

STRUCTURAL REFORM PROSECUTION

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November 9, 2006

Forthcoming Virginia Law Review, June 2007

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* Associate Professor, University of Virginia School of Law. I gratefully acknowledge invaluable comments from Kerry Abrams, Richard Bierschbach, Samuel Buell, Chris Elmendorf, Theodore Garrett, Rachel Harmon, James Jacobs, Greg Klass, Jody Kraus, Erin Murphy, Richard Myers, Jed Purdy, George Rutherglen, David Sklansky, Dan Solove, Susan Sturm, David Zaring, and Robert Hur; participants at the 2006 Junior Criminal Law Conference and the Washington & Lee Works in Progress Conference; and research assistance from Michelle Morris, Richard Rothblatt and Erin Montgomery.

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ABSTRACT

In what I call a structural reform prosecution, prosecutors secure the cooperation of an organization in adopting internal reforms. No scholars have considered the problem of prosecutors seeking structural reform remedies, perhaps because until recently organizational prosecutions were themselves infrequent. In the past few years, however, federal prosecutors adopted a bold new prosecutorial strategy under which dozens of leading corporations entered into demanding settlements, including AIG, American Online, Bristol-Myers Squibb Co., Computer Associates, HealthSouth, KPMG, MCI, Merrill Lynch & Co, Monsanto, and Time Warner. Unlike in civil rights cases that long accomplished court-supervised institutional reform, prosecutors designed these settlements to avoid judicial review of their terms and implementation. To better understand what the DOJ accomplished, I conducted an empirical study of the terms in all agreements the DOJ has negotiated to date. My study reveals consistent imposition of deep governance reforms, but also some unrelated terms indicating potential abuses of power. To situate the DOJ's latest strategy, I then frame five possible models under which prosecutors can pursue structural reforms. Although prosecutors have now chosen the model that departs most radically from prior federal organizational criminal law, I conclude that over time, as with past structural reform efforts, judicial limits can constrain prosecutorial discretion and result in a more effective regime for deterring organizational crime.

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INTRODUCTION

Prosecutors who pursued entire organizations traditionally sought criminal convictions, but only rarely. Broad federal statutes and respondeat superior standards allowed prosecutors to charge an entity with a crime for the act of a single agent.¹ Organizations feared the catastrophic punitive fines and severe reputational consequences of a conviction – what one court described as a “matter of life and death.”² Despite their substantial power, federal prosecutors seldom exercised it, fearing the collateral consequences to an organization and also the harm to employees, stockholders and the public. In the past few years, however, prosecutions of organizations have accelerated. Using a new paradigm, one that I call “structural reform prosecution,” the Department of Justice (DOJ) now uses prosecutions to secure an entity’s adoption of sweeping internal reforms. Without obtaining an indictment much less a conviction, the DOJ prevailed on leading corporations to enter into demanding settlements, including AIG, American Online, Boeing, Bristol-Myers Squibb Co., Computer Associates, HealthSouth, KPMG, MCI, Merrill Lynch & Co, Monsanto, Time Warner, and also several public entities.³

Critics of this strategy, such as Ralph Nader, call failures to convict organizations a “shocking” and “systematic derogation” of the DOJ’s duty to seek justice.⁴ From a different perspective, white collar defense practitioners complain in the press that federal prosecutors “exploit their virtually unchecked power to extract and coerce ever greater concessions.”⁵ The Senate Judiciary Committee questioned tactics used by the DOJ.⁶ All sides agree that for good or ill, federal prosecutors exercise vast discretion; Prof. John C. Coffee, Jr. commented that they have “something close to absolute power” when negotiating settlements with organizations.⁷

¹See *infra* Part I.C.2.

²See *United States v. Stein*, 2006 WL 1735260 *33 (S.D.N.Y.).

³See Appendix A, Chart of DPA, NPA Agreements, 2003 to present.

⁴See Ralph Nader, Robert Weissman, Letter to Attorney General Alberto Gonzales, June 5, 2006, at <http://www.multinationalmonitor.org/editorsblog/index.php?/archives/26-The-Boeing-DOJ-Debaacle.htm#extended>.

⁵See N. Richard Janis, Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed, *WASH LAW.*, March 2005, at http://www.dcbarr.org/for_lawyers/washington_lawyer/march_2005/stand.cfm.

⁶See Lynnley Browning, Justice Department is Reviewing Corporate Prosecution Guidelines, *N.Y. Times*, Sept. 13, 2006.

⁷See John C. Coffee Jr., Deferred Prosecution: Has it gone too far?, *NAT’L L.J.*, July 25, 2005, at 13.

The DOJ explains that its new settlement approach avoids collateral consequences of an indictment, while using the prosecution as a “spur for institutional reform.”⁸ By entering into agreements with organizations, prosecutors have imposed rigorous requirements to promote compliance. For example, in 2005, KPMG International agreed to shut down its entire private tax practice, to cooperate fully in the investigation of former employees, and to retain an independent monitor, a former SEC chairman, for three years, in order to implement an elaborate compliance program.⁹ Agreements are now common as prosecutors bring more organizational prosecutions than before in response to post-Enron corporate fraud scandals.¹⁰ The agreements form a part of the larger fabric of federal response to a perceived breakdown in corporate culture that also includes passage of the Sarbanes-Oxley Act and enhanced regulatory enforcement targeting corporate fraud.¹¹ Unlike those legislative and administrative responses, structural reform prosecutions raise especially difficult questions about the reach of federal executive branch power.

Some prosecutorial overreaching is already apparent in agreements that exact terms totally unrelated to the alleged criminality. For example, in 2003 the New York Racing Association (NYRA), a state franchised operation, agreed to install “video lottery terminals,” or slot machines, at its race tracks. Federal prosecutors imposed this term only because state officials hoped to use the revenue from the slot machines to comply with a court ruling requiring adequate public school funding, and thus used the agreement to make available a funding stream.¹² Similarly, in 2004 MCI (the entity that replaced WorldCom) entered into an agreement with state prosecutors in Oklahoma to settle accounting fraud charges in 2004. State officials feared that if indicted MCI might face bankruptcy, leading to jobs losses and harm to state pension plans with MCI stock. The agreement required MCI to create 1,600 jobs over 10 years in Oklahoma. MCI was later fined when it did not create those jobs as promised.¹³ Nor do prosecutors quickly relinquish their power. Prosecutors retain the authority to prosecute based on their own unilateral decision that an organization breached the agreement.¹⁴ The agreements do not provide for judicial review of implementation or of any alleged breach.

⁸See John Gibeaut, *Junior G-Men*, 89 A.B.A. J., June 2003, at 46, 48 (quoting Michael Chertoff). See *infra* note xxx.

⁹See *infra* Part I.A.

¹⁰See *infra* note xxx.

¹¹See, e.g. John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 303 (2004) [hereinafter “Coffee, Gatekeeper Reform”] (describing “pervasiveness of the sudden surge in financial irregularities in the late 1990s” and regulatory responses); “The Public Company Accounting Reform and Investor Protection Act of 2002.” 107 Pub. L. No. 204, 116 Stat. 745 (2002) (codified at 15 U.S.C. § 7201); see *supra* note xxx.

¹²See *infra* note xxx.

¹³See Barbara Hoberock, *MCI Coughs Up \$280,000 Payment to State*, TULSA WORLD, Mar. 31, 2005.

¹⁴See *infra* Part II.A.3.

One can also imagine cases of prosecutorial under-reaching. Prosecutors could settle with an organization but then tolerate mere “window dressing” compliance. Cases of lenient treatment or collusion may prove very difficult to even detect, since no court supervises the compliance process, which remains non-public.

The recent wave of structural reform prosecutions is not the first time that the litigation process has been used to effect organizational change. Beginning in the 1960’s and 1970’s, private attorneys general increasingly sought structural reform of public entities by bringing lawsuits against government entities that challenged school segregation, prison abuse, and housing discrimination. These lawsuits were “structural reform” cases because they sought more than just negative cease and desist orders, instead obtaining ongoing judicial oversight of government institutions. After the heyday of such lawsuits decades ago, courts restricted the scope of prospective remedies for reasons of equitable restraint, federalism, comity, and counter-majoritarian legitimacy.¹⁵

The current structural reform prosecutions know no such bounds. Not only does the DOJ seek to reshape Fortune 500 companies, but to achieve “deterrence on a massive scale” of entire industries.¹⁶ In these cases, prosecutors are asserting far more expansive prospective authority over organizations, at the charging stage, and – so far – without formal or judicial limits. After all, federal prosecutors, unlike civil rights plaintiffs, operate as politically accountable public actors to whom courts remain highly deferential. Nevertheless, courts will soon be called on to adjudicate disputes over the scope and limits of such efforts. We should be examining these prosecutions carefully, because of the lack of safeguards and their national importance, and because structural reform is a radically different aim for federal criminal law. Yet legal scholars have not critically examined this bold new prosecutorial mission.¹⁷ Nor have

¹⁵See *infra* Part I.A.

¹⁶See *Memorandum from Dep. Att. General Larry Thompson, Principles of Federal Prosecution of Business Organizations*, II(A)(5) (Jan. 20, 2003), at http://www.usdoj.gov/dag/business_organizations.pdf (hereinafter “Thompson Memo”).

¹⁷Little scholarship has to date critically examined the DOJ’s recent deferral strategy and none treats the problem as one of structural reform of organizational criminality. See Benjamin M. Greenblum, *Note, What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863 (2005) (proposing that courts act as fiduciaries for third parties affected by deferral agreements); Lawrence D. Finder and Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 St. Louis Univ. L. J. (forthcoming 2006) (suggesting that corporations try to negotiate more lenient terms and noting variation among U.S. Attorney’s Offices between the agreements). The only additional commentary on recent structural efforts by DOJ was written by current or former DOJ prosecutors, and usefully explains DOJ policy and practice. 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-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043 (2006); 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.

any scholars explored the problem of structural reform of organizations through criminal prosecutions, perhaps due to the traditional view that structural reform occurred only in civil rights cases.¹⁸ Civil structural reform litigation engendered an important literature regarding legitimacy and efficacy of such interventions.¹⁹ Similar questions should be asked again by courts, scholars, and practitioners, about structural reform in criminal cases.

This Article proceeds in three Parts. The first Part introduces the structural reform prosecution by describing the KPMG case, and contrasting the classic civil structural reform model and its judicial limits with vast discretion of prosecutors. I classify four stages of prosecutorial discretion: prevention, charging, plea bargaining, and sentencing, and explain why that discretion is so broad in organizational cases.

In Part II.A, I describe the current approach in which prosecutors obtain structural reform settlements early, at the charging stage, through deferral or non-prosecution agreements. I provide an empirical study of the terms in agreements the DOJ has negotiated to date (summarized in two charts in the Appendix), to assess how prosecutors have exercised their discretion in practice.²⁰ This empirical analysis shows that the DOJ since adopting its new policy in 2001, true to its stated mission consistently pursued compliance by negotiating agreements to appoint independent monitors and require creation of compliance programs. Nevertheless, the DOJ includes overreaching terms in several agreements and I note indications of under-reaching as well.

Prosecutors act as institutional reformers in a variety of contexts, some longstanding and non-controversial. I show that prosecutors have available not just one but a range of structural reform models operating at the four stages of a criminal case, each with greater judicial review, and as a fifth option they can seek parallel civil relief. In Parts II.B-E, I develop these alternative models. Under the second model, a mild preventative approach, the DOJ may encourage compliance and voluntary disclosure to deter lawbreaking before it occurs. If an organization does break the law, prosecutors may pursue structural reform with more judicial review than in the recent deferral agreements. Third, prosecutors may secure compliance agreements during plea bargaining. Fourth, a sentencing court

1095 (2006). Several pieces criticize recent deferred prosecution agreements but only regarding the specific subject of privilege waiver, an issue tangential to this project, but discussed *infra* note xxx. See, e.g. George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 993 (Summer 2005).

¹⁸My hope is that this piece will begin to link criminal law structural reform scholarship to scholarship on civil structural remedies. James Jacobs, in his landmark book on civil RICO labor racketeering prosecutions, is one of the few to recognize a need for scholarship connecting the history of structural reform litigation in civil rights cases and in federal organized crime prosecutions. See James B. Jacobs, *et al.*, *MOBSTERS, UNIONS, AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT* 246 (2006).

¹⁹See *infra* Part I.B.

²⁰See Appendix A and Appendix B.

may place an organization on probation and supervise implementation of a compliance program. Fifth, prosecutors may seek parallel civil remedies, such as in consent decrees obtained in RICO prosecutions.

In Part III, I design a framework for judicial review under the U.S. Organizational Sentencing Guidelines and drawing from civil structural reform doctrine. While the DOJ's current deferred prosecution approach raises more concerns about executive power than any previous structural reform model, it remains more complex than it first appears. The agreements' form tracks requirements of the Guidelines, which already mitigates sentences for organizations with "effective" compliance programs. Further, despite the DOJ's efforts to avoid judicial review, courts will be inevitably called on to adjudicate disputes that arise. Structural reform prosecutions may then shed light on an intractable debate in criminal law. Scholars have long decried largely unconstrained prosecutorial discretion,²¹ particularly in organizational cases.²² Given a regime in which organizations remain subject to criminal sanctions, I argue that at least in some circumstances, prosecutors should be permitted to seek organizational reform, due to the dire collateral consequences of not settling. Focusing on the role of judicial review to constrain prosecutorial discretion, I propose that courts review agreements prior to initial approval, by using their thus far unexercised statutory power at that stage. Similarly, at the implementation and termination stages, I suggest that courts conduct review based on the template the Guidelines provide and by drawing limiting principles from civil caselaw. Over time, structural reform prosecutions may then lead courts to develop remedial rules that though certain to remain highly deferential to prosecutors' discretion, can nevertheless define important constraints at the outer limits. I conclude that judicial review can strengthen DOJ efforts to rehabilitate organizations and make structural interventions a more predictable and effective crime deterrent.

²¹Literatures treating each of these problems are discussed further *infra* notes xxx, xxx and at Part III.C. I note here several classic works. Regarding the problem of prosecutorial discretion, particularly in organizational cases, *see, e.g.* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23 (1997); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 790-91 (2006); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 U.C.L.A. L. REV. 757 (1999).

²²Regarding the problem of overbroad and vague federal criminal law, *see infra* Part III.B.; *see e.g.* Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 908-25 (2005); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 244-45 (1985); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 353. Regarding the unique problem of organizational punishment, *see* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD 833 (1994); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984); Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1983); 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, 394 (1981).

I. STRUCTURAL REFORM AND PROSECUTORIAL DISCRETION

Prosecutors long have sought to combat organizational crime in various forms, but in a paradigm shift, they increasingly attempt to reform institutions themselves, rather than impose punitive fines, restitution and imprison individual offenders. I first present the story of the KPMG deferred prosecution to illustrate the scope of these structural reform efforts. In the second section in this Part, I tie these efforts to the classic civil model for structural reform litigation. Prosecutors now employ some of the same tools developed by private attorneys general. Yet the structural reform agenda of prosecutors is shaped by different institutional incentives, including the substance of federal criminal law and the power and discretion of prosecutors in our criminal system. In the third section, I discuss the scope of federal prosecutorial discretion in organizational cases by separating it into four stages, prevention, charging, plea bargaining, and sentencing, each with greater court supervision. In the second Part, I then develop those stages as four alternative models for structural reform prosecutions (adding a fifth civil settlement model).

A. The KPMG Prosecution Deferred

One AUSA explained that what I term structural reform prosecutions provide “a way to get better results more quickly . . . We're getting the sort of significant reforms you might not even get following a trial and conviction.”²³ The KPMG case provides a vivid illustration of the injunctive terms federal prosecutors obtain in agreements resolving the most high profile corporate prosecutions, and the successes and flaws of such settlements.

By 2005, it emerged that KPMG, one of the largest accounting firms in the world, with tax and consulting practices, engaged in alleged tax fraud that resulted in \$2.5 billion in evaded taxes by wealthy individuals. As early as 2001, the IRS investigated certain tax shelters and issued a series summonses to KPMG, with which KPMG did not comply, forcing the IRS to seek judicial enforcement in 2002.²⁴ A Senate Subcommittee began an investigation and at hearings in November 2003, KPMG employees were questioned.²⁵ By 2004, the IRS referred the case to DOJ for possible criminal prosecution.²⁶

In 2004, a criminal complaint was filed by the DOJ against KPMG, “the largest criminal tax case ever filed.”²⁷ In 2004 and 2005

²³See Vanessa Blum, *Justice Deferred: DOJ Gets Companies to Turn Snitch*, LEGAL TIMES, March 25, 2005; *supra* note xxx (quoting the lead AUSA in the Computer Associates case).

²⁴See *United States v. KPMG LLP*, 316 F. Supp.2d. 30, 31-32 (D.D.C. 2004).

²⁵See *United States v. Stein*, 2006 WL 1735260 *3 (S.D.N.Y.).

²⁶See *id.* at *4.

²⁷See Press Release, KPMG to Pay \$456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case, Aug. 25, 2005, at

KPMG and prosecutors at the United States Attorney's Office for the Southern District of New York entered into lengthy discussions. KPMG offered to cooperate and "clean house" to save the company and avoid an indictment.²⁸ The negotiations operated at a high level, with executives meeting directly with the U.S. Attorney.²⁹

On August 25, 2005, after the grand jury had been convened but before an indictment, the DOJ and IRS announced that the criminal prosecution of KPMG would not go forward, though prosecution of individual employees would proceed, because an agreement had been reached.³⁰ U.S. Attorney General Alberto Gonzales cited "the reality that the conviction of an organization can affect innocent workers and others associated with the organization, and can even have an impact on the national economy."³¹

No court was involved in approving the terms of this agreement. Indeed, though federal courts have statutory authority to reject the deferral of a prosecution, the court apparently ratified it without comment.³² The resulting deferred prosecution agreement provided a remarkable blueprint for radical structural change at KPMG.

The agreement begins with an detailed admission of wrongdoing, stating that KPMG "[a]ssisted high net worth United States citizens to evade United States individual income taxes on billions of dollars in capital gains and ordinary income by developing, promoting and implementing unregistered and fraudulent tax shelters."³³ The agreement provided for a penalty of \$456 million, including full restitution to the IRS.³⁴ The provisions placed "permanent restrictions" on KPMG's tax practice, barring taking on new private tax clients, terminating its tax and benefits practice, preventing it from issuing advice and selling certain pre-packaged tax products, and limiting work for individual clients.³⁵

The compliance reforms reached farther. KPMG agreed to

http://www.usdoj.gov/opa/pr/2005/August/05_ag_433.html; KPMG Deferred Prosecution Agreement (August 2005) (hereinafter "KPMG Agreement"), at <http://www.usdoj.gov/usao/nys/Press%20Releases/August%2005/KPMG%20dp%20AGMT.pdf>.

²⁸See Stein, 2006 WL 1735260 at *5-*11.

²⁹See *id.* at *10.

³⁰*Id.*, see also Sue Reisinger, *KPMG's Knight in Shining Armor, Corp. Counsel*, Nov. 9, 2005, at <http://www.law.com/jsp/ihc/PubArticleFriendlyIHC.jsp?id=1131425800801>. The DOJ had been intent on pursuing a trial, in part because of perceived evasion by KPMG in not turning over documents. *Id.* Ultimately, negotiations that included KPMG's new general counsel, former U.S. District Judge Sven Erik Holmes, produced an agreement. *Id.*

³¹*Id.*

³²See KPMG Agreement, *supra* note xxx, at ¶ 11 (the Agreement "must be approved by the Court, in accordance with 18 U.S.C. § 3161(h)(2).")

³³*Id.* at ¶2.

³⁴*Id.* at ¶3; see also Statement by IRS Commissioner Mark W. Everson, <http://www.irs.gov/newsroom/article/0,,id=146998,00.html> (noting that "blue chip firms like KPMG that, by virtue of their prominence, set the standard of conduct for others").

³⁵See KPMG Agreement, *supra* note xxx, at ¶ 6.

“implement and maintain an effective compliance and ethics program that fully comports with the criteria set forth in Section 8B2.1 of the United States Sentencing Guidelines.”³⁶ Attorney General Gonzales called this the “most important” part of the agreement, vital to “prevent such wrongdoing in the future.”³⁷ The Guidelines, as discussed below, require a comprehensively defined series of compliance protocols, risk analysis, training programs and auditing.

Beyond those efforts, KPMG created “a permanent compliance office and a permanent educational and training program relating to the laws and ethics governing the work of KPMG’s partners and employees...”³⁸ The program paid “particular attention to practice areas that pose high risks.”³⁹ The agreement added that whistleblowers shall be protected and rewarded, a hotline be created to report noncompliance, and “KPMG shall take such reasonable additional personnel actions for wrongdoing as are warranted.”⁴⁰ Further, “KPMG shall take steps to audit the Compliance and Ethics Program to ensure it is carrying out the duties and responsibilities set out in this Agreement.” Thus the compliance program was itself evaluated so that compliance efforts are continually improved. Such data collection tasks KPMG with not only detection of employee wrongdoing, but predicting and preventing future criminality among employees.

Overseeing these efforts, the agreement required KPMG to permit DOJ appointment of an “independent monitor” serving for three years.⁴¹ Richard Breeden, a former SEC Chairman, received the appointment (he previously served as a special master overseeing SEC compliance at MCI/Worldcom).⁴² When his term expires, the IRS will then monitor KPMG’s tax practice for two more years, issuing compliance reports every four months.⁴³

Breeden was empowered to “review and monitor KPMG’s compliance with this Agreement” and “review and monitor KPMG’s maintenance and execution of the Compliance & Ethics Program” and also “recommend such changes as are necessary to ensure conformity with the Sentencing Guidelines and this Agreement, and that are necessary to

³⁶*Id.*

³⁷*See* Attorney General Alberto R. Gonzales, Prepared Remarks at the Press Conference Regarding KPMG Corporate Fraud Case (Aug. 29, 2005), available at <http://www.usdoj.gov/ag/speeches/2005/082905agkpgmcorpfraud.htm>.

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.* KPMG then created a 24-hour whistleblower telephone hotline and also web-site for employees described on its website. *See* <http://www.us.kpmg.com/news/index.asp?cid=2012>.

⁴¹*See* KPMG Agreement, *supra* note xxx, at ¶ 18 (e)(3). Up to two additional years may be added to the Monitor’s term in the sole discretion of the DOJ, if it finds KPMG breached the agreement. *Id.*

⁴²*See infra* note xxx.

⁴³*Id.* at (e)(III), (e)(IV).

ensure that the Program is effective.”⁴⁴ To accomplish those broad ends, he was invested with sweeping powers, such as unrestricted access to information, including any correspondence or email of KPMG employees, and inquisitorial powers including the right to call a meeting or interview any KPMG partner, employee or agent.⁴⁵ In addition, “the Monitor shall have compensation and expenses paid by KPMG and the authority to employ legal counsel, consultants, investigators, experts and any other personnel necessary to assist in the proper discharge of the Monitor’s duties.”⁴⁶ The Monitor had the authority to “take any other actions that are necessary to effectuate his or her oversight and monitoring responsibilities.”⁴⁷ Nevertheless, none of the KPMG monitor’s reports have been made public (or in any other case). None of the monitor’s actions have been made public either.⁴⁸

The agreement had substantial effects on non-parties in addition to the ways it reshaped corporate governance within KPMG. Nineteen individual employees and former KPMG tax partners still face criminal charges, and must argue that KPMG’s admissions that the relevant tax shelters were illegal and intended to assist clients in breaking the law, should not prejudice them or constitute a finding of misconduct as a matter of tax law.⁴⁹ Further impeding their defense, the Monitor may interview any current employees for any reason.

Several of those employees have made motions complaining that the DOJ pressured KPMG to decline to pay for their criminal defense as part of its effort to show its cooperation under the Thompson Memo factors.⁵⁰ The District Judge, Lewis Kaplan, ruled that DOJ unconstitutionally pressured KPMG to cut off legal defense payments and though the indictments should not be dismissed, the defendants could file ancillary civil actions for reimbursement.⁵¹ Judge Kaplan decried the power DOJ exercises in its organizational prosecutions, stating “justice is not done when the government uses the threat of indictment—a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees—to coerce companies into depriving their present and even former employees of the means of defending themselves against criminal charges in a court of law.”⁵²

The KPMG agreement may have had industry-wide effects, where given KPMG’s prominence in the industry, any reforms adopted by the Independent Monitor seem likely to become established “best practices” in

⁴⁴Id. at 18(a).

⁴⁵Id. at 18(b).

⁴⁶Id. at 18(c), (e)(VI).

⁴⁷Id. at 18(d).

⁴⁸One in one DOJ prosecution agreement has the monitor make a public statement. *See infra* note xxx.

⁴⁹*See* http://www.usdoj.gov/opa/pr/2005/October/05_tax_547.html.

⁵⁰*See infra* note xxx.

⁵¹*See* United States v. Stein, 2006 WL 1735260 *3 (S.D.N.Y.).

⁵²*See* United States v. Stein, 2006 WL 1735260 *33 (S.D.N.Y.).

the industry. The Monitor may thus wield tremendous influence.⁵³

The Agreement may also create industry-wide effects in a regulatory manner not present in any of the other structural reform agreements. The Agreement includes detailed factual findings regarding criminality of the use of particular tax shelters that had not previously been found illegal by a court, nor had the IRS issued a regulation making them illegal. Some tax experts predict that using those stipulated findings, “[t]he IRS and Justice Department will attempt to use KPMG’s admissions as evidence in litigation with taxpayers on the merits of the shelters.”⁵⁴ The agreement in that sense does an end run around time consuming notice and comment rules.⁵⁵ More broadly, the process through which the agreement was reached reflects a collaborative approach by the DOJ, where the IRS was intimately involved from the investigation stage to the drafting and implementation of the agreement.

A different kind of effect on industry may also have been considered in negotiations between KPMG and the DOJ. Proceeding to trial against KPMG, a “big five” accounting firm, might have weakened the accounting industry which the DOJ counts on to audit corporations to prevent and detect corporate fraud.⁵⁶ Indeed, KPMG provides consulting on corporate compliance issues, including on technology to improve compliance programs and auditing.⁵⁷ KPMG had every incentive to fully comply to protect its business in the compliance industry and to distance itself from wrongdoing employees.

The agreement terminates on December 31, 2006, at which point the DOJ will consent to dismissal of the criminal information, unless before then the DOJ in its sole discretion finds that KPMG breached the agreement.⁵⁸ The DOJ could add up to five years to the agreement term. Or the DOJ could at its option pursue a criminal proceeding. This would nearly certainly result in conviction, where the DOJ could make full use of

⁵³See Scott Michel and Kevin Thorne, *Deferred Prosecution Agreements: Implications for Corporate Tax Departments*, THE TAX EXEC. 4 (Jan.-Feb. 2006), at <http://www.captale.com/db30/cgi-bin/pubs/Deferred%20Prosecution%20Agreements.pdf>.

⁵⁴See Michel & Thorn, *supra* note xxx.

⁵⁵Raising additional questions regarding the KPMG tax shelters, nicknamed “Blips, Flip, Opos and SOS,” a new IRS document indicates that there was substantial debate within the IRS whether shelters had to be registered with the agency. See Lynnley Browning, Document Could Alter KPMG Case, N.Y. Times, Sept. 15, 2006. Nevertheless, the government’s case also relies upon other related frauds in addition to failure to register the shelters. *Id.* In an additional possible blow to the case, a federal judge in Texas ruled that the IRS can not retroactively apply 2003 rules regarding these tax shelters to prior conduct. See Lynnley Browning, Judge Rules a Tax Shelter in KPMG Case is Legitimate, N.Y. Times, July 21, 2006.

⁵⁶See Albert B. Crenshaw & Carrie Johnson, *Regretful KPMG Asks for a Break*, WASH. POST, June 17, 2005, at D1; Greenblum, *supra* note xxx at 1881 n. 128.

⁵⁷KPMG’s website describes its corporate compliance consulting services including an annual “integrity survey” of compliance at firms nationwide. See <http://www.us.kpmg.com/>; <http://www.kpmg.com/aci/international.asp>.

⁵⁸See KPMG Agreement, *supra* note xxx, at ¶ 10.

all statements and admissions by KPMG obtained in the agreement and through KPMG's cooperation with the DOJ and the monitor.⁵⁹

B. The Limits of the Classic Civil Structural Reform Model

The KPMG example demonstrates the substantial power and discretion prosecutors may exercise in what I term structural reform prosecutions. Stepping back several decades to take a longer view of the subject, the structural reform ideal's recent ascendance in criminal law follows its metamorphosis since the 1960's in civil rights law, reflecting shifts in policy goals of government, reformers and the public.

In civil rights law, structural reform litigation rose to assume central importance given a need for deep institutional change following efforts to end segregation in the wake of *Brown v. Board of Education*. As federal courts struggled to enforce decrees ordering desegregation of schools, the school desegregation decree became "the prototype for the judiciary's new supervisory role" in the 1970's as the model was then extended from schools to diverse areas such as prisons, medical care, public housing, disability assistance and special education.⁶⁰ In his landmark article, Prof. Abram Chayes describes such efforts as fundamentally unlike traditional civil litigation "settling disputes between private parties about private rights," but rather constituting a new form of "public law litigation" involving multi-polar disputes, institutional reform, outside involvement of parties such as "masters, experts, and oversight personnel," and "a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer."⁶¹ In particular, structural reform involved courts changing "the operation of large-scale organizations."⁶²

The legitimacy of the classic structural reform model in part derived from the model of the prosecutor, the subject of this piece. That is, civil rights groups were envisioned as "private attorney generals" to define and then vindicate the public interest just as a prosecutor seeks to do.⁶³ The status of such private attorneys general was bolstered by statutes providing for attorney's fees to reward successful litigation, under a "private attorneys general" rationale that they serve the public interest.⁶⁴

⁵⁹See *id* at ¶ 13.

⁶⁰See Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979).

⁶¹See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298 (1976).

⁶²See Owen Fiss, *The Supreme Court, 1978 Term--Foreword: The Forms of Justice*, 93 HARV.L.REV. 1, 5 (1979).

⁶³See *Flast v. Cohen*, 392 U.S. 83, 119 (1968) (Harlan, J., dissenting) (describing origins of the term "private attorneys-general"); *Assoc. Indus. of New York v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) (first decision using the term); William B. Rubenstein, *On What A "Private Attorney General" Is--And Why It Matters*, 57 VAND. L. REV. 2129 (2004).

⁶⁴The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988 (2000); S.Rep. No. 94-1011, 4-5 (1976), 1976 U.S.Code Cong. & Admin.News 5909

Prof. Chayes, Owen Fiss, and others argued that courts would inevitably move towards broad structural reform litigation and that in appropriate circumstances, judges should exercise great discretion, decoupling the remedy from the contours of the constitutional right when designing and implementing a structural remedy.⁶⁵ A new body of remedial law developed. As courts and special masters continued to seek the means to remedy problems like school segregation, poor prison conditions, and housing discrimination, new remedial norms took hold in each particular context, which in turn helped to define the content of the underlying constitutional rights.⁶⁶

As remedies matured during years of experience implementing structural reform remedies, courts also limited the scope, duration and content of structural reform remedies. While the Court initially held that district courts can exercise broad discretion in exercising equitable powers,⁶⁷ during a decades long period of retrenchment beginning in the early 1970's, the Court narrowed the scope of available structural remedies.⁶⁸ The Court enacted justiciability limits specific to actions seeking injunctive relief,⁶⁹ emphasized doctrines of federalism,⁷⁰ comity and local control,⁷¹ urged least restrictive remedies for civil rights violations,⁷² and encouraged lower courts to modify, narrow and terminate

(The Senate Report on the Civil Rights Attorney's Fees Awards Act of 1976 explained its intent to shift fees to reward civil rights lawyers acting as a "private attorney general").

⁶⁵See Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 45-46 (1982); Fiss, *supra*; Donald Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1268 (1983); William Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

⁶⁶See John C. Jeffries, Jr., *The Right-Remedy Gap In Constitutional Law*, 109 YALE L.J. 87, 110-13 (1999), Levinson, *supra* note xxx at 873-882; Zaring, *supra* note xxx (noting a path dependency in adoption of structural remedies in certain contexts).

⁶⁷See, e.g. *Milliken v. Bradley*, 433 U.S. 267 (1977) ("Once invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad'"); *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*); *Griffin v. County Sch. Bd.*, 377 U.S. 218, 221 (1964); see also David Rudovsky, *Running In Place: The Paradox Of Expanding Rights And Restricted Remedies*, 2005 U. ILL. L. REV. 1199; Judith Resnik, *For Owen Fiss: Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 193 (2003).

⁶⁸See, e.g., Brandon Garrett & James Liebman, *Experimentalist Equal Protection*, 2 YALE L. & POL'Y REV. 261 (2004); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983); Jeffries, *supra* note xxx at 113.

⁶⁹See *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (urging "restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws").

⁷⁰See *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995); *Younger v. Harris*, 401 U.S. 37, 53 (1971).

⁷¹E.g., *Milliken*, 418 U.S. at 744-45.

⁷²See, e.g., *Jenkins*, 515 U.S. at 83-90 (condemning, as beyond the district court's remedial powers, plan to desegregate Kansas City schools by inducing white suburban children to transfer voluntarily); *Lyons*, 461 U.S. at 112 (requiring "restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws").

consent decrees.⁷³ Supreme Court Justices now disparaged overreaching in structural reform remedies as “wildly intrusive,” leaving courts “enmeshed ... in [] minutiae,” and “judicial overreaching... [that] eviscerates a State's discretionary authority over its own programs and budgets.”⁷⁴ Particularly in school desegregation decisions, the Court instructed lower courts to limit the boundaries of remedies that departed too far from the scope of the constitutional violations, and to terminate oversight when substantial compliance was obtained.⁷⁵

The consensus account describes that as courts defined and limited the scope of remedies, the structural reform era passed, such that “[t]here are no contemporary examples of bold, Brown-like reformist judicial enterprises.”⁷⁶ Scholars produced a substantial body of literature examining critically concerns of counter-majoritarian legitimacy, federalism, comparative institutional competence, and the need for coherent remedial limits for the classic structural reform model.⁷⁷ Others point out that structural reform litigation still persists and succeeds in new forms, in state courts, regarding challenges brought by opponents of affirmative action,⁷⁸ in areas governed by statutes,⁷⁹ and in areas in which plaintiffs and government share incentives to enter into experimentalist arrangements, such as in consent decrees, to resolve pressing public

⁷³Frew v. Hawkins, 540 U.S. 431 (2004); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 518 (1986).

⁷⁴See Jenkins, 515 U.S. at 123 (Thomas, J., concurring); Lewis v. Casey, 518 U.S. 343, 362 (1996) (reversing prison order as “wildly—intrusive”); Bell v. Wolfish, 441 U.S. 520, 562 (1979) (disapproving orders that “enmeshed [lower courts] in the minutiae of prison operations”); see also Lewis, 518 U.S. at 349 (Scalia, J.) (“[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution”).

⁷⁵See *supra* notes xxx, xxx.

⁷⁶See Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops ... It's Still Moving!*, 58 U. MIAMI L. REV. 143, 145 (2003); Russell L. Weaver, *The Rise And Decline Of Structural Remedies*, 41 SAN DIEGO L. REV. 1617 (2004); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 295 (1989) (“Institutional reform litigation generally has decreased since the mid-1970s”); Resnik, *supra* note xxx at 193.

⁷⁷See e.g. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1738-44 (1996); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996); Ross Sandler and David Schoenbrod, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003); Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617 (2003); Susan Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1359 (1991); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 951 (1978).

⁷⁸Gilles, *supra* note xxx at 145.

⁷⁹Statutes that permit injunctive remedies include the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12209, and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1487 (2000) and 42 U.S.C. § 1437d(j) (2000) (permitting the Department of Housing and Urban Development to seek receivership of troubled housing projects). Regarding persistence of such litigation, see, e.g. Zaring, *supra* note xxx at 1033; see also *infra* part xxx.

problems.⁸⁰ Rather than withering on the vine, the structural reform model instead adapted as it was reshaped by judicial review, political realities and practical difficulties in implementation.

A new and previously unexamined brand of structural reform litigation, developed by prosecutors, extends far more broadly in ways that challenge the outermost limits of the Chayesian model.⁸¹ The KPMG example illustrates how in structural reform prosecutions, it is prosecutors and not courts, who serve as the chief decisionmaker and create the clearinghouse for “multilateral” bargaining among parties and regulators.⁸² Yet this structural reform litigation remains unsaddled with the history of civil rights litigation and the remedial limitations that federal courts elaborated to reign in private litigants seeking to effect reform of public institutions. Here the paradigm is somewhat reversed, with federal, public actors seeking to reform private institutions (though also several local public institutions). The relevant “rights” being vindicated are also of a very different character. Prosecutors bring this modern wave of structural reform litigation in response to organizational crime, as government actors tasked with defining law enforcement goals.

Structural reform in criminal cases at first blush appears impossible. Injunctions are not technically available in criminal law. The common law rule since the demise of the Star Chamber has been that “equity will not enjoin a crime.”⁸³ Only where a legislature authorizes it by a civil statute, such as in the RICO statute or federal fraud statutes, may courts enter civil injunctions.⁸⁴ Nevertheless, while criminal courts can not formally enjoin organizations as part of a criminal sentence, prosecutors may impose injunctive conditions on alternatives to prosecution, during pre-trial diversion or plea bargains, just as courts do so

⁸⁰See Diver, *supra* note xxx, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); Garrett, *Remedying Racial Profiling*, *supra*; Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study Of Jail And Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006).

⁸¹Abram Chayes did briefly note in his seminal article that “securities fraud and other aspects of the conduct of corporate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management--cases in all these fields display in varying degrees the features of public law litigation.” See Chayes, *supra* note xxx at 1284.

⁸²See Diver, *supra* note xxx; Sabel and Simon, *supra* note xxx.

⁸³See *S.E.C. v. Carriba Air, Inc.*, 681 F.2d 1318 (11th Cir. 1982). For some time, courts could issue limited injunctions to prevent crimes to property or nuisance. See *In re Debs*, 158 U.S. 564, (1895); *United States v. Dixon*, 509 U.S. 688, 694 (1993). The Supreme Court later insisted that jury trial rights be provided during contempt proceedings and rejected “standardless” injunctions deeming behavior a public nuisance. See *Bloom v. State of Ill.*, 391 U.S. 194, 208 (1968).

⁸⁴See 18 U.S.C.A. § 1964(a) (“The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders. . . .”); James M. Fischer, *UNDERSTANDING REMEDIES* § 27 (1999) (describing modern “legislative supremacy” approach to enjoining criminality).

during probation.⁸⁵ In doing so, none of the well-developed limitations of civil structural remedies necessarily apply. After all, prosecutors are public attorneys general. No civil doctrines limiting the scope of prospective relief have ever been applied to prosecutors. Structural reform conducted by essentially unconstrained federal prosecutors seeking to influence entire industries suggests possibilities for vast abuses. Further, as discussed next, not only do civil remedial limits not apply to prosecutors, but their discretion, resources, and power all permit far more expansive remedies than in cases brought by private attorneys general.

C. Prosecutorial Discretion and Organizational Crime

1. *Stages of Prosecutorial Discretion*

Prosecutors, federal prosecutors in particular, operate with broad and often nearly unfettered discretion that provides them with enhanced status in our criminal system.⁸⁶ Prosecutors are tasked with seeking justice in the criminal system by defining the state's enforcement goals and deciding when to prosecute those they deem deserving of criminal sanction.⁸⁷ Prosecutorial discretion typically is conceived as limited to decisions whether and how to charge individuals and plea bargaining.⁸⁸ However, as I develop in this section, the job of the prosecutor at several stages resembles more the role of the institutional reformer. I further

⁸⁵I note here at the outset that what I describe is to some extent a prosecutorial departure from traditional deterrence theory. Whether a compliance-based approach can more optimally deter criminality than punitive fines is a difficult and perhaps unresolvable empirical question that I do not address. I discuss instead the implications of the structural model that prosecutors have adopted and its relationship to their discretion and substantive criminal prohibitions. See *infra* Part II.B. For work comparing approaches towards punishing firms, see *supra* note xxx.

⁸⁶See, e.g. Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252-59 (2004), Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 563-64 (1978); see also *United States v. Van Engel*, 15 F.3d 623, 629 (7th Cir. 1993) ("The Department of Justice wields enormous power over peoples' lives, much of it beyond effective judicial or political review."). Where local prosecutors primarily enforce criminal violations, federal prosecutors can often handpick their cases. The DOJ brings very few corporate prosecutions and typically only in egregious cases. See Daniel C. Richman, William J. Stuntz, *Al Capone's Revenge: An Essay On The Political Economy Of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 609-612 (2005); Daniel Richman, *Prosecutors And Their Agents, Agents And Their Prosecutors*, 103 COLUM. L. REV. 749, 758-67 (2003) (describing structure and discretion of U.S. Attorney's offices).

⁸⁷See Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809, 843-47 (2000); William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090, 1123-25 (1988); Model Code of Prof. Resp. EC 7-13 ("The responsibility of the public prosecutor . . . is to seek justice, not merely to convict."); ABA Standards Relating to the Administration of Criminal Justice, 3-1.2(C) (same).

⁸⁸See, e.g. Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey Of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1172-73 (2005); Stuntz, *supra* note xxx at 790-91.

divide the exercise of a prosecutor's discretion into four stages chronologically, into prevention, charging, plea bargaining, and sentencing. I discuss individual versus organizational cases at each stage. At each successive stage of the criminal process, courts additionally constrain prosecutorial discretion.

First, prosecutors may act as institutional reformers by focusing on prevention before responding to any specific reports of criminal activity. For example, regarding individual cases, they may participate in early intervention programs to prevent youth violence, truancy or drug use,⁸⁹ or joint task forces that raise public awareness, encourage voluntary reporting, hinder criminals and assist victims.⁹⁰ In the organizational crime context, the Corporate Fraud Task Force coordinates prosecutions, but also aims to encourage voluntary disclosure to regulatory agencies, coordinate resources among federal and state agencies in order to develop capability to audit organizations and develop compliance procedures.⁹¹

Second, having been made aware of alleged criminality, prosecutors decide whether or not to pursue charges and then what charges to pursue. At the charging stage, prosecutors have considerable discretion. The Supreme Court has held that the executive branch "has exclusive authority and absolute discretion to decide whether to prosecute a case."⁹² Prosecutorial exercise of discretion is generally unreviewable if the prosecutor has probable cause, unless prosecutors rely on invidious characteristics like race or religion.⁹³ This "broad discretion" stems from separation of powers and the President's power to "take Care that the Laws be faithfully executed."⁹⁴ As an additional constraint on discretion,

⁸⁹See James C. Backstrom, *The Role Of The Prosecutor In Juvenile Justice: Advocacy In The Courtroom And Leadership In The Community*, 50 S.C. L. REV. 699, 712 (1999) (listing examples nationwide of prosecutor's involvement in juvenile crime prevention programs); Anthony V. Alfieri, *Community Prosecution*, 90 CAL. L. REV. 1465, 1473-80 (2002) (describing community outreach and violence-prevention efforts by prosecutors).

⁹⁰See *infra* note xxx. For example, as part of the Trafficking Victims Protection Act (TVPA) a task force was tasked in part with developing economic opportunities for potential victims of trafficking. 22 U.S.C.A. § 7103(d)(4), § 7105(a)(1) (West 2004).

⁹¹See Exec. Order No. 13271, 67 Fed. Reg. 46,091 (July 9, 2002), at <http://www.usdoj.gov/dag/cftf/execorder.htm>, *First Year Report to the President, Corporate Fraud Task Force*, at http://www.usdoj.gov/dag/cftf/first_year_report.pdf.

⁹²See *United States v. Nixon*, 418 U.S. 683, 693 (1974).

⁹³See, e.g. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citing *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." (*citing authority*)); *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978) ("[S]o long as the prosecutor has probable 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.").

⁹⁴See U.S. Const., Art. II, § 3; see 28 U.S.C. §§ 516, 547. *United States v. Hicks*, 693 F.2d 32, 34 n.1 (5th Cir. 1982); *Bordenkircher*, 434 U.S. at 268.

prosecutors may publicly define guidelines or standards that limit exercise of their discretion and provide internal review of charging decisions.⁹⁵

As an alternative, prosecutors may again take on the role of an institutional reformer, by seeking permission from the court to “defer” prosecution before indictment and pending an opportunity to complete a rehabilitative program.⁹⁶ Courts typically supervise such efforts in drug courts or other alternate, community based courts that institutionalize deferral (also called diversion) at the local level.⁹⁷ Organizations may also receive pre-trial diversion, an opportunity to cooperate with prosecutors and agree to implement compliance reforms, as in the KPMG case.⁹⁸ Until recently, few organizations were offered deferral or non-prosecution agreements, but as discussed next, this is now the preferred DOJ approach.

Third, prosecutors may choose to negotiate a plea bargain. Almost all individual criminal prosecutions settle in with guilty pleas.⁹⁹ Plea bargaining retains the same prominence in organizational prosecutions; the overwhelming majority of organizations charged plead guilty.¹⁰⁰

⁹⁵The U.S. Attorney’s Manual does so, but using very broad factors, such as “federal law enforcement priorities” “the person’s culpability” and “the nature and seriousness of the offense.” See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2117 (1998) (hereinafter “Lynch, Administrative System”); see U.S. Attorney’s Manual §9-27.230 (2d ed. 2000). The DOJ more recently has added guidelines that prosecutors should seek “the most serious readily provable offense” in individual prosecutions. See Memorandum from Attorney General John Ashcroft on Departmental Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentences (Sept. 22, 2003), at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

⁹⁶Generally, federal prosecutors enter into deferral agreements when “the person’s timely cooperation appears to be necessary to the public interest.” See U.S. Attorneys’ Manual 9-27.600; see also *United States v. Richardson*, 856 F.2d 644, 647 (4th Cir. 1988) (“A defendant has no right to be placed in pretrial diversion. The decision. . . is one entrusted to the United States Attorney.”); see also Thomas E. Ulrich, *Pretrial Diversion In The Federal Court System*, 66-DEC Fed. Probation 30 (2002) (presenting five year study of federal diversion agreements).

⁹⁷See Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1209 (1998).

⁹⁸See *infra* Part II.A; Appendix A.

⁹⁹See Bureau of Justice Statistics, U.S. Dep’t of Justice, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-- 2004, tbl.5.22, <http://www.albany.edu/sourcebook/pdf/t5222004.pdf> (finding that in 2004, federal district courts, 95.7 percent of individual defendants plead guilty or nolo contendere, with 81,717 total defendants, 7,465 were dismissed, leaving 74,252 defendants of whom 71,028 had a plea of guilty or nolo contendere (95.7%)); *Mitchell v. United States*, 526 U.S. 314, 324-25 (1999) (“Over 90% of federal criminal defendants whose cases are not dismissed enter pleas of guilty or nolo contendere.”). See Rachel E. Barkow, *Federalism And The Politics Of Sentencing*, 105 COLUM. L. REV. 1276 (2005); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 20-21 (1988) (discussing the “decision to increase the severity of punishment for white-collar crime”).

¹⁰⁰See Sentencing Commission’s Annual Reports, FY 2003, at <http://www.ussc.gov/ANNRPT/2003/Table54.pdf> (in fiscal 2003, 182 of 200 organizations prosecuted plead guilty, with 18 proceeding to trial).

Federal courts are more involved in reviewing plea bargains than charging decisions, but still remain highly deferential.¹⁰¹ Judges examine voluntariness, factual basis, fairness, abuse of discretion, or infringement on the judge's sentencing power.¹⁰² Judges may reject plea agreements "when the district court believes that bargain is too lenient, or otherwise not in the public interest."¹⁰³ However, plea agreements can not be modified, but can only be accepted or rejected.¹⁰⁴ Once entered, both prosecutors and defendants are bound by plea agreements as contracts and may seek relief for any material breach.¹⁰⁵

Fourth, a prosecutor may pursue a conviction. At trial, a prosecutor's discretion is sharply limited by detailed constitutional criminal procedure rules and Federal Rules of Criminal Procedure.¹⁰⁶ If the Government prevails at trial, the court, not the prosecutor, exercises discretion though limited by the Guidelines. In some circumstances, a court may decide to order supervised probation, in which all or part of the sentence is deferred pending successfully compliance.¹⁰⁷

Similarly, in organizational cases, upon a guilty plea or a conviction, the court and not the prosecutor exercises the discretion. Thus, at that stage, it is the court that pursues institutional reform. The court possesses a different range of sentencing options than in individual cases,

¹⁰¹Nolo contendere agreements without an admission of guilt must be approved by the court. See FED. R. CRIM P. 11 (requiring that the court evaluate nolo contendere pleas "in consideration of the views of the parties and the interest of the public in the effective administration of justice.")

¹⁰²See FED. R. CRIM P. 11(e), advisory committee note ("The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge."); *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("A court may reject a plea in exercise of sound judicial discretion."); Lowell B. Miller, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L. J. 241, 246 (1974).

¹⁰³See, e.g. *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir.1985) ("Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that a bargain is too lenient, or otherwise not in the public interest." (quoting *United States v. Miller*, 722 F.2d 562, 563 (9th Cir.1983)); *United States v. Freedberg*, 724 F.Supp. 851, 854 (D.Utah 1989) (plea agreement dismissing charges against owner but not corporation contrary to the public interest); *United States v. Nederlandsche Combinatie Voor Chemische Industrie*, 75 F.R.D. 473, 474-475 (S.D.N.Y.1977) (dismissal of a corporate conspiracy case involving life-saving drugs contrary to the manifest public interest); *United States v. Ammidown*, 497 F.2d 615, 622 (D.C.Cir.1973) ("[A]uthority has been granted to the judge to assure protection of the public interest").

¹⁰⁴See e.g. *U.S. v. Reyes*, 313 F.3d 1152 (9th Cir. 2002); *U.S. v. Cunavelis*, 969 F.2d 1419 (2d Cir. 1992); *U.S. v. Martin*, 287 F.3d 609 (7th Cir. 2002).

¹⁰⁵See *Santobello v. New York*, 404 U.S. 257, 261 (1971); *Ricketts v. Adamson*, 483 U.S. 1 (1987); see also Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1915 (1992).

¹⁰⁶See discussion in Stuntz, *supra* note xxx at 291.

¹⁰⁷The Guidelines were intended to reduce use of probation through determinate sentencing. See U.S. Sentencing Comm'n, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 68-69 tbls.2 & 3 (1987); U.S.S.G. Ch. 1 Pt. A § 4(d); Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933 (1995).

where organizations obviously can not be imprisoned; organizations can be fined punitively and ordered to pay restitution. Unlike in individual prosecutions where plea bargaining occurs in the shadow of prosecutor's own charge decisions, given sentences that are largely "charge-offense based," organizational sentences reflect a range of flexible factors.¹⁰⁸ While for individuals, the Guidelines provide a strict grid that "scores" on one axis the defendant's prior record and on the other axis the seriousness of the crime,¹⁰⁹ the Organizational Guidelines include a series of factors. The Organizational Guidelines first consider the type and severity of an offense to establish a base fine, and then organizational culpability, which depends on a range of institutional factors, including whether top management or middle management "participated in" the criminality, and whether the organization reported the offense or cooperated with the investigation.¹¹⁰ Based on those factors, a punitive fine is assessed against the organization, together with any civil remedies such as restitution or remedial measures including community service and notice to victims.¹¹¹

In addition, organizations may receive mitigation for compliance. When Congress passed Sarbanes-Oxley, it directed the U.S. Sentencing Commission to consider more effective means to deter organizational crime. New Organizational Sentencing Guidelines, which took effect in November 2004,¹¹² explicitly permit an entity to avoid a potentially crippling fine if it adopts an "effective" compliance program that meets a detailed set of criteria.¹¹³ The Commission explicitly adopted "structural reform" reasoning in promulgating the guidelines; the approved compliance programs were intended to create "structural safeguards" against future criminality.¹¹⁴

Finally, after a trial and conviction, not only may organizations be fined, but also receive probation just like individual convicts. The court may order in probation that an organization take remedial actions, such as

¹⁰⁸See Jeffrey Standen, *Plea Bargaining In The Shadow Of The Guidelines*, 81 CAL. L. REV. 1471, 1475 (1993).

¹⁰⁹See U.S.S.G. § 3.

¹¹⁰See U.S.S.G., ch. 8.

¹¹¹See *id.* at introductory cmt. (2005).

¹¹²The recent amendments to the Sentencing Guidelines were adopted in response to the Sarbanes-Oxley Act direction to promulgate new Guidelines that could better deter corporate wrongdoing. See Section 805(a)(2)(5), Public Law 107-204 (stating that the Sentencing Commission should promulgate rules "sufficient to deter and punish organizational criminal misconduct"); see also U.S.S.G. § 8B2.1, Application Notes, Background (Congress "directed the Commission to review and amend the organizational guidelines and related policy statements to ensure that they are sufficient to deter and punish organizational misconduct").

¹¹³See USSG § 8B2.1. Such programs had been defined previously only in the advisory notes under the 1991 Guidelines; U.S. Sentencing Guidelines Manual § 8A1.2, cmt. n.3(k) (2003); Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines, October 7, 2003, at <http://www.uscc.gov/corp/advgrprpt/advgrprpt.htm>; U.S.S.G. § 8C2.5(g).

¹¹⁴See 15 U.S.C. § 7201.

the creation of a compliance program.¹¹⁵ Such structural reform decrees and agreements are the subject of the next Part. Thus, with each successive stage in the criminal process, courts further limit prosecutorial discretion that at the outset is essentially unconstrained.

2. Organizational Over-Criminalization

The breadth of prosecutorial discretion raises special problems in the context of organizational crime. Two central and long-recognized features explain that breadth: (1) minimal respondeat superior requirements, and (2) open-textured federal criminal prohibitions. Each empowers federal prosecutors, so much so that they have crafted guidelines to limit their vast discretion, lest they unnecessarily impose dire collateral consequences of an indictment or conviction.

First, organizational prosecutions raise unique problems of overbreadth not present in prosecutions of individual criminals, due to the fictional nature of such entities.¹¹⁶ An organization may be held liable under respondeat superior, for the act of any agent that violates a criminal law, in the scope of employment and with intent to benefit the corporation.¹¹⁷ That standard, intended to deter and to avoid potentially intractable issues of assigning responsibility within complex firms, permits enormous exposure to acts of agents. Judge Gerard E. Lynch writes, “there is often no distinction between what the prosecutor would have to prove to establish a crime and what the relevant administrative agency or a private plaintiff would have to prove to show civil liability.”¹¹⁸ Indeed, criminal law drew its respondeat superior approach from tort principles of enterprise liability.¹¹⁹

¹¹⁵See *infra* Part II.C.

¹¹⁶See *supra* note xxx, see also Annie Geraghty, *Corporate Criminal Liability*, 39 AM. CRIM. L. REV. 327, 338, 338 n.73 (2002); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1351 (1999) (calling for “significant constraint of prosecutorial discretion” in organizational prosecutions); Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1479-81 (1996); Coffee, *No Soul to Damn*, *supra* note xxx; see also Buell, *supra* note xxx.

¹¹⁷See *New York Central & H.R.R.R. v. United States*, 212 U.S. 481, 494-95 (1909). Further, after the fact approval of the agents’ conduct, or ratification, can satisfy the scope and intent requirements. See RESTATEMENT (SECOND) OF AGENCY § 82 (1968). See also Thompson Memo at I.A.-B (citing *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985) (affirming conviction of corporation “despite its claim that the employee was acting for his own benefit, namely his ‘ambitious nature and his desire to ascend the corporate ladder.’”); *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982) (the agent’s acts “must be motivated -- at least in part -- by an intent to benefit the corporation.”). This 20th century development altered the common law rule that “[a] corporation cannot commit treason, or felony, or other crime, in [its] corporate capacity: though its members may, in their distinct individual capacities.” See W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 464 (1765).

¹¹⁸See Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 23 (1997) (hereinafter Lynch, *Policing Corporate Misconduct*); see also John C. Coffee, Jr., *Does “Unlawful” Mean*

Second, organizational criminal prohibitions remain notoriously vague. Organizations do possess some of the same protections as individual defendants. A corporate defendant has the right to a grand jury, a jury trial, to be found guilty beyond a reasonable doubt, and protection from the Double Jeopardy Clause.¹²⁰ Congress has, however, delegated greater power to prosecute organizations by legislating substantive criminal law rules with open-textured prohibitions and reduced culpability resembling civil standards for liability.¹²¹ Courts play little role in narrowing these broad commands. The RICO statute, for example, has been interpreted broadly and prohibits a person “to conduct or participate” in conduct of an enterprise or group of individuals “through a pattern of racketeering activity.”¹²² Federal criminal fraud statutes leave much to the interpretation of courts and prosecutors.¹²³ Many corporate criminal statutes also incorporate compliance with agency regulations.¹²⁴ Thus, the discretion the DOJ exercised in the KPMG case can be explained in part by broad respondeat superior liability combined with broad underlying substantive criminal law provisions.

The reasons why the DOJ felt compelled to voluntarily limit its power and discretion in organizational cases can be explained in part by the adverse collateral consequences of an indictment, combined with cost of prosecution and the defense resources of firms like KPMG.

“Criminal”?: *Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV. 193, 246 (1991).

¹¹⁹By 1918, Judge Learned Hand observed “there is no distinction in essence between the civil and the criminal liability of corporations, based upon the element of intent or wrongful purpose.” *United States v. Nearing*, 252 F. 223, 231 (S.D.N.Y. 1918); Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 U. Pitt. L. Rev. 21, 22 (1957) (describing criminal law drawing of principles from tort law). On tort origins for enterprise liability, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 465 (1985); John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 26 (2003).

¹²⁰See Vikramaditya S. Khanna, *Corporate Defendants and the Protections of Criminal Procedure: An Economic Analysis* (2005), at <http://law.michigan.edu/centersandprograms/olin/papers.htm>; *Developments in Law – Corporate Crime: The Use of Criminal Sanctions to Regulate Corporate Behavior*, 92 HARV. L. REV. 1227, 1230 (1979).

¹²¹See, e.g. John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the Evolution of a White Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models--And What Can Be Done About It*, 101 YALE L.J. 1875 (1992); Kahan, *supra* note xxx, Lynch, *Policing Corporate Misconduct*, *supra* note xxx at 36-37, see also Richman, *Congressional Delegation*, *supra* note xxx at 757-771; see also *infra* Part III.B.

¹²²See 18 U.S.C. 1962(c), 1961(4); see discussion in Kahan, *supra* note xxx at 472-3; Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 661-64 (1987).

¹²³See, e.g. 18 U.S.C. s 1341, 1343 (1994) (wire and mail fraud); see discussion in Kahan, *supra* note xxx at 1476.

¹²⁴See *id.*

The consequences of prosecution for both the organization and others may be so great that prosecutors felt compelled to devise alternatives to prosecution. Punitive fines directed at corporations may instead penalize third party shareholders, customers, or employees not involved in malfeasance.¹²⁵ Collateral consequences of organizational indictments include severe regulatory prohibitions such as debarment or revocation of licensing.¹²⁶ Reputational effects of an indictment, much less a conviction, may be similarly severe.¹²⁷ As a result, not only corporations, but prosecutors may face great incentives to avoid an indictment that could destroy a corporation and harm employees, shareholders and customers. The over-deterrent effect of an indictment provided great impetus for the DOJ to resolve prosecutions pre-indictment at the charging stage. A turning point for the DOJ was the Arthur Andersen LLP case. Andersen decided to go to trial rather than agree to a deferred prosecution agreement, because the terms gave so much “power and discretion to the Justice Department.”¹²⁸ Andersen later sought bankruptcy in part because its conviction, though later reversed, resulted in automatic debarment by the SEC and inability to provide services to public corporations.¹²⁹ The DOJ suffered great criticism following the collapse of Andersen and moderated its approach since then to explicitly take into account collateral consequences when exercising discretion in organizational cases.¹³⁰ That said, the DOJ still sometimes prosecutes, and recently the class action law firm Milberg Weiss Bershad & Schulman was indicted after balking at a deferral agreement.¹³¹

¹²⁵See Miller, *Corporate Criminal Liability: A Principle Extended to its Limits*, 38 Fed. B.J. 49, 53 (1979); Coleman, *Is Corporate Criminal Liability Really Necessary?*, 29 SW. L.J. 908, 919-20 (1975).

¹²⁶See 48 C.F.R. §9.406 (1998) (providing for debarment and suspension from government contracts or subcontracts during criminal prosecution). Examples of regulated industries that disqualify criminally prosecuted firms include: The Securities Exchange Act of 1934, 15 U.S.C. § 78b; The Investment Advisors Act of 1940, 15 U.S.C. § 80b-3(e); The Commodity Exchange Act, 7 U.S.C. § 12a; The Federal Deposit Insurance Act, 12 U.S.C. § 1818(a); The Medicare and Medicaid Patients and Program Protection Act, 42 U.S.C. § 1320a-7; see generally ABA, *Collateral Consequences of Convictions of Organizations* (1991).

¹²⁷See discussion in Samuel W. Buell, *The Blaming Function Of Entity Criminal Liability*, 81 IND. L.J. 473 (2006); Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L.Q. 329, 352 (1993) (“In some instances adverse publicity alone can cause corporate devastation”).

¹²⁸See Richard B. Schmitt, et al., *Behind Andersen's Tug of War with U.S. Prosecutors*, Wall St. J., Apr. 19, 2002, at C1

¹²⁹See *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2137 (2005); Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons Of The Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 110 (2006); 17 C.F.R § 201.102(e)(2) (2005).

¹³⁰See Thompson Memo, *supra* note xxx at IX.

¹³¹See Julie Creswell, *U.S. Indictment for Big Law Firm in Class Actions*, N.Y. Times, May 19, 2006 (the U.S. attorney commented that “[w]e really had a situation where the firm was not accepting responsibility, was not making any substantial changes to the firm itself. We really were in a situation where we had no choice but to indict.”). Milberg Weiss responded that the agreement would have required improper waiver of

Organizational prosecutions also impose special burdens on the DOJ, perhaps also explaining the “cooperation dynamic.”¹³² Organizational prosecutions require a substantial investment, due to their complexity, organizations’ greater ability to conceal information, attorney-client privilege issues, access to very highly paid defense counsel, and factual complexity of such cases. Perhaps for those reasons, for decades federal prosecutors chose to prosecute very few organizations.¹³³ It was not until 1999 that the DOJ issued any document making transparent its approach to exercising discretion regarding organizations, recently updated in a memo by then-Deputy Attorney General Larry Thompson, now known as the Thompson Memo.¹³⁴ Prosecutors are instructed by the Thompson Memo to consider whether criminal prosecution is necessary at all, or whether civil or regulatory fines sufficiently punish and deter.¹³⁵ The need for more formalized procedures may be explained by the acceleration in organizational prosecutions post-Enron, discussed next.

Thus, for important reasons prosecutors have decided to constrain their vast discretion, settling organizational cases at the charging stage to avoid dire collateral consequences of indictment and burdensome proceedings. In contrast, individual cases tend to settle later resulting in plea bargains. As discussed next, prosecutions have chosen a structural reform approach in settling organizational cases.

II. FIVE MODELS FOR STRUCTURAL REFORM PROSECUTION

Like the explosion of public interest law firms in the late 1960’s and early 1970’s pursuing structural reform, the DOJ has now consciously adopted a structural reform litigation strategy in the wake of Enron and dozens of other high-profile corporate malfeasance scandals.¹³⁶ A structural reform paradigm is radically different from the traditional role of prosecutors to seek convictions. Further, though as described prosecutors have in the past acted as institutional reforms in several contexts, the DOJ has fixed upon one model for its recent structural reform litigation, the deferred or non-prosecution agreement, secured at

attorney-client privilege. *See Statement by Milberg Weiss Regarding Indictment*, May 18, 2006, <http://www.milbergweissjustice.com/ourstatements.php>.

¹³²*See* Darryl K. Brown, *The Problematic And Faintly Promising Dynamics Of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 526-29 (2004).

¹³³*See* Khanna, *supra* note xxx at 25-26.

¹³⁴*See* Thompson Memo, *supra* note xxx at X. Also, until the Organizational Sentencing Guidelines were promulgated in 1991, fines remained low and civil awards might have the greater effect. *See* Cindy Alexander, Jennifer Arlen & Marc Cohen, *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J. LAW & ECON. 393, 395, 409 (1999) (before 1984, “the average fine was about \$46,000,” while “the mean criminal fine imposed on a publicly held firm increased from \$1.9 million pre-Guidelines to \$19.1 million under the Guidelines”).

¹³⁵*See* Thompson Memo, *supra* note xxx at X; *see also* Lynch, *Policing Corporate Misconduct*, *supra* note xxx at 32.

¹³⁶*See* Blum, *supra* note xxx; *supra* note xxx, xxx.

the charging stage, far earlier than in typical negotiations that occur during plea bargaining after an indictment.

The DOJ's new structural reform model for organizational prosecutions is again, only one of several possible models operating at each of the stages of the criminal process discussed in Part I. These disparate structural reform prosecution efforts have not been viewed as sharing a common project, whereas on the civil side, institutional reform interventions in schools, police, and prisons have been considered as part of a common reform agenda.¹³⁷ In developing five structural reform models that prosecutors can employ, I first describe in the greatest detail (1) the DOJ's adoption of a strategy at the charging stage resulting in a recent wave of high-profile settlements. I then describe four more traditional alternatives: (2) a prevention approach that focuses on building institutional capacity to hinder and detect crime; (3) plea-bargaining settlements requiring creation of compliance programs; (4) courts imposed compliance programs during corporate probation; and (5) civil settlement models, including consent decrees supervised by courts.

A. Deferred Prosecutions

1. *The DOJ's New Structural Approach*

The Department of Justice now operates at the center of a program chiefly seeking reform of private corporations (though also targeting a few public entities) engaging in crimes ranging from criminal white collar fraud, securities fraud, tax violations, health care fraud and environmental crimes.¹³⁸ In the past several years, corporate culture has been scrutinized in the wake of the recent "epidemic" of accounting and financial malfeasance.¹³⁹ Congress responded to the crisis with the Sarbanes-Oxley Act, which relies on both enhanced criminal penalties and regulatory reform of governance to create "internal controls" to prevent malfeasance.¹⁴⁰ At the same time, the DOJ responded with a series of large scale organizational prosecutions. A negligible number have

¹³⁷See *supra* note xxx.

¹³⁸I use DOJ to refer to both the central office and U.S. Attorney's offices collectively. I will then refer to individual U.S. Attorneys, the central office, or divisions or Task Forces separately.

¹³⁹See *supra* note xxx.

¹⁴⁰The Act, among its provisions, creates new offenses for destruction or falsification of records with intent to obstruct federal investigations; requires accountants to maintain audit documents, creation of independent audit committees within corporations, requires the SEC to require companies to report on their "internal controls", and finally, establishes an independent Public Accounting Oversight Board. 15 U.S.C. §§ 1519, 1520, 1349-50, 78j-1(m). 7211, 7241 (1)(A), 7245 (1), 7262. See Coffee, *Gatekeeper Reform*, *supra* note xxx at 336, 353-64 (discussing Sarbanes-Oxley as a useful but incomplete response and calling for further measures to empower gatekeepers); Roberta Romano, *The Sarbanes-Oxley Act And The Making Of Quack Corporate Governance*, 114 YALE L.J. 1521, 1529 (2005) (criticizing imposition of governance norms "from the top down").

proceeded with an indictment, much less a trial and conviction.¹⁴¹ Again, that is not due to any difficulty in obtaining indictments against firms.¹⁴²

Instead, DOJ prosecutors have done something unprecedented. In 2002, President Bush created a DOJ Corporate Fraud Task Force (“Task Force”) to coordinate investigation and prosecution of companies.¹⁴³ A novel strategy emerged. Typically only in cases involving small organizations do federal prosecutors still proceed to trial, though in exceptional cases they still prosecute.¹⁴⁴ Far more than ever before, DOJ avoids trial by entering into pre-trial diversion agreements permitting organizations to commit to a rehabilitative program, and agreeing to defer prosecution should it comply. Such agreements are signed at the charging stage, after filing a criminal complaint but without an indictment.¹⁴⁵

The new approach was announced in 2003 by the then-head of the Task Force, Deputy Attorney General Larry Thompson, in a document called the Thompson Memo.¹⁴⁶ The Memo recommended “granting a corporation immunity or amnesty or pretrial diversion . . . in exchange for cooperation” when that cooperation “appears to be necessary to the public interest. . . .”¹⁴⁷ The notion of “pre-trial diversion” for corporations constitutes a radical form of alternative prosecution. Nor did the Memo suggest when the “public interest” might be served by not prosecuting a corporation but in exchange for an agreement. The Memo did, however, set out factors to provide guidance as to when the DOJ should prosecute. They include: (1) the nature, scope and pervasiveness of wrongdoing, (2)

¹⁴¹See Sentencing Commission’s Annual Reports, FY 2003, at <http://www.uscc.gov/ANNRPT/2003/Table54.pdf> (only two of ninety organizational prosecutions in fiscal year 2003 involved organizations with more than 5,000 employees; 86 involved firms of less than 200 employees with half in firms of less than ten employees); Sentencing Commission’s Annual Reports, FY 2004, http://www.uscc.gov/ANNRPT/2004/Table_54-post.pdf, http://www.uscc.gov/ANNRPT/2004/Table_54-pre.pdf (only two of 69 organizational prosecutions in fiscal year 2004 involved organizations with more than 5,000 employees; 62 involved firms of less than 200 employees with half in firms of less than ten employees); see also *infra* note xxx regarding the Milberg Weiss indictment.

¹⁴²See *supra* note xxx.

¹⁴³The Executive Order states that the Corporate Fraud Task Force shall “provide direction for the investigation and prosecution of cases of securities fraud, accounting fraud, mail and wire fraud, money laundering, tax fraud based on such predicate offenses, and other related financial crimes committed by commercial entities and directors, officers, professional advisers, and employees.” Exec. Order No. 13271, 67 Fed. Reg. 46,091 (July 9, 2002).

¹⁴⁴See *supra* note xxx.

¹⁴⁵See *Crime Without Conviction: The Rise of Deferred and Nonprosecution Agreements*, Corporate Crime Reporter (Dec. 28, 2005) at <http://www.corporatecrimereporter.com/deferredreport.htm> (“prosecutors have entered into twice as many non-prosecution and deferred prosecution agreements with major American corporations in the last four years”).

¹⁴⁶See Thompson Memo, *supra* note xxx. Generally, DOJ suggests prosecutors enter into deferred prosecution agreements when “the person’s timely cooperation appears to be necessary to the public interest.” See U.S. Attorneys’ Manual 9-27.600.

¹⁴⁷*Id.*

the history of misconduct, (3) timely and voluntary disclosures and cooperation with the investigation (versus “circling the wagons”), (4) remedial actions taken, including disciplining wrongdoers, (5) whether the company has an adequate compliance program, (6) collateral consequences to shareholders, pension-holders and employees of prosecution, and (7) the adequacy of individual prosecutions or civil and regulatory remedies.¹⁴⁸

The heart of the Thompson Memo approach is factor five, emphasizing compliance in the DOJ’s exercise of discretion and in design of remedies.¹⁴⁹ The approach creates, in effect, a “due diligence” defense for corporations.¹⁵⁰ Corporations that adopt an “adequate compliance program,” may avoid prosecution. Of course, a central concern of the DOJ is to screen out “cosmetic compliance” programs.¹⁵¹ As the DOJ well knew, Enron had a compliance program entitled “Respect, Integrity, Communication and Excellence,” which despite the lofty title existed only on paper.¹⁵² The Thompson Memo guidelines counsel that prosecutors investigate whether compliance efforts are implemented effectively.¹⁵³

¹⁴⁸*Id.* at II.A.

¹⁴⁹While the Thompson Memo generally governs all criminal prosecutions, divisions within the DOJ adopted earlier compliance based strategies in division-specific areas ranging from Antitrust, environmental enforcement, to civil rights. The DOJ’s Antitrust Division adopted a “Corporate Leniency Policy” since 1978, revised in 1993 to focus on compliance. See Antitrust Division, U.S. Dept. of Justice, Corporate Leniency Policy (1993), at <http://www.usdoj.gov/atr/public/guidelines/0091.pdf>. Similarly, the DOJ’s Environment & Natural Resources Division adopted an approach rewarding compliance and voluntary disclosure. See Env’t & Nat. Resources Div., U.S. Dep’t of Justice, Factors in Decision on Criminal Prosecution for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (July 1, 1991), at http://www.usdoj.gov/enrd/Electronic_Reading_Room/factors.htm. In the area of police misconduct, in which the DOJ may file civil suits for injunctive relief against local government, the Civil Rights Division at DOJ has in recent years settled cases pursuant to Memoranda of Agreements rather than consent decrees. See 42 U.S.C. § 14141(a) (1994); Matthew J. Silveira, *An Unexpected Application Of 42 U.S.C. § 14141: Using Investigative Findings For § 1983 Litigation*, 52 UCLA L. REV. 601, 617 n. 73 (2004). The DOJ also emphasizes voluntary settlement of ADA violations and mistreatment of institutionalized persons in correctional facilities under the Civil Rights of Institutionalized Person Act. See News Release, U.S. Dep’t of Justice, *Fact Sheet: Civil Rights Accomplishments* (July 23, 2003), at 2003 WL 21715202.

¹⁵⁰See Developments, *supra* note xxx at 1258 (advocating a due diligence defense in federal criminal law to modify respondeat superior.)

¹⁵¹Kimberly D. Krawiec, *Cosmetic Compliance and The Failure Of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

¹⁵²See Enron Corp., Code of Ethics 4 (2000), at <http://www.thesmokinggun.com/enron/enronethics1.html>; Public Hearing Held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines 60 (2002), at http://www.ussc.gov/corp/ph11_02/plenary1.pdf.

¹⁵³The Thompson memo states that: “In evaluating compliance programs, prosecutors may consider whether the corporation has established governance mechanisms that can effectively detect and prevent misconduct.” See Thompson Memo, *supra* note xxx at VII.B; see also Office of the Deputy Attorney General, Guidance on Prosecutions of Corporations (June 16, 1999) (noting that the mere “existence of a

Further, the U.S. Sentencing Commission adopted guidelines mitigating punishment but only where organizations develop “effective” compliance programs.¹⁵⁴ Those criteria for effectiveness will be developed in Part III.

The DOJ now seeks to use prosecution in egregious cases to leverage compliance on a “massive scale” and provide “a force for positive change of corporate culture.”¹⁵⁵ In keeping with its new mission, the DOJ has obtained deferred or non-prosecution agreements with thirty four companies, many of which are leading Fortune 500 companies, including AIG, AOL, KPMG, Monsanto, Motorola, and Time Warner.¹⁵⁶ The alleged criminal violations range from white collar fraud, accounting, tax, foreign corrupt practices to health care fraud.¹⁵⁷ DOJ has also declined prosecution of organizations in part because they maintain “effective” compliance programs.¹⁵⁸ States have adopted parallel strategies to create “incentives... to implement compliance programs,” with New York Attorney General Eliot Spitzer leading the way.¹⁵⁹

2. Empirical Analysis of the DOJ’s Agreements

a. A Common Remedial Framework

Judge Gerard E. Lynch and others have argued that as the best solution for the problem of vast prosecutorial discretion, prosecutors should develop standards to constrain their discretion and to provide clear notice to organizations.¹⁶⁰ In some respects that is what the DOJ did when it issued its Thompson Memo guidelines. Nevertheless, no DOJ guidelines define what remedies prosecutors seek when they negotiate structural reform agreements. Courts must approve deferred prosecution agreements, but no court has rejected an agreement.¹⁶¹ All have been

compliance program is not sufficient,” and that criminal conduct may suggest “management is not adequately enforcing its program”).

¹⁵⁴See *infra* Part xxx.

¹⁵⁵See Thompson Memo, *supra* note xxx (“corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale.”).

¹⁵⁶See Appendix A.

¹⁵⁷See *id.*

¹⁵⁸See Ad Hoc Committee Report at 27 (citing examples); *supra* note xxx.

¹⁵⁹See Michael Bobelian, *Companies Under Fire Often Decide to Settle to End Problems Quickly*, N.Y.L. J., Nov. 30, 2004; Woo, *Self Policing Can Pay Off for Companies*, Wall St.J., Sept. 8, 1993 at B5. Perhaps most remarkable was a global settlement of a dozen of the leading Wall Street investment banking firms with the New York Attorney General, the SEC, the New York Stock Exchange, and other regulators, “mandating sweeping structural reforms.” See Joint Press Release, SEC, NASD, NYSE, NYSAG & NASAA, Ten of Nation's Top Investment Firms Settle Enforcement Actions (Apr. 28, 2003), <http://www.sec.gov/news/press/2003-54.htm>.

¹⁶⁰See Lynch, *Corporate Misconduct*, *supra* note xxx; see *infra* note xxx.

¹⁶¹See 18 U.S.C § 3161(h)(2) (stating that the time to file an indictment is tolled during “[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the

approved without any judicial modification. The DOJ's remedial discretion could create substantial uncertainty among potential targets of prosecution. The agreements, for example the KPMG agreement, show the vast power and discretion of the DOJ to achieve structural oversight with a wide range of intrusive terms. Nevertheless, looking at the KPMG agreement alongside the other agreements casts it in a different light.

To determine whether or how the DOJ adopts any consistent approach that would provide somewhat clearer notice to organizations, I compiled terms from deferred and non-prosecution agreement entered in federal organizational prosecutions. I separated agreements into two groups, before and after January 20, 2003, the date of the Thompson Memo. I have included at Appendix A and B charts of the main features of these deferred prosecution agreements (DP's) and non prosecution agreements (NP's). I am confident that I have included *all* of the post-Thompson memo agreements, and for that reason I focus the analysis on that time frame. I provide this comprehensive study of the DOJ approach both to better understand its features, and also to provide guidance to prosecutors, courts and practitioners in future negotiations.

Overall, the compliance focus of the DOJ is clear. Almost all agreements make very explicit the requirement of an independent monitor to supervise compliance and the creation of a compliance program, often with specific provisions of that program elaborated. Of the thirty-three agreements entered after January 2003, seventeen include Independent Monitors and three others had already secured independent monitors. Twenty-two of the agreements ordered compliance programs (two-thirds). Although eleven agreements did not include compliance programs, of those, in six agreements the prosecutors recognized the organization had already taken sufficient steps to implement compliance measures;¹⁶² in four simultaneous compliance agreements were reached with regulators.¹⁶³

court, for the purpose of allowing the defendant to demonstrate his good conduct.” (italics added)); *see, e.g.* *United States v. Computer Associates International, Inc.*, Deferred Prosecution Agreement, 1492 PLI/Corp 861 (2005) (“the Agreement to defer prosecution of CA must be approved by the Court, in accordance with 18 U.S.C. § 3161(h)(2). Should the Court decline to approve the Agreement to defer prosecution for any reason, both the Office and CA are released from any obligation imposed upon them by this Agreement, and this Agreement shall be null and void.”)

¹⁶²Those companies are: AIG, HealthSource, MCI, PNC and Williams Power Co, Inc. *See* Appendix A.

¹⁶³*See* SEC Press Release, *Sec And U.S. Attorney Settle Massive Financial Fraud Case Against Adelpia And Rigas Family For \$715 Million*, at <http://www.sec.gov/news/press/2005-63.htm>; *see* FERC Press Release, *supra* note xxx (“Commission staff understands that the companies’ new owners are not repeating the improper practices.”); FirstEnergy Nuclear Hit With Record Fine for Reactor Damage, at <http://www.ens-newswire.com/ens/apr2005/2005-04-22-04.asp> (“Davis-Besse’s performance has been closely monitored by a dedicated NRC oversight panel and the inspection staff.”). *See* Appendix A. In the one remaining agreement does not include or recognize compliance programs or monitors, but the company issued a public statement that it had implemented substantial compliance efforts. *See* BankAtlantic – Press Release, *BankAtlantic Enters into Agreements with the Department of Justice, Office of*

Thus, the DOJ appears to follow the Thompson Memo guidelines in emphasis on compliance, at least in the written terms of the agreements. Some consistency would not be surprising given that the Corporate Fraud Task Force coordinates the prosecution of these cases, but some inconsistency could also be expected, given that each U.S. Attorney's Office negotiates the agreements independently and there is no requirement of central office approval.¹⁶⁴

The DOJ did not invent this approach wholecloth. Instead, it pursues similar compliance-based remedies as do regulatory agencies such as the SEC, the EPA, the Treasury Department, the Defense Department, and the Inspector General for the Department of Health and Human Services, as well as voluntary disclosure and cooperation regimes two DOJ Divisions had earlier adopted.¹⁶⁵ Prosecutors also followed the framework of the new Organizational Sentencing Guidelines, with its focus on rewarding corporations with "effective" compliance programs. Perhaps it was the Sentencing Commission that was the "provocateur" of the DOJ's new approach.¹⁶⁶ Nevertheless, many of these agreements fall short of the rigorous Guidelines criteria for what constitutes effective compliance. I discuss each category of provision in turn.

First and most prominent is the role of independent monitors in these agreements. Seventeen of the thirty-three prosecution agreements entered since the Thompson Memo required independent monitors (three more noted voluntary retention of monitors).¹⁶⁷ These monitors had sweeping powers to gather information, promulgate policies, and oversee compliance. As the U.S. Attorney for New Jersey explains, "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

Thrift Supervision, and FinCEN Relating to Bank Secrecy Act and Anti-Money Laundering Compliance Matters, at <http://phx.corporate-ir.net/phoenix.zhtml?c=106823&p=irol-newsArticle&ID=847985&highlight> (CEO Alan B. Levan commented, "we have worked tirelessly to ensure we are in full compliance with the Bank Secrecy Act and other anti-money laundering laws and regulations, and have made significant investments in personnel and compliance systems.") The only firm left, the exception, is BAWAG, a foreign bank that was in the process of being sold. See Press release, U.S.A.O. S.D.N.Y., Austrian Bank "BAWAG" to Pay 337.5 million, June 5, 2006.

¹⁶⁴See Andrew Hruska, *The President's Corporate Fraud Task Force*, U.S. ATT'Y BULL. 1 (May 2003), at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5103.pdf (the Task Force members "consult regularly with the prosecutors and investigators . . . to coordinate the overall scope and direction of the Department's effort to combat corporate fraud"); Wray and Hur, *supra* note xxx at 1187-88 & n. 407. Districts use each others' work as a template. The District of New Jersey "utilized the work of other districts as a starting point and crafted the final document to fit the facts of the case and the negotiations with Bristol-Myers." See Christie & Hanna, *supra* note xxx at 1049.

¹⁶⁵See Wray & Hur, *supra* note xxx at 1107-8; see *supra* note xxx.

¹⁶⁶See Ronald F. Wright, *Sentencing Commissions As Provocateurs Of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

¹⁶⁷See Appendix A.

Office. Independent monitors are visible, on-site reminders that compliance with the terms of a deferred prosecution agreement is mandatory, not optional.”¹⁶⁸ The monitors did not report to a court, but report to the DOJ and perhaps also a federal agency. Further, none of the agreements provide that the reports of these monitors are to be made public (nor does the DOJ take a position whether the reports are privileged). The length of monitoring is often longer than the typical 18 months for deferral agreements and can be as long as three years, but a few specify that they can be extended if needed to secure compliance.¹⁶⁹

The monitors may become involved in uncovering and remedying new criminality totally unrelated to the agreement. Demonstrating the power of these monitors, in the Bristol-Myers Squibb case, the monitor recommended and then the Board dismissed the CEO, not based on failures related to the agreement deferring prosecution of securities fraud charges, but a new criminal investigation relating to a patent dispute.¹⁷⁰

Second, the agreements either contain requirements to create detailed compliance programs or the entity had already created one voluntarily. These compliance programs are often sweeping, affecting both top management and low level employees. Some, because of the prosecution of key actors, inevitably affect entire industries. Most require the creation of elaborate compliance programs, including auditing, new policies, reporting systems, and training.

Only five agreements incorporate the Sentencing Guidelines requirements for effective compliance programs.¹⁷¹ The others agreements specify creation of compliance programs that do not satisfy the Guidelines’ seven criteria. Those agreements, for example, do not specify that the compliance program itself be audited to improve its effectiveness and do not specify involvement of high-level officials. Some also go farther than the Guidelines in some respects, for example by requiring top-level governance changes apart from the creation of a compliance program, including addition of members to the Board of Directors of the corporation, and in one case, DOJ approval of an independent director.¹⁷²

¹⁶⁸See Christie and Hanna, *supra* note xxx at 1055.

¹⁶⁹See U.S. Attorneys Manual § 9-22.010 (“The period of supervision is not to exceed 18 months.”) The few, such as KPMG, that specify they can be extended if compliance is not complete, do not specify how that is to be judged.

¹⁷⁰See Stephanie Saul, Bristol-Myers Chief Fired Over Patent Dispute, N.Y. Times, Sept. 12, 2006.

¹⁷¹The KPMG, Hilfiger, German Bank HVB, Mellon Bank, and Roger Williams Medical Center agreements require creation of “effective compliance” programs as per the USSG. See Appendix A.

¹⁷²See Christie & Hanna, *supra* note xxx at 1052-53 (describing Bristol-Myers agreement requirement of two directors appointed to the Board, one with the approval of the U.S. Attorney’s Office, stating their “aim was to bring fresh blood and a new perspective to the board of directors; our preference for someone with a law enforcement background was made clear.”)

Third, nine of the decrees include in the compliance programs data gathering efforts to enable monitors to better oversee compliance.¹⁷³ The decrees do not, however, specify what measure the monitor should use to quantify compliance.

Fourth, all of the agreements include provisions that require cooperation with the DOJ during investigation of individual employees or former employees.¹⁷⁴ Such provisions include waivers of attorney-client and work-product privilege, access to records, and interview powers. In effect the organization serves as “an investigative partner” of the DOJ.¹⁷⁵

Fifth, the decrees often retained nonstructural elements typical of criminal law judgments – punitive fines, with amounts ranging from the thousands to the hundreds of millions. Nevertheless, many of the decrees require payments of civil restitution only rather than a punitive fine, including to shareholder compensation funds, disgorgement and payment of back taxes.¹⁷⁶ These fines and restitution were often already imposed fines by regulatory actors; the added fine was often negligible.¹⁷⁷

Thus, the overall approach requires comprehensive compliance programs, including independent monitors, detailed injunctive changes of policy and practice, training programs, auditing, data collection, and cooperation with the DOJ. This is a real change from the general features of known organizational agreements prior to the Thompson Memo, which tended to last for a short time and had fewer requiring compliance.¹⁷⁸

Given each of the reasons discussed why prosecutors possess near-overwhelming power to prosecute organizations, the adoption of a more lenient approach, an “entente cordiale,” is perhaps surprising.¹⁷⁹ Explanations already given include that prosecutors hope to avoid the catastrophic collateral consequences of an indictment, and also that that settlement conserves DOJ resources, where organizational prosecutions

¹⁷³See Appendix A (BDO Seidman, Bristol-Myers Squibb, Canadian Imperial Bank, Computer Associates, and Operations Management International agreements, together with the KPMG, Hilfiger, and German Bank HVB agreements require creation of “effective compliance” programs under the Guidelines).

¹⁷⁴There is one exception - the Hilfiger agreement does not require full cooperation with the DOJ - but only because Hilfiger had already provided it.

¹⁷⁵See Michael R. Sklaire and Joshia G. Berman, *Deferred Prosecution Agreements: What is the Cost of Staying in Business?*, 15 WASH. LEGAL FOUNDATION 11 (June 3, 2005).

¹⁷⁶The Sentencing Guidelines prioritize payment of restitution. See 18 U.S.C. § 3572(b) (2000) (“the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.”). See Christie and Hanna, *supra* note xxx at 1059 (describing why the Bristol-Myers agreement did not include a punitive fine).

¹⁷⁷As in civil structural reform cases, a structural reform remedy may cost far less than a damages award (or in a criminal case a punitive fine). See Jeffries, *Right-Remedy Gap*, *supra* note xxx at 107-110.

¹⁷⁸As illustrated in Appendix B below, only one-third of those agreements had independent monitors, most lasted for a short time or listed no duration at all, and only one-third required compliance programs.

¹⁷⁹See Joseph A. Grundfest, *Over Before it Started*, N.Y. TIMES, June 14, 2005.

are complex and firms can afford expensive and experienced defense counsel. Prosecutors also describe they could likely never obtain such sweeping injunctive relief through the courts.¹⁸⁰

An additional explanation suggested by these agreements is that prosecutors often confront situations in which the organization is less blameworthy than individual employees. Prosecutors may confront two general types of organizations. If rogue employees can be blamed for the criminality, then the interests of prosecutors and the current leadership organization may be entirely aligned. Both may wish to reform the organization and punish those involved in criminality, but also take special care to avoid undue collateral consequences to blameless employees, shareholders, pension plans and the public.¹⁸¹ Thus it is often defense lawyers representing the employees being individually prosecuted that protest about the prejudicial effects of these agreements.¹⁸²

However, in cases where the current leadership of the organization shared a role itself in the wrongdoing, reforms may require purging the leadership and fundamentally changing the organizational mission. Those cases may not easily be settled, perhaps explaining occasional inability to reach agreements, such as in the Andersen and Milberg Weiss cases, or in cases involving small firms.

Finally, the DOJ's own deterrence goals may be better served by a system of narrow standards in order to better provide notice.¹⁸³ I take up the subject of clear remedial limits in the next Part.

b. Examples of Overreaching

Despite the consistent DOJ focus on compliance since 2003, the agreements taken together also reveal the limitations of prosecutors supervising ongoing structural reform projects. While I have described a striking family resemblance between the agreements to date, some case by case inconsistency may also be observed that can not be easily explained by the type or organization, misconduct or prior compliance.¹⁸⁴ Some

¹⁸⁰See *supra* note xxx.

¹⁸¹See Blum, *supra* note xxx ('Deferred prosecutions give a company the chance to reform itself without creating a situation where a lot of people are going to lose their jobs and a lot of investors are going to lose more money,' says Timothy Coleman, senior counsel to Deputy Attorney General James Comey Jr.').

¹⁸²See *id.* at 3 (quoting attorney for Computer Associates, calling the agreements "an excellent way for prosecutors to satisfy their objectives without imposing serious collateral consequences," but quoting an attorney who represented a former Computer Associates executive facing criminal charges objecting to the decrees).

¹⁸³Few organizational prosecutions were brought before Thompson Memo. See *supra* note xxx. The DOJ treated the Memo as notice that they will now emphasize structural reform over prosecution.

¹⁸⁴See F. Joseph Warin, Peter E. Jaffe, Esq., *The Deferred-Prosecution Jigsaw Puzzle: A Modest Proposal For Reform 19*, SL046 ALI-ABA 263 (2005). ("[I]n Shell and Monsanto we have two blue-chip, highly regarded public companies. . . each cooperated fully with the investigations of both the DOJ and the SEC. . . Yet one corporation walked away with the disconcerting prospect of conducting 36 months of

non-prosecution agreements have more onerous terms, for example, than deferred prosecution agreements, which may indicate underreaching, or providing “sweetheart deals” for certain firms.¹⁸⁵

Some agreements display signs of prosecutorial abuse of power.¹⁸⁶ Several agreements include injunctive concessions simply unrelated to the substance of the alleged criminal offenses. Four agreements include “community service” requirements, such funding the chair in ethics at Seton Hall law school in the Bristol Myers case, the donation to the Coast Guard alumni association and chair in environmental studies in the Operations Management International case, and the environmental community service projects funded in the FirstEnergy Nuclear Operating Company case.¹⁸⁷ Similarly, in the Roger Williams Medical Center case, the government feared that indicting a non-profit hospital for public corruption would jeopardize health care to the poor in Providence, Rhode Island; the deferred prosecution agreement required that the hospital provide \$4 million in additional free uninsured health care to low-income residents.¹⁸⁸ The DOJ has articulated no principle to limit the reach of such terms, nor is there anything unusual about those three cases making community service more appropriate there than in the other twenty-nine post-Thompson Memo agreements (but then again, perhaps the firms themselves proposed to perform such community service).¹⁸⁹

Still more troubling are terms unresponsive to either rehabilitative or punitive ends, for example the prosecution of the New York Racing Association (NYRA), a state franchised operation,¹⁹⁰ notable because the

business under the shadow of a deferred criminal information and a corporate monitor, while the other was let off with a good talking to. 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. . .”).

¹⁸⁵See *id.* at 267 (comparing the American Electric Power Inc. deferred-prosecution agreement with the Symbol Technologies Inc. non-prosecution agreement; “you get the curious result that some non-prosecution agreements are quite possibly more oppressive than some deferred-prosecution agreements.”).

¹⁸⁶See Coffee, *supra* note xxx.

¹⁸⁷See *Prosecutor to Corporation: Endow a Chair at My Law School, or Else*, 19 Corporate Crime Rep. 32(3), August 3, 2005 (“the company agreed to endow a chair in business ethics at Seton Hall University School of Law – the law school where U.S. Attorney Christie received his law degree.”). John Coffee commented that this raises an issue of “prosecutorial accountability. . . Should a U.S. attorney exploit his leverage over a corporate defendant to compel it to do good deeds, such as creating a chair at the U.S. attorney’s law school?” *Id.*

¹⁸⁸See Press Release, Gov. Carcieri, Attorney General Lynch, Health Director Gifford Announce Oversight Agreement with Roger Williams Hospital, April 7, 2006; Deferred Prosecution Agreement, United States v. Roger Williams Medical Center, at ¶12-13 (Jan. 27, 2006) (on file with author).

¹⁸⁹See U.S.S.G. § 8B1.3; Brent Fisse, Community Service as a Sanction Against Corporations, 1981 Wis. L. Rev. 970.

¹⁹⁰See Press Release, U.S. Dep’t of Justice, The New York Racing Association, Two Former Directors of the Pari-mutuel Department and Four Former Pari-mutuel Tellers Charged in a Multi-million Dollar Scheme to Defraud the United States.

federal prosecutors, in deference to state officials fearing loss of slot machine revenue at race tracks that they were counting on to comply with a ruling requiring additional school financing, required as part of the conditional dismissal of the criminal charges, that the NYRA install slot machines (“video lottery terminals”) at its race tracks.¹⁹¹ The settlement between state prosecutors and MCI included “a first-of-its-kind economic development agreement” that MCI would increase by 1,600 jobs over 10 years its employment in Oklahoma.¹⁹²

Critics call such unrelated obligations imposed on corporations by federal prosecutors “Tammany Hall politicking,” and indeed prosecutors in both cases acted to benefit state government and not because the conditions had any relationship to the alleged crimes.¹⁹³ Such terms resemble the sort of collusion in order to secure resources for local government noticed in some civil structural reform litigation.¹⁹⁴

These agreements may severely impact the rights of individuals being prosecuted. Judge Kaplan in the KPMG case raised alarms regarding pressure-tactics during negotiations of deferred prosecution decrees, in which the DOJ allegedly discouraged payment of legal defense fees to employees; others have objected to the requirements in many decrees that organizations waive attorney client privilege.¹⁹⁵

These non trivial examples of overreaching suggest that despite adoption of a fairly consistent compliance oriented approach, prosecutors nevertheless may abuse their enormous power during negotiations.

Further, discretion is unlimited by any judicial review. The agreements, with only one exception, permit the DOJ in its sole discretion, to find that an agreement has been breached, and then pursue a prosecution of the organization. Interestingly, in a possible example of underreaching and special lenient treatment, Boeing negotiated a unique provision where a Special Master, a retired federal judge, will adjudicate any alleged breach – and any breach by an employee “at a level below Executive Management” is to not “be deemed to constitute conduct by Boeing.”¹⁹⁶ For all of the other organizations subject to agreements, however, the DOJ may unilaterally find a breach. This problem of unreviewed prosecutorial discretion will be taken up in the next Part, after discussing three alternative models for structural reform.

¹⁹¹See *id.* (citing James M. Odat, NYRA Deal in the Works, Times Union (Albany, N.Y.), Dec. 6, 2003, at A1 (reporting that “Gov. George Pataki and legislative leaders are counting on the gambling hall to help balance the state budget” and projecting that the slots would generate \$500 million for state coffers)); see also Greenblum, *supra* note xxx at 1878.

¹⁹²See Corporate Crime Reporter, *supra* note xxx.

¹⁹³See Warin and Jaffe, *supra* note xxx at 268.

¹⁹⁴Here private parties provide benefits to local government, whereas in civil rights cases, local government often cooperated with plaintiffs to obtain resources from the state. See, e.g. Schlanger, *supra* note xxx at 2010-13.

¹⁹⁵See *supra* note xxx.

¹⁹⁶See Boeing, Deferred Prosecution Agreement at ¶10-12.

B. A Prevention Model

Four additional models in addition to the deferred prosecution model exist, though the DOJ no longer emphasizes those models in its current approach to organizational prosecutions. They shed light on alternative remedial roles for prosecutors, courts and organizations.

A second model, a prevention model, operates before an investigation or a prosecution. In such an approach, the DOJ seeks to create compliance programs or voluntary disclosure programs to detect and deter lawbreaking before it occurs. Such a prevention role seems contrary to the typical role of prosecutors to litigate instances of investigated criminal behavior. Nevertheless, as a complement to their traditional role, prosecutors also focus on prevention to influence primary behavior without adversarial proceedings or judicial involvement.

Preventative approaches may be particularly useful in the organizational context, where organizations themselves may welcome assistance in preventing employees from breaking the law. For that reason, in a range of areas the DOJ now operates joint task forces with other agencies in part to focus on prevention. The Corporate Fraud Task Force, for example, not only coordinates prosecutions, but allocates resources among federal and state agencies to develop capability to audit organizations, compliance procedures, encourage voluntary disclosures, and detect criminality.¹⁹⁷ The Katrina Fraud Task Force similarly aims to develop institutional ability to prevent government agencies from falling victim to fraud directed at the \$85 billion in Gulf region relief spending.¹⁹⁸

Federal prosecutors remain far more focused in their day to day work on investigation and prosecutions, but they operate against a regulatory background in which auditing and reporting aims to prevent crime. Regulators have long promulgated policies encouraging prevention-oriented reporting and auditing measures.¹⁹⁹ A range of other agencies also adopt rewards for voluntary disclosure, including the Department of Defense, EPA, Federal Aviation Administration, HHS, SEC, State Department, and Department of Labor.²⁰⁰ The emphasis on voluntary disclosure and prevention increased in response to corporate governance scandals post-Enron. With the passage of Sarbanes-Oxley, with its elaborate reporting and compliance requirements, and then with

¹⁹⁷See Exec. Order No. 13271, 67 Fed. Reg. 46,091 (July 9, 2002), at <http://www.usdoj.gov/dag/cftf/execorder.htm>, First Year Report to the President, Corporate fraud Task Force, at http://www.usdoj.gov/dag/cftf/first_year_report.pdf.

¹⁹⁸See Hurricane Katrina Fraud Task Force, A Report to the Attorney General, Feb. 2006, 21, http://www.usdoj.gov/katrina/Katrina_Fraud/docs/katrinareportfeb2006.pdf.

¹⁹⁹See *supra* note xxx.

²⁰⁰See discussion in Wray and Hur, *supra* note xxx at 1108-1133.

addition SEC requirements, corporations face more onerous rules governing internal auditing and compliance.²⁰¹

Prosecutors rely on these pre-existing disclosure regimes to prevent crime in the first instance, they coordinate training on those requirements, and then bolster those rules by investigating along with agencies noncompliance with regulatory reporting requirements as an early signal of possible criminality.²⁰² Further, prosecutors have increased their focus on prevention by conditioning settlement of criminal prosecutions on compliance with such regulatory self-reporting and auditing regimes. Perhaps the DOJ adoption of a compliance oriented approach reflects a certain path dependency, following the reporting and auditing compliance model already in place at the SEC and other agencies, and then policing violations detected through that regime. Regulators may also prefer non-prosecution and settlement to prosecutions that can discourage voluntary compliance and disclosures. The net result may allow prosecutors to rely less on criminal sanctions and more on auditing and reporting regimes aimed at self-reporting and prevention.

C. A Plea Bargaining Model

Just as most civil cases settle and almost all individual criminal prosecutions resolve in plea-bargaining, almost all organizational prosecutions settle.²⁰³ Prosecutors could seek structural reforms at the plea bargaining stage, seeking a guilty plea under which a corporation will implement compliance reforms. Doing so requires more involvement of a court than in a deferred prosecution. During plea-bargaining, as noted, a court minimally ensures that a plea is voluntary, in the public interest, and consistent with the purposes of the Guidelines.

The DOJ has sometimes pursued guilty pleas combined with compliance settlements. Doing so risks the potentially crippling collateral consequences of a conviction. Before the Thompson Memo, the DOJ occasionally sought structural reforms from corporations charged with crimes, and did so chiefly by securing plea agreements including injunctive reforms. The E.F. Hutton and the Drexel Burnham Lambert cases in the 1980's were leading examples.²⁰⁴

²⁰¹See Final Rule: Disclosure Required by Sections 406 and 407, 17 C.F.R. 228, 229 & 249 (January 23, 2003); NYSE Rule 303A.10, 68 Fed. Reg. 5110, 5118 (January 31, 2003); Sarbanes-Oxley Act anti-shredding provision, at 18 U.S.C. § 1519; Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 ADMIN L. REV. 757 (2005); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1209-1220 (1999); *supra* note xxx.

²⁰²See First Year Report, *supra* note xxx at iii; see also Appendix A, in which most agreements were negotiated in collaboration with regulators.

²⁰³See *supra* note xxx.

²⁰⁴The E.F. Hutton case was the most high profile early instance. See Plea Agreement in *United States v. E.F. Hutton & Co., Inc.*, Crim. No. 85-00083 (Apr. 30, 1985), reprinted in Subcomm. on Crime of the House Comm. on the judiciary, Report on E.F. Hutton Mail and Wire Fraud, 99th Cong. 325 (Comm. Print 1986).

More recently, the DOJ has pursued an indictment more rarely, preferring deferral or non-prosecution agreements. In a few cases brought under the Foreign Corrupt Practices Act, however, the DOJ used a different approach, obtaining guilty pleas by subsidiaries resulting in criminal fines, and a separate agreement with regulators and the parent corporation to adopt compliance reforms.²⁰⁵ That approach secures compliance but also avoids harsh consequences on the parent of a plea.

D. Corporate Probation

A final criminal law model for structural reform of corporations, corporate probation operates at the sentencing stage either after a guilty plea or conviction, during which courts, not prosecutors, retain the power and discretion to craft remedies. This model more closely resembles classic civil court-centered structural reform litigation, except here it is the Guidelines that provide the authority and limitations under which a federal court may impose reforms as part of an order of probation for a convicted organization. The vast majority of organizations convicted or that plead guilty are sentenced by federal courts to probation, and a smaller number are ordered to create compliance programs.²⁰⁶ Of the thousands of organizations sentenced to probation since the early 1990's, almost all are small organizations, where large organizations now enter into deferral agreements. Most probation agreements require only that an entity not engage in any criminality during a probationary period.

However, the Organizational Sentencing Guidelines also permit a court to impose affirmative structural conditions, including by ordering the creation of an “effective ethics and compliance program,” “if such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct.”²⁰⁷ The

²⁰⁵The ABB corporation agreed to compliance based reforms with the SEC in conjunction with guilty pleas by its subsidiaries ABB Vetco Gray and ABB Vetco Gray UK. See *SEC v. ABB Ltd.*, No. 1:04CV01141 (July 6, 2004) at <http://www.sec.gov/litigation/complaints/comp18775.pdf>.

²⁰⁶See Sentencing Commission's Annual Reports, FY 2003, at <http://www.ussc.gov/ANNRPT/2003/Table53.pdf> (in fiscal 2003, 148 of 200 organizations received probation, with 24 a court-ordered compliance program); Sentencing Commission's Annual Reports, FY 2004, at <http://www.ussc.gov/ANNRPT/2004/Table53-pre.pdf>, <http://www.ussc.gov/ANNRPT/2004/Table53-post.pdf> (in fiscal 2004, 116 of 130 organizations received probation with 21 court-ordered compliance program).

²⁰⁷See U.S.S.G. § 8D1.1(a) (6). Probation is also to be ordered if necessary “to secure payment of restitution, ... enforce a remedial order ... or ensure completion of community service.” U.S.S.G. § 8D1.1(a)(1). Probation is also to be ordered, “if the organization within five years prior to sentencing engaged in similar misconduct. . . .” and if an “individual within high-level personnel of the organization ... participated in the misconduct underlying the instant offense . . .” *Id.* at § 8D1.1(a)(4)-(5). See Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 *YALE L.J.* 2017, 2028 (1992) (describing the breadth of the probation option); Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning*

court then orders that the entity maintain “an effective compliance and ethics program consistent with § 8B2.1.”²⁰⁸ Recall that an “effective” program must be quite comprehensive, including auditing, data collection, policy changes, training, and involvement of high level management. Courts now order a significant number of organizations to install such compliance programs during probation.²⁰⁹ The court may also impose other sanctions including restitution, community service, and shaming where a company must publicize its noncompliance to victims.²¹⁰

Courts supervise implementation of these compliance programs in much the same fashion as in a civil structural reform case. Once courts order an organization to develop a compliance program as a condition of probation, courts monitor to decide whether the organization has successfully done so. Courts largely rely on organizational self-reporting, but in a form specified by the court.²¹¹ The Sentencing Commission also recommends that a regulatory body review those reports and that appropriate experts be employed to assess compliance.²¹² The court, relying on reporting and evaluations, remains involved until it determines that the firm complied and should be released from probation. Thus, in an organizational probation, the court is closely involved in oversight of compliance efforts and in ensuring that an effective program is in place before its oversight ends.

E. Civil Models: Consent Decrees and Parallel Settlement

A final model uses hybrid civil and criminal prosecutions, and then settlement in the civil case to obtain injunctive reforms designed to prevent future criminality. The DOJ has in the health care context occasionally brought parallel criminal fraud charges and civil False Claims Act proceedings. The dismissal of criminal charges against the organization or a guilty plea by a subsidiary may then be accompanied by a parallel civil settlement requiring adoption of compliance measures.²¹³

Corporate Offenders Through Corporate Probation, 16 AM. J. CRIM. L. 1, 4 (1988).

²⁰⁸See U.S.S.G. §§ 8D1.1(a), 8D1.4(a).

²⁰⁹See Sentencing Commission’s Annual Reports, FY 2003, available at <http://www.ussc.gov/ANNRPT/2003/Table53.pdf> (74% of organizations had probation ordered and 12% had court ordered compliance programs). Most notable was the Consolidated Edison case, in which ConEd plead guilty mid-trial and accepted a probation agreement including appointment of a special master. See Arthur F. Mathews, *Defending SEC And DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations*, 18 NW. J. INT’L L. & BUS. 303, 431 (1998).

²¹⁰See USSG § 8D1.3, 4(a).

²¹¹See *id.* at 8D1.1(a), 8D1.4(a), (c).

²¹²See Application Notes to USSG § 8D1.4 (“To assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment.”).

²¹³See, e.g. Wray and Hur, *supra* note xxx at 1167-68 & n. 334 (listing examples of civil False Claims Act settlements together with dismissal of criminal charges or a

If the DOJ is concerned about the collateral effects of an indictment, it could pursue such a strategy, rather than enter into deferral agreements.

A more robust civil settlement model is that of a civil consent decree, in which a court supervises the implementation of any agreement and adjudicates any breach and the agreement's ultimate termination. The SEC pursues civil consent decrees, for example, in its regulatory enforcement actions.²¹⁴ And though the DOJ has not done so in its recent agreements, the DOJ adopted a civil consent decree model in its one previous effort to use structural reform to combat organization (there organized) crime.²¹⁵ Federal prosecutors started to bring in the 1980's a series of RICO prosecutions of labor unions. The RICO statute provides both for criminal punishment and civil injunctions, permitting a court to issue "such restraining orders and prohibitions or take such other actions as it shall deem proper."²¹⁶ In 1982, the DOJ filed its first lawsuit attempting to restore democracy to a "mobbed up" union,²¹⁷ and since then has filed twenty more such lawsuits.²¹⁸ The DOJ negotiated in almost all cases consent decrees in which trusteeships would take over the control of affected unions or locals.²¹⁹ Though far more intrusive in their day to day control over the entity, they were also closely monitored by courts, often involving judges in supervising years of protracted efforts to obtain compliance. In that sense, they more closely resemble the traditional "public law" judging model.

An example of such a structural labor prosecution is the longest running and most ambitious such effort, the prosecution of the International Brotherhood of Teamsters Union, with 1.5 million members, "the largest trade union in the free world."²²⁰ In June, 1988, Rudolph Giuliani, then U.S. Attorney for the Southern District of New York, filed a civil action under RICO, alleging that the IBT "suffered from rampant

subsidiary guilty plea, regarding Abbott Laboratories, Gambro Healthcare, Schering-Plough, McKesson, Serono, S.A., Novartis, and Tenet Healthcare).

²¹⁴See *infra* note xxx.

²¹⁵On the influence of organized crime efforts on recent corporate fraud prosecutions, see Kurt Eichenwald and Alexei Barrionuevo, *Tough Justice for Executives in Enron Era*, May 27, 2006 ("The tactics and strategies used in the successful prosecution of the former Enron chief executives, Jeffrey K. Skilling and Kenneth L. Lay, highlight the transformation that has occurred in recent years in the investigation and prosecution of white-collar crime, a change that has brought many of the techniques applied to drug cases and mob prosecutions into the once-genteel legal world of corporate wrongdoers.").

²¹⁶See Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68; 1964(a), (b); § 1961 note; Lynch, *supra* note xxx.

²¹⁷See *United States v. Local 560, International Brotherhood of Teamsters*, 581 F. Supp. 279, 115 L.R.R.M. (BNA) 2829 (D.N.J. 1984), James B. Jacobs et al., *BUSTING THE MOB: UNITED STATES V. COSA NOSTRA* (1994).

²¹⁸See James B. Jacobs, et. al., *The Rico Trusteeships After Twenty Years: A Progress Report*, 19 LAB. LAW. 419 (2004).

²¹⁹In only two cases was the trusteeship imposed post-trial. See Jacobs et al., *supra*, at n.6.

²²⁰*United States v. IBT*, 803 F.Supp. 806, 808 (S.D.N.Y. 1992);

corruption and La Cosa Nostra domination.²²¹ The complaint named the IBT along with the General President, the General Executive Board, individual defendants including 26 members of the mafia leadership, and the “Commission of Law Cosa Nostra.”²²² The IBT quickly agreed to a consent decree rather than face an ongoing prosecution and trial.²²³ The sweeping terms called for three court-appointed officers: an Independent Administrator to oversee compliance and function with powers equivalent to the union’s General President and Executive Board, an Investigations Officer to put in place a new disciplinary system, and an Election Officer overseeing a new system of rank-and-file elections of IBT officers.²²⁴ The IBT Constitution was amended to incorporate the terms of the Consent Decree.²²⁵ Further, the district court had continuing jurisdiction to enter final judgment only when it deemed implementation complete.

A long and difficult remedial phase followed, with resistance by union leadership to the Government’s efforts to reshape the union, discipline and fire employees, reorganize the finances and supervise new elections to make “the teamsters safe for democracy.”²²⁶ Each of the three special masters faced prolonged challenges to their authority, with constant litigation and “incessant attacks against the Court Officers, Government and [the] Court objecting to the implementation of the Consent Decree” and also with litigation by nonparties.²²⁷ On balance, Jim Jacobs concluded in his book exploring the history of these decrees, that the trusteeship “triggered major changes in the IBT,” including expulsion of hundreds of organized crime members, conduct of three “fair and competitive elections.”²²⁸ However, the decree “remains in place for the foreseeable future.”²²⁹ Other DOJ trustees have had similarly mixed results, where despite successes in eradicating racketeering in some, “there has been very little success in establishing union democracy.”²³⁰ The experience illustrates the difficulty of structural reform in the face of institutional resistance; these RICO consent decrees remained supervised by courts for years, even decades. Whether the recent wave of DOJ deferred prosecution regimes will face the same roadblocks during their intended shorter life-spans remains to be seen.

²²¹*Id.*

²²²Consent Decree at 29-31, *United States v. International Bhd. of Teamsters*, 905 F.2d 610 (2d Cir. 1990) (IBT Consent Decree).

²²³*See id.*

²²⁴*United States v. IBT*, 764 F.Supp. 787, 788 (S.D.N.Y. 1991).

²²⁵*United States v. IBT*, 905 F.2d 610, 613 (2d Cir.1990).

²²⁶*See* George Kannar, *Making the Teamsters Safe for Democracy*, 102 *Yale L. J.* 1645 (1993).

²²⁷*United States v. IBT*, 742 F. Supp. at 102; *United States v. IBT*, 803 F.Supp. at 806, *United States v. IBT*, 905 F.2d at 613; *Yellow Freight System, Inc. v. U.S.*, 506 U.S. 802 (1992).

²²⁸Jacobs et al., *supra* note xxx at 212.

²²⁹*Id.* at 213.

²³⁰*Id.* at 160.

III. JUDICIAL REVIEW OF STRUCTURAL REMEDIES FOR ORGANIZATIONAL CRIME

Of the five models discussed, the DOJ has perhaps unsurprisingly embraced the model that most enhances their power at the expense of courts and defendants. Problems unique to the role of prosecutors in the federal criminal system flow from locating structural reform exclusively with prosecutors and not also with courts. Recall the range of limits on civil structural reform remedies derived from federalism and comity. Prosecutors face none of those limitations, while instead, federal criminal law delegates to them vast discretion and separation of powers constrains courts. The central problem that I elaborate in this section is the problem of overbroad prosecutorial discretion, and I suggest how courts can limit that discretion in structural reform prosecutions.

A. A Model for Judicial Review

In the classic structural reform model, “public law” litigation fundamentally reallocates government power and places judges as impartial power brokers in an ongoing bargaining process between citizens and government.²³¹ During remedial efforts, courts serve as gatekeepers, deciding and defining when the entity has substantially complied with constitutional mandates, and then terminating remedial decrees. As described above, for a number of reasons, prosecutors and not courts have assumed the public law mantle in organizational crime cases. They have decoupled the remedy from the underlying criminal prohibition, substantially narrowing federal criminal law. Nevertheless, I argue this equilibrium may not be stable in the long run and it could be reinforced by limits defined by courts.

Prosecutors naturally assumed the public law role in structural reform prosecutions. Due to their overwhelming power, prosecutors arguably operate at the center of the criminal system, whereas courts remain on the sidelines except in the few cases that proceed to trial.²³² In Judge Gerard E. Lynch’s terms, the criminal system in practice operates as “an administrative system” in which almost all cases are resolved in plea bargaining based on prosecutor’s internal procedures and standards. The present system constitutes “an informal, administrative, inquisitorial process of adjudication, internal to the prosecutor’s office—in absolute distinction from a model of adversarial determination of fact and law before a neutral judicial decision maker.”²³³ Such a system has benefits,

²³¹ See Diver, *supra* note xxx at 64.

²³² See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 469 (1996).

²³³ Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1404 (2003).

as Lynch and others have argued. Regardless, it is the reality.²³⁴

A structural reform process, however, does not necessarily call for the same dominant prosecutorial role. Prosecutors are situated very differently than judges when they oversee organizational reform efforts. Judges serving as “public law” actors sit as disinterested actors mediating impartially. Further, federal judges remain constrained not just by Article III limits but by doctrines of equitable abstention, standing, and separation of powers limits. Prosecutors lack such distance, limits and impartiality, and instead act as dominant institutional actors with few limits, institutional partiality, and predictable abuses. Nor does the largely unfettered authority of prosecutors to engage in plea bargaining and make charging decisions necessarily extend to structural reform efforts. The same constitutional and institutional reasons do not apply. For example, although prosecutors are politically accountable unlike private attorneys general, nevertheless, the same separation of powers deference may not be warranted when executives assert ongoing remedial authority over private or local public institutions.

One source for developing limiting rules for structural reform prosecution remedies is civil jurisprudence. Federal courts have long developed the means to police the boundaries of equitable remedies in civil law. The Supreme Court developed doctrines to guide lower courts in defining the boundaries of equitable remedies. The Court, despite lower courts’ “inherent capacity to adjust remedies” to enjoin unconstitutional acts, ruled that courts should craft limited injunctions with “appropriate limits” to be dissolved after local compliance “for a reasonable period of time.”²³⁵

The Court developed, for example, in the school desegregation context a three part test, requiring the court to (1) consider of the nature and scope of the constitutional violation, (2) impose the least restrictive injunctions, to restore victims to the position they would have been in absent the unconstitutional acts, and (3) take account of the administrative prerogatives of state and local authorities.²³⁶ In other contexts the Court developed “equitable principles” to guide remedies for unconstitutional housing discrimination, prison conditions, and other institutional reform. Generally, in each context, the Court’s test counsels tailoring, taking into account the scope of the violation, causation and federalism. What tailoring means depends on contours of the underlying constitutional right and the experience of implementing particular remedies. Thus, in the school desegregation context, courts variously approved and disapproved of remedies from busing, altering of district lines, merging of schools,

²³⁴See *infra* note xxx.

²³⁵See *Milliken v. Bradley*, 433 U.S. 267, 282 (1977); *Bd. Of Ed of Oklahoma City v. Dowell*, 498 U.S. 237 (1991); *Missouri v. Jenkins*, 515 U.S. 70 (1995); see also Fed. R. Civ. P. 60(b) (permitting a court to relieve a party of a judgment if “it is no longer equitable that the judgment should have prospective application.”).

²³⁶See *Milliken*, 433 U.S. at 280-81.

teacher salary raises, and creation of magnet schools, with over time the scope of acceptable remedies converging to focus on limited equalization of resources within a school district.²³⁷

Those same equitable concerns apply in civil cases even where parties enter into bargains such as consent decrees. Consent decrees are not so different from plea bargains or deferral agreements, because they are agreements between parties that invoke the power of a court. Therefore, the court's remedial limits apply. For example, in civil consent decrees, while the parties may agree upon relief broader than which might have been ordered after a trial, the Court has held that a consent decrees may only remedy matters "within the general scope of the case" and "must further the objectives of the law upon which the complaint was based."²³⁸ If third parties will be adversely affected by a consent decree, they may also participate in a fairness hearing conducted before the decree is approved, to raise their concerns and present evidence.²³⁹ The Court also held that civil consent decrees may be terminated in stages based on hearings, and relying on experts, data collection and independent monitors.²⁴⁰ A federal court similarly has the equitable discretion to modify a prospective judgment or a consent decree to take account of changed circumstances.²⁴¹ Thus, the tailoring of the consent decree is

²³⁷See *id.* (approving remedial programs), *Milliken v. Bradley*, 418 U.S. 717 (1974) (limiting interdistrict remedies to the situation of an interdistrict constitutional violation but approving use of magnet schools); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971) (approving busing and altering attendance zones); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (disapproving use of magnet schools as beyond scope of interdistrict violation). Again, those remedial limits have been much criticized, though a more recent generation of scholarship has argued that the surprising result has been a more collaborative approach towards civil rights remedies. See *supra* notes xxx-xxx.

²³⁸*Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004) (holding "a federal consent decree must spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based"); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (stating that a federal court may enter a consent decree that "provides broader relief than the court could have awarded after a trial.").

²³⁹See *Firefighters*, 478 U.S. at 529 (While a party "is entitled to present evidence and have its objections heard at the [fairness] hearings ..., it does not have the power to block [the] decree merely by withholding its consent").

²⁴⁰See *Freeman v. Pitts*, 503 U.S. 467 (1992).

²⁴¹See *Firefighters*, 478 U.S. at 526-27; see also Fed. R. Civ. P. 60(b). The Court also noted in *Frew* that "Rule 60(b)(5) ... encompasses the traditional power of a court of equity to modify its decree in light of changed circumstances." 540 U.S. at 441-42. Similarly, in *Rufo*, the Court held that district courts should apply a "flexible standard" to the modification of institutional reform consent decrees when a significant change in facts or law warrants their amendment, noting that "principles of federalism and simple common sense require the [district] court to give significant weight" to the views of government officials. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392-93, n. 14 (1992). See also *Railway Employees v. Wright*, 364 U.S. 642, 646-7 (1961) (citing "a sound judicial discretion" to modify relief "if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have arisen.").

monitored over time. Finally, though it calls for equitable relief, a consent decree is also treated as a contract in that its terms are interpreted using contract principles, based on its text and if ambiguous, based on extrinsic sources such as the intent of the parties when they entered the bargain.²⁴²

Whether federal courts unduly constrained civil rights remedies or not, in criminal law, even the most minimal judicial review that remains deferential to prosecutors in the exercise of their discretion could still have an important impact. Short of a principle requiring least intrusive means to prevent future violations, highly deferential limits could still serve to bar inclusion of unrelated terms that stray far from the core objectives of the criminal prohibition and the Organizational Sentencing Guidelines.²⁴³

Courts already have to develop such limits. Structural reform efforts at later stages of a prosecution, in consent decrees and at the probation stage, already require courts to retain a strong supervisory role in defining and monitoring remedies. The DOJ, however, increasingly seeks to avoid such judicial involvement by entering into structural reform agreements at the earlier charging stage. Nevertheless, judicial review of deferral agreements is also inevitable as organizations seek to challenge terms of agreements or prosecutors allege breach, and as third parties challenge the agreements. Some of these disputes have already occurred, but no approach towards judicial review has emerged. I describe below how courts may develop a body of criminal law to define structural reform remedies, just as they did in civil structural reform efforts.

Looking again at stages in the criminal process, I examine not just prosecutorial discretion, but also what role courts assume during (1) the approval of structural reform prosecution remedies, (2) implementation, (3) disputes over a breach, and (4) termination.

1. *Approval and the Organizational Sentencing Guidelines*

Courts have not intervened during the approval stage, during which the parties negotiate and agree on the terms of a structural reform prosecution agreement. Yet federal judges need not accept a “fait

²⁴²See *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) (“the scope of a consent decree must be discerned within its four corners”); *United States v. I.T.T. Continental Baking Co.*, 420 U.S. 223, 238 (1975) (“Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree.”); *Firefighters*, 478 U.S. at 522; see also Lloyd C. Anderson, *Implementation Of Consent Decrees In Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 726.

²⁴³The two other concerns the Supreme Court expressed in its three part civil test would not apply to structural remedies in criminal law. Federalism concerns that counsel deference to an institutional defendant are not apposite. Nor are prosecutors limited by the civil principle that victims should only be placed in the position they would have been absent a constitutional violation. Instead of equitable discretion alone, in criminal law, the punitive (and some compensatory) goals of an institutional remedy are set out for the court in sentencing guidelines.

accompli” deferral agreement.²⁴⁴ None have suggested how judges can review such charging decisions. However, the U.S. Code provides the legal hook for courts to review a deferred prosecution agreement, requiring that a court approve of any “diversion.”²⁴⁵ There is no case law on that provision. There is no commentary on it. Every judge has approved deferred prosecution agreements without any rulings, limitations, or even hearings. I propose that courts should exercise their statutory authority and conduct meaningful hearings at the deferral stage in order to evaluate deferral agreements. After all, federal courts scrutinize plea agreements for several reasons noted, including voluntariness, factual basis, fairness, but also the “public interest” and whether they conflict with the purposes of the Guidelines.²⁴⁶

The Organizational Sentencing Guidelines thus provide a natural source of law to guide such judicial review. These Guidelines, intended to promote structural changes in corporate governance, include detailed criteria for what constitutes a compliance program sufficiently “effective” to deserve mitigation. Unlike the Supreme Court’s fairly broad equitable factors applied in civil structural reform cases and vague constitutional norms in civil school desegregation, prison conditions, or voting rights cases, in criminal law, the Guidelines carefully define the scope of remedies imposed on organizations at the sentencing stage.

The Guidelines offer seven detailed criteria for what constitutes an “effective” compliance program, requiring that an organization: (1) “establish standards and procedures to prevent and detect criminal conduct,” (2) the governing authority and high-level personnel ensure an effective compliance program, delegating specific individuals to implement it and report to on its progress, (3) exclude from positions of authority persons involved in illegality, (4) conduct effective training on the compliance and ethics program, (5) use monitoring and auditing to detect criminal conduct and to evaluate the effectiveness of the compliance and ethics program and create avenues for confidential reporting of malfeasance, (6) discipline failures to comply, and (7) after criminal conduct is detected, take reasonable steps to respond and modify the compliance and ethics program.²⁴⁷

Further, the Guidelines make clear an organization must have done more than redress “specific instances of misconduct” but must also develop ways to cure “systemic shortcomings.”²⁴⁸ In response to a

²⁴⁴ See Greenblum, *supra* note xxx at 1964.

²⁴⁵ See 18 U.S.C § 3161(h)(2) (stating that the time to file an indictment is tolled during “[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, *with the approval of the court*, for the purpose of allowing the defendant to demonstrate his good conduct.” (italics added)).

²⁴⁶ See *supra* Part I.B.1. Courts can not modify plea agreements but only accept or reject the plea; no such prohibition attaches to deferral agreements.

²⁴⁷ See USSG § 8B2.1.

²⁴⁸ See Application Notes, Historical Notes; U.S.S.G. § 8B2.1(b)(7).

specific incident, and in developing a plan to redress systemic shortcomings, a company must also consider improvements to its compliance and ethics program.²⁴⁹

Still more demanding, the Guidelines require that a company “evaluate periodically the effectiveness of the organization's compliance and ethics program.”²⁵⁰ Thus, part of what constitutes a culture of compliance is a constant institutional vigilance---ongoing problem solving, not just to respond to problems, but at the meta-level to adapt the detection process itself in response to problems, is a required criteria. Still more radical, a compliance program is not enough; an organization must “. . . promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”²⁵¹ Further, courts consider best practices in industry and take into account the size of an organization.²⁵²

The new Guidelines have just started to be applied, since they are not retroactive.²⁵³ Courts, as noted, also apply these guidelines at the probation stage and can order organizational compliance programs implemented. Courts will thus already develop for convicted organizations a body of criminal law assessing whether structural safeguards will adequately prevent future malfeasance.²⁵⁴

Relying on the Guidelines and the developing body of law interpreting the meaning of “effective compliance,” courts may also review deferral or non-prosecution agreements. In that context, however, judicial review would mirror the sort of very deferential reasonableness review courts conduct regarding federal plea agreements, asking whether the agreement’s terms comport with the goals of the Guidelines.²⁵⁵ One court has already evaluated the reasonableness of a plea agreement with a corporate defendant that included substantial compliance and remedial measures and cooperation with prosecutors, approving it with reference to

²⁴⁹U.S.S.G. § 8B2.1(b)(7).

²⁵⁰See U.S.S.G. § 8B2.1(b)(5)(b).

²⁵¹See U.S.S.G. § 8B2.1(a).

²⁵²See U.S.S.G. § 8B2.1(a).

²⁵³Few courts have thus far given credit to organizations for having effective compliance programs (only 4% of 812 organizations sentenced from 1993-2001). See Ad Hoc Committee Report at 26. Part of the reason may be that most companies sentenced had 50 or fewer employees, and thus were small enough that a high-level person engaged in or approved of the criminal offense (66.4%; 27.5 % had fewer than 10 and only 7.4% had 1,000 or more). *Id.* However, a fair number of cases (40%) did involve mitigation for cooperation with the Government. See Sentencing Commission’s Annual Reports, FY 2003, at <http://www.ussc.gov/ANNRPT/2003/Table54.pdf>.

²⁵⁴See *In re Caremark Int’l, Inc. Derivative Litigation*, 698 A.2d 959, 969-70 (Ct. Chancery DE 1996) (stating that where the Guidelines offer “powerful incentives for corporations today to have in place compliance programs to detect violations of law,” failure to implement compliance systems supports derivative liability); *Dellastatious v. Williams*, 242 F.3d 191 (4th Cir. 2001) (stating directors may avoid derivative liability if they demonstrate “an adequate corporate information-gathering and reporting system”); *McCall v. Scott*, 239 F.3d 808, 819 (6th Cir. 2001) (stating that “inaction” and failure to implement compliance programs in the face of “red flags” supports liability).

²⁵⁵See *supra* note xxx.

the Organizational Sentencing Guidelines goal of encouraging compliance.²⁵⁶ A judicial role could prevent under-reaching or overreaching remedies that do not serve underlying criminal law ends. For example, a requirement that a company collect data on compliance and provide it to the DOJ, as many agreements now do, would be uncontroversial and would follow the Guidelines. Overreaching terms, like the installation of slot machines in New York, should be reviewed. Now that the Guidelines commentary no longer suggests that privilege waiver supports a reduction, courts may also consider whether terms requiring privilege waivers support the purposes of the Guidelines.²⁵⁷

By the same token, courts might reject an agreement with underreaching terms in extreme “sweetheart deals” that require no compliance program or other Guidelines requirements. While I do not ask here whether compliance programs are effective remedies or whether costs of compliance are inefficient or socially desirable, given questionable terms and some observed inconsistencies in agreements, judicial review based on the Guidelines could provide a useful check.²⁵⁸ Such review would however, be limited; not only is it highly deferential, but a court can not modify and can only reject the entire agreement. Regardless, almost all agreements have terms requiring some compliance. And only a judicial role during implementation or at the conclusion of the agreement could address whether an organization actually complied with the terms.

Courts will face far greater difficulties in providing protections for non-defendant third parties at the approval stage. The most likely parties to intervene are current and former employees who face individual prosecutions and are negatively impacted by the firm’s cooperation with DOJ, as in the KPMG case.²⁵⁹ The District Court made a novel ruling that as individuals, they had due process rights regarding the government’s conduct during its decision whether to settle with KPMG, but then offered only the remedy of a civil suit for legal fees.²⁶⁰ Including the narrow category of employees or former employees also subject to prosecution for

²⁵⁶United States v. C.R. Bard, Inc. 848 F.Supp. 287 (D.Mass. 1994) (“As contemplated by the Sentencing Guidelines, Bard is required by the plea agreement to reorganize in many ways to minimize the risk that its crimes will recur. [Bard took steps including] the implementation of a new corporate compliance program, the hiring of a new Vice President for Scientific Affairs with responsibility for medical and regulatory affairs company wide, the creation of a Regulatory Compliance Committee of the Board of Directors, the retention of an outside regulatory compliance consultant to inspect Bard each year and report his or her findings and suggestions to both Bard and the FDA, and the adoption of additional reporting obligations to the FDA.”).

²⁵⁷See U.S. Sentencing Commission New Release, April 11, 2006, at <http://www.ussc.gov/PRESS/rel0406.htm>.

²⁵⁸Courts could also suggest that parties retain “settlement masters” to assist in crafting agreements. See Kenneth R. Feinberg, Creative Use of ADR: The Court-Appointed Special Settlement Master, 59 Alb. L. Rev. 881, 884 (1996).

²⁵⁹See Mark Hamblett, *Judge: Evidence Shows Government Influenced KPMG's Defense Fees Policy*, N.Y.L.J., May 12, 2006.

²⁶⁰See United States v. Stein, 2006 WL 1735260 (S.D.N.Y.).

the same underlying conduct in consolidated hearings at the approval stage may sensibly resolve common issues and prevent such disputes later. However, unless a fairly discrete third party group would be adversely affected, hearings could turn into intractable multi-polar disputes.²⁶¹ I note that if legislation could provide for enhanced judicial review, or require some limited opportunity for public notice, comment and for intervention, as several federal agencies must provide before entering into consent decrees under certain statutes.²⁶²

2. *Review of Implementation and Monitoring*

Current structural reform remedies may not anticipate difficulties during the implementation stage. Further, prosecutors may not be competent to monitor long-term implementation of such remedies, which require expertise in management and governance reform, very different skills than negotiating plea bargains and trying criminal cases.²⁶³ Other models for structural reform prosecutions, RICO consent decrees and corporate probation, heavily involved courts in policing the implementation process and setting the boundaries of that process during protracted disputes. Judges have no role during the implementation of deferral agreements absent a dispute regarding the terms of an agreement.

Judges could insist that a deferral not be approved in the first instance absent periodic reports to the court regarding the progress of compliance. Such reports could allow the court to monitor the deferral and terminate all or part of the agreement when compliance is achieved. In so doing, judges would be working to ensure that intent of the Guidelines is followed (as they currently do when approving plea bargains). Courts do this at the probation stage, relying on organizational self-reporting, in a form specified by the court on progress in

²⁶¹For example, a court could enter joint rulings on narrow legal issues also raised by the limited group of parties also being criminally prosecuted for the same underlying conduct, pursuant to its inherent authority to consolidate cases. *See* Garrett, *Aggregation in Criminal Law*, Part II.A. In contrast, I find it unrealistic, as one author suggests, that courts broadly serve as a “fiduciary for constituencies otherwise unrepresented in the corporate deferral process and potentially vulnerable to negative externalities.” *See* Greenblum, *supra* note xxx at 1901.

²⁶²*See, e.g.* Clean Water Act, 33 U.S.C. § 1319(g)(4), Safe Drinking Water Act, 33 U.S.C. § 300h-2(c)(3)(B), 40 C.F.R. § 22.45; CERCLA, 42 U.S.C. § 9622(d)(2); Tunney Act, 15 U.S.C. § 16(b); 16 C.F.R. § 2.34(c) (FTC consent orders).

²⁶³Mary Jo White, former U.S. Attorney for the Southern District of New York, commented “[f]or a prosecutor to get into the business of changing corporate culture is skating on fairly thin ice.” *See* <http://www.corporatecrimereporter.com/maryjowhiteinterview010806.htm>. Professor Coffee added “I don’t think prosecutors are particularly skilled in corporate governance.” *Id.* Similar criticisms are directed at civil structural reform efforts. *See* Zaring, 1040 n. 122 (criticizing a path dependency in remedial design, stating “the Civil Rights Division regularly enters into cookie-cutter consent decrees across jurisdictions”).

implementing a compliance program.²⁶⁴ Similarly, the SEC settles enforcement actions using consent decrees with court supervision.²⁶⁵

Courts may be highly reluctant to assume such a supervisory role. Further, prosecutors already rely heavily on independent monitors, just as a court would, to structure compliance programs and audit performance. However, the criminal law context raises special challenges for independent monitors, that suggest whether it is a court or a prosecutor supervising, the implementation process must be better structured.²⁶⁶ The Probation Officers Advisory Group has noted that its members lack expertise in organizational reform.²⁶⁷ The DOJ has attempted to hire former regulators and former corporate crime prosecutors to serve as independent monitors. Those credentials nevertheless may not prepare a monitor for the work of reconstituting a compliance program and attempt to shape a new culture of compliance amongst employees. Gatekeepers such as auditors and lawyers may already have been involved in the entity and failed to detect malfeasance or contributed to failures.²⁶⁸

Under-enforcement of compliance may be far more likely absent sustained judicial supervision. Monitors may achieve deep changes only with more time than many agreements currently provide.²⁶⁹ One monitor has uncovered substantial new criminality in the organization, which may result in additional individual prosecutions, but perhaps also complicating the compliance process.²⁷⁰ Another, at Bristol-Myers Squibb recently recommended that the CEO be dismissed, and the Board cooperated, but a new criminal investigation is now ongoing regarding not the original securities fraud, but rather concealing a patent agreement from the Federal Trade Commission and state attorneys general conducting antitrust review.²⁷¹ Given difficulties in quickly achieving reform, prosecutors may need to make interventions over longer periods of time, and with judicial

²⁶⁴See U.S.S.G. §§ 8D1.1(a), 8D1.4(a), (c).

²⁶⁵See Recent Prosecutions in the Securities Industry, 1389 PLI/Corp 161; SEC Charges WorldCom with \$3.8 Billion Fraud, Litigation Release No. 17588, 77 SEC Docket 3013 (June 27, 2002), at <http://www.sec.gov/litigation/litreleases/lr17588.htm>.

²⁶⁶See Anderson, *supra* note xxx at 732-35 (describing roles of independent monitors in civil structural remedies); Note, Mastering Intervention in Prisons, 88 Yale L.J. 1062, 1063 (1979) (exploring use of Special Masters in prison reform litigation).

²⁶⁷See Cathy A. Battistelli, *Letter from Probation Officers Advisory Group to United States Sentencing Commission*, Oct. 4, 2002.

²⁶⁸See John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 293-98 (2004).

²⁶⁹See Jill Nawrocki, *Morale Booster*, Corporate Counsel, May 3, 2006 (describing the sustained efforts of the Computer Associates General Counsel to “weave the [DP] agreement’s principles into the fabric of the company.”)

²⁷⁰See Troy Graham and Jennifer Moroz, *UMDNJ monitor says fraud, failures now up to \$243 million*, PHIL. INQUIRER, July 25, 2006 (monitor’s investigation of University of Medicine and Dentistry of New Jersey lead to resignation of Dean and firing of Associate Dean and uncovering \$243 million in mismanagement and \$30 million in Medicare fraud added to the original \$5 million).

²⁷¹See Saul, *supra* note xxx.

supervision. So far, prosecutors have been unable or unwilling to secure such longer term remedies in their deferral agreements.

3. *Review of Asserted Breach*

At the back end, courts could more readily adjudicate disputes that may inevitably arise if the DOJ unilaterally terminates an agreement. Federal courts already conduct analogous review in individual cases where the defendant made promises in exchange for a plea agreement, which the Government then did not fully honor, asking whether the Government acted in “good faith” and “lived up to its end of the bargain.”²⁷²

Almost all of the deferred and non-prosecution agreements contain provisions in which the DOJ can unilaterally assert a breach, terminate the agreement, and then pursue a criminal prosecution of the organization (only Boeing has managed to negotiate a different scheme in which a Special Master will adjudicate whether there has been a breach). Despite those stringent terms, federal courts have already held due process prevents the Government from “unilaterally determining” that a defendant breached an agreement not to prosecute but rather “must obtain a judicial determination of the defendant’s breach.”²⁷³ The DOJ can not reserve interpretation of structural reform agreements to itself. As courts mediate disputes they will develop standards to interpret and limit agreements.

In one example, a federal court recently intervened to enjoin prosecution of the Stolt-Nielsen company, a supplier of parcel tanker shipping services, after the DOJ unilaterally found a breach with a corporation’s cooperation under the DOJ Antitrust Division’s Corporate Leniency Program. The Court explained: “When it entered into the agreement, DOJ never intended to prosecute SNTG. Its goals were to pursue SNTG’s co-conspirators and to break up the conspiracy. It got what it had bargained for in the agreement. SNTG’s partners in the conspiracy were prosecuted and convicted, and the conspiracy has been terminated,”

²⁷²United States v. Leonard, 50 F.3d 1152 (2d Cir. 1995) (quoting United States v. Knights, 968 F.2d 1483, 1486 (2d Cir. 1992)). This issue often arises in cases where the Government promises to move for a downward sentencing departure for “substantial assistance” under U.S.S.G. § 5K1.1, but later decides it did not receive such assistance and does not make the 5K1.1 motion. Other Circuits adopt a more deferential review, *see, e.g.* United States v. Garcia-Bonilla, 11 F.3d 45, 47 (5th Cir. 1993) (government refusal to file departure motion unreviewable absent unconstitutional motive since agreement “expressly provides that the government retains absolute discretion”), or they adopt an intermediate “rationality review” approach, *see, e.g.* United States v. Copeland, 122 F.3d 1063 (4th Cir. 1997); United States v. Pipes, 125 F.3d 638 (8th Cir. 1997).

²⁷³*See* U.S. v. Miller, 406 F.3d 323, 334-335 (5th Cir. 2005) (stating “in the context of non-prosecution agreements the government is prevented by due process considerations from unilaterally determining that a defendant is in breach and nullifying the agreement.”); United States v. Meyer, 157 F.3d 1067, 1076 (7th Cir.1998); United States v. Castaneda, 162 F.3d 832, 835-36 (5th Cir.1998); United States v. Verrusio, 803 F.2d 885, 888 (7th Cir.1986); United States v. Ataya, 864 F.2d 1324, 1330 n. 9 (7th Cir.1988) (“A pre-indictment hearing would curtail prosecutorial overreaching in drafting ambiguous immunity agreements”).

and the Court then enjoined any future prosecution.²⁷⁴ The agreement's objectives were accomplished when the illegality ceased and the corporation cooperated with the DOJ. At that point, neither side was bound. The Third Circuit reversed, ruling that the court could not enjoin a prosecution, but the company could raise the defense post-indictment.²⁷⁵

Federal courts developed standards grounded in contract law to interpret immunity, cooperation, and plea agreements, mostly in cases involving individual defendants. As in the *Stolt-Nielsen* case, courts interpret plea agreements and deferral and non-prosecution agreements all as contracts. Under contract law principles, the Government is not entitled to rescission if the defendant had substantially performed.²⁷⁶ If “nonperformance ... is innocent, does not thwart the purpose of the bargain, and is wholly dwarfed by that party's performance,” then the Government “is not entitled to rescission.”²⁷⁷ Conversely, defendants are entitled to the benefit of the bargain and may try to demonstrate that the Government did not substantially perform.²⁷⁸ Civil consent decree cases raise similar issues, as courts decide whether a party has substantially performed, given the limits of the court's equitable authority, the text of the agreement, and if ambiguous, the understanding of the parties when they entered a bargain.

²⁷⁴See *Stolt-Nielsen, S.A. v. United States*, 352 F. Supp. 2d 553, 560-63 (E.D. Pa. 2005).

²⁷⁵See *Stolt-Nielsen*, 442 F.3d at 187. The Supreme Court denied certiorari. See *Stolt-Nielsen, S.A. v. U.S.*, 2006 WL 2049755 (2006); the U.S. Chamber of Commerce and others as amicus urged the Court to rule that an agreement could be specifically enforced, and the prosecution enjoined. Perhaps the corporation could have sought a declaratory judgment it did not breach. See *id.* at 184-5 (collecting authority). The Seventh Circuit recommends pre-indictment hearings, while the Third Circuit along with others holds a pre-trial determination is not required. See *id.*, Meyer, 157 F.3d at 1076-77; *United States v. Bailey*, 34 F.3d 683, 690-91 (8th Cir. 1994); *United States v. Bird*, 709 F.2d 388, 392 (5th Cir. 1983); *but see Verrusio*, 803 F.2d at 889 (“preferred procedure, absent exigent circumstances” is for the government to seek a hearing pre-indictment to seek relief from an agreement); Ataya, 864 F.2d at 1330 n. 9. The Seventh Circuit approach seems correct given due process requirements and the great harm of improper indictments. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (pre-deprivation hearing is “root requirement” of due process).

²⁷⁶See, e.g. *United States v. Tilley*, 964 F.2d 66, 71 (1st Cir. 1991) (holding government to revoke agreement must show by a preponderance of evidence that the defendant committed a material breach); *Ricketts v. Adamson*, 483 U.S. 1, 9 (1987); *United States v. Crawford*, 20 F.3d 933 (8th Cir.1994); *United States v. Packwood*, 848 F.2d 1009, 1011 (9th Cir.1988) (same); *Verrusio*, 803 F.2d at 888.

²⁷⁷See *United States v. Castaneda*, 162 F.3d 832, 837-38 (5th Cir.1998); *Crawford*, 20 F.3d at 933; *U.S. v. Fitch*, 964 F.2d 571 (6th Cir. 1992); *Rodriguez v. State of N.M.*, 12 F.3d 175 (10th Cir. 1993); *U.S. v. Riggs*, 287 F.3d 221 (1st Cir. 2002).

²⁷⁸See *Santobello v. New York*, 404 U.S. 257, 262 (1971) (holding that defendant is entitled to enforcement of bargained-for plea agreement); *United States v. Hodge*, 412 F.3d 479, 485 (3d Cir.2005); *United States v. Price*, 95 F.3d 364, 367 (5th Cir.1996); *U.S. v. Nolan-Cooper*, 155 F.3d 221, 236 (3d Cir. 1998); *United States v. Badaracco*, 954 F.2d 928, 939 (3d Cir.1992) (court determines “whether the government's conduct is inconsistent with what was reasonably understood by the defendant when entering the plea of guilty.”).

Even back-end review of termination under such principles would remain fairly deferential, given arms length negotiations between organizations and prosecutors. Courts already apply concepts of material breach and substantial performance to the context of structural reform requirements of a deferred prosecution agreement. In some organizational cases, however, the decision whether an organization breached a structural decree may raises more difficult questions regarding how much compliance constitutes substantial performance. To answer such questions, courts will need to develop standards for remedial success.

4. *Termination: Developing Standards for Remedial Success*

When inevitable disputes arise regarding alleged breach of a structural reform prosecution agreement's terms or whether compliance with a consent decree or corporate probation has been achieved, courts must decide whether the remedy has been substantially obtained. In reviewing an asserted breach, a court interjects itself in the decision whether a corporation had sufficiently implemented a structural reform remedy. In civil law, as noted, the standard for termination of a structural reform effort is compliance-based.²⁷⁹ Courts developed means to assess what compliance with constitutional norms entailed in different contexts. In criminal law, though the same civil substantial performance standard applies, no court has addressed the circumstances when compliance occurs (the Third Circuit in *Stolt-Nielsen* ruled whether a company had cooperated with a DOJ investigation, a far simpler inquiry).

Nor is it clear in the recent deferral-agreement regime who decides whether compliance has been achieved. The DOJ considers initially when deciding whether to charge an organization, whether it has an "effective corporate compliance program" that meets "industry standards and best practices" and that is not a "paper program."²⁸⁰ However, the DOJ has not defined how its prosecutors measure whether a company that is ordered to create an "effective" compliance program, has succeeded in doing so. Second, not only are there no standards for success, but no independent actor evaluates compliance. Worse, it is often not clear whether anyone, including the prosecutor, actually determines whether there has been compliance or not. Most of the agreements specify that supervision terminates after 18 months to 3 years, without any evaluation of success, without the possibility of extending the time period to ensure compliance, and only the extreme provision that the DOJ may unilaterally find a breach and terminate the agreement. Finally, the entire process remains non-public, so no outsider can assess whether agreements are complied with. Each of these objections suggests reasons for judicial review. When disputes arise, particularly where prosecutors have not incorporated

²⁷⁹See Board of Educ. of Ok. City v. Dowell, 498 U.S. 237, 246-49 (1991).

²⁸⁰See *supra* note xxx.

standards for compliance into their agreements, courts will of necessity develop remedial limits.

The Guidelines could provide courts with a framework to define what constitutes remedial success and substantial performance, if the agreement that the organization and prosecutors reached fails to do so. The Guidelines, as noted, provide a detailed seven-part definition of an “effective” compliance program. Those standards may exclude unrelated and overreaching terms in agreements that do not advance the compliance purposes the Guidelines. At this stage a court could also address underreaching. The Guidelines may require more rigorous structural reforms than the parties agreed to implement. For example, the Guidelines require for a compliance program to be “effective,” the involvement of high level officials and meaningful auditing to measure the success of the program. A court could not impose such a requirement if excluded by an agreement’s terms. However, if an agreement is silent, a court could interpret a compliance program to require such assessment of whether it is working. After all, the best way for a court to assess substantial performance, i.e. compliance, would be through reporting by an independent monitor that reviews data and investigates first-hand.

As courts are called on to decide whether a compliance program is sufficiently “effective” to justify termination of an agreement, they can further develop an already emerging common law of compliance under the seven-part Guidelines standard. Courts already must decide whether to grant mitigation credit for an “effective” compliance program for a convicted organization under the Guidelines, including by considering “industry practice.”²⁸¹ Courts already rely on industry experts regarding compliance in defining what new best practices are considered reasonably effective to adequately “reduce the likelihood of future criminal conduct.”²⁸² As these standards evolve, organizations will have clearer notice of how to avoid the threat of prosecution and criminal punishment.

Such standards could also play an important role at the earliest prosecutorial stage that I call the prevention stage. These standards would continue to affect voluntary disclosures and voluntary adoption of compliance programs and cooperation with regulatory actors. Clearer standards would then have broader impact on primary behavior and reduce the need for prosecution.

B. Remedial Limits for Organizational Crime

The perennial criticism of underlying federal substantive law for which organizations may be prosecuted is its open textured, vague

²⁸¹ See USSG § 8B2.1.

²⁸² See USSG § 8D1.1(a)(6).

terms.²⁸³ Added to that broad substantive law is much criticized liability under a sweeping respondeat superior standard.²⁸⁴ These and other factors, as noted, combine to provide federal prosecutors with overwhelming power and discretion. As a result, scholars question whether over-broad criminal prohibitions sensibly deter organizations.²⁸⁵

Scholars have largely advocated two solutions for this problem: that prosecutors voluntarily constrain their own discretion, or that judges narrow federal organizational criminal law. Regarding the first approach, Gerard E. Lynch and Daniel Richman and others argue that prosecutorial self-regulation of discretion offers the most practical means for allocating enforcement resources and the approach that best fits our constitutional and political system.²⁸⁶ While under the typical account, prosecutors push for high-profile convictions and expansive interpretations of federal criminal law in order to advance their institutional interests,²⁸⁷ these commentators argue that instead prosecutors will often narrow their focus and create standards to provide notice and better deter wrongdoers. I have described how the DOJ to some extent sensibly constrained the exercise of its discretion in organizational cases.

Regarding the second approach, scholars have long decried how courts do not seriously enforce rules that criminal statutes be strictly construed, interpreted narrowly to eliminate vagueness and to provide adequate notice.²⁸⁸ Worse, Congress continues to pass broad, ill defined statutes that would overrule any such judicial efforts should they be attempted and that continue to expand corporate criminal liability.²⁸⁹ Where courts do not narrow the meaning of such statutes, prosecutors then fix their meaning in practice so that in effect the legislature has delegated

²⁸³See e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005); William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519-20, 531 (2001); see also *supra* notes xxx, xxx.

²⁸⁴See *supra* note xxx.

²⁸⁵See *supra* note xxx.

²⁸⁶See Lynch, *Administrative System*, *supra* note xxx, Lynch, *Corporate Misconduct*, *supra* note xxx; Richman, *Congressional Delegation*, *supra* note xxx; Kenneth Culp Davis, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969) (calling for creation of guidelines limiting exercise of prosecutorial discretion); see also Buell, *supra* note xxx at 535 (arguing prosecutors should restrict charging to corporations for whom reputational sanctions would appropriately deter); Laufer, *supra* note xxx at 1351 (calling for “significant constraint of prosecutorial discretion.”).

²⁸⁷Individual U.S. Attorneys may do so not just for internal rewards, but also for political gain and publicity. See Kahan, *supra* note xxx at 487 (citing Daniel R. Fischel, *PAYBACK 98-127* (1995)); see also James Eisenstein, *COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS* 230-31 (1978).

²⁸⁸See, e.g. Jeffries, *Legality*, *supra* note xxx, at 244-45 (describing the demise of strict construction of criminal statutes); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 353.

²⁸⁹See Richman, *supra*, at 763-65, Lynch, *Administrative System*, *supra* note xxx at 2137-38; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 66-76 (1997); Louis D. Billionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269 (1998).

common-law crime making authority to prosecutors. As an intermediate approach focusing both on substantive clarity and prosecutorial self-regulation, Dan Kahan, suggests that courts adopt a form of *Chevron* deference to prosecutorial interpretations of ambiguous criminal law prohibitions.”²⁹⁰ Others suggest decriminalization of corporate crime and greater reliance on civil and regulatory enforcement.²⁹¹

I propose a third approach that relies on courts, not to narrow substantive criminal law or prosecutorial discretion directly, but rather to oversee structural reform remedies for violations of organizational criminal law. The time for a structural reform approach has come. Courts will inevitably become more involved in adjudicating disputes regarding the current crop of structural reform deferral agreements. As courts do so, judicial review can rely on the Guidelines’ definition of an “effective compliance” program to resolve ambiguity and narrow the scope and duration of structural reform agreements. A new body of law may then clarify what obligations an organization assumes and the authority of prosecutors during negotiation and implementation of agreements.

The need for judicial narrowing of remedies remains great. Despite the DOJ’s innovative efforts, no standards, judicial or prosecutorial, guide the negotiation, implementation, or termination of remedies. The preference for settling organizational prosecutions remains deeply embedded in the institution of the prosecutor and sensible given the collateral consequences of indictment. Nevertheless, uncertainty and some indications of abuse are not surprising where the DOJ’s retains vast power to secure agreements. Judicial review using the Guidelines as a template could provide a much needed check.

By locating limits in remedial law, courts may safeguard due process, but also preserve the ability of other branches to redefine law enforcement priorities and substantive criminal law. Separation of powers concern explains the understandable reluctance of courts to limit either prosecutorial discretion or federal criminal statutes. However, separation of powers principles are less implicated where a prosecutor does not comport with the goals of the Guidelines, and seeks not to enforce underlying criminal prohibitions, but rather to secure structural reform through settlement. As in civil cases, courts may assert their inherent equitable authority to carefully review the scope of structural remedies, whether through settlements in consent decrees or injunctions. Development of limiting principles through remedial law intrudes less on the other branches. Unlike judicial interpretation of the constitutionality of broad substantive criminal law, Congress or the Sentencing Commission could override limitations courts impose on structural reform remedies. Prosecutors, in the exercise of their discretion, could merely

²⁹⁰See Kahan, *supra* note xxx at 484.

²⁹¹See Arlen, *supra* note xxx; Kraakman, *supra* note xxx; John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466 (1982).

seek an indictment and try a case if they feel that a judicially monitored structural remedy would not adequately punish a wrongdoing entity.

As courts develop a common law of structural reform remedies for organizational crime, they will clarify substantive criminal law. Already the DOJ has created a template. By making clear its criteria in prosecuting organizations, the DOJ provided greater notice than vague substantive federal criminal law now provides. Courts can now develop rules for structural reform remedies. Nor does this require intrusive interventions. As courts resolve disputes, they can develop outer limits of remedies, and can largely permit industry practice to develop what remedial protections best deter criminal conduct.

A structural reform approach for judicial review may create a new remedial equilibrium between prosecutors and organizations, informed by the Guidelines.²⁹² Remedial standards for structural reform prosecutions will confer bargaining endowments on public and private actors that affect the content of settlements.²⁹³ These standards can clarify and constrain the sweeping exercise of prosecutorial discretion that makes the DOJ's current charging stage model of structural reform prosecution so troubling. More important, negotiation of remedies will become more predictable for all sides. Organizations will know better in advance what compliance costs are worth avoiding a potential prosecution. Disputes over agreements may then become less likely. The result may make prosecutions a far more powerful tool for the deterrence of organizational crime.

CONCLUSION

In its sheer novelty, the rise of structural reform prosecution calls into question the traditional civil rights-centric view of structural reform. While Owen Fiss wrote that “the structural injunction received its most authoritative formulation in civil rights cases,”²⁹⁴ now it receives a reformulation in criminal law. This illuminates both the continuing vitality of the structural reform model, but also how the challenges faced during decades of civil structural reform efforts acquire new relevance today in the area of organizational criminality. Structural reform litigation engendered an important literature regarding legitimacy and efficacy of such interventions by federal courts. Now that prosecutors harness powerful civil institutional reform tools, similar questions should be asked again in the criminal context.

The move towards a structural reform approach is in my view the most important development in decades in the law of organizational crime.

²⁹²See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

²⁹³See Marc S. Galanter, *Federal Rules and the Quality of Settlements: A Comment on Rosenberg's The Federal Rules of Civil Procedure in Action*, 137 U. PA. L. REV. 2231, 2234 (“Substantive and procedural rules, and the practices of courts and lawyers, confer bargaining endowments upon the parties in settlement negotiations.”)

²⁹⁴Fiss, *Allure of Individualism*, *supra* note xxx at 965.

Prosecutors anointed themselves as the primary decisionmakers in organizational crime cases, almost all of which never go to trial. Federal prosecutors stepped far outside of their traditional role to obtain convictions, and instead seek to reshape the governance of leading corporations, public entities, and ultimately entire industries. This development has gone largely unexamined. To show the range of alternative approaches for structural reform prosecutions, I modeled structural reform remedies at four stages of the criminal process, each with mounting judicial involvement, together with parallel civil remedies. Despite those options, the DOJ adopted a single-minded strategy to accomplish ambitious structural reform at the charging stage alone, to avoid collateral consequences of an indictment, but also to evade judicial review. My empirical study of the terms of the DOJ's agreements illuminates a consistent compliance-based approach and in doing so provides notice to organizations and counsel. The study also indicates signs of overreaching that may increasingly lead to legal disputes, and signs of underreaching that though difficult to confirm, should trouble us.

Structural reform prosecutions also upend the traditional criminal law focus on substantive criminal rules and prosecutorial discretion. These agreements place the focus instead on practical efforts to reform institutions. Law will play a significant role in this new regime, but courts will apply remedial law and not substantive law. I develop ways that courts can review the approval, implementation and termination of such structural reform agreements. As legal challenges arise, judges will be called on to interpret their scope. In order to reorient the legal approach towards structural reform prosecutions, I propose that courts conceive of their role as analogous to civil public law courts, except that in criminal cases they operate in the shadow of the Organizational Sentencing Guidelines. The Guidelines provide judges with something crucial – standards to evaluate terms of agreements and remedial success. As courts continue to develop body of remedial law, drawn from the Guidelines and also civil principles, organizations will have far greater notice of what practices they should adopt to avoid debilitating prosecutions.

Judicial review of structural reform remedies can then address the persistent over-criminalization in federal organizational criminal law. By using the Guidelines to sharpen the limits of structural remedies, courts will narrow underlying prohibitions. Over time, the criminal remedial law that matures will provide clearer standards to delimit prosecutorial discretion. As a result, the structural reform approach can not only better rehabilitate organizations, deter crime, and accomplish industry change, but also improve the relationships between courts, Congress, federal prosecutors, and organizations. Federal criminal law will then itself benefit from a much needed structural reform.

APPENDIX A – CHART OF POST-THOMPSON MEMO DEFERRED AND NON-PROSECUTION AGREEMENTS (AFTER JAN. 20, 2003)²⁹⁵

Organization (U.S. Atty's Office) (date of agreement)	Non-prosecution (NP) or Deferred prosecution (DP)	Crime	Indep Monit or Req.	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Wai v.	Reg Agency	Fines	Length	Can DOJ Unilaterally Terminate the agreement?
Adelphia Communications (S.D.N.Y.) (May 2005)	NP	Sec. Fraud	No	No	None cited	No	No	SEC, US PIS	\$715 mill restitution	2 years	Yes
AEP Energy Services (S.D.OH) (Jan. 2005)	DP	Fraud (commodities reports)	No	No	None cited	No	Yes	None	\$30 mill fine	15 months	Yes
American Int'l Group (W.D.P.A.) (Nov. 2004)	DP	Sec. Fraud	No	No	None cited	No	No	None	None listed	2 years (1 year if compliance).	Yes
AOL (E.D.VA) (Dec. 2004)	DP	Sec. Fraud	Yes. (1 yr)	Yes: New policies	None cited	No	Yes	SEC	\$150 mill to compensation/settlement fund; \$60 mill fine	2 years	Yes
AmSouth Bancorp (S.Dist.Miss)	DP	Sec. Fraud	No	No	Revised policies w/respect to	No	No	None	\$40 mill settle	1 year	Yes

²⁹⁵ A note on methodology: The charts at Appendix A and Appendix B were compiled from the DOJ's website and U.S.A.O. office websites, where the full text of deferred and non-prosecution agreements since 2003 have been publicly posted. See http://www.usdoj.gov/dag/cftf/cases_m_p.htm. I have used news searches and have not found reports of agreements entered that have not had their terms made public. However, I am not confident I have included all of the pre-Thompson Memo agreements; not all agreements from the 1990's have been made public or posted on DOJ websites. I have where possible reconstructed their terms using available news sources. Details regarding parallel SEC, IRS and other federal agency agreements were confirmed in press releases on those agencies' websites.

(Oct. 04)					responding to grand jury subpoenas				ment w/gov't		
BankAtlantic (S.D. Fla.) (March 2006)	DP	Sec. Fraud (Failure to maintain eff. anti-money laund. program)	No	No	Investments in personnel and compliance systems	No	No	No	\$10 mill settlement with gov't.	1 year	Yes
Bank of New York (S.D.N.Y., E.D.N.Y.) (Nov. 2005)	NP	Sec. Fraud (Unauthorized money transfers; no anti-money laundering program)	Yes	Yes: New policies; New management structure; Reporting system	Retained law firm to conduct investigation; shared results	No	Yes	No	\$12 mill restitution; \$26 mill in civil settlements	3 years (can be terminated earlier)	Yes
BAWAG P.S.K. (Bank owned by Austrian Trade Unions Association) (S.D.N.Y.)	NP	Bank and securities fraud	No	No	Yes, new management took over	No	No	US PIS, SEC, CFTC	\$337.5 million to U.S. bankruptcy estate in Refco case and victims; further payments depending on sale price	None	N/A

									of Bank		
BDO Seidman (S. D. Ill) (2003)	DP	Accounting Fraud	No	Yes: Auditing; Data collection	None cited	No	Yes	No	\$16 mill restitution	18 months	Yes
Boeing Co. (C.D.C.A.) (E.D.V.A.) (6/30/2006)	NP	Federal procurement fraud conflict of interest, use of competitor's information	Yes – Special Master appointed to determine any breach.	Yes, training, discipline, prohibiting retaliation, hot line created, auditing of compliance program created	Yes – changes to ethics and compliance program, interim agreement with Air Force in 2005, appointing “Special Compliance Officer” as a monitor	No	No	NA SA, NA SA – OIG, US AF, DO D-OIG	\$50,000,000 penalty, \$565 civil settlement	2 years	Yes – but “conduct by a Boeing employee classified at a level below Executive Management... shall not be deemed to constitute conduct by Boeing” and “USAO’s shall provide Boeing with written notice” of belief a breach occurred. Special Master will adjudicate any breach.
Bristol-Myers Squibb (D. NJ) (June 2005)	DP	Sec. Fraud	Yes	Yes: Policy changes; Data collection; info on website	Independent advisor; personnel changes; created two positions on Board of Directors; Reporting	Yes: endow chair in ethics at Seton Hall Law School	Yes	No	\$300 mill compensation fund	2 years	Yes
Canadian Imperial Bank of Commerce (Enron Task Force) (Dec. 2003)	DP	Aided and Abetted Accounting Fraud (Enron)	Yes	Yes: Auditing; Policy changes; Data collection; Confidential reporting	Agreement w/OSFI and Federal Reserve of NY (new policies)	No	Yes	SEC	\$80 mill to SEC	3 years	Yes
Computer Associates (E.D.N.Y.) (Sept. 2004)	DP	Sec. Fraud ; Obstr	Yes	Yes: Auditing; Policy changes;	Terminate employees; Add two independent	No	Yes	SEC	\$225 restitution; \$163	18 months	Yes

		action		Data collection; Confidential and public reporting	directors to board.				mill civil compensation		
FirstEnergy Nuclear Operating Company (N.D.O.H.) (Jan 2006)	DP	Environmental Crimes, False statements by employees	No.	No.	Extensive corrective actions with ongoing supervision of NRC.	Fund community serv. projects	NA	NR C	\$23 million fines; \$4.3 mill community service	Dec. 21, 2006	Yes
German Bank HVB (S.D.N.Y.) (Feb. 2006)	DPA	Conspiracy to defraud IRS	No	Yes: compliance program as per U.S. Sentencing Guidelines; Policy changes	None cited	No	NA	IRS	\$29,635,125 in fines, restitution	18 months	
HealthSouth Corp. (N.D. AL) (May 2006)	NP	Accounting Fraud and Sec. Fraud	No	Yes: Actions taken/agreed to pursuant to SEC settlement incorporated in agreement	Adoption of new compliance policies; payments in SEC agreement; new management, terminated employees; confidential hotline; retained consultant	No	No	SEC, IRS, US PIS	(\$100 million in SEC settlement; \$445 million Class Settlement); \$3 mill to USPS	Nov. 17, 2009	Yes
Hilfiger (S.D.N.Y.) (Aug. 2005)	NP	Mail Fraud Wire Fraud	No	Yes: compliance program as per U.S. Sentencing Guidelines	Full cooperation; file amended tax returns; internal investigation	No	No	IRS	Pay back taxes, interest; fine (est. \$15.4 mill; \$2.7 million interest)	3 years (can request to be terminated after 2 years)	No
InVision	DP	Foreign	Yes	Yes: Policy	Voluntary	No	Yes	SE	\$800,	2 years	Yes

(Dec.04)		gn Corru pt Practi ces Act (FCP A)		changes	disclosure; prompt disciplinary action; no prior history			C	000 fine		
KPMG (S.D.N.Y.) (Aug. 2005)	DP	Tax Fraud , Cons piracy to defra ud IRS; Tax Evasi on	Yes	Yes: Policy changes; confidential reporting ; compliance program as per U.S. Sentencing Guidelines	None cited	No	Yes	IRS	\$29,6 35,12 5 fines, restitu tion	Until 12/31/0 6 (can be extende d at one year interval s; max. 5 yrs)	Yes
MCI (S.D.N.Y.) (Sept. 2005)	NP	Sec. Fraud	No	Yes, compliance program as part of 2004 settlement with OK prosecutors	None cited	No	No	SE C	Restit ution (SEC agree ment)	2 years	Yes
Mellon Bank, N.A. (W.D.P.A.) (Aug. 15, 2006)	NP	Theft of Gov. Prope rty, Theft of Mail Matte r, Cons piracy	Yes	Yes, compliance and ethics program that satisfies U.S.S.G., new training, auditing	None cited	No	Yes	US PIS , De pt Tre asu rey Ins pec tor Ge ner al for Tax Ad min	\$30,0 00 in costs, \$18,1 30,40 5 in restitu tion to taxpa yers, U.S.	3 years	
Merrill Lynch (Enron Task Force) (Sept. 2003)	NP	False state ments , aided/ abette d Enron	Yes	Yes: policy changes; Confidential reporting	None cited	No	Non e liste d	SE C	None listed	21 months	Yes
Micrus Corporation	NP	FCPA	Yes	No	Voluntary disclosure;	No	Yes	SE C	\$450, 000	3 years	Yes (for 24 months)

(Feb. 2005)					disciplinary action of employees, no prior criminal history				fine		
Monsanto (D.C.) (Jan. 2005)	DP	FCPA	Yes	Yes: Auditing; Policy changes; Confidential reporting; Press release	Internal investigation, voluntary reporting, new policies	No	Yes	No	\$1 mill fine	3 years	Yes
New York Racing Assoc. (E.D.N.Y) (Dec. 2003)	DP	Conspiracy to defraud; Tax Fraud	Yes	Yes: Auditing; New management; policy changes	Formation of oversight committee; retain outside firm to review; new policies; confidential reporting	Video lottery terminals at racetracks	Yes	No	\$3 mill fine	18 months	Yes
Operations Management International (D.Conn) (2006)	DP	Reporting requirements under CWA	No	Yes: Auditing; data collection	New policies and compliance structure; confidential reporting; compliance program; new management	Gift to Alumni Assoc. for Coast Guard Academy to endow chair for enviro't'l stud	Yes	No	\$2 million to Coast Guard Academy; \$1 mill to Greater New Haven Water Pollution Control Authority	2 years	Yes
PNC Financial (W.D.P.A.) (June 2003)	DP	Sec. Fraud	No	No	"exceptional remedial measures"	No	Yes	No	\$90 mill restitution fund; \$25 mill fine	1 year	Yes
Roger Williams	DP	Public	Yes	Yes; revise ethical	Yes; previously	Yes - \$4 million	Yes	No	None	2 years; maybe	Yes

Medical Center (D.R.I.) (Jan. 27, 2006)		corruption		standards, in accord with U.S.S.G.; hire Executive Ethics Officer, ethics training, written reports	adopted compliance program, and prior Corporate Integrity Agreement with Dep. Health Human Servs.	in free health care to the public					be extended up to a total of 5 years if there are violations	
Symbol Technologies (E.D.N.Y.) (June 2004)	NP	Accounting Fraud	Yes	Yes: New policies (training and educational program); new auditing firm; appointed independent examiner	Retained firm to conduct internal investigation; shared results; waived privilege; termination of new employees; new management term appointed; new policies; confidential reporting	No	Previously waived	SEC; US PIS	\$139 million to compensation fund; \$3 million to U.S.P.S	3 years	Yes	
University of Medicine and Dentistry of New Jersey (D.N.J.) (Dec. 2005)	DP	Health Care Fraud	Yes	Yes: new policies; confidential reporting.	None cited	No	Yes	No	Full restitution in amount determined by Monitor, \$4.9 million to Medicaid	2 years (can be extended one year)	Yes	
WesternGeco LLC (subsidiary of Schlumberger Seismic, Inc.) (S.D.T.X.) (June 16, 2006)	DP	Immigration (visa) fraud	No	No	Yes – cites “remedial actions” taken including “a comprehensive compliance program”	No	Yes	US PIS, Dep’t Labor OIG,	\$18 million fine, \$1.6 million in costs	1 year	Yes	

								IRS, Dep. State Diplomatic Sec Serv.			
Whitehall Jewelers, Inc. (E.D.N.Y.) (Sept. 28, 2004)	NP	Bank fraud	Yes	Yes, hiring of Internal Audit Director, reporting hotline, compliance program, compliance committee, training program, whistleblower protection, compliance reports to USAO EDNY	Yes – terminated employment of those involved, committed to hiring new President, General Counsel, Internal Audit Director, instituted comprehensive compliance program	No	No	US PIS	\$350,000 fine, \$10.8 million restitution	3 years	Yes
Williams Power Company, Inc. (N.D.C.A) (Feb. 22, 2006)	DP	Fraudulent commodities reports	No	No	Yes – “remedial actions to date” cited	No	Yes	CF TC	\$50 million	15 months	Yes

APPENDIX B – PRE-THOMPSON MEMO DEFERRED AND NON-PROSECUTION AGREEMENTS (BEFORE JAN. 20, 2003)

Organization (U.S. Atty’s Office) (date of agreement)	Non-prosecution (NP) or Deferred prosecution (DP)	Crime	Indep Monitor	Compliance Program Required	Pre-Agreement Compliance	Unrelated terms	Priv Waiv.	Reg Agency	Fines	Length	Can DOJ Unilaterally Terminate the agreement?
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Aetna (D.Ma.) (Aug. 1993)	NP	N/A	No	No	\$9.5 million restitution; structural/policy changes; internal investigation	No	No	No	\$3.7 mill restitution; civil assessment \$1 mill	None listed	Yes
Arthur Andersen (D. Conn.) (April 1996)	DP	Accounting fraud	No	No	None listed	No	Yes	IRS	\$10.3 mill reimbursement fund; \$200,000 costs	Gov't conclude investigation in 90 days	Yes
Aurora Foods (S.D.N.Y.) (Jan. 2001)	NP	Accounting Fraud	Yes; outside consultant	Yes: New policies; Confidential reporting by employees	Immediate disclosure; voluntary cooperation; termination of employees; compliance program	No	Yes	SEC	None listed	None listed	Yes
Banco Popular De Puerto Rico (Dist. of Puerto Rico) (Jan. 2003)	DP	Failure to file SARS	No	No	None listed	No	No	FIN - CE N	\$21.6 mill settlement ; \$20 mill fine	12 months	Yes
Coopers & Lybrand (Sept. 1996)	NP	Obtaining confidential bid info during K selection; lying to grand jury	Yes			3,000 hrs community service; teach ethics classes			\$2.75 mill settlement w'gov't; \$725,000 to State of AZ		
John Hancock Mutual Life (Dist. of Mass) (March 1994)	NP	Mail Fraud	No	No	Internal investigation ; voluntary disclosure; waived privilege; new policies	No	Yes	No	\$900,000 civil assessment; \$110,000	No time listed	Yes

									to MA State Ethics Commission		
Lazard Freres (Dist. of Mass) (Oct. 1995)	NP	Individual employee's misconduct	No	No	New compliance policies; internal investigation voluntary notification; waive privilege	No	Already waived	No	\$4.28 mill restitution; \$4.43 mill administrative payment; \$300,000 reimbursement; \$3 mill civil penalty	None listed	Yes
Merrill Lynch (Dist. of Mass) (Oct. 1995)	NP	N/A	No	Those already enacted by company; injunctive policy changes	Administrative payment to U.S.; new compliance policies	No	Already waived	No	\$3.8 mill restitution; \$4.91 mill administrative payment; \$3 mill civil penalty; \$300,000 reimbursement	None listed	No
Prudential Securities (S.Dist. of NY) (Oct. 1994)	DPA	Fraud in sale of limited partner	Yes	Yes (previous SEC agreement); new outside director; confidential	None listed	No	Yes (limited)	SEC; US PIS	\$330 mill settlement w/SEC	3 years	Yes

		rship intere sts		reporting								
Salomon Brothers (May 1992)	NPA											
Sears (S. Dist. of Ill.) (April 2001)	DPA	Mail Fraud	No	Injunctive policy changes; data collection; auditing	None listed	No	Yes	No ne	\$62.6 mill fine	18 months	yes	
Sequa (June 1993)	NPA			NA								