

IMPOSING LIMITS ON PROSECUTORIAL DISCRETION IN CORPORATE PROSECUTION AGREEMENTS

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In late 2006, the Department of Justice (DOJ) overhauled its internal policy regarding the prosecution of corporate entities. The new policy—expressed in the “McNulty Memo”—was issued as a direct response to charges that the DOJ had abused its leverage over the companies it targeted for criminal prosecution, specifically with regard to compelled cooperation. The McNulty Memo addressed these charges, in part, by restricting the discretion of individual prosecutors and requiring approval by the Deputy Attorney General on significant prosecutorial decisions.

While the changes ushered in by the McNulty Memo are a promising first step, they will not remedy all of the potentially abusive practices that mar the prosecution of corporate entities—particularly in regard to the use of deferred and non-prosecution agreements. At first blush, deferred and non-prosecution agreements appear to present a win-win situation: They offer the benefits of criminal punishment without the negative collateral consequences that flow from criminal charges. Their increased use, however, has revealed a different picture. By removing the threat of collateral consequences, deferred and non-prosecution agreements allow individual prosecutors to take full advantage of the unique weaknesses of corporations in the criminal justice system. These weaknesses provide prosecutors with a dangerous amount of leverage over the corporations they target, creating a bargaining imbalance and a new threat of abuse.

The potential for abuse that flows from the use of deferred and non-prosecution agreements should be addressed by restricting the discretion of individual prosecutors. This Note argues that the DOJ should look to the solution offered in the McNulty Memo and require that individual prosecutors receive permission from the Deputy Attorney General before entering into any deferred or non-prosecution agreement.

INTRODUCTION

Early in the morning of December 12, 2006, Paul McNulty, then Deputy Attorney General of the Department of Justice (DOJ), strode to the podium at the Lawyers for Civil Justice Conference in New

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York City.¹ It was perhaps fitting that Mr. McNulty was surrounded by an audience attired in dark suits, for he came to give a eulogy. He told the audience that the “Thompson Memo,” scourge of corporate America, had been laid to rest.²

For nearly four years, the Thompson Memo had served as the touchstone for all DOJ efforts to root out corporate fraud. Written in the wake of the accounting scandals that engulfed companies like Enron, Arthur Andersen, and WorldCom, it guided prosecutors in deciding whether or not to pursue criminal charges against a corporation.³ Use of the Thompson Memo guidelines, however, led to allegations of abuse. These allegations focused principally on two kinds of cooperation requests permitted under the Thompson Memo: requests for waiver of corporate attorney-client privilege and requests for company refusal to pay employee legal fees. A diverse range of interests argued that the DOJ was abusing its power by repeatedly demanding these kinds of cooperation.⁴ Condemnation came from all directions, and the Thompson Memo could not withstand the collective weight of the attacks.⁵ When McNulty took the podium on December 12, 2006, he was there to announce a new DOJ policy—expressed in the

¹ Paul J. McNulty, U.S. Deputy Att'y Gen., Prepared Remarks of Deputy Attorney General Paul J. McNulty at the Lawyers for Civil Justice Membership Conference Regarding the Department's Charging Guidelines for Corporate Fraud Prosecutions (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speech/2006/dag_speech_061212.htm [hereinafter McNulty Speech].

² *Id.* (“Today I’m announcing revisions to the Thompson Memorandum. The previous guidance is superseded, and a new memorandum, under my signature, will provide revised guidance to corporate fraud prosecutors across the country.”).

³ See *infra* notes 77–85 and accompanying text.

⁴ See Jason McLure, *Coalition Scores Major Victory in Policy Retreat: How Business, Civil Liberties Groups Pushed DOJ To Alter Fraud Stance*, *LEGAL TIMES*, Dec. 18, 2006, at 1.

⁵ A wide variety of organizations and individuals criticized the cooperation provisions in the Thompson Memo. The American Civil Liberties Union and American Bar Association (ABA) combined lobbying efforts with strange bedfellows like the National Association of Manufacturers and the U.S. Chamber of Commerce. McLure, *supra* note 4. Ex-attorneys general and solicitors general from previous administrations, both Republican and Democrat, co-signed a letter asking for a repeal of the practice. Jason McLure, *Ex-DOJ Officials Blast Current Policy: Letter Signed by Bell, Thornburgh, and Others Criticizes Approach Outlined in Thompson Memo*, *LEGAL TIMES*, Sept. 11, 2006, at 18. Senator Arlen Specter introduced legislation to change DOJ policy. Lynnley Browning, *Senator Calls for an Easing of Corporate-Wrongdoing Rules*, *N.Y. TIMES*, Dec. 8, 2006, at C3. A federal judge in New York declared the Memo, in part, unconstitutional. *United States v. Stein*, 435 F. Supp. 2d 330, 365 (S.D.N.Y. 2006). Even Thompson himself, the eponymous author of the memorandum, expressed reservations. See Lynnley Browning, *Former Deputy at Justice Dept. Would Limit Legal Disclosure*, *N.Y. TIMES*, Dec. 1, 2006, at C6 (quoting Thompson as saying that use of waiver should be “extremely limited”).

“McNulty Memo”⁶—that addressed the issues that had provoked such vigorous opposition.

While the modifications in the McNulty Memo may indeed prove significant, it would be foolish to think that they will completely solve the problem of abuse in the prosecution of corporate entities. The world of corporate prosecution has undergone a revolution during the past decade, ushering in changes that will survive the replacement of the Thompson Memo. Foremost among these changes is the widespread use by federal prosecutors of deferred and non-prosecution agreements. The use of these agreements has created the potential for a different kind of abuse, which the McNulty Memo does not address.

Deferred and non-prosecution agreements are essentially probationary agreements between a prosecutor and a corporation suspected of criminal conduct.⁷ Prosecutors agree to waive or defer criminal prosecution of the corporate entity in exchange for a variety of corporate promises. These concessions often include massive fines, internal reforms, and assistance in prosecuting corporate employees.⁸ The use of these agreements exploded after the demise of the corporate accounting giant Arthur Andersen. When Andersen collapsed after its indictment, federal prosecutors realized that prosecution alone could destroy even the most established of companies.

It is in this context that corporate prosecutors turned to deferred and non-prosecution agreements, which serve as a middle ground between full prosecution and declination.⁹ These agreements allow prosecutors to punish corporations without risking total corporate collapse—an arrangement that appears to benefit both parties. This seemingly beneficial dynamic, however, hides a new potential for abuse. It has become increasingly clear that the government holds all the cards in negotiations over these agreements. As long as the threat of prosecution lingers over a company, the corporation is compelled to agree to the prosecutor’s terms, vesting nearly absolute power in the government’s hands. Unable to risk a potential indictment, the corporation is thus left at the mercy of the prosecutor.

This bargaining imbalance is not easily rectified—in fact, there may not be any true solution short of changing the law of corporate

⁶ Memorandum from Paul J. McNulty, U.S. Deputy Att’y Gen., to Heads of Dep’t Components and U.S. Att’ys (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf [hereinafter McNulty Memo].

⁷ See *infra* Part I.A.

⁸ See *infra* Part I.B.

⁹ Declination means to decline to prosecute criminally. Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1868 (2005).

criminal liability. The abusive tendencies of this bargaining imbalance can, however, be limited by constraining prosecutorial discretion. This Note argues that decisions related to deferred and non-prosecution agreements—both the offer of an agreement as well as its terms—should be channeled through a formal approval process at the DOJ in Washington, D.C. rather than decided by individual federal prosecutors.¹⁰ This process would mirror the procedures already adopted in the McNulty Memo to handle requests for waiver of attorney-client privilege. Although this approach would not alter the bargaining disparity between corporations and prosecutors, it would curb the potential for abuse by subjecting the decisionmaking of individual prosecutors to centralized review. Procedures of this sort would impose some consistency and uniformity on what has hitherto been a decentralized and haphazard process.

Part I of this Note details the modern use of corporate prosecution agreements. Part II reviews the expansive nature of the black letter law of corporate liability and outlines the procedures developed by the DOJ to guide prosecutorial discretion. Part III highlights the steadily growing power of individual prosecutors in the negotiation of corporate prosecution agreements and points out some early signs of abuse. Part IV criticizes various remedies that have been proposed to rein in potential abuse and proposes an expansion of the remedy provided in the McNulty Memo.

I PROSECUTION AGREEMENTS

This Part provides a detailed look at the use of deferred and non-prosecution agreements. Part I.A lays out the basics of prosecution agreements: what they are and how they work. Part I.B reviews some of the common terms of prosecution agreements. Part I.C makes two significant observations about these agreements: First, prosecutors retain almost complete discretion in crafting the terms; and second, these agreements are becoming ever more common.

A. What Are Prosecution Agreements?

A federal prosecutor seeking a middle ground between a prosecution and declination has two principal options: a deferred prosecution agreement or a non-prosecution agreement.¹¹ A deferred

¹⁰ See *infra* Part IV.B.

¹¹ This is, of course, a bit simplistic. A prosecutor can arrange for civil penalties with the Securities and Exchange Commission (SEC), for example, instead of pursuing any kind of criminal discipline. Such options, however, essentially amount to declinations.

prosecution agreement is essentially a probationary agreement arranged between a corporation and the government.¹² In lieu of criminally prosecuting the entity, the government files some kind of criminal charge—normally a complaint, information, or indictment—but then agrees to hold the charge open as long as the corporation successfully fulfills the terms of the agreement.¹³ If the prosecutor deems the agreement's terms satisfied, the charges are dismissed.

While non-prosecution agreements are identical to deferred prosecution agreements in most respects, there are two key differences. First, in a non-prosecution agreement the prosecutor does not file a charging instrument. In some circumstances, this can be a significant difference: Mere indictment can trigger penalties for certain corporations.¹⁴ Second, non-prosecution agreements normally send a less strident message to the market—the absence of the charging instrument often indicates a lower level of culpability.¹⁵ As a result, potential defendants prefer non-prosecution agreements.¹⁶

In most other respects, however, the two types of agreements—especially those signed since the introduction of the Thompson Memo—tend to have identical terms and qualities.¹⁷ In fact, some non-prosecution agreements can be as harsh as their deferred counterparts.¹⁸ For the purposes of this Note, I will treat them as one and the

¹² Despite their frequent use today, prosecution agreements were not engineered in the context of corporate liability. Rather, they began as a means to rehabilitate juvenile offenders. Greenblum, *supra* note 9, at 1864. It was not until the early 1990s that agreements of this type were used to settle criminal charges against entities. *Id.*

¹³ Eugene Illofsky, *Corporate Deferred Prosecution Agreements: The Brewing Debate*, CRIM. JUST., Summer 2006, at 36, 36, available at <http://www.abanet.org/crimjust/cjmag/21-2/corporatedefered.pdf>.

¹⁴ Interview with David Pitofsky, CORP. CRIME REP., Nov. 28, 2005, at 8, 13.

¹⁵ See *id.* (noting that a non-prosecution agreement “communicates something that is substantially less harsh than a deferred prosecution agreement . . . [and] provides the prosecutor with the ability to send a graded message about the seriousness of the misconduct”).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ The HealthSouth Non-Prosecution Agreement, for example, features a three-year, six-month duration; over \$500 million in penalties and restitution; substantial internal governance reforms; and a compliance monitor. Non-Prosecution Agreement Between U.S. Dep't of Justice and HealthSouth Corp., paras. 3, 8–9 (May 18, 2006) (on file with the New York University Law Review) [hereinafter HealthSouth NPA]. The Boeing Non-Prosecution Agreement features a two-year duration; over \$600 million in penalties; substantial internal governance reforms; and an agreement to provide a limited privilege waiver. Non-Prosecution Agreement Between U.S. Att'y's Office for E. Dist. Va. and Boeing Co., paras. 3–4, 6–7 (June 30, 2006) (on file with the New York University Law Review) [hereinafter Boeing NPA]. These conditions are comparable to modern deferred prosecution agreements. E.g., Deferred Prosecution Agreement Between U.S. Att'y's Office for S. Dist. of N.Y. and KPMG, para. 3 (Aug. 26, 2005) (on file with the New York University Law Review) [hereinafter KPMG DPA] (noting substantial penalties, internal business reforms, and privilege waiver).

same—when I use the term “prosecution agreements,” I am generally referring to both deferred and non-prosecution agreements, noting differences only where relevant.¹⁹

B. Elements of Prosecution Agreements

Prosecution agreements feature a wide variety of terms. These include, *inter alia*, provisions about cooperation, acknowledgment of criminal conduct, business reforms, penalties, and independent monitors.

Cooperation: Corporate cooperation has been the most controversial element of prosecution agreements. In particular, negative attention has focused on two common prosecutorial practices: requests that the company refuse to pay attorneys’ fees for employees suspected of criminal conduct,²⁰ and requests that the company waive

¹⁹ The overwhelming majority of these agreements share the same features despite their different titles. If a distinction is to be drawn regarding the agreements’ terms, one might separate out the early non-prosecution agreements from the rest. For example, many of the early non-prosecution agreements did not feature any set duration—that is, once the agreement was signed, the company’s relationship with the prosecutor’s office was essentially over. Of the fifty-nine agreements signed between 1992 and 2006, seven fit this mold: the Aurora Agreement, the Lazard Agreement, the Merrill Lynch First Agreement, the John Hancock Agreement, the AETNA Agreement, the Sequa Agreement, and the Salomon Brothers Agreement. See Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 6–7, app. (2006) (indicating that six of seven agreements signed before 1999 did not contain explicit expiration dates); *infra* notes 46–47 (noting fifty-nine total agreements from 1992 to 2006). These seven agreements are probably best described as official statements detailing the reasons why the government declined to prosecute the organization in question.

Once the Holder Memo was released, nearly all deferred and non-prosecution agreements took on the same form. Memorandum from Eric H. Holder Jr., U.S. Deputy Att’y Gen., to All Component Heads and U.S. Att’ys (June 16, 1999) (on file with the New York University Law Review) [hereinafter Holder Memo]. Of the seven agreements noted above which differ from the modern form, six were signed before 1999, the date that the Holder Memo was issued. The one exception to this generalization is the Aurora Agreement, which was signed in 2001 and is perhaps best treated as an anomaly. See Non-Prosecution Agreement Between U.S. Att’y’s Office for S. Dist. of N.Y. and Aurora Food (Jan. 22, 2001) (on file with the New York University Law Review). Other than the Aurora Agreement, all the deferred and non-prosecution agreements issued since 1999 are sufficiently similar that they can be spoken of as a group.

²⁰ Many corporations, either by explicit employment contract or by historical practice, provide their employees with attorneys’ fees to cover criminal allegations involving actions committed in the course of employment. *United States v. Stein*, 435 F. Supp. 2d 330, 353–55 (S.D.N.Y. 2006) (summarizing historical practice of employers indemnifying employees for legal expenses). In certain circumstances, prosecutors have frowned on these agreements, and have pressured companies to waive or limit these arrangements to demonstrate cooperation. The Thompson Memo explicitly stated that the advancement of attorneys’ fees might be evidence of non-cooperation as the company is “protecting . . . culpable employees and agents.” Memorandum from Larry D. Thompson, U.S. Deputy Att’y Gen., to Heads of Dep’t Components and U.S. Att’ys § VI(B), at 7–8 (Jan. 20, 2003),

attorney-client privilege.²¹ Controversy over these practices eventually resulted in the replacement of the Thompson Memo with the McNulty Memo.²²

Although these issues are of tremendous significance, this Note will not focus on the potential for abuse in the cooperation provisions of prosecution agreements for two important reasons. First, compelled cooperation has already received considerable attention. To the extent that commentators have examined the use and abuse of prosecution agreements, criticism has mainly focused on the issue of cooperation.²³ Second, and more significantly, the abuses identified in these practices are moving toward a legal remedy: The McNulty Memo is a clear indication that the DOJ is expending serious effort to address potential abuse in prosecutorial practices related to cooperation. The same, however, cannot be said for the other provisions of prosecution agreements. Accordingly this Note will focus on the potential for prosecutorial abuse in these other provisions.

Acknowledgement of Conduct: The majority of prosecution agreements, especially those signed since the introduction of the Thompson Memo, require the company to acknowledge responsibility

available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf [hereinafter Thompson Memo].

²¹ The Thompson Memo stated that a corporation's willingness to waive attorney-client privilege was highly relevant evidence of a corporation's cooperation. Thompson Memo, *supra* note 20, § VI(B), at 6–7. While the Thompson Memo stated that such waiver was not an "absolute requirement," *id.*, many practitioners found that prosecutors demanded disclosure of privileged documents in nearly all circumstances. Companies that resisted risked appearing uncooperative. Stephen W. Grafman & Jeffrey L. Bornstein, *New Memo Won't Help*, NAT'L L.J., Nov. 14, 2005, at 31, 31 ("In reality today, a corporation that does not waive these valuable privilege rights effectively is considered a non-cooperator.").

²² See *supra* note 6 and accompanying text.

²³ See, e.g., Am. Coll. of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 321–22 (2003) (criticizing government for asking for privilege waiver); Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 595–607 (2004) (summarizing and responding to criticisms of privilege waiver); George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 992–93 (2005) (criticizing pressure exerted on companies to waive attorney-client privilege); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 319–21 (2007) (discussing Thompson Memo factors for assessing corporate cooperation, which include corporation's identification and sanctioning of employees); Joseph F. Savage, Jr. & Melissa M. Longo, 'Waive' Goodbye to Attorney-Client Privilege, BUS. CRIMES BULL., Oct. 2000, at 1, 8 (discussing waiver in context of inadvertent disclosure); Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, in 2 37TH ANNUAL INSTITUTE ON SECURITIES REGULATION 815, 821 (PLI Corporate Law & Practice, Course Handbook Series No. B-1517, 2005) (arguing that waiver has "become a heavy stick and a company, only at its extreme peril, declines a prosecutor's request for waiver"); Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1170–74 (2006) (summarizing criticisms of cooperation policy).

for the conduct in question. The company and the government agree to a “statement of facts” that details the government’s allegations.²⁴ The company stipulates to the conduct alleged in the statement of facts and consents to admission of the statement as evidence if the prosecution agreement is breached. If this occurs, there is essentially a corporate confession to the charge.²⁵ The power of these provisions is worth noting: Detailed admissions to criminal charges typically result in lucrative civil suits that piggyback on the signing of these agreements.²⁶ For many corporations, “the ripple effect” of these admissions is catastrophic.²⁷ The fact that corporations typically agree to these admissions—despite the consequences in civil suits—underscores the degree to which corporations desire to avoid criminal indictment and/or conviction.

Monetary Penalties: Modern prosecution agreements generally feature significant monetary penalties, which can involve a combination of criminal penalties, civil penalties, and civil settlements to non-governmental plaintiffs—often in staggering amounts. For example, Boeing’s non-prosecution agreement called for a \$565 million civil settlement and a \$50 million criminal penalty.²⁸ KPMG was ordered to pay \$456 million—\$128 million in disgorged fees, \$288 million in restitution to the Internal Revenue Service (IRS), and a \$100 million penalty to the IRS.²⁹ These numbers are not unusual—numerous agreements feature settlements worth hundreds of millions of dollars.³⁰ Other agreements call for more unorthodox penalties, such as the provision requiring \$4 million worth of free medical services in the

²⁴ E.g., Deferred Prosecution Agreement Between U.S. Dep’t of Justice and BankAtlantic, para. 2 (Apr. 26, 2006) (on file with the New York University Law Review); Deferred Prosecution Agreement Between U.S. Dep’t of Justice and Monsanto Co., para. 4 (Jan. 6, 2005) (on file with the New York University Law Review).

²⁵ E.g., Boeing NPA, *supra* note 18, para. 12(a)(4); Deferred Prosecution Agreement Between U.S. Att’y’s Office for D. of Conn. and Operations Mgmt. Int’l, para. 9 (Feb. 8, 2006) (on file with the New York University Law Review) [hereinafter OMI DPA].

²⁶ Admissions within a prosecution agreement can have significant consequences on subsequent or pending litigation, as “a plaintiff will seek to use [them] against the corporation in later civil proceedings.” Michael R. Sklaire & Joshua G. Berman, *Deferred Prosecution Agreements: What Is the Cost of Staying in Business?*, LEGAL OPINION LETTER, June 3, 2005, at 2, available at http://www.sonnenschein.com/docs/Cost_of_Staying_in_B.pdf.

²⁷ See Stephanie Martz, *Trends in Deferred Prosecution Agreements*, CHAMPION, Nov. 2005, at 45, 45 (“[F]or corporations, the ripple effect of these admissions could be devastating.”).

²⁸ Boeing NPA, *supra* note 18, para. 4(b)–(c).

²⁹ KPMG DPA, *supra* note 18, para. 3.

³⁰ See Finder & McConnell, *supra* note 19, app. (noting various prosecution agreements with nine-figure fines).

prosecution agreement with Roger Williams Hospital.³¹ While such settlements are not the norm, they evince a potential for abuse: Prosecutors have wide flexibility and few barriers in crafting penalties.

Business Reforms: Prosecution agreements often require the target company to make significant changes to the way it conducts business. Some of the more common undertakings involve personnel. The agreement might call for the termination or disciplining of employees for either contributing to the underlying criminal conduct³² or for failure to cooperate with the investigation.³³ Required changes might also include the hiring of new senior management,³⁴ new board members,³⁵ or new auditors.³⁶

The other common type of business reform involves operational changes. Perhaps the most common are enhancements to compliance programs, which can include, among other measures, amended financial controls, hotlines for whistleblowers, training programs to underscore legal behavior, new personnel hiring policies, and ethics officers.³⁷

These business reforms have also raised concern. Shareholders traditionally control decisions regarding the staffing of boards of directors, which in turn control the staffing of management. Prosecutors are not businessmen, and some commentators have questioned the wisdom of permitting prosecutorial intrusion into the internal workings of large corporations.³⁸

³¹ Deferred Prosecution Agreement Between U.S. Att'y's Office for Dist. of R.I. and Roger Williams Med. Ctr., para. 12 (Jan. 27, 2006) (on file with the New York University Law Review) [hereinafter Roger Williams DPA].

³² E.g., Non-Prosecution Agreement Among U.S. Att'y's Office for E. Dist. of N.Y., U.S. Att'y's Office for S. Dist. of N.Y. and Bank of New York, para. 10(a) (Nov. 8, 2005) (on file with the New York University Law Review); HealthSouth NPA, *supra* note 18, para. 8(a).

³³ Non-Prosecution Agreement Between U.S. Att'y's Office for E. Dist. of N.Y. and Symbol Techs., para. 9(b) (June 3, 2004) (on file with the New York University Law Review) [hereinafter Symbol NPA].

³⁴ E.g., HealthSouth NPA, *supra* note 18, para. 8(b); Symbol NPA, *supra* note 33, para. 9(c).

³⁵ E.g., HealthSouth NPA, *supra* note 18, para. 8(d); Deferred Prosecution Agreement Between U.S. Att'y's Office for S. Dist. of N.Y. and Prudential Secs., Inc. 3 (Oct. 27, 1994) (on file with the New York University Law Review).

³⁶ E.g., HealthSouth NPA, *supra* note 18, para. 8(c); Symbol NPA, *supra* note 33, para. 9(d).

³⁷ E.g., OMI DPA, *supra* note 25, paras. 5–6.

³⁸ Professor John C. Coffee argues, for example, that there is little to stop a prosecutor from demanding as a condition of deferred prosecution that a board without much diversity reconstitute itself as half female and at least one-third minority. John C. Coffee Jr., *Deferred Prosecution: Has It Gone Too Far?* NAT'L L.J., July 25, 2005, at 13, 13. Coffee believes that shareholders should have the right to choose their own directors, and such interference by prosecutors goes beyond their “competence or entitlement.” *Id.*

Independent Monitors: A large percentage of modern prosecution agreements require compliance monitors—*independent experts retained to supervise compliance with the agreement who report periodically to the prosecutor.*³⁹ These monitors are normally either compliance specialists or august members of the legal community.⁴⁰ The corporation pays the costs of the monitor and his/her staff and is expected to give the monitor relatively unfettered access to business operations.⁴¹ For some, the monitor's very presence assuages concerns about prosecutorial expertise in business regulation.⁴² Others, however, generally doubt the wisdom of allowing prosecutors to interpose their power into sensitive boardroom decisions, arguing that such business decisions are beyond prosecutors' expertise.⁴³

Miscellaneous Penalties: Some of these agreements contain unusual provisions which defy categorization. Prosecutors have significant leeway as to what conditions they demand of the target corporations, and there is little to stop a prosecutor from crafting unique penalties. For example, the agreement between WorldCom and the Attorney General of Oklahoma required the company to create sixteen hundred new jobs over a ten-year period.⁴⁴ Similarly, the Bristol-Meyers Squibb Agreement mandated the creation of an endowed chair in business ethics at Seton Hall Law School, the local U.S. Attorney's alma mater.⁴⁵

³⁹ See Finder & McConnell, *supra* note 19, app. (tabulating terms of deferred and non-prosecution agreements, including monitors).

⁴⁰ In the Bristol-Meyers Squibb Agreement, for example, the prosecutor and company agreed to use Frederick B. Lacey, a former U.S. Attorney and federal judge. Deferred Prosecution Agreement Between U.S. Att'y's Office for D.N.J. and Bristol-Meyers Squibb Co., para. 5 (June 15, 2005) (on file with the New York University Law Review) [hereinafter Bristol-Meyers DPA].

⁴¹ E.g., Roger Williams DPA, *supra* note 31, paras. 21–31; HealthSouth NPA, *supra* note 18, para. 11.

⁴² See Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Meyers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1055 (2006) (“A strong, independent monitor is in a far better position to ride herd over a mammoth corporation than any U.S. Attorney's Office or Probation Office. . . . Monitors are able to observe and understand the business they oversee, . . . in ways that federal prosecutors never could or should.”); Interview with David Pitofsky, *supra* note 14, at 9 (“One of the reasons why the deferred prosecution agreements require a monitor to be put in place is that the prosecutor's office has no experience or skills to analyze whether a company is reforming its internal governance practices.”).

⁴³ See *supra* notes 32–38 and accompanying text.

⁴⁴ Deferred Prosecution Agreement Between State of Oklahoma and WorldCom, Inc. 2 (Mar. 12, 2004) (on file with the New York University Law Review).

⁴⁵ Bristol-Meyers DPA, *supra* note 40, para. 20. The OMI Agreement contains a similar provision with the Coast Guard Academy. OMI DPA, *supra* note 25, app. A. Christopher Christie, the U.S. Attorney who negotiated the Bristol-Meyers Squibb Agreement, states that the idea of endowing a chair in ethics came from defense counsel. Fur-

C. The Use and Frequency of Prosecution Agreements

There are two initial observations that should be made about the use of prosecution agreements in the corporate criminal context. First, prosecutors are not significantly limited in what they might include as conditions in these agreements. As noted above, prosecution agreements feature a wide variety of terms, often including enormous fines, serious overhauls of business practices, and full admissions of criminal responsibility. Despite the severity of these conditions, however, corporations nearly always accept the prosecutor's terms. The content of the agreement depends almost entirely on the discretion of the prosecutor; what the prosecutor asks for, the prosecutor gets.

A second observation relates to the frequency of these agreements. From 1992 to the end of 2002, the ten years following the first use of prosecution agreements in the corporate criminal context, there were sixteen deferred and non-prosecution agreements—an average of fewer than two a year.⁴⁶ From the beginning of 2003 to the end of 2006, however, there were a staggering forty-three prosecution agreements—an average of more than ten a year.⁴⁷ And during this latter

ther, Seton Hall was chosen because Rutgers University School of Law already had a chair in business ethics endowed by Prudential. Christie & Hanna, *supra* note 42, at 1058 n.29.

⁴⁶ Finder & McConnell, *supra* note 19, app. Lawrence Finder and Ryan McConnell have assembled the most comprehensive index of known agreements. In the appendix to their article they count ten deferred and non-prosecution agreements during the period from 1992 to 2002. They intentionally excluded the agreements with Coopers & Lybrand, Salomon Brothers, and Sequa because those agreements were never made public. *Id.* at 36 n.193. For the purpose of this counting exercise, however, I am including those three agreements as well as three agreements not considered by Finder and McConnell—the agreements with JB Oxford & Co., Hilton Hotels, and Doyon Drilling. Deferred Prosecution Agreement Among U.S. Att'y's Office for Cent. Dist. of Cal., JB Oxford Holdings, Inc., and JB Oxford & Co. (Feb. 12, 2000) (on file with the New York University Law Review); Press Release, Office of U.S. Att'y for W. Dist. of Mo., Hilton Kansas City Corporation and Hildeon Gaming Enter Pretrial Diversion Agreement Over Investigation of \$1.25 Million Grant (Aug. 12, 1998) (on file with the New York University Law Review); Deferred Prosecution Agreement Between U.S. Att'y's Office for Dist. of Ala. and Doyon Drilling Inc. (Apr. 1998) (on file with the New York University Law Review).

⁴⁷ Finder & McConnell, *supra* note 19, app. Finder and McConnell counted thirty-eight deferred and non-prosecution agreements between 2003 and 2006. They intentionally excluded two agreements from their list: the Hilfiger Agreement, because the agreement was never released to the public, and the WorldCom Agreement, because it was negotiated with the Attorney General of Oklahoma. For the purposes of this counting exercise, I have included both agreements. Further, three agreements were signed in the final months of 2006, too late to be included in Finder and McConnell's article. These three agreements—the Statoil Agreement, the SSI Korea Agreement, and the Intermune Agreement—are also included in my final count of forty-three agreements. Press Release, U.S. Dep't of Justice, U.S. Resolves Probe Against Oil Company that Bribed Iranian Official (Oct. 13, 2006) (on file with the New York University Law Review); Press Release, U.S. Dep't of Justice, Schnitzer Steel Industries Inc.'s Subsidiary Pleads Guilty to Foreign

period, the rate of use was still increasing—2006 alone saw eighteen such agreements.⁴⁸

The first of these two observations—that prosecutors possess wide discretion in crafting agreements—points to a developing problem of abuse, a concern that will be addressed in Parts III and IV of this Note. Before addressing the issue of abuse, however, we need to understand why prosecution agreements have become so common in the area of corporate criminal liability. The peculiar nature of corporate prosecution—in particular the broad scope of entity liability and the concern for “collateral consequences”—has provided prosecutors with clear incentives to use these agreements with increasing frequency.

II PROSECUTION AGREEMENTS AND CORPORATE CRIMINAL CONDUCT

This Part explores reasons why prosecutorial agreements have become so common in the area of corporate criminal liability. Part II.A lays out the basic law of corporate criminal liability, which is astonishingly broad: Any criminal act committed by an employee of a corporation, if committed within the scope of employment and in part to benefit the corporation, can be imputed to the corporation itself.⁴⁹ Part II.B details some common concerns with entity prosecution, and goes on to discuss federal prosecutors’ responses. Part I.C focuses on the most significant of these concerns: the fear of collateral consequences. Typified by the Arthur Andersen collapse, corporate prosecution can visit massive harms upon innocent parties who depend upon the corporation. In part to avoid these effects, prosecutors have turned to prosecution agreements as a means to punish companies while sidestepping collateral consequences.

A. The Remarkably Broad Scope of Corporate Criminal Liability

Modern corporate criminal liability was born in 1909 in *New York Central & Hudson River Railroad Co. v. United States*.⁵⁰ New York

Bribes and Agrees to Pay a \$7.5 Million Criminal Fine (Oct. 16, 2006) (on file with the New York University Law Review); Deferred Prosecution Agreement Between U.S. Att’y’s Office for N. Dist. of Cal. and Intermune, Inc. (Oct. 28, 2006) (on file with the New York University Law Review).

⁴⁸ This count includes the fifteen 2006 agreements listed in Finder and McConnell’s matrix, as well as the Statoil Agreement, the SSI Korea Agreement, and the Intermune Agreement. *See supra* note 47 and accompanying text.

⁴⁹ *See infra* notes 54–66 and accompanying text.

⁵⁰ 212 U.S. 481 (1909); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1226, 1246 & n.12 (1979).

Central was a rate-fixing case: An employee of the defendant railroad violated federal tariff laws on sugar shipments.⁵¹ Instead of filing criminal charges solely against the employee, however, the government took the radical step of charging both the employee and the corporate employer. Prior to *New York Central*, no federal standard existed for charging a corporation with a crime that required intent.⁵² Rather, the legal community generally accepted that corporations could not be charged with criminal behavior because corporations are fictional persons.⁵³

New York Central drastically altered the legal landscape. Borrowing the tort law principle of respondeat superior,⁵⁴ the Supreme Court held that a corporate entity could be criminally liable for its employees' actions.⁵⁵ The imposition of entity liability through the respondeat superior model addressed two fundamental concerns associated with corporate crime. First, entity liability augmented the deterrent effect of the law: Because corporations often derived benefits from the unlawful practices of their employees, criminal conduct could only be deterred effectively if the corporation, in addition to its employees, was subject to prosecution.⁵⁶ Second, vicarious corporate

⁵¹ *N.Y. Cent.*, 212 U.S. at 489–91.

⁵² The decision in *New York Central* was not completely without precedent; there had been some development of corporate liability for public nuisances and strict liability crimes before 1909 in non-federal forums. See V. S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1479–82 (1996) (describing evolution of corporate criminal liability). In addition, Justice Day, the author of the *New York Central* opinion, cited a variety of non-federal sources for the proposition that corporations could be held liable for crimes of intent, including a contemporaneous criminal treatise and court decisions from Massachusetts and England. *N.Y. Cent.*, 212 U.S. at 492–93. However, as *New York Central* was the first case where the Supreme Court explicitly used these precedents in formulating federal law, commentators generally consider this case to be the progenitor of entity liability in the United States. See, e.g., Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 406–07 (1998) (noting that Supreme Court ratified previous developments in corporate liability in *New York Central*, signaling “beginning of the end of corporate immunity from criminal liability”).

⁵³ See *N.Y. Cent.*, 212 U.S. at 492 (“Some of the earlier writers on common law held the law to be that a corporation could not commit a crime.”). Specifically, Justice Day noted that Blackstone’s *Commentaries* stated, “‘A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may, in their distinct individual capacities.’” *Id.* (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *476).

⁵⁴ See *id.* at 493–94 (describing liability of corporation for acts of employee). Respondeat superior is defined as “[t]he doctrine holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of employment or agency.” BLACK’S LAW DICTIONARY 1338 (8th ed. 2004).

⁵⁵ *N.Y. Cent.*, 212 U.S. at 495–96.

⁵⁶ See *id.* (“[T]o give [corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.”); Khanna, *supra* note 52, at 1483 (describing deterrence as motive for change in jurisprudence).

liability sidestepped the thorny issue of intent: By using the individual's criminal conduct as the basis for the criminal charge against the corporation, the law could satisfactorily address the issue of how to establish the mens rea of an inanimate entity.⁵⁷

The *New York Central* Court suggested a two-part test to effectuate this criminal version of respondeat superior: If an employee committed a crime (1) within the scope of his or her employment and (2) for the benefit of the corporation, the corporation could be liable for the employee's criminal act.⁵⁸ This standard remains the law to this day.⁵⁹

The two elements of the *New York Central* test—"scope of employment" and "for the benefit"—are not difficult to satisfy. Consequently, virtually every case of employee misconduct could result in corporate criminal liability. Courts have construed the "scope of employment" very broadly, covering actions authorized by both actual⁶⁰ and apparent⁶¹ authority. Federal courts have considered employee actions to be within the scope of employment even where the corporation expressly forbade the behavior in question, either with a general policy or with individual admonitions to the culpable employees.⁶² "For the benefit" has also been construed broadly. Courts do not require that the corporation actually receive a benefit; it is sufficient that the employee merely intends to benefit the corpo-

⁵⁷ Cf. *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, *supra* note 50, at 1241 (noting that "mental state has no meaning when applied to a corporate defendant").

⁵⁸ See *N.Y. Cent.*, 212 U.S. at 493–95 (allowing criminal prosecution of corporation where agents act "within the authority conferred upon them" and where "the corporation . . . profits by the transaction").

⁵⁹ See, e.g., *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 892–93 (D.D.C. 2006) (applying *New York Central* test of corporate criminal liability).

⁶⁰ An employee acts with actual authority if "a corporation knowingly and intentionally authorizes [the] employee to act on its behalf." Michael Viano & Jenny R. Arnold, *Corporate Criminal Liability*, 43 AM. CRIM. L. REV. 311, 314 (2006); see also Joel M. Androphy et al., *General Corporate Criminal Liability*, 60 TEX. B. J. 121, 122 (1997) (discussing actual authority).

⁶¹ An employee acts with apparent authority "if a third party reasonably believes that the [employee] has the authority to perform the act in question." Viano & Arnold, *supra* note 60, at 314; see also Androphy, *supra* note 60, at 121–22 (discussing apparent authority).

⁶² See *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985) ("The fact that many of [the employees'] actions were unlawful and contrary to corporate policy does not absolve [the defendant-corporation] of legal responsibility for their acts."); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972) (holding that company can be found liable "for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent").

ration.⁶³ Nor do courts require “that the employee be primarily concerned with benefiting the corporation;”⁶⁴ employees may act principally for their own gain and intend to benefit the corporation only in a secondary manner.⁶⁵ Generally speaking, an employee’s behavior must be completely inimical to the corporation’s interests—for example, violating a fiduciary duty owed to the company itself—for courts to determine that the corporation received no benefit.⁶⁶

The *New York Central* standard thus offers a simple method for finding a corporation criminally liable. It is a powerful weapon in the hands of prosecutors since nearly any predicate criminal act by an employee can lead to a corporate criminal charge. Given the low threshold of liability established by *New York Central*, it is natural to ask why so few corporations are convicted of federal crimes. The answer is prosecutorial discretion.

B. DOJ Efforts To Guide Prosecutorial Discretion in Corporate Prosecution: The Holder, Thompson, and McNulty Memos

There are a variety of reasons why a prosecutor might be disinclined toward using *New York Central*’s vicarious criminal liability standard. Some concerns with vicarious criminal liability border on the philosophical: The prosecutor may struggle with conceptualizing corporations as entities capable of intent.⁶⁷ For most, however, concerns with vicarious criminal liability are moral or instrumental.

⁶³ See *Automated Med. Labs.*, 770 F.2d at 407 (“[W]hether the agent’s actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation.”); Viano & Arnold, *supra* note 60, at 316 (“The corporation [to be held liable] need not have actually received a benefit; the employee’s mere intention to bestow such benefit suffices.”).

⁶⁴ Viano & Arnold, *supra* note 60, at 316.

⁶⁵ See *Automated Med. Labs.*, 770 F.2d at 407 (upholding conviction of corporation based on employee’s acting “at least in part” to benefit corporation); Viano & Arnold, *supra* note 60, at 316 (noting that “courts recognize that many employees act primarily for their own personal gain”).

⁶⁶ See *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 129 (5th Cir. 1962) (reversing conviction of corporate defendants because criminal acts of corporate employees were intended to defraud company itself); Viano & Arnold, *supra* note 60, at 317 & n.41 (noting that corporation cannot be subject to criminal liability on basis of employee behavior that is “expressly contrary to the interests of the corporation and for which the corporation derives no benefit”).

⁶⁷ Edward, First Baron Thurlow, is famously said to have quipped that a corporation has “no soul to be damned, and no body to be kicked.” MERVYN KING, PUBLIC POLICY AND THE CORPORATION 1 (1977) (attributing quote to Thurlow); John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 386 & n.1 (1981) (same). On this subject, see Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 475 & n.8, 517 & n.191 (2006). Buell observes that scholars have long doubted the logic of respondeat superior criminal liability, “pointing to illogic in retribution toward objects and

Overuse of the vicarious liability standard runs the risk of criminally condemning an entity that may have had little to do with the criminal behavior in question.⁶⁸ Vicarious criminal liability may overdeter, compelling risk-averse corporations to steer employees away from borderline but permissible conduct out of uncertainty over punishment.⁶⁹ Efficiency may be best served by reserving criminal liability for individuals and subjecting corporations to civil penalties.⁷⁰ Finally, and perhaps most significantly, criminal charges against a corporation can negatively affect shareholders, employees, and communities dependent on the corporation—parties which may have had no involvement in the alleged misconduct.⁷¹ These negative effects are typically described as “collateral consequences”—damages to those innocent of the wrongdoing in question.⁷²

In response to these various concerns surrounding the use of corporate liability, the DOJ issued a series of memoranda outlining factors that federal prosecutors should consider in determining whether to indict a corporation. These memos, named after their Deputy Attorney General authors, have served as touchstones for discretionary decisions on corporate prosecution.

The first of these memos, named after Deputy Attorney General Eric Holder,⁷³ was released in 1999 without much fanfare.⁷⁴ At that time, the United States was experiencing unprecedented business prosperity, and corporate prosecution was hardly en vogue.⁷⁵ Within a short period of time, however, this dramatically changed. In the years following the issuance of the Holder Memo, a series of corpo-

the impossibility of fitting liberal concepts about responsibility with nonhuman actors.” *Id.* at 475.

⁶⁸ Samuel W. Buell notes that although the rule of entity liability allows virtually all crimes committed by corporate agents to be imputed to the corporation, the law is not actually applied in such an aggressive manner: Prosecutors have developed a social practice of evaluating an institution’s “real responsibility” in determining whether or not to charge the institution. Buell, *supra* note 67, at 526; see also Thompson Memo, *supra* note 20, § IV, at 5 (noting that it may not be appropriate to apply respondeat superior liability for an employee’s “single isolated act” and that prosecutors “should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation”).

⁶⁹ See *infra* note 123 and accompanying text.

⁷⁰ See generally Khanna, *supra* note 52 (comparing efficacy of corporate civil and criminal liability and concluding that civil liability can provide more effective deterrence at lower cost).

⁷¹ See Thompson Memo, *supra* note 20, § IX, at 12–13 (expressing this concern).

⁷² See *id.* (describing collateral effects of corporate prosecution).

⁷³ Holder Memo, *supra* note 19.

⁷⁴ See Finder & McConnell, *supra* note 19, at 14 (observing that Holder Memo did not receive as much attention as later Thompson Memo).

⁷⁵ See *id.* (noting that Holder Memo was “drafted in a period of unprecedented prosperity”).

rate accounting scandals occurred, including the notable failures of Enron and WorldCom.⁷⁶ As the facts of these scandals came to light, it became clear that the corporations' own aggressive business cultures, not merely the actions of a few bad employees, were in large part driving the criminality.⁷⁷

In response to this wave of business crime, the DOJ reprioritized the prosecution of corporate entities. The Thompson Memo, the most significant of the three Deputy Attorney General memos, was released in early 2003 as part of this renewed DOJ effort.⁷⁸ The Memo noted that prosecutions against individuals could be supplemented by the unique benefits that flow from an additional charge against the corporate entity.⁷⁹ It also posited that an indictment against a corporation could change the culture and behavior of the entity, as well as that of other corporations in the industry.⁸⁰ Industry peers "are likely to take immediate remedial steps" when another corporation in its respective industry is indicted for criminal conduct, so that one prosecution can create opportunities for "deterrence on a massive scale."⁸¹

To effectuate these purposes, the Thompson Memo laid out a multifactor test to guide the decision to charge a corporation.⁸² Although the DOJ specified that all federal prosecutors were required

⁷⁶ *Id.*

⁷⁷ See John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 270, 281–82 (2004) (arguing "that Enron and related scandals were neither unique nor idiosyncratic; rather, pervasive problems arose that undercut existing systems of corporate governance"). See generally BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2003) (providing detailed history of Enron scandal and description of business culture that generated it). Coffee notes, among other explanations for the spate of corporate scandals, that emphasis on earnings and stock price, with executive compensation tied to success in those metrics, induced managers to engage in risky behavior. Coffee, *supra*, at 275.

⁷⁸ See Carmen Couden, *The Thompson Memorandum: A Revised Solution or Just a Problem?*, 30 J. CORP. L. 405, 413 (2005) ("[I]n response to the corporate fraud scandals . . . Deputy Attorney General Larry D. Thompson issued a revision of the DOJ's guidelines on corporate prosecution."); Wray & Hur, *supra* note 23, at 1097 ("The spate of corporate scandals that began with Enron's meltdown in 2001 prompted the Bush Administration to dramatically increase the federal government's focus on rooting out corporate fraud").

⁷⁹ Thompson Memo, *supra* note 20, § I(B), at 1.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² The factors are:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;

to use these factors,⁸³ the Memo was ambiguous about their practical application. It stated that while the nine factors listed were meant to be “illustrative of those that should be considered,” they were not meant to be an exhaustive list.⁸⁴ Furthermore, the Memo was silent on how much weight a prosecutor should put on any individual factor, stating, without further explanation, that “in some cases one factor may override all others.”⁸⁵ In short, the Thompson Memo balancing test entrusted a massive amount of discretion to the individual prosecutors who would determine whether to employ the *New York Central* vicarious liability standard.

In December 2006, the DOJ replaced the Thompson Memo with the McNulty Memo,⁸⁶ which contains two significant modifications relating to corporate cooperation with criminal investigations. As noted in the Introduction, the cooperation provisions of the Thompson Memo produced an enormous outcry: The Memo was criticized by businesses, advocacy organizations, senators, ex-attorneys general, and even Thompson himself.⁸⁷ The McNulty Memo addresses these criticisms by making two key changes. First, the McNulty Memo states that prosecutors generally may not consider whether a corporation is advancing an employee attorneys’ fees in

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- 3. the corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
 - 4. the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection;
 - 5. the existence and adequacy of the corporation’s compliance program;
 - 6. the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
 - 7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution;
 - 8. the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance;
 - 9. the adequacy of remedies such as civil or regulatory enforcement actions.

Id. § II(A), at 3 (internal cross-references omitted). For an analysis of each factor, see Couden, *supra* note 78, at 407–14.

⁸³ U.S. DEPT OF JUSTICE, CRIMINAL RESOURCE MANUAL § 163 (2005) (“The *Thompson Memorandum* sets forth nine factors that federal prosecutors must consider in determining whether to charge a corporation or other business organization.”); *see also* United States v. Stein, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006) (noting that, unlike Holder Memo, Thompson Memo was binding on all federal prosecutors).

⁸⁴ Thompson Memo, *supra* note 20, § II(B), at 4.

⁸⁵ *Id.*

⁸⁶ McNulty Memo, *supra* note 6.

⁸⁷ *See supra* notes 4–5 and accompanying text.

assessing cooperation.⁸⁸ This change addresses a recent constitutional challenge to the attorneys' fees aspect of the Thompson Memo.⁸⁹ The second modification relates to prosecutorial requests for waiver of attorney-client privilege—a highly contentious aspect of the Thompson Memo.

The McNulty Memo does not ban these waiver requests. Rather, it restricts their use in three significant ways. First, the Memo clarifies that such waivers should only be requested when a “legitimate need” exists.⁹⁰ Second, the McNulty Memo states that if the government makes a request for waiver, the waiver should be “the least intrusive waiver necessary.”⁹¹ Furthermore, the Memo precludes prosecutors from considering a corporation’s refusal to release “attorney-client communications or non-factual attorney work product” in their charging decision.⁹² Third—and most importantly for the present discussion—the Memo imposes a certain amount of uniformity by requiring individual prosecutors to vet their waiver decisions with upper-level DOJ officials.⁹³ As discussed below, this latter proposal—vetting by senior DOJ officials—may provide guidance for remedying threats of abuse in the use of prosecution agreements with corporations.⁹⁴

C. Accounting Fraud and Extreme Collateral Consequences

Although each of the three DOJ memos offered some guidance for prosecutors faced with the decision of whether or not to prosecute a corporation, the memos did not—and perhaps could not—tell a prosecutor how to make a final discretionary determination. In making these determinations, one concern in particular became paramount: the massive collateral consequences to innocent shareholders and employees that often result from corporate indictment and/or prosecution. Even in those situations when entity prosecution could

⁸⁸ Specifically, the McNulty Memo states that prosecutors should not consider a corporation’s advancement of legal fees as indicative of non-cooperation except in rare cases where the totality of the circumstances indicates that the corporation’s actions were intended to impede a government investigation. McNulty Memo, *supra* note 6, § VII(B)(3), at 11–12; see also McNulty Speech, *supra* note 1 (emphasizing that McNulty Memo “generally prohibit[s] prosecutors from considering whether a corporation is advancing attorneys’ fees”).

⁸⁹ See *United States v. Stein*, 435 F. Supp. 2d 330, 362–69 (S.D.N.Y. 2006) (holding that government violated Fifth and Sixth Amendments by causing company to cut off payment of legal fees to employees).

⁹⁰ McNulty Memo, *supra* note 6, § VII(B)(2), at 8–9.

⁹¹ *Id.* § VII(B)(2), at 9.

⁹² *Id.* § VII(B)(2), at 10.

⁹³ *Id.* § VII(B)(2), at 9.

⁹⁴ See *infra* Part IV.B.

be justified because of a corrupt corporate culture (as was arguably the case with Enron), prosecutors were rightly concerned with the negative effects on innocent third parties such as shareholders and employees. Although each of the DOJ memos explicitly counsels that prosecutors should consider the issue of collateral consequences, they provide little guidance on how that interest should be balanced against the others.

The concern with collateral consequences is especially acute when dealing with charges related to financial fraud.⁹⁵ It has often been said that no major American financial services institution has survived criminal indictment.⁹⁶ The prosecution of Arthur Andersen is perhaps the most dramatic recent example of the collateral consequences of prosecuting a financial services company: After indictment for its role in the Enron accounting scandal, more than twenty-eight thousand Arthur Andersen employees were laid off in the United States alone.⁹⁷ A company like Arthur Andersen could not survive such a public blow to its reputation and integrity.

The collateral consequences of financial fraud are not limited, however, to financial services companies. Disastrous collateral consequences can result when any major company that depends on public reputation—publicly traded companies, in particular—engages in fraud related to its finances. Criminal charges involving financial fraud call into question the basic information relayed by the company about its financial health and prospects—information that various

⁹⁵ David Pitofsky, the lead prosecutor in the prosecution agreement negotiations with Computer Associates, believes that a distinction needs to be drawn between prosecutions of corporations for financial fraud and prosecutions for other kinds of crimes:

You have to draw a distinction between the types of violations.

If it is a Foreign Corrupt Practices Act violation, or an antitrust or an environmental violation, that's different than if it is an accounting fraud violation. The market receives an accounting fraud violation as a black cloud over the entire company. Investors don't know what they are buying when they buy a share of stock of the company.

With an FCPA violation, it doesn't undermine your confidence in the entire company, top to bottom. Its [sic] something that can be carved out. You can see that the company can go forward, that it has good products and strong finances and that it is worth investing in. But when you are talking about a securities fraud case, you really have to ask yourself—is this company a total sham?

Interview with David Pitofsky, supra note 14, at 12.

⁹⁶ E.g., Ken Brown et al., *Called to Account: Indictment of Andersen in Shredding Case Puts Its Future in Question: Obstruction of Justice Count May Speed the Departure of Clients and Partners: Firm Calls It 'Death Penalty.'*, WALL ST. J., Mar. 15, 2002, at A1; Monica Langley & Ian McDonald, *Marsh Averts Criminal Case with New CEO*, WALL ST. J., Oct. 26, 2004, at A1.

⁹⁷ Finder & McConnell, *supra* note 19, at 14–15.

markets rely upon in evaluating the company.⁹⁸ Charges involving inaccurate financial data send shockwaves through the investing and creditor communities and often cause the market to lose faith in the targeted corporation.⁹⁹

The heightened stakes of these kinds of offenses thrust a tremendous responsibility upon the government. When confronted with a corporation that measures poorly against the DOJ memo factors, the government has to decide not only whether the company's behavior merits sanction, but whether it wants to risk putting the company out of business and inflicting heavy losses on innocent third parties.¹⁰⁰

It is in this context that the use of prosecution agreements has become so significant. Prosecutors—even when convinced that a company's actions merit criminal sanction—have become hesitant to risk destroying the company by prosecuting it, thereby harming shareholders and employees. Prosecution agreements provide a solution to this problem, permitting the imposition of criminal penalties without the risk of dire collateral consequences.¹⁰¹

III CORPORATE VULNERABILITY AND THE SPECTER OF PROSECUTORIAL ABUSE

This Part explores the ramifications of unrestrained prosecutorial power in the use of prosecution agreements. Part III.A notes the respective reasons why both a prosecutor and a corporation might

⁹⁸ *Id.*

⁹⁹ See *infra* notes 104–07 and accompanying text.

¹⁰⁰ Deputy Attorney General James Comey has remarked that corporate criminal prosecutions should only be used in cases where the prosecutor is willing to “put down” the corporation. James Comey, U.S. Deputy Att'y Gen., Statement at Justice Dep't News Conference (Sept. 22, 2004) (LexisNexis Media Transcripts). In this vein, then-New York Attorney General Eliot Spitzer backed off prosecuting Marsh & McLennan when told that the company “was in an ‘Arthur Andersen situation.’” BROOKE A. MASTERS, SPOILING FOR A FIGHT: THE RISE OF ELIOT SPITZER 218 (2006).

¹⁰¹ Of course, this particular advantage of prosecution agreements may not be the only explanation for their increased use. Part of this increase can perhaps be attributed to the general reprioritization of corporate crime prevention following the accounting scandals of the early part of the decade. On July 9, 2002, President George W. Bush formed a Corporate Fraud Task Force, which focused the DOJ and U.S. Attorneys' Offices on the issue of corporate crime. See Exec. Order No. 13,271, 3 C.F.R. 245 (2002), reprinted as amended in 28 U.S.C. § 509 (Supp. IV 2004) (establishing Task Force). At the state level, attorneys general like Eliot Spitzer reinvigorated efforts to root out fraud. See generally MASTERS, *supra* note 100 (highlighting Eliot Spitzer's campaigns against white collar fraud). However, while the reallocation of resources aimed at detection and prosecution of corporate crime certainly explains the attention paid to corporate crime, it does not explain the increased use of one particular tool: prosecution agreements. See *infra* notes 118–19 and accompanying text (arguing that powers prosecution agreements offer to prosecutors incentivize their increased use).

desire to enter into a prosecution agreement. There is, however, a bargaining imbalance in these negotiations: Corporations are uniquely vulnerable to criminal sanction, which shifts power and leverage to the prosecutor. Part III.B addresses the implications of this bargaining imbalance, including the threat of abuse that results from one-sided negotiations. I focus in particular on two signs of abuse—lack of predictability in punishment and prosecutorial overreaching—as examples of problems that result when prosecutorial discretion is unchecked.

A. Inequality of Bargaining Position in the Negotiation of Prosecution Agreements

Prosecution agreements, like other settlements, offer benefits for all parties. Companies avoid criminal liability; prosecutors reform and punish while conserving resources. Beneath this apparent mutuality of benefits, however, lies a distinct power imbalance. Though both the corporation and the prosecutor have reason to prefer settlement to prosecution, their interests are not equivalent.¹⁰² A company does not just *want* to avoid prosecution—it may *need* to avoid prosecution in order to save itself.

Corporations are uniquely vulnerable to criminal prosecution for a variety of reasons. First, as explained previously, the law of corporate liability is remarkably broad in scope—once the government has established criminal conduct by an employee, the corporation is nearly strictly liable.¹⁰³ Corporations thus have great difficulty winning at trial, no matter what precautions they have taken.

Even in the small percentage of cases where a company might have a promising defense, publicly traded corporations are still tremendously vulnerable to criminal charges.¹⁰⁴ This is primarily due to corporate reliance on public perception—the necessity of preserving

¹⁰² Prosecutors may also want to avoid the collateral consequences of corporate prosecution—but not to the same extent as the shareholders and employees of a targeted company. Prosecutors must accept that their job may sometimes require the use of the ultimate penalty against a corporate offender, despite the collateral consequences. See Thompson Memo, *supra* note 20, § IX(B), at 12 (“[T]he mere existence of [collateral consequences] is not sufficient to preclude prosecution of the corporation.”).

¹⁰³ See White, *supra* note 23, at 817 (“[T]he sweep of corporate criminal liability could hardly be broader. . . . It is essentially absolute liability.”); *supra* Part II.A.

¹⁰⁴ See Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 426 (2007) (describing “devastating consequences” of criminal indictment of corporation); Richard A. Epstein, Op-Ed, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14 (stating that even companies that believe they have reasonable defenses at trial are “helpless to protect [themselves],” since indictment can be very damaging).

“the reputation of a corporation in the eyes of third parties.”¹⁰⁵ As a result, mere indictment can put a company in a tremendously vulnerable position: Stock prices plummet, lines of credit dry up, and clients are scared off.¹⁰⁶ Without the promise of a prosecution agreement, a company may not be able to “avoid[] the paralysis that can grip an indicted corporation unsure of the impending resolution of its legal problems.”¹⁰⁷ These harms—which can result from a mere charge, regardless of the result at trial—can destroy a business entity, as occurred with Arthur Andersen.¹⁰⁸

The effective result of this vulnerability to mere indictment, not just conviction, is that corporations cannot typically risk going to trial.¹⁰⁹ This is a tremendous weakness. Prosecutors enjoy wide discretion regarding whom they charge and what crimes they allege—decisions which are generally unreviewable.¹¹⁰ The trial by jury is the

¹⁰⁵ Greenblum, *supra* note 9, at 1887 & n.167. This concern is more pressing for corporations than for individuals. *Id.* at 1887, 1895 (“The adverse publicity and collateral consequences of a conviction are tantamount to a death penalty for corporations, but not for individuals.”).

¹⁰⁶ See *id.* at 1886 (“The adverse publicity that accompanies a prosecution can devastate a corporation, particularly one that relies heavily on its reputation in the marketplace, because of the effect on relationships with customers, creditors, and the public at large.” (citation omitted)); *Interview with David Pitofsky*, *supra* note 14, at 11 (“[U]pon the announcement of a criminal investigation, companies regularly lose half of their market value. If the price remains depressed long enough, the capital markets dry up, the ability to hire quality people dries up. The company’s oxygen supply is cut off.”).

¹⁰⁷ Greenblum, *supra* note 9, at 1887.

¹⁰⁸ The Supreme Court overturned the Arthur Andersen conviction on May 31, 2005. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698 (2005) (“We hold that the jury instructions failed to convey properly the elements of a ‘corrup[t] persua[sion]’ conviction under § 1512(b), and therefore reverse.” (alteration in original) (quoting 18 U.S.C. § 1512(b) (2000 & Supp. IV 2004))). The decision proved to be too little, too late, as the indictment itself had effectively driven Arthur Andersen out of business. *Finder & McConnell*, *supra* note 19, at 14–15 & n.66.

It is commonly assumed that the fate of Arthur Andersen—collapse following indictment—would be shared by many other companies were they to face similar indictment. See Greenblum, *supra* note 9, at 1888–89 (“[Arthur Andersen] suggests the potentially catastrophic result that may await at trial.”); Weissmann, *supra* note 104, at 426 (noting that indictment “risks the market imposing what is in effect a corporate death penalty”); Wray & Hur, *supra* note 23, at 1097 (noting that “indictment often amounts to a virtual death sentence for business entities”). This is believed to be true even though Andersen was a partnership and not a publicly traded corporation. *Id.* at 1097 (noting that Andersen case “sent a clear and unmistakable message to Corporate America in general”). As the number of non-deferred prosecutions of publicly traded companies following the collapse of Andersen has been minimal, there is very little empirical support for this claim. Regardless, an evaluation of this widespread assumption is beyond the scope of this Note.

¹⁰⁹ Weissmann, *supra* note 104, at 426 (“[C]orporations as a practical matter can rarely afford to take criminal cases to trial . . . ”).

¹¹⁰ See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.”); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has prob-

principal way we test prosecutorial discretion in our criminal justice system. It is the primary means for checking overly aggressive prosecutorial behavior.¹¹¹ Without the threat of trial, however, there is no assurance that the prosecutor is acting in a judicious manner.

B. The Specter of Abuse

The legal and reputational vulnerabilities detailed above make corporations uniquely weak negotiators in the criminal context. Since corporations cannot run the risk of going to trial, their choice to accept a deferred prosecution agreement is not really a choice at all.¹¹² Given this kind of leverage, prosecutors can negotiate overwhelmingly favorable prosecution agreements. The benefits that flow to a prosecutor as a result of this leverage are evident from the terms of the agreements: enormous financial penalties, significant internal busi-

able cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); United States v. Dotterweich, 320 U.S. 277, 285 (1943) ("[T]he good sense of prosecutors . . . must be trusted."); Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 183 (3d Cir. 2006) (noting that executive branch, through its prosecutors, "has exclusive authority and absolute discretion to decide whether to prosecute a case" (citing United States v. Nixon, 418 U.S. 683, 693 (1974))). *See generally* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (examining pervasive power of prosecutors in U.S. criminal justice system). The Supreme Court has identified two separate bases for why courts give prosecutors broad deference in matters of prosecution. First, because prosecution is an executive act aimed at fulfilling the President's constitutional obligation to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, cl. 4, judicial deference helps fulfill separation of powers principles. United States v. Armstrong, 517 U.S. 456, 464 (1996) ("[Prosecutors help the President] discharge his constitutional responsibility to take Care that the Laws be faithfully executed. As a result, [t]he presumption of regularity supports their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." (alteration in original) (internal quotation marks and citations omitted)). Second, courts' lack of competence in matters of prosecutorial discretion militate against intervention. *Id.* at 465 ("Judicial deference to the decisions of [prosecutors] rests in part on an assessment of the relative competence of prosecutors and courts.").

¹¹¹ The Supreme Court has noted the role that a jury trial plays in checking aggressive prosecutorial behavior: "The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (citing Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968)). Professor Lisa Kern Griffin notes that juries have provided a check against prosecutorial overreaching in a number of recent, high-profile white collar cases. Griffin, *supra* note 23, at 380 & n.357. Each of her examples, however, concerns a charge against an individual, not a corporate entity. As detailed in this Note, corporations cannot typically risk indictment or trial, and thus cannot test the merits of the prosecution's case by bringing their cases before a jury.

¹¹² See Greenblum, *supra* note 9, at 1885, 1895 ("The corporate offender's unique vulnerability to adverse publicity and collateral consequences . . . calls into question whether the choice to enter into deferral is really a choice at all.").

ness reforms, and cooperation in pursuing the corporation's individually culpable employees and directors.¹¹³ This last point—assistance in the pursuit of individuals—is of particular importance to resource-deficient prosecutors. White collar prosecutions are tremendously difficult to conduct. The trials often depend on complex financial records and complicated regulatory schemes¹¹⁴—material which may test the comprehension of a typical jury.¹¹⁵ The offenses typically take place in large organizations where decisionmaking is shared among boards of directors, executives, mid-level managers, and ground-level employees, making it difficult to identify who should be held responsible for the alleged criminal activity.¹¹⁶ Furthermore, government prosecutors often have to tangle with well-financed defendants capable of hiring sophisticated law firms that can match government resources.¹¹⁷ For all of these reasons, corporate cooperation through prosecution agreements—admitting liability, identifying perpetrators of the criminal conduct, and occasionally waiving privilege to internal documents and investigations—can be invaluable in prosecuting a case against the individuals.

In light of these benefits, one might ask why a prosecutor would *not* demand a prosecution agreement. After all, a prosecution agreement removes the threat of corporate collapse, saves resources, and offers a relatively one-sided negotiation where the prosecutor can ask for almost anything, including cooperation in prosecuting individual offenders.

It is precisely this accumulation of unchecked power that is disconcerting. Prosecutors have tremendous incentives to use prosecu-

¹¹³ See *supra* Part I.B.

¹¹⁴ Andrew Weissmann & Joshua A. Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286, 290 n.18 (2007), http://thepocketpart.org/2007/02/21/weissmann_block.html (“White-collar prosecutions are notoriously difficult to pursue successfully because they depend on complex financial records and often arcane regulatory schemes.”).

¹¹⁵ Professor Stuart Green notes that understanding the processes behind white collar crime often requires sophisticated knowledge of a variety of complex subjects, including, *inter alia*, finance, management, and accounting. Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 508 (2004).

¹¹⁶ *Id.* at 510.

¹¹⁷ See Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U. L.J. 485, 487–88 (1999) (“Criminologists have long lamented the resources white-collar criminals have at their disposal: adroit legal counsel, political connections, social legitimacy, alternative enforcement paths (civil and regulatory routes), and finances that allow them to out-spend prosecutors.” (citations omitted)); Weissman & Block, *supra* note 114, at 290 n.18 (“[W]hite collar defendants are often represented by skilled and well-financed attorneys.”).

tion agreements: The benefits are often too great to refuse.¹¹⁸ They offer a means for prosecutors to exploit the vulnerabilities of public corporations—in particular their dependence on reputation and public perception for healthy relationships with investors, creditors, and clients¹¹⁹—as a means to attack corporate crime. Corporations—wary of Arthur Andersen's fate, and cognizant of *New York Central's* unfavorable liability rule—have little choice but to agree to the prosecutor's demands.

One might argue that there is nothing wrong with this situation: The reputational concerns of corporations are being leveraged against them in the legitimate pursuit of ferreting out crime. To a certain extent, it is satisfying that the same motives that led to the recent wave of accounting fraud—the desire to craft a strong public image of financial health—are being leveraged against corporations in an effort to clean up criminal behavior. The concern, however, is not with the efforts to stop corporate crime, but rather with the bargaining and settlement dynamic itself. When the corporation is unwilling to risk trial and incapable of defending itself in any case, there is no assurance that the prosecutor is using her discretion wisely. It is in this exploitation of the corporation's unique vulnerabilities that one begins to see the first signs of abuse. The two most obvious indications of the abuse are the lack of predictability and prosecutorial overreaching in various agreements.

Lack of Predictability: The first sign of abuse is that there is little predictability in the terms of prosecution agreements. In the corporate criminal context, like conduct often does not receive like punishment. Conduct that would merit a declination from one prosecutor might lead to a prosecution agreement with another prosecutor. To take a recent example, a billion dollar misreporting scheme received a prosecutorial declination from one U.S. Attorney's Office, while a five-figure bribery attempt produced a tremendously punitive deferred prosecution agreement from a different U.S. Attorney's Office.¹²⁰ The difference between deferred prosecution agreements

¹¹⁸ See Richard S. Gruner, *Three Painful Lessons: Corporate Experience with Deferred Prosecution Agreements*, in CORPORATE COMPLIANCE INSTITUTE 2006, at 61, 65–67 (PLI Corp. Law & Practice, Course Handbook Series No. 891761, 2006) (noting that prosecution agreements make “the threat of corporate criminal liability more palatable than if a full fledged prosecution were the federal authorities’ only choice”).

¹¹⁹ Interview with David Pitofsky, *supra* note 14, at 11 (“[U]pon the announcement of a criminal investigation, companies regularly lose half of their market value. If the price remains depressed long enough, the capital markets dry up, the ability to hire quality people dries up. The company’s oxygen supply is cut off.”).

¹²⁰ Comparing the facts surrounding criminal investigations is something like comparing apples and oranges. However, there is still observable inconsistency. F. Joseph Warin and

and non-prosecution agreements has largely disappeared: The terms of non-prosecution agreements, which are thought to convey a lower degree of culpability than deferred prosecution agreements, actually can be as harsh as their deferred counterparts.¹²¹ Much of this, of course, is the result of the language in the Holder, Thompson, and McNulty Memos: They give broad discretion to prosecutors to determine whether or not to file criminal charges against a corporation, resulting in almost total leeway in crafting such agreements.¹²² A corporation under investigation might compare its behavior with that of past corporations, in a hope that analogous criminality will receive analogous treatment. The prosecutor, however, is not required to follow any kind of precedent and has virtually unlimited discretion in deciding what kind of action to take.

This lack of predictability has two implications. First, unpredictability prevents corporate planning. If a corporation has no clear sense of what employee crimes will be imputed to the entity or what punishment those crimes might produce, the corporation will have difficulty properly allocating its resources. Corporations will be unable to predict, *ex ante*, what compliance measures prosecutors will consider adequate *ex post*, which in turn “breed[s] over deterrence and risk aversion, both of which increase the company’s (and society’s) costs.”¹²³ Deferred and non-prosecution agreements further exacerbate this tendency toward overdeterrence: Onlooker corporations

Peter E. Jaffe offer the following comparison of two 2005 prosecutorial actions, the Monsanto Deferred Prosecution Agreement and the declination to prosecute Shell Oil:

So in Shell and Monsanto we have two blue-chip, highly regarded public companies: each discovered a violation of federal law; each immediately initiated an internal investigation and promptly self-reported to federal authorities who, in each instance, had theretofore been unaware of the conduct; each cooperated fully with the investigations of both the DOJ and the SEC; and each substantially remedied its respective compliance program. Yet one corporation walked away with the disconcerting prospect of conducting 36 months of business under the shadow of a deferred criminal information and a corporate monitor, while the other was let off with a good talking to. Oh, and did we mention that Shell, the one admonished to “go forth and sin no more,” admitted to a misreporting scheme that allegedly cost investors billions of dollars, while Monsanto, the one with the hammer-shaped cloud hanging over its head, admitted to a failed five-figure bribery attempt that, in the end, cost no one but itself?

F. Joseph Warin & Peter E. Jaffe, *The Deferred-Prosecution Jigsaw Puzzle: A Modest Proposal for Reform*, ANDREWS LITIG. REP.: WHITE COLLAR CRIME, Sept. 2005, at 1, 1 (footnote omitted).

¹²¹ See *supra* note 18 and accompanying text.

¹²² See *supra* notes 82–85 and accompanying text.

¹²³ Miriam H. Baer, *Insuring Corporate Crime*, 83 IND. L.J. (forthcoming 2008) (manuscript at 22), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1050&context=nyu/pltwp>.

notice the drastic penalties which accompany these agreements, giving the agreements a deterrent power that belies their relatively small number.¹²⁴ Corporations may respond to these vague deterrents by erring on the side of caution, which could result in the overdeterrence of aggressive but legitimate business practices.¹²⁵

Second, unpredictability violates basic notions of fairness. When similar offenses give rise to widely disparate punishments, a defendant has good reason to feel that the system is unjust. Our legal system has faced this issue before: In 1984, Congress reformed the Federal Sentencing Guidelines to address the disparities in punishment that resulted from the wide sentencing discretion enjoyed by federal judges.¹²⁶ With the development of prosecution agreements, however, the power to punish corporations has shifted from judges to prosecutors. These prosecutors, like federal judges prior to 1984, have no guidelines to cabin their discretion.

Prosecutorial Overreaching: The second indication of abuse comes from the quixotic nature of some terms in the agreements. Some of the more bizarre conditions have already been addressed—the requirement to create sixteen hundred jobs in the WorldCom Agreement,¹²⁷ or the provision to endow a chair in legal ethics in the Bristol-Meyers Squibb Agreement.¹²⁸ These examples are, admittedly, still quite unusual. The infrequency of these unusual terms is likely due to the restraint of the prosecutors that author the agreements: The majority of these agreements have been negotiated by the DOJ and U.S. Attorneys' Offices, organizations generally known for their integrity and restraint. Of the two aforementioned bizarre conditions, only one of the two—the endowed chair of ethics—was authored by a federal prosecutor, and that term was allegedly proposed by the defense counsel, not the government.¹²⁹

Integrity, however, can only go so far: The massive, unfettered power that prosecution agreements offer to prosecutors ushers in the possibility of these kinds of bizarre conditions. While such conditions

¹²⁴ *Id.* at 1.

¹²⁵ See *id.* (arguing that corporations will overpay to avoid collateral consequences of criminal indictment).

¹²⁶ See Adam Lamparello, *Implementing the "Heartland Departure" in a Post-Booker World*, 32 AM. J. CRIM. L. 133, 152–54 (2005) (noting that concerns with sentencing disparities motivated creation of guidelines).

¹²⁷ See *supra* note 44 and accompanying text.

¹²⁸ See *supra* note 45 and accompanying text.

¹²⁹ The WorldCom Agreement, which featured the job-creation provision, was negotiated by the Attorney General of Oklahoma, not the DOJ. Finder & McConnell, *supra* note 19, at 36. The Bristol-Meyers Squibb Agreement was negotiated by the U.S. Attorney's Office in New Jersey. See *supra* note 45.

are fairly innocuous at present, they could become more offensive in the future. Further, it is disturbing to see these conditions coming from government prosecutors, individuals who are trained in prosecution, not corporate regulation.¹³⁰ Mary Jo White, the former U.S. Attorney for the Southern District of New York, has claimed that prosecutors are transforming into “super regulators”—capable of being proactive in any direction they please.¹³¹ If a prosecutor can require the creation of jobs in the local community, or the endowment of a chair at a favored law school, what limits exist—especially when a corporation under threat of indictment will do almost anything to satisfy the government?¹³² As one commentator has said, prosecutors are “starting to possess something close to absolute power.”¹³³ A solution that limits this discretion is sorely needed.

IV WHAT CAN BE DONE?

This Part reviews potential solutions to the threat of prosecutorial abuse. Part IV.A lays out two solutions suggested in the scholarship that address the imbalance in bargaining leverage between corporations and prosecutors and examines their weaknesses. Part IV.B proposes an alternate solution. Rather than seeking to alter the underlying law or the enforceability of the agreements, this solution restrains prosecutorial discretion by centralizing the review of prosecution agreements in the office of the Deputy Attorney General. Such a framework, similar to that employed by the McNulty Memo with regard to waivers of attorney-client privilege, would impose uniformity and consistency on the choices of individual prosecutors, addressing the problem of abuse noted in Part III. Centralized oversight would address the concerns identified in Part III by ensuring consistency and restraining overreaching by individual prosecutors.

A. Proposed Fixes

Armed with an easy-to-satisfy legal standard and near limitless discretion, the prosecutor who desires to impose corporate criminal

¹³⁰ Professor Coffee argues that acts of regulation are beyond the “competence or entitlement” of prosecutors. *See supra* note 38.

¹³¹ White, *supra* note 23, at 818.

¹³² A company’s objective, as described in the KPMG case, was “to be able to say at the right time with the right audience, we’re in full compliance with the Thompson Guidelines.” United States v. Stein, 435 F. Supp. 2d 330, 348 (S.D.N.Y. 2006) (internal quotation marks omitted).

¹³³ Coffee, *supra* note 38, at 13 (“[T]he deeper problem lies in the danger that power corrupts and that prosecutors are starting to possess something close to absolute power.”).

liability is not significantly restrained by the law. Prosecutors do not need to push the envelope in order to threaten liability against corporate entities: The stigma of criminal liability is so powerful, yet remarkably easy to apply.

Commentators have proposed two solutions to address the bargaining imbalance between corporations and prosecutors. The first proposed solution—perhaps both the cleanest and the least likely to occur—is simply to change the law of vicarious corporate liability. The foundation of prosecution agreements is the near absolute liability standard of *New York Central* coupled with the corporation's inability to go to trial. Scholars and practitioners have long criticized the scope of corporate criminal liability.¹³⁴ Some have argued that *New York Central* was a wrong turn from which the law never recovered.¹³⁵ Andrew Weissman, ex-director of the Enron Task Force, has argued that before charging a corporation with a crime, the government should have to bear the burden of establishing that the corporation failed to have reasonably effective policies and procedures to prevent the conduct, a standard which would mirror Supreme Court developments in corporate civil liability.¹³⁶ Weissman argues that adding this new element to the black letter law of liability would effectively separate the blameworthy corporations from the non-blameless corporations by preventing prosecutors from threatening corporate charges against companies with satisfactory compliance programs.¹³⁷

There is merit to this suggestion. At the base of all prosecution agreements is the remarkable power granted by the *New York Central* standard—a long term solution, therefore, may need to address the standard itself. Such a proposal, however, would represent a radical shift in nearly one hundred years of jurisprudence. This is not to say that such a change would be impossible—the McNulty Memo, after all, was the result of a massive outcry over what was perceived as prosecutorial abuse stemming from the Thompson Memo.¹³⁸ If the use of prosecution agreements continues at the current breathtaking pace, the courts and Congress might feel the need to step in. Congress has already shown itself willing to intervene in issues related to

¹³⁴ See, e.g., White, *supra* note 23, at 817 (stating “the sweep of corporate criminal liability could hardly be broader”).

¹³⁵ See Buell, *supra* note 67, at 474, 478 (noting that enterprise liability had “a weak start nearly a century ago when common law courts . . . imported respondeat superior liability from tort law into the criminal law” and that this decision was “a wrong turn for the criminal law”).

¹³⁶ Weissman, *supra* note 104, at 412–13.

¹³⁷ *Id.* at 414–15.

¹³⁸ See *supra* notes 4–6 and accompanying text.

prosecutorial discretion in corporate charging decisions.¹³⁹ Perhaps that desire can evolve into a willingness to reassess the basic black letter law.

A second proposed solution is to require judicial review of prosecution agreements. Most corporations agree to terms whereby the prosecutor retains the right to determine whether breach has occurred.¹⁴⁰ If the corporation breaches, the agreement is revoked and the corporation will be subject to prosecution. However, corporations are probably unwilling to demand such judicial review themselves. The corporation has signed the agreement because it wants to avoid prosecution and trial, and the agreement, even if harsh, satisfies this core concern. With the power to determine whether the agreement has been breached, the prosecutor can effectively play judge and jury over the corporation's criminal conduct.¹⁴¹ While there are some instances where prosecution agreements permit judicial review of determinations of breach, these agreements are the exception rather than the rule.¹⁴²

In light of this prosecutorial power, some commentators have pondered methods for imposing judicial review over the issue of breach, regardless of the terms of the contract.¹⁴³ Judicial review of breach would no doubt offer some measure of security to the corporations that sign prosecution agreements. The threat of unilateral revocation has exacerbated the leverage exercised by prosecutors—companies such as KPMG have been pressured to cooperate throughout the deferral period, knowing that the government would be the sole arbiter of whether the terms of the agreement had been met.¹⁴⁴

¹³⁹ Browning, *supra* note 5 (“[T]he departing chairman of the Senate Judiciary Committee proposed legislation yesterday calling for a rollback of the tactics adopted by federal prosecutors to combat corporate wrongdoing after the Enron collapse.”).

¹⁴⁰ See, e.g., OMI DPA, *supra* note 25, para. 15. Since prosecution agreements are private contractual agreements, it is not clear that judicial review could start any earlier than the occurrence of breach. See Greenblum, *supra* note 9, at 1898–99 (noting difficulties of judicial involvement in negotiation phase).

¹⁴¹ See Greenblum, *supra* note 9, at 1864 (“Deferral is a powerful prosecutorial tool because it is negotiated and implemented exclusively by the prosecutor.”).

¹⁴² See Warin & Jaffe, *supra* note 120, at 4 & n.25 (“[I]n those cases where the District Court does not agree with the DOJ’s breach assessment, a policy of pre-indictment judicial intervention would save everyone’s time and resources.”).

¹⁴³ Benjamin Greenblum, for example, argues that judges should be permitted to intervene during the implementation of the deferral terms, which would bring judicial involvement into the definition of breach. This intervention, argues Greenblum, would place an outer boundary on the “sole discretion” exercised by prosecutors and thus ensure that the deferral mechanism is not abused. Greenblum, *supra* note 9, at 1899–1903.

¹⁴⁴ See United States v. Stein, 435 F. Supp. 2d 330, 350 (S.D.N.Y. 2006) (noting that if KPMG did not comply with demands for cooperation, “it will be open to the risk that the

It is worth noting, however, that neither the DOJ nor any U.S. Attorney's Office has ever revoked a prosecution agreement. While judicial review over breach of the agreement would be a positive step for corporations, it would not change the underlying issue of bargaining leverage or prosecutorial discretion. Prosecutors would still be free to demand almost anything they desire. Moreover, if breach were to be determined by a judge rather than a prosecutor, one might expect prosecutors to ask for more detailed agreements. Certain terms, such as "cooperation," are currently kept vague—in no small part because the prosecutor knows he or she reserves the right to interpret the meaning of "cooperation" and thus determine breach. If that were not the case, prosecutors would likely respond by crafting agreements which would more explicitly detail their demands.

The two solutions presented offer limited assistance to a corporation facing an aggressive prosecutor. The reformation of black letter law would indeed redistribute the negotiating leverage, but this shift in jurisprudence is unlikely to occur. Imposing judicial review of breach has the opposite problem—it may indeed become a feasible option, but it still does not substantially alter the relationship between prosecutor and defendant. A more effective solution will have to mitigate the bargaining imbalance by limiting the scope of prosecutorial discretion.

B. Expanding the McNulty Solution

The concerns over the Thompson Memo's treatment of cooperation, particularly with regard to attorneys' fees and privilege waiver, found a remedy in the political sphere. The DOJ responded to pressure—some political, some legal—and issued the McNulty Memo.¹⁴⁵ The legal community decided that these bargaining imbalances were unacceptable, and addressed it as a matter of policy.

government will declare that KPMG breached [the deferred prosecution agreement] and prosecute the criminal information to verdict"). In the KPMG prosecution agreement, the government retained the "sole discretion" to determine whether the company had violated any of the provisions, including the requirement of cooperation. KPMG DPA, *supra* note 18, para. 12.

¹⁴⁵ This sort of solution was appropriate. The determination of prosecutorial priorities and the allocation of prosecutorial resources are best determined by individuals accountable to the public because issues of prosecution are typically questions of politics. Ross E. Wiener, *Inter-branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 427 (2001) (noting that prosecutor's appointment is "intrinsically a political decision" and that "[s]electing a U.S. Attorney requires making political judgments about what a district's prosecutorial priorities should be and who is best suited to realize those goals"). Courts lack the tools to guide prosecutors' discretion when they are operating within the boundaries of the law. Prosecutorial discretion is virtually unfettered. See *supra* note 110 and accompanying text.

The McNulty Memo solution may offer a blueprint for addressing concerns relating to the accumulation of prosecutorial power highlighted in this Note. The McNulty solution requires consultation with senior attorneys in the DOJ before waiver requests can be made. If a prosecutor wants access to communications between attorney and client, the local United States Attorney must get approval from the Deputy Attorney General.¹⁴⁶ Without explicit permission there can be no request for waiver.

Some critics of the McNulty Memo have argued that these modifications represent only a “modest improvement.”¹⁴⁷ On the contrary, I believe that these changes will prove to be significant. On several prior occasions, the DOJ has sought to constrain prosecutorial discretion by requiring the approval of the Deputy Attorney General, and this procedural hurdle has been largely effective. Procedures under the Foreign Intelligence Surveillance Act (FISA)¹⁴⁸ are an example: FISA warrants, like waiver requests under the McNulty Memo, can only be issued after approval from either the Attorney General, the Deputy Attorney General, or the Assistant Attorney General for National Security.¹⁴⁹ While FISA court proceedings have been criticized as rubber-stamp affairs,¹⁵⁰ various post-9/11 inquiries revealed DOJ’s internal vetting policies as “much more demanding than outsiders had imagined.”¹⁵¹ Centralized review has had a similar effect in regard to the Economic Espionage Act, a statute that criminalizes theft of trade secrets and other forms of proprietary information.¹⁵² The Act restrains prosecutorial discretion by mandating centralized

¹⁴⁶ McNulty Memo, *supra* note 6, § VII, at 2; McNulty Speech, *supra* note 1.

¹⁴⁷ See Martha Neil, *Thompson Memo Changes Not Enough, ABA Says*, A.B.A. J. EREPORT, Dec. 15, 2006, <http://www.abanet.org/journal/ereport/d15specter.html> (quoting ABA President Karen J. Mathis calling McNulty Memo “modest improvement” and stating that changes do not go far enough).

¹⁴⁸ Originally enacted as the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1863).

¹⁴⁹ Matthew R. Hall, *Constitutional Regulation of National Security Investigation: Minimizing the Use of Unrelated Evidence*, 41 WAKE FOREST L. REV. 61, 84 (2006) (citing 50 U.S.C. § 1801(g) (2000) (amended 2006)); see also 50 U.S.C.A. § 1801(g) (West Supp. 2007) (adding Assistant Attorney General for National Security to list of those who may approve FISA applications).

¹⁵⁰ Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059, 1097 (2006) (“[A] legitimate question could be raised as to whether the court merely serves as a rubber stamp function.”); Stephen J. Schulhofer, *The New World of Foreign Intelligence Surveillance*, 17 STAN. L. & POL’Y REV. 531, 535 (2006) (“[C]ivil liberties groups understandably viewed the FISA Court as little more than a rubber stamp.”).

¹⁵¹ Schulhofer, *supra* note 150, at 535.

¹⁵² See generally James M. Fischer, Note, *An Analysis of the Economic Espionage Act of 1996*, 25 SETON HALL LEGIS. J. 239 (2001).

DOJ approval, which, according to commentators, has resulted in a lower incidence of prosecution.¹⁵³

These results should not be surprising, for two key reasons. First, the Deputy Attorney General is a single individual with limited resources and time. Naturally, any approval process that requires the imprimatur of a single individual will be more restrictive than one that allows decentralized discretion. Second, and perhaps more importantly, the Deputy Attorney General is charged with “providing overall supervision and direction to all the organizational units of the [DOJ].”¹⁵⁴ Funneling decisionmaking through a figure with such responsibility will be of particular import where, as with prosecution agreements, the unfettered discretion of individual prosecutors is part of the problem.

Constraining prosecutorial discretion will begin to rectify the bargaining imbalance that exists in crafting the terms of prosecution agreements. While the principal reason prosecution agreements can be abused is the expansive nature of vicarious liability law and corporate vulnerability to bad publicity—two factors that likely will not change—the potential for abuse is exacerbated by prosecutors’ near limitless discretion. An approval process akin to that required in the McNulty Memo could address both of the concerns identified above.

Lack of Predictability: As discussed in Part III.B, there is little standardization in the penalties negotiated in prosecution agreements,¹⁵⁵ which can result in unfairness and overdeterrence of legitimate employee behavior. The Deputy Attorney General’s approval of penalties could help remedy these problems. That office could provide centralized review, use past agreements as rough precedent, and ensure that penalties are proportionate to the misconduct.

¹⁵³ See Peter E. Calamari, *Protection of Confidential Business Information*, in CORPORATE RAIDING 2001, at 35, 76 (PLI Corp. Law & Practice, Course Handbook Series No. B0-00VS, 2001) (“[P]rosecutions are likely to be few and far between in the short term. The Attorney General has stated that, until October 2001, any prosecution under the Espionage Act will require the personal approval of the Attorney General, the Deputy Attorney General, or the Assistant Attorney General for the Criminal Division.”); D. Peter Harvey, *IP Maintenance: Protecting Intellectual Property Assets Through Registration, Proper Use and Contractual Provisions*, in PROTECTING YOUR INTELLECTUAL PROPERTY ASSETS 2002, at 33, 77 (PLI Patents, Copyrights, Trademarks, & Literary Property, Course Handbook Series No. G0-0120, 2002) (“Because the Justice Department has required the personal approval of the Attorney General, the Deputy Attorney General or the Assistant Attorney General for the Criminal Division before filing a charge under the [Economic Espionage Act of 1996], only a relatively modest number of prosecutions under the Act have taken place.”).

¹⁵⁴ Office of the Deputy Attorney General, United States Department of Justice, <http://www.usdoj.gov/dag/index.html> (last visited June 16, 2007).

¹⁵⁵ See *supra* notes 18, 120.

Prosecutorial Overreaching: One also sees the potential for abuse in the seemingly inappropriate terms that have appeared in some of the more recent prosecution agreements.¹⁵⁶ These sorts of terms push the boundaries of what should be included in criminal punishment, but remain available due to individual prosecutors' virtually unfettered discretion. Deputy Attorney General approval could also help remedy this problem. Centralized review of agreement terms could ensure that bizarre and inappropriate conditions,¹⁵⁷ especially those pandering to local interests, would be detected and removed.

To some extent, consultation of this sort with central DOJ probably does happen.¹⁵⁸ It is not, however, official policy, and the hap-hazard nature of these agreements testifies to the lack of any centralizing standard. Central DOJ can and should provide such a standard. This approval process will no doubt cause some administrative headaches, but the costs will be a small price to pay to ensure consistency and fairness in corporate prosecutions.

Of course, even with such an approval system, corporations will still be vulnerable due to their legal and social relationship to the criminal justice system. Such reform would, however, at least allow corporations to expect a more uniform approach to punishment. Furthermore, if such a vetting system failed to direct prosecutorial discretion in a principled manner, Congress or the courts would have a clearer mandate to step in and contemplate changes to the black letter law.

CONCLUSION

The black letter law of entity liability is remarkably broad, though it has traditionally been limited by prosecutors' discretion. The use of prosecution agreements, however, has enabled prosecutors to overcome many of the traditional concerns with corporate liability, thus permitting a more aggressive application of criminal law against corporations. While the prosecution of corporate criminality is a positive development, the unique weaknesses of corporations in the criminal justice system has vested a dangerous amount of power in the hands of individual prosecutors. The DOJ has recognized this and has

¹⁵⁶ See *supra* notes 127–31 and accompanying text.

¹⁵⁷ See *supra* notes 127–33 and accompanying text.

¹⁵⁸ The former U.S. Attorney for the Southern District of New York, David Kelley, would have prosecuted KPMG criminally if not for the intervention of Deputy Attorney General James Comey, who insisted on a deferred prosecution agreement. Corporate Crime Reporter, *Crime Without Conviction: The Rise of Deferred and Non-Prosecution Agreements*, <http://www.corporatecrimereporter.com/deferredreport.htm> (last visited August 16, 2007).

attempted to constrain some aspects of prosecutorial discretion with the McNulty Memo. This is a worthwhile development, but more needs to be done. The consultation framework established in the McNulty Memo should be expanded to include decisions relating to prosecution agreements. Such a change will not erase the bargaining inequities between corporations and prosecutors, but it will ensure that the use of prosecutorial discretion is exercised in a more consistent and fair manner. The current relationship between corporate prosecutors and their target companies is ripe for abuse—the DOJ needs to expand its supervision efforts to ensure that corporate criminal sanctions are used in a principled and consistent manner.