of the nature of the quid pro quo and a careful assessment of its probable value to the government."[235] With that in mind, what exactly are the company's senior managers providing to DOJ that is valuable, toward the exchange? Boeing *does* agree to cooperate with DOJ in its investigations and prosecutions surrounding the misconduct.[236] However, such a promise to cooperate is considered 'boiler plate' and is included in all DPA agreements—so including that provision would not be enough to prompt DOJ, in fulfillment of quid pro quo or reciprocity obligations, to provide senior managers with what appears to be blanket immunity.

If the new law recommended in Part III of this Article had been passed, and prosecutors had thereby been limited to resolving the Boeing case through either a courtroom trial or plea deal, prosecutors in all likelihood would have simply followed the guidance of the U.S. Justice Manual and pursued *all* individuals who might have engaged in misconduct, including top-level managers. As the Justice Manual states, "One of the most effective ways to combat corporate misconduct is by holding accountable all individuals who engage in wrongdoing."[237] The Justice Manual makes it clear that focusing on individuals helps DOJ determine the full extent of the misconduct, and all who are responsible for it.[238]

Holding all blameworthy individuals accountable within a large and complex organization such as Boeing would be a challenging task, of course. Judge Jed Rakoff, although not speaking specifically to the Boeing matter, suggests the key to accomplishing that goal is to employ the same strategies

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233. U.S. Dep't of Just., Just. Manual § 9-28.210 (2023).

234. Non-prosecution agreements are identical to DPAs, with the exception that non-prosecution agreements do not have to be approved by a federal district court.

235. U.S. Dep't of Just., Just. Manual § 9-27.620 cmt. 2 (2022).

236. Boeing DPA, *supra* note 1, at 7.

237. U.S. Dep't of Just., Just. Manual § 9-28.010 (2023).

238. *Id.*

and tactics DOJ uses to reach high-level operators within an organized crime network, an illegal drug distribution ring, or any other large and complex organization: "[Y]ou start at the bottom and, over many months or years, slowly work your way up. Specifically, you start by 'flipping' some lower- or mid-level participant . . . . With his help, and aided by the substantial prison penalties now available in white-collar cases you go up the ladder."[239] In the past, DOJ has successfully engaged in this sort of costly and time-consuming work. Consider, for example, the Enron case, involving one of the nation's biggest corporate scandals in decades. Beginning in 2002, DOJ's Enron Task Force worked for five years straight, digging into the details of the company's fraudulent accounting practices.[240] The Task Force members were able to flip low-level employees and work their way up the ladder to the C-suites. "In the end, their diligence led to convictions for nearly every top executive at the firm," including both the CEO and Chairman of the company.[241]

So, as compared to the Enron case, why did DOJ seem to take the exact *opposite* approach in the Boeing matter—immunizing senior-level managers rather than working to determine if those managers were directing, or complicit in, criminal activity? Judge Rakoff suggests that DOJ fails to pursue individuals generally, let alone high-level managers, in complex corporate crimes because the agency no longer has "the experience or the resources" needed to successfully engage in such years-long investigations.[242] Other commentators have suggested that the government's turn in recent decades to an enforcement regime based on cooperation and compliance rather than prosecutions has led to a decrease in DOJ's ability to conduct investigations on its own and to an erosion of its prosecutorial skills.[243] Such an enforcement regime also instills and reinforces the idea that taking cases to trial is not worth the risk because losses in court could damage prosecutors' careers more than wins in court could boost them.[244]

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239. *See* Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. OF BOOKS, Jan. 9, 2014.

240. David Dayen, *Club Fed: Why the Government Goes Easy on Corporate Crime*, THE NEW REPUBLIC (Oct. 23, 2017), https://newrepublic.com/article/144969/club-fed-why-government-goes-easy-federal-crime [https://perma.cc/56LN-PQU7].

241. *Id.*

242. *See* Rakoff, *supra* note 239.

243. EISINGER, *supra* note 24, at 196; *see also* William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 80–81 (2006) (noting "[t]he shift from trials as the central icon of the federal courts to a 'settlement culture'").

244. EISINGER, *supra* note 24, at 281.

Another theory is that revolving door issues can potentially influence DOJ leadership to have a light touch toward large companies accused of wrongdoing. The reason has to do with professional self-interest: Those large companies are usually represented by the most prestigious and highest-paying law firms in the country—firms that some who occupy DOJ leadership positions hope to eventually be employed by.[245] In fact, there are some lawyers who look upon employment with DOJ as merely "a way station, . . . a résumé builder for future partners of prestigious law firms."[246] As one commentator puts it, "The revolving door was not just a way for government employees to cash in. Both sides were changing the other—ultimately to the benefit of corporations. No one conceded, at least publicly, that the revolving door influenced the lawyers' work in government."[247]

It appears that DPAs present mostly upsides for companies, as well as for the government. For companies, DPAs mean nobody will have to admit guilt or go to prison; nor will they pay fines from their own pockets, as all fines will be paid by company shareholders.[248] Moreover, because they are not adjudged to be 'guilty' under DPAs, wrongdoers will never be barred from government contracting programs or lose operating licenses.[249] DPAs are advantageous for the government as well. Jesse Eisinger, the Pulitzer Prize-winning investigative journalist, writes that federal prosecutors embrace DPAs "with a fever" because investigations of corporations "are so complex and difficult, and because the defense is so robust and well-funded."[250] Tough investigations and well-financed defendants can turn prosecutions into uphill battles, which government lawyers sometimes do not want to fight.

Of course, DOJ might retort that they *did* prosecute a Boeing employee they believed to play a central role in the MAX crashes. The DPA specifically refers to "two of the Company's 737 MAX Flight Technical Pilots" who deceived the FAA "about an important aircraft part . . . that impacted the

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245. *See* Alexander I. Platt, *The Whistleblower Industrial Complex*, YALE J. ON REGUL. 688, 699 (2023) ("Enforcers may decline to pursue certain potential misconduct because they do not want to anger a prospective future employer when they hope to walk through the 'revolving door' to the private sector . . . .").

246. EISINGER, *supra* note 24, at 193.

247. *Id.* at 190.

248. *Id.* at 214, 318.

249. *See* Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big To Debar?*, 80 FORDHAM L. REV. 775, 797–98 (2011); *see also* Peter R. Reilly, *Incentivizing Corporate America To Eradicate Transnational Bribery Worldwide: Federal Transparency and Voluntary Disclosure Under the Foreign Corrupt Practices Act*, 67 FLA. L. REV. 1683, 1708–09 (2015) (noting risk of debarment from government contracts).

250. EISINGER, *supra* note 24, at 197.

flight control system of Boeing's 737 MAX."[251] Only one of the two individuals was prosecuted: Mark Forkner, chief technical pilot for the MAX airplane during its development.[252] Despite his job title, Forkner was neither a test pilot nor an engineer.[253] Rather, his job entailed three tasks, all associated with the MAX: to work with flight simulators; to determine what training would be required by pilots; and to decide what information would be placed into pilot flight manuals.[254] Forkner was the only Boeing employee prosecuted as a result of the two crashes, and that prosecution failed.[255] Richard Reed, a former FAA safety engineer who was involved with certification of the MAX's electronic systems, said Forkner "was just a small tooth on a small cog in a big sub-assembly of a bigger Boeing machine . . . . A scapegoat."[256] Professor John Coffee agrees with that assessment, asserting that Forkner's trial was the result of Boeing "giving up a sacrificial lamb that the jury refused to sacrifice."[257] Noting that the jury acquitted Forkner after deliberating for just two hours,[258] Coffee concludes that DOJ's trial of Forkner was "quickly repudiated by the jury, which viewed [him] as an innocent pawn in this game."[259]

Third, it is likely that an outside compliance monitor, perhaps under court supervision, would have become part of any resolution in the case, whether that resolution was achieved by trial or by plea bargain. According to the Boeing DPA, DOJ's Fraud Section "determined that an independent compliance monitor was unnecessary."[260] One can understand why DOJ would prefer not to appoint an outside monitor, as doing so results in transferring oversight, decision-making, and review powers from the government to the monitor—specifically, to a monitor that might have different viewpoints and priorities. Yet, independent monitors can help ensure that defendants comply with DPA deal terms, plea bargain provisions, or court orders and therefore can play a central role in public safety. This was recognized by Deputy Attorney General Lisa Monaco when she stated in October 2021 that DOJ is free to employ compliance monitors "whenever it is appropriate to do so in order to satisfy our prosecutors that a company is

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251. Boeing DPA, *supra* note 1, at 4.
252. *See* Gates, *supra* note 23.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. Coffee, *supra* note 5, at 16.
258. *Id.*
259. *Id.*
260. Boeing DPA, *supra* note 1, at 6.

living up to its compliance and disclosure obligations under the DPA."[261] In the end, DOJ decided the Boeing DPA did not require a monitor.[262] An expert in corporate law calls that decision a "glaring failure" and argues that "[r]arely did a clearer case exist for such a monitor."[263]

United States v. *WakeMed*,[264] a case from 2013 that was resolved using a DPA, can serve as a model for how a court might play a supervisory role in monitoring a company's implementation of reforms and mandates ordered during a trial's sentencing phase, or as part of a plea agreement. In *WakeMed*, an independent monitor would periodically assess the defendant's DPA compliance efforts and status, and those reports would be filed with the court for review.[265] Halfway through the twenty-four-month DPA term, the court also conducted a hearing to determine whether the deferral was being properly managed.[266] It is clear, then, that a court can successfully take on an important oversight function with respect to outside monitors that might be appointed as part of a trial or plea deal. The court would serve, again, as an independent and neutral third party—an extra set of eyes—to ensure that defendant companies are adhering to sentencing terms from a trial, or to deal terms from a plea bargain.[267]

Fourth, if DOJ had prosecuted Boeing and the parties ultimately decided to enter a plea bargain instead of going to trial, that would have led to a more just result than was provided by the Boeing DPA. Former Assistant Attorney General Lanny Breuer once stated that DPAs have "the same punitive, deterrent, and rehabilitative effect as a guilty plea."[268] However, a study by the U.S. Government Accountability Office ("GAO") concludes that DOJ lacks the measures necessary to make such a claim. As GAO puts it, "DOJ cannot evaluate and demonstrate the extent to which DPAs . . . contribute to

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261. Lisa O. Monaco, Deputy Att'y Gen., Keynote Address at ABA's 36th Nat'l Inst. on White Collar Crime (Oct. 28, 2021).

262. Boeing DPA, *supra* note 1, at 6.

263. Coffee, *supra* note 5, at 14.

264. United States v. WakeMed, No. 5:12-CR-398-BO, 2013 WL 501784, at *1 (E.D.N.C. Feb. 8, 2013).

265. *Id.* at *2.

266. *Id.*

267. *But see* Anthony S. Barkow & Matthew D. Cipolla, *Increased Judicial Scrutiny of Deferred Prosecution Agreements*, N.Y.L.J. (Aug. 20, 2013), https://www.law.com/newyorklawjournal/almID/1202616076909/ [https://perma.cc/UN9A-EB5B] (discussing a study in which "a majority of prosecutors, company representatives, independent monitors and judges interviewed reported more disadvantages than advantages to increased judicial involvement in the DPA process").

268. Lanny A. Breuer, Assistant Att'y Gen., Dep't of Just., Address at the New York City Bar Association (Sept. 13, 2012).

the department's efforts to combat corporate crime because it has no measures to assess their effectiveness."[269]

Contrary to Breuer's assertion regarding DPAs, there is evidence suggesting the punitive and deterrent effects of DPAs are quite limited, to the point where companies actually *welcome* the agreements, with one former federal prosecutor stating that "[c]ompanies are happy to enter into [DPA 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."[270] Even Breuer concedes that "the strongest deterrent against corporate crime is the prospect of prison time for individual employees."[271] And while DPAs are popular with defendants because they eliminate the possibility of imprisonment as punishment, the prospect of jail time is still present in cases resolved by a plea bargain. The deterrence engendered from even the *possibility* of incarceration, along with the fact that plea bargains are subject to review by a court, combine to suggest that resolving a case by plea would present a superior form of justice when compared to resolution by DPA.[272] Finally, a plea deal can be written to include any agreement terms

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269. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 20 (2009).

270. Danielle Douglas, *Royal Bank of Scotland To Pay $612 Million To Resolve Libor Case*, WASH. POST (Feb. 6, 2013), https://www.washingtonpost.com/business/economy/rbs-to-pay-612m-to-resolve-libor-case/2013/02/06/2c0cc42c-6fd3-11e2-aa58-243de81040ba_story.html [https://perma.cc/F6HD-6TJE]. *See generally* Randall D. Eliason, *We Need To Indict Them: Deferred Prosecution Agreements Won't Deter Enough Corporate Crime*, 31 LEGAL TIMES, Sept. 22, 2008.

271. Breuer, *supra* note 268.

272. Some suggest that criminal convictions can effectively destroy businesses due to collateral consequences such as debarment from federal contracting. *See* Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 277–78 (2008). However, such arguments have proven to be red herrings given that many U.S. companies have thrived post-conviction. *See* Russell Mokhiber, *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, CORP. CRIME REP. (Dec. 28, 2005), https://www.corporatecrimereporter.com/news/200/crime-without-conviction-the-rise-of-deferred-and-non-prosecution-agreements-2/ [https://perma.cc/ZW56-4EJB] (discussing U.S. businesses that were convicted of serious crimes but nonetheless continued to succeed in the marketplace); *see also* 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) (concluding that, in the years 2001 to 2010, no publicly traded company failed due to a conviction). *But see* Elkan Abramowitz & Barry A. Bohrer, *The Debate About Deferred and Non-Prosecution Agreements*, 248 N.Y.L.J., Nov. 6, 2012, at 2 ("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."). If DOJ starts using trials and plea bargains instead of DPAs, and if

that might be included in a DPA, including ordering fines and victim restitution; mandating company cooperation with DOJ follow-on investigative work; and mandating companies to strengthen internal compliance programs.[273]

In summary, if the law proposed in Part III of this Article had been in place when the 737 MAX crashes occurred (thereby resulting in a courtroom trial or plea agreement rather than DOJ's issuance of a DPA), the outcome would likely include the following: a more thorough and comprehensive investigation of the misconduct, rather than the more narrow and focused investigation that took place; possible increases in the number of people charged, as well as the severity of charges put forth; increased victim participation in, public participation in, and overall transparency of the processes surrounding the resolution of the case; the possibility of people being found guilty under the law, either by jury or by plea agreement; the likelihood of serious punishment accompanying any resulting guilty verdicts or pleas; the inclusion of judicial review by an independent, neutral third party (i.e., a court), thereby providing oversight to both process and punishment; and greater deterrence to future misconduct. All of this, in combination, would have led to greatly enhanced justice taking place in the Boeing matter.

The motto of Georgetown University Law Center is "*Law is but a means, justice is the end.*"[274] If the end goal in the Boeing case was justice, then litigation—whether that litigation ended with a jury decision or with a plea deal—would have been a far more effective means for obtaining that end goal than was a DPA. Integrated within both trials and plea deals are numerous checks, balances, and oversight protections that have been carefully crafted and tested over many decades. Unfortunately, DPAs fail to employ these important checks, balances, and protections—all of them key components in achieving justice.

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that change leads to excessive debarments from federal contracting, then the U.S. Congress might have to address that issue through legislative action.

273. *Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements: Hearing on H.R. 1947 Before the Subcomm. on Com. & Admin. L. of the H. Comm. on the Judiciary*, 111th Cong. 5–6 (2009) (statement of Gary G. Grindler, Deputy Assistant Att'y Gen. for the Crim. Div., U.S. Dep't of Just.) (discussing advantages of DPAs in addressing allegations of corporate malfeasance).

274. *See* William M. Treanor, *Welcome from Dean William M. Treanor*, GEORGETOWN. L., https://www.law.georgetown.edu/about/georgetown-law-leadership/welcome-from-the-dean/ [https://perma.cc/GKH9-6UMV] (emphasis added).

V. CONCLUSION

Judge Jed Rakoff tells us that "[a] trial is nearly the only place where the entire criminal justice system is put to the test of truth: Do you have the proof of guilt, or don't you? A system of justice that chiefly operates behind closed doors will sooner or later be a system that leads to abuse."[275] DPAs chiefly operate behind closed doors, and using one to resolve the Boeing matter has resulted in "a case that on all levels seems dysfunctional."[276] This Article demonstrates why DPAs are the antithesis of the "day-in-court ideal . . . at the heart of constitutionally guaranteed procedural due process."[277] Congress must now act. The federal judge approving the Boeing DPA stated that even if the court "held legitimate concerns" about the DPA's agreement terms, it is the role of Congress—not the court—to address those concerns.[278] As the judge puts it, "Should Congress wish to take further action with respect to the Government's conduct in [the Boeing] matter, or with respect to DPAs more generally, it is well positioned to do so."[279]

Judge Harry T. Edwards warned, with respect to using alternative dispute resolution processes instead of traditional litigation, that "[i]nexpensive, expeditious, and informal adjudication is not always synonymous with *fair* and *just* adjudication."[280] Quite presciently as it relates to the Boeing case, Judge Edwards observed decades ago that decisions reached through these alternative processes "may merely legitimate decisions made by the existing power structure within society."[281] This is especially true when the process is not subject to judicial review, as is the case with DPAs.

It is understandable why people who lost loved ones in a plane crash would feel an overwhelming sense of anger and dismay upon learning that a DPA—a tool designed by Congress to assist vulnerable people like sex workers and drug addicts—has been used to dispose of the case. Congress should now pass a law banning DPAs for any federal matter in which corporate misconduct played a role in the loss of human life. After such legislation is passed, if the government wishes to continue using DPAs to resolve cases *not*

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275. EISINGER, *supra* note 24, at 226 (citation omitted).

276. Coffee, *supra* note 5, at 23.

277. Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 134 (2015).

278. United States v. Boeing Co., No. 4:21-CR-5-O, 2023 WL 5183058, at *13–14 (N.D. Tex. Feb. 9, 2023).

279. *Id.*

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

281. *Id.*

involving tragic deaths—run-of-the-mill tax evasion, counterfeiting, or money laundering cases, for example—then so be it. However, if the misconduct leads to one or more deaths, then DPAs must be excluded. The families of those killed in the Boeing crashes want and deserve to learn how and why their loved ones died, and who is to blame. The public wants and deserves that same information, as well as for the government to use the most effective means possible in ensuring full accountability, punishment when warranted, and prevention of additional harm. In short, the families and public want and deserve real justice. Using a DPA to resolve a matter as deadly as the Boeing crashes was ineffective, immoral, and unjust. Congress must act to prevent DOJ from being able to do it again.