

DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS AND THE EROSION OF CORPORATE CRIMINAL LIABILITY

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On April 5, 2010, a massive explosion killed twenty-nine miners at Massey Energy's Upper Big Branch mine near Montcoal, West Virginia.¹ Following the explosion, President Barack Obama vowed that the U.S. Department of Labor would conduct "the most thorough and comprehensive investigation possible" and work with the U.S. Department of Justice ("Justice Department" or the "Department") to address any criminal violations.² Later in the month, the President and Vice President flew to West Virginia to eulogize the victims and comfort their families.³ It was the nation's worst coal mining disaster in forty years.⁴

The tragic loss of life at the Upper Big Branch mine was not an accident.⁵ After a twenty-month investigation, the Mine Safety and

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1. MINE SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION, FATAL UNDERGROUND MINE EXPLOSION, APRIL 5, 2010, at 1 (2010) [hereinafter MSHA REPORT].

2. *Id.*; see also Ian Urbina, *No Survivors Found After West Virginia Mine Disaster*, N.Y. TIMES, Apr. 9, 2010, at A1.

3. See Peter Baker, *A Time for Farewells, Tearful Reminiscences and Promises of Change*, N.Y. TIMES, Apr. 26, 2010, at A11 (describing President Obama's eulogy for the miners lost at Upper Big Branch mine).

4. Urbina, *supra* note 2; Ken Ward Jr. & Andrew Clevenger, *Last Four Big Branch Miners Found Dead*, CHARLESTON GAZETTE, Apr. 9, 2010, available at wvgazette.com/News/montcoal/201004090857.

5. See MSHA REPORT, *supra* note 1, at 2 (stating that the root causes of the explosion were Massey's unlawful policies and practices).

Health Administration (“MSHA”) determined that the workers died because of a methane and coal dust explosion at the Upper Big Branch mine that was “entirely preventable.”⁶ The MSHA identified over 300 violations⁷ of the Mine Safety and Health Act⁸ at the Upper Big Branch mine, including nine flagrant violations that contributed to the explosion.⁹ Without any of the hedging often found in safety investigations, MSHA concluded that Massey’s “unlawful policies and practices . . . were the root cause” of the Upper Big Branch mine tragedy.¹⁰

To those familiar with Massey’s safety and environmental record, the MSHA findings came as no surprise. In October 2000, a coal slurry impoundment breached at a Massey facility in Martin County, Kentucky, causing 250 million gallons of toxic sludge to ooze into the Big Sandy River and polluting surrounding water sources with debris and coal dust.¹¹ The spill was more than twenty times the volume of the Exxon Valdez oil spill and contaminated 100 miles of rivers.¹² In January 2008, Massey paid a then-record \$20 million in civil penalties for thousands of violations of the Clean Water Act committed between January 2000 and December 2006.¹³ At the Upper Big Branch mine, Massey had a methane explosion in 1997, and near misses in 2003 and 2004, because the company repeatedly “mined into a fault zone that was a reservoir and conduit for methane.”¹⁴

Yet despite Massey’s poor safety and environmental record, the Upper Big Branch mining disaster stood out as a shocking example of corporate lawlessness. Massey routinely provided employees advance notice of MSHA inspections at the Upper Big Branch mine, which is a federal crime,¹⁵ so that safety violations could be concealed from in-

6. *Id.*

7. *Id.* at 9.

8. 30 U.S.C. §§ 801–965 (2006).

9. MSHA REPORT, *supra* note 1, at 2, 9.

10. *Id.* at 2.

11. *A River of Goo on the Loose; 250 Million Gallons of Coal Slurry Oozing in Eastern Ky.*, WASH. POST, Oct. 15, 2000, at A2.

12. Peter T. Kilborn, *A Torrent of Sludge Muddies a Town’s Future*, N.Y. TIMES, Dec. 25, 2000, at A1.

13. Press Release, U.S. Env’tl. Prot. Agency, *Massey Energy to Pay Largest Civil Penalty Ever for Water Permit Violations* (Jan. 17, 2008); Ken Ward, Jr., *Fines to Force Change, Feds Say; \$20M Penalty Against Massey in Settlement*, CHARLESTON GAZETTE, Jan. 18, 2008, at P1A. Massey was also a leading proponent of the practice known as “mountaintop mining,” which involves stripping mountaintops of trees, soil, and rock to make mining operations more efficient. See, e.g., Dan Barry, *As Mountaintops Fall, a Coal Town Vanishes*, N.Y. TIMES, Apr. 13, 2011, at A1.

14. MSHA REPORT, *supra* note 1, at 6.

15. 30 U.S.C. § 820(e) (2006).

spectors.¹⁶ Massey intimidated its workers so that they would not report safety and health violations to MSHA.¹⁷ The company also kept two sets of books at the Upper Big Branch mine—perhaps the most egregious evidence of criminal intent in regulatory cases—one for internal use that noted violations and one for safety inspectors that did not.¹⁸

The MSHA found that the Upper Big Branch tragedy occurred because Massey allowed unsafe working conditions to persist, and because it ignored other safety measures that would have prevented the explosion and the resulting loss of life.¹⁹ Methane was released into the mine because Massey mined in a fault zone that it knew had released methane in the past.²⁰ Methane accumulated and became explosive because Massey failed to provide adequate ventilation or roof control in the mine.²¹ The methane subsequently ignited because Massey used a shearing device that was missing seven water spray nozzles and therefore did not have adequate water pressure to move methane away from the shearer and prevent sparking.²² Further, Massey allowed dangerous levels of loose coal, coal dust, and float coal dust to accumulate over the days, weeks, and months leading up to the explosion, providing an enormous fuel source for the deadly blast that killed miners nearly a mile from the methane release and ignition.²³

The Upper Big Branch mine disaster cried out for criminal prosecution under the Mine Safety and Health Act, both for the willful violations of the Act that caused the explosion and the resulting worker deaths, and for the advance notice of safety inspections that sought to conceal the hundreds of safety violations at the mine.²⁴ The tragedy also provided a textbook example of a conspiracy to defraud the United States²⁵ and to obstruct the due administration of justice,²⁶ be-

16. MSHA REPORT, *supra* note 1, at 5–6.

17. *Id.* at 5.

18. *Id.* at 4.

19. *Id.* at 6–8.

20. *Id.* at 6.

21. *Id.*

22. *Id.* at 6–7.

23. *Id.* at 7–8.

24. See 30 U.S.C. § 820 (d) (2006) (willful violations of mine safety regulations); 30 U.S.C. § 820 (e) (advance notice of inspections).

25. 18 U.S.C. § 371 (2006); *cf.* *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957) (upholding convictions of conspiracy to defraud the Treasury Department through tax evasion and fraud).

26. See, e.g., 18 U.S.C. § 1505 (2006) (concerning obstruction of proceedings before departments, agencies, and committees); 18 U.S.C. § 1519 (2006) (concerning obstruction, alteration, or falsification of records in federal investigations and bankruptcy).

cause of Massey's efforts to thwart the government's mine safety regulations.

The Justice Department indicted the head of security at the Upper Big Branch mine for lying about the practice of giving advance notice of inspections and attempting to destroy evidence.²⁷ The Justice Department also charged the mine superintendent at the Upper Big Branch mine with conspiracy to violate the federal government's mine safety laws for his role in allowing rampant safety violations at the mine.²⁸ Both defendants have received prison sentences.²⁹ In addition, a third Massey official, who was the top official at another Massey mine, has been charged with conspiracy to defraud the United States,³⁰ which suggests that the criminal activity that caused the Upper Big Branch tragedy extended to other Massey facilities. Since two Massey officials entered plea agreements that required their cooperation in the investigation,³¹ it is possible that other individuals also will be charged.

The prosecution of Massey officials for the Upper Big Branch tragedy and for crimes committed at other Massey facilities is a positive development. If corporate officials at Massey or other companies are considering similar conduct in the future, they will know they could go to jail for putting the lives of mine workers at risk, just as other white collar criminals face the possibility of jail time for their crimes. Corporate officials are more likely to refuse to engage in criminal activity and less likely to discount the risk of getting caught when the consequence is a loss of personal freedom, as opposed to financial penalties.³² There is no better deterrent to corporate crime

27. Ken Ward, Jr., *UBB Security Chief Charged with Lying, Destroying Files*, CHARLESTON GAZETTE, Feb. 28, 2011, available at <http://wvgazette.com/News/201102280915>.

28. Ken Ward, Jr., *Super at UBB Mine Charged by Feds*, CHARLESTON GAZETTE, Feb. 23, 2012, at P1A.

29. Ken Ward, Jr., *UBB Disaster; Mine Official Gets 21 Months Superintendent Violated Safety Regulations*, CHARLESTON GAZETTE, Jan. 18, 2013, at P1A; Ken Ward, Jr., *Upper Big Branch Disaster Conviction of Massey Official for Lying, Obstruction Is Upheld*, CHARLESTON GAZETTE, Dec. 15, 2012, at P2A.

30. Jess Bidgood, *Ex-Official Is Charged After Deaths at Coal Mine*, N.Y. TIMES, Nov. 29, 2012, at A20.

31. Ken Ward, Jr., *Massey Official Cooperating as Probe Widens*, CHARLESTON GAZETTE, Nov. 29, 2012, at P1A; Ken Ward, Jr., *UBB Superintendent to Plead Guilty*, CHARLESTON GAZETTE, Mar. 9, 2012, at P8A.

32. See, e.g., David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1443 (2011) [hereinafter Uhlmann, *After the Spill*] (explaining that "[c]orporate officials are more likely to comply with the law when they fear that they may go to jail if their violations are discovered," and noting that monetary fines are not as great a deterrent as prison sentences).

than the realization that criminal activity could result in incarceration.

The most effective way to combat corporate crime, however, is to prosecute the individuals who committed the offenses *and* the companies involved. The law on corporate liability is well established in the United States, making clear that corporations are criminally responsible for the criminal acts of their employees committed within the scope of their employment.³³ While employees may commit violations for personal reasons, corporate liability is imposed when they act, at least in part, to benefit the corporation.³⁴ Moreover, corporate crime often occurs because the companies involved lack adequate management structures to prevent wrongdoing. Prosecution of corporations ensures that criminal activity is punished and deterred, that structural reforms occur to promote future compliance efforts, and that corporate lawlessness like Massey's receives the societal condemnation it deserves.³⁵

It is hard to imagine a case in the last decade where corporate criminal prosecution was more warranted than the Upper Big Branch mining disaster. The nature and seriousness of the violations could not have been greater: Massey's willful violations of federal mine safety laws resulted in twenty-nine deaths and the worst mining disaster in the United States in more than forty years. On that basis alone, criminal prosecution would have been warranted. Massey also engaged in a deliberate, long-standing, and deceitful effort to thwart the mine

33. See, e.g., *N.Y. Cent. v. United States*, 212 U.S. 481, 494 (1909) (holding that the conduct of an employee "while exercising the authority delegated to him" can be attributed to his employer, upon whom penalties can be imposed); *United States v. Hilton Hotels*, 467 F.2d 1000, 1004-06 (9th Cir. 1972) (noting that the criminal liability of an employer for the acts of its employees within the scope of their employment can be either express or implied); cf. *United States v. Bank of New Eng.*, 821 F.2d. 844, 856 (1st Cir. 1987) (upholding the "collective knowledge" doctrine in the realm of corporate criminal liability, which attributes the knowledge of all a corporation's employees and agents to the corporation as an entity).

34. See, e.g., *United States v. Potter*, 463 F.3d. 9, 25 (1st Cir. 2006) (finding that an employee acts within the scope of employment if "acts are motivated—at least in part—by the intent to benefit the corporation"); *United States v. Automated Med. Labs., Inc.* 770 F.2d 399, 407 (4th Cir. 1985) (affirming a conviction despite claim that employee acted for his own benefit because employee acted at least in part to benefit the corporation).

35. See Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 854-59 (2007) [hereinafter Garrett, *Structural Reform*] (explaining how the prosecution of entire agencies can lead to agreements that include increased corporate compliance with federal regulations); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618-22 (1998) (explaining the role of expression of societal condemnation in the criminal prosecution of corporations); Uhlmann, *After the Spill*, *supra* note 32, at 1452-53 (discussing societal condemnation that comes from corporate prosecutions and noting the relation between criminal prosecution and deterrence).

safety laws that were enacted to prevent exactly this kind of tragedy. Even without the worker deaths, it would have been appropriate to prosecute Massey for its false and misleading conduct and its efforts to undermine safety.³⁶

Instead, on the same day that MSHA issued a 972-page investigative report that lay bare the lawlessness that occurred within Massey, the Justice Department announced that it was entering a non-prosecution agreement with the new owners of Massey and therefore would not bring criminal charges against the company.³⁷ The United States Attorney justified the non-prosecution because Massey's new owners had agreed to enhance its compliance programs and described the non-prosecution agreement as "the largest-ever resolution in a criminal investigation of a mine disaster."³⁸ But there was no mistaking the outcome: there would be no criminal charges brought against Massey, no guilty plea or admission of liability by Massey, and no sentencing hearing where the families of the victims could address the court about their suffering, as victims have a right to do under the Crime Victim's Rights Act of 1984.³⁹

I have written elsewhere that the Justice Department did not live up to its name when it agreed not to prosecute Massey for its crimes.⁴⁰ The failure to prosecute Massey sent a terrible message about how our society views corporate misconduct and sowed doubts about the Justice Department's commitment to address corporate crime. As a former federal prosecutor, I supervised or handled hundreds of corporate criminal prosecutions that, while serious, did not involve the trag-

36. Other factors also warranted prosecution of Massey. The violations at the Upper Big Branch mine were pervasive—there were over 300 violations at the mine unrelated to the explosion, according to the MSHA report. MSHA REPORT, *supra* note 1, at 9. Massey and its subsidiaries committed similar violations at other mines and were responsible for egregious environmental violations too, making clear that this was not the conduct of one Massey subsidiary or rogue Massey employees. Massey did not have an effective compliance program in place at Upper Big Branch: it threatened workers when they reported safety violations. See MSHA REPORT, *supra* note 1, at 5. In addition, senior management at Massey-owned mines threatened workers and punished those who made safety corrections. *Id.* On one occasion when production was halted to address safety issues at Upper Big Branch, the president of the Massey subsidiary that operated the mine reportedly stated, "If you don't start running coal up there, I'm going to bring the whole crew outside and get rid of every one of you." *Id.*

37. David M. Uhlmann, *For 29 Dead Miners, No Justice*, N.Y. TIMES, Dec. 10, 2011, at A25 [hereinafter Uhlmann, *No Justice*].

38. Press Release, U.S. Dep't of Justice, Alpha Natural Resources Inc. and Department of Justice Reach \$209 Million Agreement Related to Upper Big Branch Mine Explosion (Dec. 6, 2011). Alpha Natural Resources was the new owner of Massey and had successor liability for its misconduct. *Id.*

39. 18 U.S.C. § 3771(a)(4) (2006).

40. Uhlmann, *No Justice*, *supra* note 37.

tragic loss of life that occurred at the Upper Big Branch mine⁴¹ and rarely involved anything close to the rampant corporate misconduct committed by Massey.⁴² If it was not appropriate to prosecute Massey for its crimes, it is difficult for me to envision when criminal prosecution of any corporation would be warranted.

The Justice Department's deal with Massey continues a disturbing trend where corporations avoid criminal charges by entering deferred prosecution or non-prosecution agreements.⁴³ The practice is not consistent across the Department: in the Environment and Natural Resources Division and the Antitrust Division, deferred prosecution and non-prosecution agreements are rarely used; in the Criminal Division and some United States Attorney's offices, such agreements have become almost the norm.⁴⁴ The terms of the agreements are attractive to the government, because they often provide large penalties, far-reaching corporate compliance programs with outside monitors approved by the Department, and promises of cooperation by the companies involved.⁴⁵ But plea agreements—the preferred approach prior to the last decade—can offer the same benefits to the government without making it appear that large companies can buy their way out of criminal prosecution.⁴⁶

In this Article, I argue that the use of deferred prosecution and non-prosecution agreements in the Upper Big Branch mining case

41. *Id.*

42. The closest parallel to Massey is McWane, Inc., a large pipe manufacturing company, which was prosecuted for violations of worker safety and environmental laws and concealing illegal activities from federal inspectors. See David M. Uhlmann, *Prosecuting Worker Endangerment: The Need for Stronger Criminal Penalties for Violations of the Occupational Safety and Health Act*, AM. CONST. SOC'Y FOR L. & POL'Y, Sept. 2008, at 1976–77 (describing the investigation of McWane and the subsequent pleas and fines); David Barstow & Lowell Bergman, *At a Texas Foundry, an Indifference to Life*, N.Y. TIMES, Jan. 8, 2003, at A1 (giving examples of the dangerous working conditions at McWane).

43. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, CORPORATE CRIME (2009) [hereinafter GAO CORP. CRIME] (“Recently, [the Justice Department] has made more use of deferred prosecution and non-prosecution agreements (DPAs and NPAs), in which prosecutors may require company reform, among other things, in exchange for deferring prosecution.”). Deferred prosecution agreements typically allow prosecutors to file criminal charges but stay or dismiss those charges after a period of time if the company fulfills certain obligations. Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1104 (2006). Non-prosecution agreements allow companies to avoid prosecution, and the collateral consequences associated with prosecution, altogether in exchange for their cooperation. *Id.* at 1105. For a more in-depth discussion of deferred prosecution and non-prosecution agreements, see *infra* Part I.A.

44. See *infra* Part II.A.

45. GAO CORP. CRIME, *supra* note 43, at 1.

46. See *infra* Part II.B.

and other high-profile matters erodes corporate criminal liability and undermines the rule of law. I assert that deferred prosecution and non-prosecution agreements limit the punitive and deterrent value of the government's law enforcement efforts and extinguish the societal condemnation that should accompany criminal prosecution.⁴⁷ I side with those within the Justice Department who have resisted the trend toward deferred prosecution and non-prosecution of corporate crime and agree with critics who claim that the Department may lack sufficient policies to ensure that abuse of power does not occur in negotiating such agreements.⁴⁸ I conclude that the government does not need the "middle ground" of deferred prosecution and non-prosecution agreements, except for less serious violations where there are no civil or administrative remedies or perhaps in the rare situation where prosecutors can demonstrate that a criminal conviction would cause unacceptable harm to innocent third parties.⁴⁹

Part I will trace the evolution of deferred prosecution and non-prosecution agreements for corporations from pretrial diversion programs for individual defendants and will explain how the Justice Department adjusted its corporate prosecution policies to facilitate non-criminal alternatives to corporate prosecution. Part II will summarize empirical evidence about the surge in deferred prosecution and non-prosecution agreements over the last decade and will consider justifications for the increase as well as resulting concerns. Part III will explain why deferred prosecution and non-prosecution agreements erode corporate criminal liability and will demonstrate how their widespread use is ill-advised from a theoretical and a practical perspective. Part IV will conclude that the Justice Department should develop guidelines that prohibit the use of deferred prosecution and non-prosecution agreements in egregious cases and impose approval requirements to limit their use to the unusual occasions when adequate civil or administrative alternatives are not available.

47. See *infra* Part III.A.

48. See *infra* Part II.A (noting disparate approaches to deferred prosecution and non-prosecution agreements within the Justice Department); Part II.C (discussing criticism from outside the Department about the use of deferred prosecution and non-prosecution agreements).

49. See *infra* Part III.C.

I. THE EMERGENCE OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS AS AN ALTERNATIVE TO CRIMINAL PROSECUTION OF CORPORATIONS AND THE CORRESPONDING EVOLUTION OF THE JUSTICE DEPARTMENT'S CORPORATE PROSECUTION POLICIES

Over the last decade, the use of deferred prosecution and non-prosecution agreements has surged within the Justice Department, particularly its Criminal Division and several United States Attorneys' Offices.⁵⁰ The Department's Corporate Fraud Task Force,⁵¹ begun by the Bush administration after the Enron scandal, pioneered the ability of federal prosecutors to use non-criminal alternatives to obtain corporate cooperation, including waivers of attorney-client privilege and the work product doctrine.⁵² Even after privilege waivers became disfavored, the use of deferred prosecution and non-prosecution agreements continued unabated during the remaining years of the Bush administration and the first four years of the Obama administration.⁵³

The use of deferred prosecution and non-prosecution agreements has its roots in pretrial diversion programs for individual defendants. For a wide range of reasons, including the desire to avoid draconian effects on first-term offenders and the need to conserve prosecutorial and judicial resources, most prosecuting offices have pretrial diversion programs. This Part begins with an explanation of the role of pretrial diversion and its potential application to the corporate setting. I then review the events that prompted the increased use of deferred prosecution and non-prosecution agreements for corporate crime and the accompanying shifts in the government's prosecution policies.

50. GAO CORP. CRIME, *supra* note 43, at 13–16; *see also* Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, University of Virginia School of Law, http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp (last updated June 7, 2013) [hereinafter Garrett & Ashley, *Prosecution Agreements*] (maintaining an extensive, and regularly updated, list of Federal Organizational Prosecution Agreements).

51. *See* Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (2002) (terminated by Establishment of the Financial Fraud Enforcement Task Force, Pres. Exec. Order, Nov. 17, 2009).

52. *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 311, 319–20 (2007).

53. *See infra* text accompanying note 177.

A. Pretrial Diversion for Individual Defendants and the Implications for Corporate Defendants

Prosecutors have used pretrial diversion agreements to resolve cases involving individual defendants for decades. In most cases, pretrial diversions occur either before or soon after charges are filed.⁵⁴ In a pretrial diversion agreement, the defendant is usually required to acknowledge and accept responsibility for the misconduct, seek any necessary counseling or treatment (for anger management or drug addiction, for example), make restitution to any victims, and perform community service.⁵⁵ The criminal case is held in abeyance while the defendant completes the terms of the diversion program,⁵⁶ usually twelve to eighteen months.⁵⁷ Once that period elapses, if the defendant has not committed other crimes and has otherwise complied with the terms of the agreement, the prosecutor drops the criminal charges.⁵⁸

Eligibility for pretrial diversion varies widely based on the prosecuting office but is typically limited to first-time offenders who have committed relatively minor offenses.⁵⁹ Some offices might limit pretrial diversion to youthful offenders who have no prior criminal records, while all first-time offenders might be eligible in other jurisdictions.⁶⁰ Some offices might allow pretrial diversion for misdemeanors but prohibit pretrial diversion for felonies.⁶¹ Other offices might in-

54. See United States Attorneys' Manual § 9-22.010 (2009) [hereinafter USAM], available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm (explaining the timing, purpose, and objectives of pretrial diversion); see also 18 U.S.C. § 3154(10) (2006) (stating that a function of pretrial services is to collect, verify, and prepare reports pertaining to pretrial diversion agreements and to perform "such other duties" as required by the agreements).

55. JOHN CLARK, PRETRIAL JUSTICE INST., PRETRIAL DIVERSION AND THE LAW I-1 (2006), available at www.napsa.org/publications/ptdivcaselaw.pdf. Some jurisdictions, but not all, require a defendant to plead guilty to the charges at the beginning of the program. *Id.*

56. *Id.*

57. See USAM § 9-22.010 (stating that the maximum period of supervision is eighteen months).

58. CLARK, *supra* note 55, at I-1.

59. See *id.* at VI-4-5 (providing an example of a defendant who was removed from the pretrial diversion program because of prior convictions); see also USAM § 9-22.100 (stating that a prosecutor can exercise discretion and offer diversion to an offender with fewer than two prior felony convictions).

60. See USAM § 9-22.010 (giving prosecutors discretion to use pretrial diversion for any individual "against whom a prosecutable case exists").

61. See, e.g., IND. CODE § 33-39-1-8(d)(1) (through 2012 Reg. Sess.) (allowing prosecutor to withhold prosecution in misdemeanor cases); ORANGE CNTY. CORR. DEP'T, MISDEMEANOR/DUI PRETRIAL DIVERSION INFORM. 1 (2012), available at

stead allow pretrial diversion for all non-violent offenses or limit their programs to those charged with certain offenses.⁶²

The theoretical basis for pretrial diversion is utilitarian. First, for less serious criminal charges, the societal benefits of prosecution may be outweighed by the costs to the defendant, particularly where youthful offenders are involved. A criminal record, even for a minor offense, could make it difficult for the individual to pursue educational or employment opportunities.⁶³ If the defendant is able to successfully complete the pretrial diversion program, it is better for society to give the defendant a second chance and not to burden her with a criminal conviction.⁶⁴ Second, investigative and prosecutorial resources are limited—as are judicial resources—so it is better for society if the government reserves criminal prosecution for more serious crimes and defendants who are repeat violators.⁶⁵

The Justice Department's policies on pretrial diversion reflect the prevailing view that eligibility for diversion should be limited to certain categories of offenders and offenses.⁶⁶ United States Attorneys are authorized to divert individuals who do not have two or more prior felony convictions,⁶⁷ which is consistent with the general approach that diversion should be limited to individuals with little or no criminal record and should not be available to recidivists.⁶⁸ United States Attorneys also are prohibited from offering diversion to current or former public officials accused of an offense involving a violation of a public trust or individuals accused of an offense related to national security or foreign affairs.⁶⁹ These limitations, although perhaps more permissive than those implemented by individual districts, reflect the

www.orangecountyfl.net/Portals/0/resource%20library/jail/Pretrial%20Diversion%20Information.pdf (allowing pretrial diversion in misdemeanor and DUI cases only).

62. CLARK, *supra* note 55, at I-1.

63. See, e.g., Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 635–36 (2006) (discussing several federal and state consequences of criminal convictions).

64. CLARK, *supra* note 55, at I-1 (describing how pretrial diversion attempts to address the underlying causes of the arrest so that offenders are “less likely to return to court on new charges in the future”).

65. See *id.* (stating that pretrial diversion programs successfully reduce criminal court caseloads).

66. USAM § 9-22.000; see also USAM, CRIMINAL RES. MANUAL 712, 715.

67. USAM § 9-22.100.

68. See CLARK, *supra* note 55, at VI-4 (explaining that many pretrial diversion programs are reserved exclusively for first-time offenders).

69. USAM § 9-22.100.

widespread belief that more serious crimes should not be eligible for pretrial diversion.

The Justice Department's approach to pretrial diversion also reflects the utilitarian theoretical basis for diversion. The United States Attorneys' Manual notes that pretrial diversion seeks to "prevent future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services."⁷⁰ In this respect, pretrial diversion is geared toward the rehabilitation of first-time offenders or those with limited criminal records.⁷¹ The United States Attorneys' Manual also indicates that a primary objective of pretrial diversion is "[t]o save prosecutive and judicial resources for concentration on major cases."⁷² By implication, pretrial diversion would not be available for major crimes.

I agree that pretrial diversion should be an option in cases involving youthful or first-time offenders who are accused of less serious crimes. While rehabilitation may have gone out of favor in our criminal justice system,⁷³ there is no disputing the impact of a criminal conviction on an individual's future and her potential contributions to society.⁷⁴ If diversion allows her to be successful and ensures that she does not engage in future criminal activity, then society and the individual benefit. At the same time, there are crimes that are so serious that diversion would not be appropriate. Homicide, rape, and other violent crimes are obvious examples; for other crimes, where to draw the line depends upon the law enforcement priorities and resources of the prosecuting office.⁷⁵

Of course, if pretrial diversion is appropriate for some individual defendants, it could be argued that deferred prosecution might be appropriate for some corporate defendants. Perhaps if a corporate defendant has a strong compliance record and commits a relatively minor offense, deferred prosecution might make sense. As with pretrial diversion, there might be variations in eligibility requirements across prosecuting offices. Some offices might limit deferred prose-

70. USAM § 9-22.010.

71. CLARK, *supra* note 55, at II-I.

72. USAM § 9-22.010.

73. MODEL PENAL CODE: SENTENCING REPORT 28-29 (2003); *see also* Michael Vitello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012-13 (1991) (noting that the rehabilitative view of the criminal justice system has given way to one that now focuses on retribution).

74. *See* Pinard, *supra* note 63, at 635-36 (discussing several of the federal and state consequences of criminal convictions).

75. *See also* CLARK, *supra* note 55, at I-2, I-3 (discussing the various ways different jurisdictions approach pretrial diversions).

cutions to companies that had no history of violations, while others might focus on criminal histories. Some offices might limit deferred prosecutions to misdemeanors, while others might allow for some felonies where there was no harm caused by the conduct. If the pretrial diversion model were followed, however, a corporate defendant with a history of violations—or one that committed a more serious crime—would not be eligible for deferred prosecution.

On the other hand, a large number of corporate prosecutions occur in the regulatory context, where the government has discretion whether to pursue criminal, civil, or administrative enforcement.⁷⁶ Where the government has multiple enforcement options, it may not be necessary to have an alternative like deferred prosecution. In cases where a defendant without a history of violations commits a relatively minor crime, it might make sense to decline prosecution in favor of civil or administrative enforcement.⁷⁷ Given the prevalence of regulatory crime, it might be appropriate to limit deferred prosecutions to (1) law enforcement programs where civil or administrative enforcement is not an adequate alternative to prosecution and (2) first-time offenders who engage in less serious criminal activity.⁷⁸

In sum, the pretrial diversion model would justify deferred prosecution agreements for corporate crime, if prosecutors limited eligibility based on the defendant's compliance history and the type of violations involved. Or the government could pursue a hybrid approach where deferred prosecution agreements were used only where civil or administrative enforcement was not a viable alternative to prosecution. Instead, the government has pursued neither of these defensible approaches as it has turned to deferred prosecution and non-prosecution agreements in many of its most high-profile cases over the last decade, even in cases where the defendants had poor compliance records and had committed egregious crimes.⁷⁹

B. The Justice Department's Corporate Prosecution Policies Evolve With the Increased Use of Deferred Prosecution and Non-Prosecution as Alternatives to Criminal Prosecution

Prior to 2001, the Justice Department rarely entered deferred prosecution and non-prosecution agreements with corporations as an alternative to criminal prosecution. A study by University of Virginia

76. USAM § 9-28.1100.

77. USAM § 9-28.600.

78. *See infra* Part III.A-B.

79. *See infra* Part II.

Law Professor Brandon L. Garrett identified only thirteen deferred prosecution and non-prosecution agreements in the nine years prior to 2001.⁸⁰ In the five years that followed, however, the Justice Department entered thirty-nine deferred prosecution and non-prosecution agreements, including twenty-six in 2004 and 2005.⁸¹

The limited number of deferred prosecution and non-prosecution agreements before 2001 is not attributable to an absence of corporate prosecution during those years. To the contrary, a database of corporate plea agreements also maintained by Professor Garrett indicates that the Justice Department prosecuted at least 101 companies for corporate crime in 2000 alone.⁸² Moreover, the Justice Department was particularly aggressive in its efforts to prosecute regulatory crime. The Corporate Crime Reporter issued a report at the end of the 1990s entitled *Top 100 Corporate Criminals of the Decade* that ranked corporate criminals based on the amount of criminal fines imposed.⁸³ The report found that the top categories of corporate crime were “[e]nvironmental (38), antitrust (20), fraud (13), campaign finance (7), food and drug (6), [and] financial crimes (4)”⁸⁴ Regulatory crime almost always involves corporate misconduct and frequently results in corporate charges.⁸⁵

80. Garrett & Ashley, *Prosecution Agreements*, *supra* note 50. The study identified one other case, *United States v. Doyon Drilling, Inc.*, as a deferred prosecution. *Id.* But, in *Doyon Drilling*, the Justice Department agreed to defer prosecution on felony charges in exchange for the defendant’s willingness to enter a guilty plea to misdemeanor charges. *Doyon Drilling Deferred Prosecution Agreement*, at 3.

81. Garrett & Ashley, *Prosecution Agreements*, *supra* note 50. Another study by the *Corporate Crime Reporter* found that the Justice Department entered only eleven deferred prosecution and non-prosecution agreements—a little more than one per year. In the four years that followed, the Department entered twenty-three deferred prosecution and non-prosecution agreements, or nearly six per year. Russell Mokhiber, Editor, *Corp. Crime Reporter*, *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements* at the National Press Club, Washington, D.C. (Dec. 28, 2005), available at <http://www.corporatecrimereporter.com/news/200/2005/12/>.

82. Brandon L. Garrett & Jon Ashley, *Federal Organizational Plea Agreements*, University of Virginia School of Law, http://lib.law.virginia.edu/Garrett/plea_agreements/home.php (last visited June 18, 2013) [hereinafter Garrett & Ashley, *Plea Agreements*] (maintaining an extensive, and regularly updated, list of Federal Organizational Plea Agreements). The database is comprehensive beginning in 2001, so it is likely that there were even more than 101 companies prosecuted during calendar year 2000.

83. Russell Mokhiber, *Top 100 Corporate Criminals of the Decade*, *CORP. CRIME REP.* (Sept. 7, 1999), <http://www.corporatecrimereporter.com/top100.html>.

84. *Id.*

85. Uhlmann, *After the Spill*, *supra* note 32 at 1439 (noting that the “overwhelming majority of [pollution crimes] are committed by corporations” including Fortune 500 companies such as BP, Exxon, Rockwell, International Paper, Royal Caribbean, Koch Petroleum, Tyson Foods, W.R. Grace, and Citgo).

The Justice Department, recognizing that corporate crime was becoming an increasing focus of its prosecution efforts, decided in the mid-1990s to provide guidance for prosecutors of corporate crime.⁸⁶ Then Deputy Attorney General Eric Holder created an ad hoc working group coordinated by the Fraud Section of the Criminal Division and including representatives from the United States Attorneys' Offices, the Executive Office of United States Attorneys, and the litigating divisions of the Department with criminal responsibilities (Antitrust, Civil, Civil Rights, Environment and Natural Resources, and Tax).⁸⁷ After an iterative process that included the circulation of multiple drafts throughout the Department, the deputy attorney general issued the "Federal Prosecution of Corporations" guidance on June 16, 1999, which would become widely known as the Holder Memo.⁸⁸

The Holder Memo contains extensive language about the benefits of corporate criminal prosecution. It notes that corporate prosecution allows the government to "be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime."⁸⁹ It counsels that corporations should generally be treated the same as individuals for purposes of corporate criminal prosecution, including the goal of deterrence, the consequences of conviction, and the adequacy of non-criminal alternatives.⁹⁰ It also identifies additional considerations that arise in the corporate context, including the pervasiveness of wrongdoing and involvement of management, the history of similar misconduct, the timely and voluntary disclosure of wrongdoing, the effectiveness of any compliance program, and collateral consequences.⁹¹

Significantly, however, the Holder Memo makes no mention of deferred prosecution or non-prosecution, even when it discusses non-criminal alternatives. Instead, in describing non-criminal alternatives, the memorandum identifies only civil or regulatory enforcement actions as examples.⁹² In addition, the memorandum notes that non-criminal sanctions may not be appropriate for egregious violations, a pattern of wrongdoing, or when a history of non-criminal sanctions

86. Memorandum from Deputy Attorney General Eric H. Holder on Bringing Criminal Charges Against Corporations to All Component Heads and United States Attorneys (June 16, 1999) [hereinafter Holder Memo].

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* § II.A.1-8.

92. *Id.* § X.A.

does not produce remediation of the violations.⁹³ In these ways, the Holder Memo acknowledged the regulatory nature of most corporate crime. The Holder Memo also reflected how prosecutors exercised their discretion in criminal investigations during the 1990s, namely choosing whether to prosecute or decline in favor of civil or administrative enforcement. Deferred prosecution and non-prosecution were rarely pursued.

The Justice Department's approach to corporate prosecution shifted after its ill-fated prosecution of Arthur Andersen LLP ("Andersen") in 2002. In the wake of Enron's collapse, and amidst allegations of accounting fraud, Andersen was charged with obstruction of justice for shredding documents related to its audits of Enron's financial statements.⁹⁴ Andersen claimed that "rogue employees" destroyed the documents, but the shredding of documents occurred even as the government was investigating Enron's accounting practices and after Andersen partners expressed concern about the firm's involvement.⁹⁵ Once Andersen was indicted in 2002, the firm hemorrhaged clients rapidly and went out of business.⁹⁶ Andersen later was found guilty at trial, but the Supreme Court of the United States overturned its conviction based on erroneous jury instructions.⁹⁷ The Justice Department decided not to retry Andersen after the Supreme Court ruling because the firm was no longer operating.⁹⁸

The Justice Department justified its prosecution of Andersen based on the massive losses that occurred at Enron, the widespread fraud in the firm's financial reports, and its legitimate concern about the destruction of documents during a pending criminal investigation.⁹⁹ In addition, at the time of the Enron scandal, Andersen had already incurred a \$7 million civil penalty in a Securities and Exchange Commission settlement for its role in other cases of accounting fraud.¹⁰⁰ Nonetheless, observers criticized the Department for

93. *Id.* § X.B.

94. Kurt Eichenwald, *Enron's Many Strands: The Investigation; Andersen Charged with Obstruction in Enron Inquiry*, N.Y. TIMES, Mar. 15, 2002, at A1.

95. Richard A. Oppel, Jr., *Enron's Collapse: The Overview; Wide Efforts Seen in Shredding Data on Enron's Audits*, N.Y. TIMES, Jan. 24, 2002, at A1.

96. *Roquet v. Arthur Andersen LLP*, 398 F.3d 585, 587-88 (7th Cir. 2005).

97. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005).

98. Carrie Johnson, *U.S. Ends Prosecution of Arthur Andersen*, WASH. POST, Nov. 23, 2005, at D1.

99. *See* Eichenwald, *supra* note 94.

100. Press Release, U.S. Sec. & Exch. Comm'n, *Arthur Andersen LLP Agrees to Settlement Resulting in First Antifraud Injunction in More Than 20 Years and Largest-Ever Civil Penalty (\$7 Million) in SEC Enforcement Action Against a Big Five Accounting Firm* (June 19, 2001).

prosecuting Andersen, claiming that it amounted to a corporate “death penalty” for the firm.¹⁰¹ When Andersen went out of business, 28,000 employees lost their jobs and competition diminished in the accounting industry as the “Big Five” accounting firms were reduced to the “Big Four.”¹⁰²

The Justice Department responded to criticism of the Andersen prosecution by developing revised guidance regarding the prosecution of corporations in January 2003.¹⁰³ The new Principles of Federal Prosecution of Business Organizations issued by Deputy Attorney General Larry Thompson was almost identical to the Holder Memo with the exception of the section regarding cooperation. For the first time, the guidance raised the possibility of deferred prosecution for corporations. The Holder Memo stated that cooperation and voluntary disclosure could warrant “granting a corporation immunity or amnesty.”¹⁰⁴ The Thompson Memo stated that cooperation and voluntary disclosure could merit “granting a corporation immunity or amnesty or *pretrial diversion*.”¹⁰⁵

The inclusion of a reference to pretrial diversion in the Thompson Memo did not trigger an increase in deferred prosecution and non-prosecution agreements; rather, it codified a change in policy that had begun to occur already at the Justice Department, particularly within the Criminal Division, the Corporate Fraud Task Force, and some United States Attorneys’ Offices. As noted above, there were thirteen deferred prosecution and non-prosecution agreements entered by Justice Department prosecutors in the nine years prior to 2001.¹⁰⁶ During 2001 and 2002, prior to issuance of the Thompson Memo, United States Attorneys and the Criminal Division entered eight deferred prosecution and non-prosecution agreements.¹⁰⁷ The pace then quickened, with fifteen more deferred prosecution and non-prosecution agreements during 2003 and 2004 after issuance of the Thompson Memo.¹⁰⁸

101. Carrie Johnson, *Ruling Won't Deter Prosecution of Fraud*, WASH. POST, June 1, 2005, at D1.

102. See Jonathan D. Glater, *Last Task at Andersen: Turning Out the Lights*, N.Y. TIMES (Aug. 30, 2002), at C3.

103. Memorandum from Larry D. Thompson, Deputy Attorney General on Principles of Federal Prosecution of Business Organizations to Heads of Department Components and United States Attorneys (Jan. 20, 2003) [hereinafter Thompson Memo].

104. Holder Memo, *supra* note 86, at § VI.A–B.

105. Thompson Memo, *supra* note 103, at § VI.A–B (emphasis added).

106. See *supra* text accompanying note 80.

107. See Garrett & Ashley, *Prosecution Agreements*, *supra* note 50.

108. *Id.*

The increase in deferred prosecution and non-prosecution agreements no doubt reflected at least in part concerns about the collateral consequences of criminal convictions and the criticism the Justice Department received based on Andersen's demise. But it merits emphasis that the Thompson Memo's reference to pretrial diversion (and thus its endorsement of deferred prosecution and non-prosecution) was not in section IX of the memorandum, which addressed collateral consequences,¹⁰⁹ or in section X of the memorandum, which addressed non-criminal alternatives.¹¹⁰ The discussion of collateral consequences was unchanged from the Holder Memo and focused on whether to prosecute or to decline—not the middle ground of deferred prosecution or non-prosecution.¹¹¹ Likewise, the guidance regarding non-criminal alternatives continued to emphasize the alternative of civil or administrative enforcement and made no mention of quasi-criminal options.¹¹²

Instead, the Thompson Memo embraced deferred prosecution and non-prosecution agreements to highlight the value of cooperation by companies involved in criminal activity.¹¹³ The cover memo circulating the document to the Department stated "[t]he main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."¹¹⁴ While the cover memo also referenced compliance programs, the inclusion of language about pretrial diversion was limited to Section VI of the memorandum, addressing cooperation and voluntary disclosure,¹¹⁵ and did not appear in Section VII regarding corporate compliance programs (which continued to focus solely on the choice between prosecution of the corporation and declination).¹¹⁶

I therefore would argue that the Department's increased use of deferred prosecution and non-prosecution agreements initially occurred because the government wanted to obtain as much cooperation as possible from corporations involved in criminal activity. The Holder Memo had authorized prosecutors to seek attorney-client privilege waivers as a condition of cooperation.¹¹⁷ As a result, prosecutors

109. Thompson Memo, *supra* note 103, at § IX.

110. *Id.* § X.

111. *Id.* § IX.

112. *Id.* § X.A.

113. *Id.* § VI; *see also* Wray & Hur, *supra* note 43, at 1105 (noting that deferred prosecution and non-prosecution agreements lead to increased cooperation by companies).

114. Thompson Memo, *supra* note 103, at 1 (cover memo).

115. *Id.* § VI.

116. *Id.* § VII.

117. Holder Memo, *supra* note 86, at § VI.B.

sought contemporaneous legal advice provided by corporate counsel about regulatory compliance and the results of internal investigations conducted by outside counsel prior to or during government criminal investigations.¹¹⁸ That practice already had begun to draw even more heated criticism of the Department than the prosecution of Andersen. Defense attorneys, including many former Justice Department prosecutors, blasted the Department's interference with the right to corporate counsel.¹¹⁹

The Thompson Memo retained the Holder Memo's focus on attorney-client privilege waivers but added the option of pretrial diversion to the possible outcomes where a corporation cooperated with a criminal investigation.¹²⁰ Under both approaches, prosecutors were to follow the principles governing non-prosecution generally when evaluating cooperation and voluntary disclosure.¹²¹ Those provisions of the Principles of Federal Prosecution encouraged prosecutors to seek reduced sentences or lesser charges in exchange for cooperation and only authorized non-prosecution if it was the only way to obtain needed cooperation,¹²² which is precisely what happened under the Holder Memo where numerous plea agreements called for attorney-client privilege waivers.¹²³ In contrast, after the Thompson Memo was issued, an increased number of attorney-client privilege waivers occurred in the context of deferred prosecution and non-prosecution agreements.¹²⁴

The shift to deferred prosecution and non-prosecution agreements did not mollify critics of the Justice Department's requests for attorney-client privilege waivers. As a result, in 2006, the Justice Department again revised its guidance on corporate criminal prosecution to impose stricter limits on waiver requests and to require prose-

118. *Id.* § VI.B n.2; David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 156 (2000).

119. Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporation Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 351-52 (2008) (citing Letter from Am. Corp. Counsel Ass'n to the Hon. Eric Holder (May 12, 2000)).

120. Thompson Memo, *supra* note 103, at § VI.B.

121. Holder Memo, *supra* note 86, at § VI; Thompson Memo, *supra* note 103, at § VI.

122. USAM § 9-27.600.

123. Joe D. Whitley et al., *The Expanding Criminalization of Environmental Laws*, 77-Jan FLA. B.J. 30, 35 (2003) (citing *United States v. BP Exploration (Alaska) Inc.*, No. A99-0141 CR (D. Ala. 1999); *United States v. Royal Caribbean Cruises Ltd.*, No. 98-0103-CR-Middlebrooks (S.D. Fla. 1999)).

124. Wray & Hur, *supra* note 43, at 1137-44 (discussing the increase in alternative resolutions following the Thompson Memo and providing examples).

cutors to obtain supervisory approval before making such requests.¹²⁵ Like the Thompson Memo, the so-called McNulty Memo only referenced pretrial diversion in its discussion of cooperation.¹²⁶ Yet the controversy over privilege waivers continued unabated.¹²⁷

Finally, in 2008, with Congress considering legislation to bar privilege waiver requests, the Justice Department eliminated any credit for attorney-client privilege waivers in yet another revision to its corporate prosecution guidelines.¹²⁸ In so doing, the Department deleted the references to pretrial diversion in the cooperation section.¹²⁹ Instead, for the first time, the Department endorsed deferred prosecution and non-prosecution in the section regarding collateral consequences.¹³⁰ The 2008 guidance stated:

On the other hand, where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement.¹³¹

125. Memorandum from Paul J. McNulty, Deputy Attorney General on Principles of Federal Prosecution of Business Organizations to Heads of Department Components and United States Attorneys (Dec. 12, 2006) [hereinafter McNulty Memo].

126. *Id.* § VII.B.1.

127. Duggin, *supra* note 119, at 364–66.

128. Memorandum from Mark Filip, Deputy Attorney General on Principles of Federal Prosecution of Business Organizations to Heads of Department Components and United States Attorneys § 9-28.720(a) (Aug. 28, 2008) [hereinafter Corporate Prosecution Principles].

129. *Id.*

130. *Id.* § 9-28.1000.

131. *Id.*

The Justice Department thus belatedly embraced the rationale that deferred prosecution and non-prosecution agreements were a necessary “middle ground” between prosecution and declination.

Whether the Department needs a middle ground between prosecution and declination is far from clear, as I discuss in Parts II and III. The evolution of the Justice Department’s approach to deferred prosecution and non-prosecution agreements, however, is best described as a policy in search of a rationale. The use of deferred prosecution and non-prosecution agreements was not contemplated by the Holder Memo, despite the surge in corporate prosecutions during the 1990s that prompted its issuance. Even when the concept of pretrial diversion for corporations was introduced by the Thompson Memo and reaffirmed by the McNulty Memo, it was solely in the context of extracting cooperation from corporations consistent with the Department’s policies on cooperation more generally. The idea that prosecutors needed a middle ground between criminal prosecution and declination emerged years after the practice of using deferred prosecution and non-prosecution agreements had taken root within parts of the Justice Department. With such a weak foundation in policy, it is no surprise that deferred prosecution and non-prosecution agreements are used inconsistently within the Justice Department and in cases where such agreements may not serve the interests of justice.

II. DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS BECOME THE NORM IN MANY HIGH-PROFILE CASES, EVEN AS THE RATIONALE FOR SUCH AGREEMENTS REMAINS ELUSIVE AND CONCERNS RISE ABOUT THEIR POTENTIAL MISUSE

The Justice Department continues to prosecute a large number of corporations every year for corporate crime.¹³² According to a study conducted in 2009 by the Government Accountability Office (“GAO”), most corporations still face criminal prosecution, despite the increased use of deferred prosecution and non-prosecution agreements.¹³³ Professor Garrett’s research supports a similar conclusion, identifying 2166 organizational plea agreements compared to 283 deferred prosecution and non-prosecution agreements for the years covered by his databases.¹³⁴ Moreover, U.S. Sentencing Commis-

132. GAO CORP. CRIME, *supra* note 43, at 1.

133. *Id.* at 14–15.

134. Compare Garrett & Ashley, *Prosecution Agreements*, *supra* note 50 and Garrett & Ashley, *Plea Agreements*, *supra* note 82. The database of deferred prosecution and non-prosecution agreements covers 1992 to the present; the database for plea agreements in-

sion data reveals an average of 210 corporate convictions per year since 2000.¹³⁵

Nonetheless, the Justice Department has made far greater use of deferred prosecution and non-prosecution agreements over the last decade, particularly in cases handled by the Criminal Division, which are often the Department's most high-profile prosecutions. The Criminal Division now enters more deferred prosecution and non-prosecution agreements than plea agreements.¹³⁶ The dramatic increase in the use of deferred prosecution and non-prosecution agreements by the Criminal Division—to a point that such agreements have become routine—raises questions about their potential misuse. Yet, even as reliance on deferred prosecution and non-prosecution agreements has surged within the Criminal Division and in some United States Attorney's Offices, other litigating divisions in the Justice Department have used the practice only sparingly.

This Part reviews the increased use of deferred prosecution and non-prosecution agreements by the Justice Department. Part II.A reviews data regarding deferred prosecution and non-prosecution agreements and how practices vary within the Department. Part II.B considers possible explanations for the Department's increased reliance on non-criminal alternatives. Part II.C analyzes concerns that have been raised about the increased use of deferred prosecution and non-prosecution agreements.

A. Deferred Prosecution and Non-Prosecution Agreements Are Widely Used by the Criminal Division and Some U.S. Attorneys but Rarely by Other Litigating Divisions That Prosecute Corporate Crime

The use of deferred prosecution and non-prosecution agreements, which began in 2001, increased dramatically starting in 2004 and 2005.¹³⁷ According to the data collected by Professor Garrett, the entire Justice Department entered just thirteen deferred prosecution and non-prosecution agreements in the nine years between 1992 and 2000.¹³⁸ In the next three years, as broader use of such agreements began, the Department entered another thirteen deferred prosecu-

cludes convictions from 1994 to the present, although as noted previously it is incomplete prior to 2001. See *supra* note 82.

135. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1175, 1870 (Appendix) (2011) [hereinafter Garrett, *Globalized Prosecutions*].

136. See *infra* text accompanying notes 145–150.

137. Garrett & Ashley, *Prosecution Agreements*, *supra* note 50.

138. *Id.*

tion and non-prosecution agreements.¹³⁹ In 2004 and 2005, the Department averaged thirteen more agreements each year—as many in two years as the previous twelve years combined.¹⁴⁰

But 2004 and 2005 were just the beginning of what would be a dramatic surge in the use of deferred prosecution and non-prosecution agreements. From 2006 through 2012, the Justice Department entered 216 deferred prosecution and non-prosecution agreements with corporations, which is an average of nearly thirty-one agreements each year.¹⁴¹ During that seven-year period, the Justice Department never entered less than twenty-two such agreements (in 2009) and entered as many as forty-one in one year (2007).¹⁴² While the Justice Department has stated that 2007 was an “aberration” because it was significantly higher than the years immediately before and after,¹⁴³ the Department entered nearly as many deferred prosecution and non-prosecution agreements in 2010 (thirty-eight agreements) and 2012 (thirty-seven agreements) as it had in 2007 (forty-one agreements).¹⁴⁴

The use of deferred prosecution and non-prosecution agreements has occurred most often in the Justice Department’s Criminal Division.¹⁴⁵ In its 2009 study regarding corporate crime and the use of deferred prosecution and non-prosecution agreements, the GAO found that the Criminal Division used deferred prosecution and non-prosecution agreements more frequently than criminal prosecutions from fiscal year 2004 through 2009.¹⁴⁶ During that six-year period, according to the GAO study, the Criminal Division brought thirty-eight criminal prosecutions against corporations, while entering forty-four deferred prosecution and non-prosecution agreements.¹⁴⁷ In contrast, United States Attorneys prosecuted 1659 corporations during that timeframe and entered ninety-four deferred prosecution and non-prosecution agreements.¹⁴⁸

The Criminal Division’s preference for deferred prosecution and non-prosecution agreements has increased in the last three fiscal years, according to the database created by Professor Garrett. In fiscal

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. GAO CORP. CRIME, *supra* note 43, at 13.

144. Garrett & Ashley, *Prosecution Agreements*, *supra* note 50.

145. GAO CORP. CRIME, *supra* note 43, at 14–15.

146. *Id.* at 15.

147. *Id.* at 15–16.

148. *Id.*

years 2010 through 2012, the Criminal Division entered twenty-two plea agreements with corporations.¹⁴⁹ During the same three years, the Criminal Division entered forty-six deferred prosecution and non-prosecution agreements, which is more than it entered during the previous six fiscal years combined.¹⁵⁰ The Criminal Division still brings criminal charges against corporations—and it prosecutes individuals for their role in corporate crime—but it is startling how much it now favors deferred prosecution and non-prosecution agreements. During the last three years, more than two-thirds of the Criminal Division's corporate cases have been resolved by deferred prosecution and non-prosecution agreements.

The Criminal Division is not the only component within the Justice Department that makes frequent use of deferred prosecution and non-prosecution agreements. From fiscal year 2004 through fiscal year 2012, the United States Attorney's Office for the Southern District of New York entered twenty-nine deferred prosecution and non-prosecution agreements.¹⁵¹ During the same time period, a significant number of such agreements were entered by United States Attorneys in Massachusetts (16), New Jersey (12), the Central District of California (11), and the Eastern District of New York (11).¹⁵² Still, those numbers pale in comparison to the ninety deferred prosecution and non-prosecution agreements entered by the Criminal Division during the same fiscal years.

Moreover, the Criminal Division's widespread use of deferred prosecution and non-prosecution agreements sets it apart from the Environment and Natural Resources Division and the Antitrust Division, which are the two other litigating divisions at the Justice Department that handle the most corporate criminal prosecutions. According to the GAO report, the Environment and Natural Resources Division entered two deferred prosecution and non-prosecution agreements during the seventeen-year period from fiscal year 1993 to 2009.¹⁵³ The Antitrust Division entered three deferred prosecution

149. Garrett & Ashley, *Plea Agreements*, *supra* note 134.

150. Garrett & Ashley, *Prosecution Agreements*, *supra* note 50.

151. *Id.*

152. *Id.*

153. *Id.* at 15 n.29, 35. One of those cases involved a prosecution for false statements at a nuclear facility where there were significant questions about whether Nuclear Regulatory Commission personnel at the site were aware of conditions that gave rise to the false statement claim. Press Release, U.S. Dep't of Justice, FirstEnergy Nuclear Operating Company to Pay \$28 Million Relating to Operation of Davis-Besse Nuclear Power Station (Jan. 20, 2006), *available at* http://www.justice.gov/opa/pr/2006/January/06_enrd_029.html. No civil alternatives were available to prosecutors. *Id.* Two of the individuals

and non-prosecution agreements during that same seventeen-year timeframe.¹⁵⁴ Likewise, during fiscal years 2010 through 2012, the Environment and Natural Resources Division and the Antitrust Division continued to favor criminal prosecution over deferred prosecution and non-prosecution agreements. The Environment and Natural Resources Division entered forty-two plea agreements with corporations during that three-year period, while entering just one deferred prosecution agreement.¹⁵⁵ The Antitrust Division entered forty-five plea agreements with corporations during that three-year period, while entering four non-prosecution agreements.¹⁵⁶

Of course, the Criminal Division is responsible for more criminal statutes than other parts of the Justice Department and has more criminal prosecutors than any other component. It therefore makes sense that it might enter more deferred prosecution and non-prosecution agreements than other parts of the Department. Yet the contrast is stark between the Criminal Division's embrace of deferred prosecution and non-prosecution agreements and the degree to which the Environment and Natural Resources Division and the Antitrust Division have avoided such agreements in most cases.

The Environment and Natural Resources Division and the Antitrust Division were responsible for half of the cases listed in the *Corporate Crime Reporter's* top 100 corporate prosecutions of the 1990s¹⁵⁷ and continue to be aggressive in prosecuting corporate crime. Environmental crime was the largest category of corporate convictions in the 2011 study by Professor Garrett; antitrust crime was third.¹⁵⁸ As a result, while the Criminal Division may have broader criminal responsibilities, the Environment and Natural Resources Division and the Antitrust Division also have significant roles in corporate criminal prosecution.

Another factor that might lead to more deferred prosecution and non-prosecution agreements in the Criminal Division is the fact that,

charged in the case also entered deferred prosecution agreements; one was acquitted at trial. Tom Henry, *Penalties Nixed for Ex-Worker at Davis-Besse*, BLADE, Aug. 29, 2009.

154. GAO CORP. CRIME, *supra* note 43, at 15 n.29, 35.

155. Garrett & Ashley, *Prosecution Agreements*, *supra* note 50; Garrett & Ashley, *Plea Agreements*, *supra* note 134. During that three year period, the Environment and Natural Resources Division also obtained the convictions of eight corporations after trials.

156. *Id.*

157. Mokhiber, *supra* note 83.

158. Garrett, *Globalized Prosecutions*, *supra* note 135, at 1873. The top three categories of corporate convictions identified by Professor Garrett were environmental crimes (232), various types of fraud (189), and antitrust violations (116). *Id.* Some of the fraud cases were handled by the Criminal Division with the remainder prosecuted by U.S. Attorneys and other Divisions.

when it declines cases, they must be referred to other litigating divisions for enforcement. In contrast, the Environment and Natural Resource Division and the Antitrust Division have civil enforcement offices within their divisions, which might facilitate referrals for civil enforcement. Yet organizational structure does not explain why the Criminal Division uses deferred prosecution and non-prosecution agreements so much more than other divisions. Criminal prosecutors never know when they decline a case whether it will be addressed by their civil counterparts, even if they work within a division that has civil enforcement authority, because civil attorneys have their own priorities and reach independent judgments about the merits of each case.

B. The Rationale for the Justice Department's Embrace of Deferred Prosecution and Non-Prosecution Agreements

The variation in the Justice Department's use of deferred prosecution and non-prosecution agreements makes it difficult to provide a rationale for the Department's approach. First, as the Department's corporate prosecution policies state, deferred prosecution and non-prosecution agreements could be an attempt to avoid collateral consequences like those that occurred in the Andersen case. Second, the use of such agreements could be seen as an incentive for companies to waive attorney-client privilege and perhaps to appease critics of waiver requests. Third, deferred prosecution and non-prosecution agreements, which emerged as an alternative during the Bush administration, could be viewed as the predictable response of a business-friendly administration to increased corporate crime. Fourth, the Department could be seeking to prioritize structural reform over prosecution. I review each of these possible rationales before offering my own: a simple cost-benefit analysis that is at once opportunistic and motivated by expediency.

The Justice Department's stated justification for entering deferred prosecution and non-prosecution agreements is the desire to avoid collateral consequences.¹⁵⁹ The 2008 revision to the Principles of Federal Prosecution for Business Organizations, which remains the only one of the four corporate prosecution guidance documents that mentions deferred prosecution, does so in the context of collateral consequences.¹⁶⁰ In a September 2012 speech extolling the virtues of deferred prosecution and non-prosecution agreements, the Assistant Attorney General for the Criminal Division repeated the justification

159. USAM § 9-28.1000.B.

160. *Id.*

from the 2008 memo that prosecutors needed a middle ground between prosecution and declination to avoid undesired collateral harm to employees and shareholders.¹⁶¹

Yet by the time the 2008 document had been issued, the surge in deferred prosecution and non-prosecution agreements had been ongoing for years under the Thompson Memo and the McNulty Memo, which only referenced pretrial diversions and in the context of cooperation.¹⁶² In fact, the Department entered more deferred prosecution and non-prosecution agreements in 2007 than any other year,¹⁶³ before the Department decided that collateral consequences had replaced cooperation as the justification for entering such agreements.

Moreover, despite the focus on avoiding collateral consequences in the Principles of Federal Prosecution for Business Organizations, there is no evidence that deferred prosecution or non-prosecution is necessary to avoid the “death penalty” for corporations involved in criminal activity.¹⁶⁴ To the contrary, most criminal prosecutions do not result in the severe collateral consequences incurred by Andersen.¹⁶⁵ Andersen was a special case because it was an accounting firm charged with massive accounting fraud. Andersen’s conduct and the publicity it received might have compromised its business model even in the absence of a criminal conviction.¹⁶⁶ No other high-profile prosecutions have resulted in similar collateral consequences.¹⁶⁷

Of course, it is conceivable that there could be collateral consequences short of the corporate death penalty that could harm employees or shareholders. For example, a company could contract in size or lose shareholder value because of a criminal prosecution, as BP did in the wake of the Gulf oil spill.¹⁶⁸ Or there might be concerns

161. Lanny A. Breuer, Assistant Attorney General, U.S. Dep’t of Justice Criminal Div., Address at the New York City Bar Association: The Role of Deferred Prosecution Agreements in White Collar Criminal Law Enforcement (Sept. 13, 2012).

162. McNulty Memo, *supra* note 125, at § VII.

163. Garrett & Ashley, *Prosecution Agreements*, *supra* note 50. The Justice Department entered forty-one deferred prosecution and non-prosecution agreements in 2007. *Id.*

164. Gabriel H. Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. (forthcoming 2013), available at <http://ssrn.com/abstract=2132242>.

165. *Id.* at 36.

166. *Id.* at 36–37.

167. The top twenty-five companies from the *Top 100 Corporate Criminals of the Decade* all remain in business. Mokhiber, *supra* note 83; see also Markoff, *supra* note 164, at 29–31, 36 (explaining that only five of the companies convicted of corporate crimes in the years 2001–2010 went out of business).

168. Christine Hauser, *BP’s Shareholders Take It on the Chin*, N.Y. TIMES, June 17, 2010, at B1. Ironically, the Criminal Division prosecuted BP despite these collateral consequences. *Id.*

about the impact on innocent third parties, as in the WakeMed case in North Carolina. In WakeMed, an \$8 million deferred prosecution agreement was entered because criminal charges would have jeopardized access to health care for elderly and poor residents who receive Medicare and Medicaid benefits.¹⁶⁹

Yet cases like WakeMed, where there was a real possibility of collateral consequences affecting innocent third parties, appear to be more the exception than the rule. There is no indication of similar collateral consequences in the overwhelming majority of cases resolved by deferred prosecution and non-prosecution agreements. Indeed, it would be curious if there were such collateral consequences in more than two-thirds of the cases handled by the Criminal Division but rarely in cases handled by other Justice Department litigating divisions.

There is far more evidence that the Justice Department's goal was to obtain privilege waivers through deferred prosecution and non-prosecution agreements, which occurred frequently after the issuance of the Thompson Memo.¹⁷⁰ Indeed, since the surge in deferred prosecution and non-prosecution agreements occurred after the Thompson Memo, it would be more logical to conclude that privilege waivers were the impetus for many of the deferred prosecution and non-prosecution agreements entered prior to 2008, as I argue in Part I.¹⁷¹ Corporate crime prosecutors want to ensure that corporations, like individuals, share information in their possession regarding their co-conspirators and accomplices in crime.¹⁷² Much of that information in the corporate context is shrouded in privilege, either because it involved communication between attorneys and corporate officials at the time of the misconduct or because it was developed after the fact during internal investigations conducted by outside counsel.¹⁷³

Attorney-client privilege waivers had been obtained in plea agreements during the 1990s, but with criticism of the practice mounting after issuance of the Thompson Memo, prosecutors may have felt they needed to offer a greater benefit to corporations in exchange for privilege waivers.¹⁷⁴ As noted above, the reference to pre-

169. *Judge OKs WakeMed Fraud Settlement*, WRAL.COM, (Feb. 8, 2013), <http://www.wral.com/judge-oks-wakemed-fraud-settlement/12084601/>.

170. Garrett, *Structural Reform*, *supra* note 35, at 899–900.

171. *See supra* text accompanying notes 117 and 118.

172. McNulty Memo, *supra* note 125, at § VII.A.

173. *Id.* §§ VII.B., VII.B.2.

174. *See supra* text accompanying notes 119–124.

trial diversion in the Thompson Memo's discussion of cooperation provides evidence that the Justice Department accelerated its use of deferred prosecution and non-prosecution to secure privilege waivers.¹⁷⁵ But the Department's desire to obtain privilege waivers cannot explain why deferred prosecution and non-prosecution agreements continued after the Principles of Federal Prosecution for Business Organizations disavowed privilege waivers in 2008. The desire to obtain privilege waivers thus may explain the initial increase in deferred prosecution and non-prosecution agreements, but it cannot explain their continued use by the Department over the last four years.

A perhaps cynical explanation would be that the Bush administration, although it justified deferred prosecution and non-prosecution with references to cooperation and collateral consequences, was motivated simply by politics. On this account, the surge in deferred prosecution and non-prosecution agreements was a political handout from a pro-business administration that was not committed to corporate prosecution. Such a partisan narrative may appeal to some; however, it lacks factual support.¹⁷⁶ The Justice Department entered 125 deferred prosecution and non-prosecution agreements during the first term of the Obama administration, just four fewer than the 129 deferred prosecution and non-prosecution agreements entered by the Justice Department during both terms of the Bush administration.¹⁷⁷

Still another explanation, offered by Professor Garrett, is that the Justice Department sought deferred prosecution and non-prosecution agreements to achieve structural reform within corporations that were accused of wrongdoing.¹⁷⁸ According to Professor Garrett, the Justice Department made a conscious choice to prioritize structural reforms, which are contained in most deferred prosecution and non-prosecution agreements, over more traditional punitive goals.¹⁷⁹ In other words, ensuring future compliance became more important to the government than meting out punishment, particularly because individuals could still be criminally prosecuted and face incarceration.

Professor Garrett marshals effectively empirical support for the argument that deferred prosecution and non-prosecution agreements

175. Thompson Memo, *supra* note 103, at § VI.

176. Accord Duggin, *supra* note 119, at 351–54 (suggesting that during the Bush era, the Thompson Memo and corporate crime prosecution reform were made in response to the “financial debacle” that followed the collapse of Enron rather than as part of a political agenda).

177. Garrett & Ashley, *Prosecution Agreements*, *supra* note 50.

178. Garrett, *Structural Reform*, *supra* note 35.

179. *Id.* at 886–91.

have emphasized corporate compliance programs. But the frequent inclusion of structural reforms may prove too much about the Justice Department's rationale for entering deferred prosecution and non-prosecution agreements. After all, the Department sought similar structural reforms in plea agreements throughout the 1990s.¹⁸⁰ In addition, the Environment and Natural Resources Division and the Antitrust Division, which rarely utilize deferred prosecution and non-prosecution agreements, continue to insist on corporate compliance in plea agreements they negotiate.¹⁸¹ Indeed, even the Criminal Division includes corporate compliance programs when it enters plea agreements, as demonstrated most recently by its agreements with BP Production and Exploration for the Gulf oil spill.¹⁸² If both plea agreements and deferred prosecution and non-prosecution agreements require corporate compliance programs, it is difficult to claim that the government must enter deferred prosecution and non-prosecution agreements to achieve structural reforms.

I therefore would argue that the Justice Department's motivation for pursuing deferred prosecution and non-prosecution agreements has been far less high-minded than concern for collateral consequences or a desire for cooperation or structural reform. For proponents of deferred prosecution and non-prosecution agreements the bottom line is the same: the Justice Department can obtain the same financial penalties, factual admissions, corporate cooperation, and structural reforms that could be achieved from plea agreements.¹⁸³ In some cases, it could fare even better, at least in terms of financial penalties.¹⁸⁴ But it nearly always fares at least as well as it would have with a corporate prosecution and without investing the investigative, prosecutorial, or judicial resources that might be needed in a corporate prosecution.¹⁸⁵ It is a simple cost-benefit analysis. The benefits are equal or greater than prosecution, and the costs are less.

180. *Id.* at 907.

181. For example, see the plea agreements in *United States v. Evergreen Int'l S.A.*, CR 05-238 (C.D. Cal. Apr. 4, 2005) and *United States v. Tyson Foods, Inc.*, No. 03-CR-00203 (W.D. Mo. 2003).

182. *United States v. BP Prod. & Exploration, Inc.*, No. 2:12-CR-00292 (E.D. La. 2012).

183. *Accord* Garrett, *Structural Reform*, *supra* note 35, at 907 (noting that the Department, at one point, favored plea agreements to deferral prosecution and non-prosecution agreements in seeking structural reforms).

184. *See* Garrett, *Globalized Prosecutions*, *supra* note 135 and accompanying text (noting that the average financial penalty for deferred and non-prosecution agreements is almost three times greater than the average penalty associated with plea agreements).

185. Garrett, *Structural Reform*, *supra* note 35, at 932 (suggesting that deferred and non-prosecution agreements are more efficient than prosecutions because they require fewer judicial resources).

Former Assistant Attorney General Christopher A. Wray, who was an architect of the Thompson Memo and oversaw the growth in the use of deferred prosecution and non-prosecution agreements by the Criminal Division, described the benefit side of the analysis starkly in a 2004 speech.¹⁸⁶ He stated:

The DP structure has many of the same benefits as a conviction. In terms of remedies, anything that the judge could impose under the organizational sentencing guidelines can be required under a DP agreement. Now, the DP won't result in a criminal conviction if the defendant company complies with the agreement, but filing charges sends a message [that] the public condemns the company's conduct.¹⁸⁷

Representatives of the Fraud Section of the Criminal Division presented the same message during an Environmental Crimes Policy Committee Meeting in April 2005 when I headed the Justice Department's Environmental Crimes Section.¹⁸⁸ The attorneys from the Fraud Section explained that deferred prosecution had become their default position, because it allowed them to prosecute cases more efficiently and achieve equal or better results.

I hesitate to suggest that the government has been merely expedient in pursuing deferred prosecution and non-prosecution agreements. I have no doubt that at least some agreements were entered because of the desire to obtain full cooperation and perhaps out of concern about collateral consequences. I also agree with Professor Garrett that the Justice Department values corporate compliance programs and sees them as a benefit of its deferred prosecution and non-prosecution agreements.

But with so many rationales and no consistent narrative to support the Justice Department's approach, it is hard to escape the conclusion that some prosecutors may be ambivalent about the role of corporate criminal prosecution and therefore willing to sacrifice it too readily for non-criminal alternatives that include otherwise attractive settlement terms. A similar discomfort with corporate criminal prose-

186. Christopher A. Wray, Assistant Att'y Gen., Crim. Div., Remarks to the Association of Certified Fraud Examiners, Mid-South Chapter, Memphis, Tennessee (Sept. 2, 2004), available at <http://www.justice.gov/criminal/pr/speeches-testimony/2004/september/09-02-04wray-remarks-memphis.pdf>.

187. *Id.*

188. The Environmental Crimes Policy Committee includes senior attorneys from the Environmental Crimes Section, Assistant United States Attorneys who prosecute environmental crime, and representatives of the law enforcement agencies that investigate environmental crimes. The policy committee is chaired by the Chief of the Environmental Crimes Section.

cution is reflected in the academic literature, which I discuss in Part III. Such discomfort is misplaced in the Justice Department, however, which is responsible for upholding the rule of law.

C. Concerns About the Misuse of Deferred Prosecution and Non-Prosecution Agreements

The Justice Department's embrace of deferred prosecution and non-prosecution agreements over the last decade has been criticized for a number of policy reasons. Some have argued that the Department favors large companies over small businesses, and domestic corporations over foreign companies.¹⁸⁹ Others have expressed concern about the extent to which the agreements focus on corporate compliance programs and thus involve the Department in management controls and structural reform that may go beyond its core area of litigation expertise.¹⁹⁰ Those objections have been intensified as the Department has supported the use of corporate monitors who often are former high-level officials at the Department.¹⁹¹ There also is lingering discomfort with the lack of meaningful judicial oversight of deferred prosecution and non-prosecution agreements.¹⁹² As noted previously, there has been widespread criticism of the Department's position on cooperation by corporations. I agree with the first four concerns to varying degrees, as I discuss below. With regard to cooperation, I fault the Department more for failing to make a better case for its position, which I also address below.

First, empirical evidence suggesting that the Justice Department pursues non-criminal alternatives more frequently with large companies and domestic corporations should be troubling to the Department.¹⁹³ If larger companies are more likely to receive the benefits of

189. Garrett, *Globalized Prosecutions*, *supra* note 135, at 1810–14; *see also* Alice Fisher, Assistant Att'y Gen., U.S. Dep't of Justice, Address at the American Bar Review National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), *available at* <http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf> (describing DOJ's commitment to prosecuting foreign firms to ensure that "major foreign competitors to U.S. companies are subject to the same stringent rules").

190. Garrett, *Structural Reform*, *supra* note 35, at 856.

191. *Id.* at 926; U.S. GOV'T ACCOUNTABILITY OFFICE, CORPORATE CRIME: PROSECUTORS ADHERED TO GUIDANCE IN SELECTING MONITORS FOR DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS, BUT DOJ COULD BETTER COMMUNICATE ITS ROLE IN RESOLVING CONFLICTS, GAO-10-260T (2009).

192. Garrett, *Structural Reform*, *supra* note 35, at 920–21 (noting the extent of prosecutorial discretion and the deferential, limited nature of judicial review).

193. Garrett identifies a number of troubling trends in the use of deferred prosecution and non-prosecution agreements. Deferred prosecution and non-prosecution occur most often during investigations of large, publicly owned corporations. *Id.* at 1811. Smaller,

deferred prosecution or non-prosecution, it is hard to see how the Department is meeting its fundamental obligation to do justice and ensure the fair and even-handed enforcement of the law. Much as we should be concerned about wealthy, individual defendants receiving more favorable treatment in the criminal justice system, it should not be the case that companies with greater financial resources fare better than small businesses. For many of the same reasons, we should not allow global corporations to receive less favorable treatment in our criminal justice system than domestic corporations.

Whether a deferred prosecution or non-prosecution agreement is offered to a company should not depend on its corporate earnings, or on its domestic or foreign status. The Justice Department would no doubt dispute that any such considerations influence its actions, and I will assume it does not intentionally favor large, domestic corporations when deciding whether to enter deferred prosecution and non-prosecution agreements. Still, even the appearance of such disparate treatment—which the empirical evidence supports¹⁹⁴—is a concern that the Justice Department should address. If the Department continues to use deferred prosecution and non-prosecution agreements, it should develop standards that ensure that eligibility for non-criminal disposition does not depend upon financial resources or whether a corporation is domestic or global.

Second, it is reasonable to ask whether criminal prosecutors are best situated to seek structural reforms in corporate governance, as frequently occurs in deferred prosecution and non-prosecution agreements.¹⁹⁵ On the one hand, prosecutors are well informed about what makes for an *ineffective* corporate compliance program, but it does not follow that they have any particular expertise in how to translate that knowledge into an understanding of what constitutes an effective corporate compliance program. On the other hand, preventing future violations by companies is a legitimate law enforcement goal. Including a commitment to corporate compliance as a term of agreements reached with corporate defendants would appear to be sound policy, and it also is understandable that the Justice Depart-

privately held corporations more often face criminal prosecution. *Id.* Domestic companies are offered deferred prosecution and non-prosecution far more often than foreign corporations, which usually must plead guilty to criminal charges. *Id.* In addition, deferred prosecution and non-prosecution agreements occur most often in Foreign Corrupt Practices Act (“FCPA”) cases. *Id.* at 1875.

194. *Id.*

195. *Id.*

ment seeks more than simple promises about compliance in its agreements.¹⁹⁶

Third, when the Justice Department selects corporate monitors who are former high-level officials within the Department, it should not be surprised that its actions are questioned. Nor should the Department negotiate for special terms of agreements that would support favorite charities or establish an endowed chair at the law school attended by the United States Attorney.¹⁹⁷ Such practices, even if well intended, raise conflicts of interest and could be seen as self-dealing. The Department has wisely issued guidance about the selection of corporate monitors.¹⁹⁸ The Department would be well advised to implement similar policies to ensure that community service and other terms of its resolutions with corporations do not involve abuse of prosecutorial authority.¹⁹⁹

Fourth, there is little or no judicial oversight of deferred prosecution and non-prosecution agreements.²⁰⁰ In deferred prosecutions, charges are filed and the court must approve the waiver of the statute of limitations that occurs while prosecution is deferred.²⁰¹ The resulting judicial review is at best perfunctory; no court has ever rejected a deferred prosecution agreement.²⁰² With non-prosecution agreements, there is no judicial role at all.²⁰³ Charges are never filed, so the

196. See USAM §§ 9-27.400, 9-27.800 (discussing plea agreements generally as well as corporate compliance programs).

197. See Garrett, *Structural Reform*, *supra* note 35, at 916 (discussing the criticism faced by deferred prosecution and non-prosecution agreements that contained certain “community service” requirements not directly related to the underlying offense with which the company was charged).

198. Memorandum from Craig S. Morford on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations to Heads of Department Components and United States Attorneys (Mar. 7, 2008).

199. See, e.g., DEP’T OF JUSTICE, SENTENCING GUIDANCE IN ENVIRONMENTAL PROSECUTIONS, INCLUDING THE USE OF SUPPLEMENTAL SENTENCING MEASURES (2000). In the Gulf oil spill criminal prosecutions of BP Production and Exploration and Transocean, prosecutors have directed billions of dollars to the Congressionally-chartered National Wildlife Foundation for Gulf Coast restoration efforts. Support for restoration efforts is laudable but it raises the question of whether prosecutors should control how funds from criminal settlements—and non-criminal alternatives—are spent.

200. See Garrett, *Structural Reform*, *supra* note 35, at 921 (noting that judicial oversight of structural reform agreements remains limited). *But see* United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *6–13 (E.D.N.Y. July 1, 2013) (holding that courts have authority to approve or reject deferred prosecution agreements pursuant to their supervisory powers to protect the integrity of judicial proceedings).

201. 18 U.S.C. § 3161(h) (2006); *see also supra* note 43.

202. Garrett, *Structural Reform*, *supra* note 35, at 893. Judge Boyle’s criticism of the WakeMed deferred prosecution agreement is an exception to the *de minimis* review that usually occurs. *See supra* note 169.

203. *Id.* at 902–05.

agreement is merely a contract between the government and the corporation.²⁰⁴ Judicial involvement does not guarantee that the public interest will be better served or that the rights of the corporate defendant will be better protected. But deferred prosecution and non-prosecution agreements occur in major, high-profile investigations.²⁰⁵ The involvement of a neutral arbiter in a public forum would help ensure the fairness of the agreements and provide the accountability the public deserves.

A related concern is that the Justice Department's authority to enter deferred prosecution and non-prosecution agreements is limited. There is a single statutory mention of deferred prosecution in the federal code section that addresses statute of limitations waivers.²⁰⁶ Perhaps that reference may be an implicit acknowledgement that the Department is authorized to enter such agreements, but Congress has never explicitly provided such authority nor imposed limits on its proper use. It should give us pause that the Justice Department is resolving a significant number of high-profile cases using agreements that are not subject to judicial review and for which the Department does not have express statutory authorization.²⁰⁷

The controversy surrounding attorney-client privilege waivers has largely subsided since the 2008 revisions to the Principles of Federal Prosecution for Business Organizations disallowed such requests. Yet the inclusion of privilege waivers in deferred prosecution and non-prosecution agreements remains one of the most heavily criticized aspects of the Justice Department's use of such agreements.²⁰⁸ I agree with those who expressed concern about how often the Department requested privilege waivers prior to 2008; such waivers should only be sought in the unusual cases when they are necessary to obtain factual information about corporate crime. I disagree with those who argue that the Department should never seek or credit privilege waivers from corporations. Rather, I fault the Department for not making a stronger case for the limited use of privilege waiver requests.

204. *Id.*

205. The average penalty in deferred prosecution and non-prosecution agreements entered from 2001 to 2010 was \$24 million; plea agreements entered during the same period averaged \$7.5 million. Garrett, *Globalized Prosecutions*, *supra* note 135, at 1873.

206. 18 U.S.C. § 3161(h) (2006).

207. See Garrett, *Structural Reform*, *supra* note 35, at 905 ("The Supreme Court has held that the executive branch 'has exclusive authority and absolute discretion to decide whether to prosecute a case.'").

208. AM. CHEMISTRY COUNCIL ET AL., THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT 3-4 n.7 (2006), available at <http://www.acca.com/Surveys/attyclient2.pdf>.

As noted in the previous Section, corporations can and should be expected to provide any information in their possession about criminal activity, if they intend to cooperate with a government investigation and receive credit in any agreement with the government resolving the corporation's criminal liability.²⁰⁹ If that is possible to do without waiver of privilege, the government should not insist on waiver. But if waiver is necessary for the government to obtain complete cooperation from a corporation, it is not clear why the government should not be able to request privilege waivers.²¹⁰

I would suggest that the Justice Department went too far when it amended the Principles of Federal Prosecution for Business Organizations in 2008.²¹¹ The attorney-client privilege deserves protection, and the government should limit its requests for waiver so that corporations are incentivized to seek counsel about their conduct and outside counsel can conduct effective internal investigation when criminal activity occurs. But the idea that waivers of privilege were an abuse that needed to be precluded in all cases elevates the privilege beyond even the protection under the Fifth Amendment of the U.S. Constitution against self-incrimination,²¹² which every cooperating individual defendant agrees to waive. It is hard to see why an evidentiary privilege, even one as essential to effective representation as the attorney-client privilege, should be entitled to greater protection than the constitutional rights provided by the Fifth Amendment.

The Justice Department did not seek attorney-client privilege waivers more often because of its decision to allow deferred prosecution and non-prosecution agreements. To the contrary, the Justice Department sought waivers in corporate cases during the 1990s, before the push for deferred prosecution and non-prosecution agreements, as the language of the Holder Memo (issued in 1999) made clear.²¹³ It would be more accurate to say that the Department's embrace of deferred prosecution and non-prosecution was an attempt to give more credit for waivers of attorney-client privilege, thus implicitly

209. See *supra* text accompanying notes 172 and 173.

210. See Michael L. Seigel, *Corporate America Fights Back: The Battle over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV 1, 54 (2008) (“[R]etaining the ability of federal prosecutors to ask a corporation to waive its attorney-client privilege . . . is in the public’s best interest when waiver is necessary to conduct a complex criminal investigation efficiently.”).

211. See *Corporate Prosecution Principles*, *supra* note 128.

212. See U.S. CONST. amend. V, cl. 3 (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

213. For example see the plea agreements in *Royal Caribbean Cruises, Ltd.*, No. 98-0103-CR-Middlebrooks (S.D. Fla. 1999) and *John Morrell and Co.* CR-96-40004 (D.S.D. 1996).

acknowledging the criticism that already was mounting about waiver requests. Some might view additional credit as coercing waivers but the broader point is that the criticism of the Department based on waiver requests is less about deferred prosecution and non-prosecution and more a question of what steps cooperating corporations should be expected to take.

In sum, the fairness concerns raised by deferred prosecution and non-prosecution agreements may have validity and would appear to warrant increased attention by the Justice Department. Questions also have been properly raised about special terms of deferred prosecution and non-prosecution agreements, although the Department has taken steps to address those issues.²¹⁴ Concerns about structural reform and cooperation are less about deferred prosecution and non-prosecution agreements, and more a matter of what the government should be seeking in resolutions with corporations. The only degree to which those concerns are heightened in the deferred prosecution and non-prosecution context is because of the coercive effect when the government bargains over whether there will be a criminal conviction of the corporation.²¹⁵ Whether it is appropriate for the government to leverage the threat of criminal prosecution is one of the more fundamental questions raised by deferred prosecution and non-prosecution agreements, which I address in the next Part.

III. DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS UNDERMINE THE PROSECUTION OF CORPORATE CRIME

The Justice Department's increased use of deferred prosecution and non-prosecution agreements over the last decade is difficult to reconcile with the purposes of corporate criminal prosecution, the Department's policies about pretrial diversion and non-prosecution, and the role of criminal prosecutors in the criminal justice system. In this Part, I address each of these issues and the deleterious effects of the result-oriented embrace of deferred prosecution and non-prosecution agreements.

214. Garrett, *Structural Reform*, *supra* note 35, at 916.

215. *Id.* at 905.

A. *Deferred Prosecution and Non Prosecution Agreements Undermine the Purposes of Corporate Criminal Liability*

The United States has held corporations criminally liable for the better part of the last century,²¹⁶ even though many other countries do not.²¹⁷ Under our jurisprudence, corporations can be held criminally responsible for the acts of their employees or agents, committed within the scope of the employment or agency, for the benefit of the corporation.²¹⁸ Corporate criminal liability can be imposed even if the conduct occurs at low levels within the corporation and in cases where the company had policies that forbade such conduct.²¹⁹ In addition, corporations can be found to have the requisite mens rea for criminal culpability under the collective knowledge doctrine, even if no individual within the company had the requisite intent.²²⁰

The broad imposition of corporate criminal liability is not without detractors. The Model Penal Code recommended limiting corporate liability to circumstances where there was at least some evidence that management of the company was involved in the violations.²²¹ The Model Penal Code also would have allowed corporations to raise as a defense the fact that the company had internal rules forbidding such conduct.²²² In these ways, the Model Penal Code sought to limit corporate criminal liability to situations where the corporation as a whole had a broader role and to avoid the imposition of liability based on the acts of individual employees.

The Model Penal Code reforms have been rejected because of the belief that better management controls and training of subordinates would prevent wrongdoing.²²³ In other words, the absence of management controls and training often results in wrongdoing, so that requiring active management involvement before imposing criminal liability on the corporation would ignore the failure to act by management that often leads to misconduct. Likewise, many corpo-

216. Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 868–70 (2003).

217. Garrett, *Globalized Prosecutions*, *supra* note 135, at 1777–78.

218. *See supra* text accompanying notes 33 and 34.

219. *United States v. Hilton Hotels*, 467 F.2d 1000, 1004–06 (9th Cir. 1972).

220. *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987).

221. MODEL PENAL CODE § 2.07 (1962).

222. *Id.*; *see also* Ellen S. Podger, *A New Corporate World Mandates a Good Faith Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1543 (2007) (discussing affirmative defenses, which reward “company[ies] that act[] in good faith . . . to preclude improper conduct within its midst”).

223. *See* Garrett, *Structural Reform*, *supra* note 35, at 903 (noting structural reforms that seek to prevent wrongdoing).

rate compliance programs exist only on paper and are not implemented in ways that ensure compliance. Where compliance is a management priority and promoted with training, auditing and internal mechanisms to achieve compliance, violations can be avoided.

Others have criticized corporate criminal liability at a more fundamental level, arguing that there is no beneficial purpose served by imposing criminal liability on corporations.²²⁴ These criticisms start from the proposition that corporations exist only to achieve lawful purposes and therefore any unlawful action carried out in the name of the corporation is antithetical to the corporate charter.²²⁵ Even if it is possible for a corporation to act unlawfully, a corporation is a legal fiction that can never be a person as that term is understood in the broader criminal law.²²⁶ A corporation cannot be jailed. It cannot lose its right to vote or its right to carry firearms or otherwise be deprived of its civil liberties in the way that individuals can, so it is fair to ask what purpose is served by the criminal prosecution of corporations.

Still, others would argue, from a utilitarian standpoint, that there is nothing to be gained by criminal prosecution that cannot be achieved outside the criminal justice system.²²⁷ Admissions of liability, although often noticeably absent from civil penalty actions, could be required in civil cases. Substantial fines could be imposed in civil cases. Consent decrees could include structural reforms, restitution obligations, and community service projects. In other words, there is no term of a criminal settlement that could not be part of a civil settlement—and it is far easier to impose civil liability (in terms of burden of proof) and the costs to society therefore are less.²²⁸

Of course, it is true that corporations cannot be jailed and have “no soul to be damned, and no body to be kicked.”²²⁹ It therefore may be less obvious that there is a retributivist argument to be made

224. See, e.g., 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, 389 (1981) (suggesting that prosecution of a company may not deter illegal behavior); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1478–79 (1996) (examining whether the characteristics of corporate criminal liability justify its existence).

225. See Khanna, *supra* note 224, at 1480 (“[Under] the ultra vires doctrine, . . . courts would not hold corporations accountable for acts, such as crimes, that were not provided for in their charters.”).

226. See *id.* (“[The] courts’ literal understanding of criminal procedure . . . required the accused to be brought physically before the court.”).

227. *Id.* at 1479.

228. *Id.* at 1520–30.

229. Coffee, *supra* note 224, at 386 (quoting Edward, First Baron Thurlow, the Lord Chancellor of England).

about the need for corporate criminal liability as a “just desserts” for engaging in criminal misconduct. Yet we give corporations “personhood” in many other areas of the law, including most notably the First Amendment of the U.S. Constitution,²³⁰ so it would be inconsistent to deny their personhood in the context of the criminal law. Moreover, the claim that corporations are not “real” persons, while obviously true in a biological sense, does not mean that corporations are not significant entities from an economic or moral standpoint.²³¹

Corporations dominate so many aspects of our economy and have such outsized ability to do good or harm in our communities that their conduct has impacts that far exceed what individuals can achieve.²³² Corporations employ citizens and provide goods and services on a scale that individuals cannot. Corporations can innovate and provide opportunities that individual action cannot. On the other hand, when corporations engage in misconduct, the resulting harms may far exceed the suffering inflicted by an individual. Because of their sheer size, a corporate polluter can cause far more environmental harm than an individual. A company that makes unsafe products can create far greater public health risks. Most corporations comply with the law and contribute in a positive ways in our communities, but there are some companies that break the law and risk or cause great harm.

I also would suggest that corporations can be moral actors. Corporate ethics is a significant topic in business schools and boardrooms and matters to corporate leadership, employees, and investors.²³³ Corporations promote economic activity but also work to be good corporate citizens in their communities through civic engagement and charitable work. When they act responsibly, corporations are valued beyond their economic contributions. They serve as role models, not only to their employees, but also to their customers and

230. See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010) (recognizing that the First Amendment applies to corporations) (citations omitted); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (“Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.”).

231. Accord Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1482–84 (2009).

232. *Id.*

233. See generally JOHN ELKINGTON, *CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS* (1999); Melissa Korn, *Does an ‘A’ in Ethics Have Any Value?: B-Schools Step Up Efforts to Tie Moral Principles to Their Business Programs, but Quantifying Those Virtues Is Tough*, WALL ST. J. (Feb. 6, 2013, 7:38 PM), <http://online.wsj.com/article/SB10001424127887324761004578286102004694378.html> (discussing the increasing emphasis placed on ethics education in business schools).

other companies. Conversely, when corporations engage in misconduct, their actions may be unethical or immoral.

I therefore assert that corporate wrongdoing deserves criminal punishment. We can debate whether too much conduct is criminalized in America and whether the criminal law has been used too often to address social and economic problems.²³⁴ But within the spheres that we impose criminal liability, corporations can engage in misconduct that deserves criminal punishment, even if that punishment cannot include incarceration.²³⁵ Incarceration is not the only form of punishment we impose, even on individuals, and yet we always think of a criminal punishment as different in kind from a non-criminal sanction. That distinction holds true for corporations as well.

Likewise, while some argue there is no utilitarian justification for imposing corporate criminal liability, the deterrent value of a criminal penalty may carry more weight than a civil penalty.²³⁶ As I suggest above, criminal penalties are different in kind than civil penalties.²³⁷ They cannot be dismissed as a mere cost of doing business because they impose reputational damage in addition to financial consequences.²³⁸ While some scholars dispute whether the possibility of reputational damage is a deterrent,²³⁹ my experience in corporate plea negotiations for many years at the Justice Department suggests that companies care about the reputational harm of a criminal conviction. Criminal penalties also carry collateral consequences, such as the loss of government contracting,²⁴⁰ that make criminal sanctions a better deterrent than otherwise comparable civil penalties.

234. On the overcriminalization debate, see Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712 (2005) (advocating against overcriminalization); Paul S. Rosenzweig, *The Overcriminalization of Social and Economic Conduct*, The Heritage Foundation Legal Memorandum No. 7 (2003) (same); cf. John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111 (1996) (arguing in support of the expansion of so-called 'regulatory offenses'); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997) (arguing that a misunderstanding of the role of morality in the criminal law has led to "miscalculation of the extent to which overcriminalization is a problem").

235. See MSHA REPORT, *supra* note 1.

236. Uhlmann, *After the Spill*, *supra* note 32, at 1448–52. But see Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 833–67 (1994).

237. See *supra* text accompanying note 32.

238. Garrett, *Globalized Prosecutions*, *supra* note 135, at 1850–51 n.296–99.

239. Khanna, *supra* note 224, at 1499.

240. See, e.g., 33 U.S.C. § 1368(a) (2006) (prohibiting federal contracting with any person convicted under the Clean Water Act "until the [EPA] Administrator certifies that the condition give rise to such conviction has been corrected").

Perhaps most significantly of all, criminal prosecution has an expressive function that cannot be achieved by non-criminal disposition.²⁴¹ Criminal prosecution has a stigmatizing effect that civil enforcement does not.²⁴² "Criminal law is ultimately different from tort and other civil law, not because it demands more culpability but because of the condemnation it imposes on the transgressors."²⁴³ When we criminalize conduct, we make clear that it is outside the bounds of acceptable conduct in our society.²⁴⁴ While some civil penalties can have the same effect, there is a qualitative difference in labeling conduct criminal.²⁴⁵

If the prosecution of corporate crime serves retributive, utilitarian, and expressive purposes, it follows that the failure to prosecute criminally by entering deferred prosecution and non-prosecution agreements will diminish those effects. We achieve less in terms of punishment and deterrence when we enter deferred prosecution and non-prosecution agreements. We fail to express societal condemnation when we agree that charges will be dismissed or not brought at all. Deferred prosecution and non-prosecution minimize criminal conduct and may risk condoning it. As Professor Kahan has explained, "when society deliberately foregoes answering the wrongdoer through punishment, it risks being perceived as endorsing his valuations [and thus his misconduct]."²⁴⁶

Nor is it sufficient to say that we will rely on the criminal prosecution of individuals to punish and deter wrongdoing. In far too many cases of corporate wrongdoing, it is not possible to identify senior level management who are criminally liable. In some cases, the individuals involved are at such low levels and have received such poor training that prosecution of individuals is not appropriate. Even in cases where there are individual defendants, we send a mixed message societally when we say that the individuals have acted criminally but the corporation that benefited from their misconduct did not. Yet that is exactly the message we send with deferred prosecution agreements and even more so with non-prosecution agreements.

241. Joel Feinberg, *The Expressive Function of Punishment*, reprinted in *DOING AND DESERVING* 95-118 (1970).

242. See Khanna, *supra* note 224, at 1499.

243. John L. Diamond, *The Crisis in the Ideology of Crime*, 31 *IND. L. REV.* 291, 311 (1998).

244. *Id.*

245. *Id.* As Professor Diamond explained, "What is criminally wrong and right must be something more than what it is merely civilly wrong and right." *Id.* at 309.

246. Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. CHI. L. REV.* 591, 598 (1996).

B. The Justice Department Is Contravening Its Policies by Entering Deferred Prosecution and Non-Prosecution Agreements

The frequent use of deferred prosecution and non-prosecution agreements over the last decade cannot be reconciled with Justice Department policies governing criminal prosecution. As Part I of this Article notes, deferred prosecution and non-prosecution agreements surged after the Thompson Memo was issued in 2003 based on a reference to pretrial diversion in the section on cooperation. Yet, neither the Department's policies on pretrial diversion nor its policies on cooperation justify the extensive use of deferred prosecution and non-prosecution agreements that ensued after 2003.

Pretrial diversion always has been limited to individuals with little or no history of misconduct and to crimes that were less serious. The Justice Department's policies on pretrial diversion are set by each United States Attorney's office but uniformly hold that pretrial diversion is not available for repeat offenders who commit serious crimes. Yet, the Justice Department has entered deferred prosecution and non-prosecution agreements with corporations that had a history of serious violations and committed egregious crimes.

The Upper Big Branch mining disaster may be the best example of how far the Justice Department has strayed from the pretrial diversion model. Massey had a terrible history of environmental and worker safety violations. The company already had been criminally prosecuted at another facility. On that basis alone, Massey's conduct should not have qualified for deferred prosecution or non-prosecution. Moreover, Massey's crimes resulted in the deaths of twenty-nine miners. Even without a history of violations, Massey's conduct was too egregious for deferred prosecution or non-prosecution.²⁴⁷

Another example of the misuse of deferred prosecution is the HSBC case. In announcing its deferred prosecution agreement with HSBC, the Assistant Attorney General for the Criminal Division stated, "HSBC is being held accountable for stunning failures of oversight—and worse—that led the bank to permit narcotics traffickers and others to launder hundreds of millions of dollars through HSBC subsidiaries, and to facilitate hundreds of millions more in transactions with sanctioned countries."²⁴⁸ The government never would

247. See USAM § 9-22.100 (limiting diversion to individuals with little or no criminal records); see also *supra* Part I.A.

248. Press Release, U.S. Dep't of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in

have agreed to pretrial diversion for individuals involved in such egregious misconduct, yet it was willing to enter a deferred prosecution agreement with HSBC. With money laundering claims that totaled nearly a trillion dollars, it is difficult to understand how anything less than a criminal prosecution would provide the accountability touted by the Criminal Division.²⁴⁹

Nor are the Massey and HSBC cases outliers. Other deferred prosecution and non-prosecution agreements have been entered in cases involving millions of dollars in fraud, securities violations, and other egregious misconduct that never would qualify for pretrial diversion. Indeed, it is hard to discern any limits on what crimes would be eligible for deferred prosecution or non-prosecution, at least in cases brought by the Criminal Division, which contorts the pretrial diversion model.

The Justice Department's policies on non-prosecution in exchange for cooperation also have been honored in the breach in the rush to enter deferred prosecution and non-prosecution agreements. The Thompson Memo notes that the United States Attorney Manual allows prosecutors to enter "a non-prosecution agreement in exchange for cooperation when a corporation's 'timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.'"²⁵⁰ A closer examination of these requirements shows how far the Department has strayed from its policies regarding cooperation.

First, the United States Attorneys' Manual expresses a strong preference for obtaining cooperation by entering plea agreements that involve either a reduction in charges or sentencing consideration.²⁵¹ These alternatives are described as "clearly preferable to permitting an offender to avoid any liability for [its] conduct," and prosecutors are advised that "the possible use of an alternative to a non-prosecution agreement should be given serious consideration in the first instance."²⁵² In other words, non-prosecution only occurs if co-

Deferred Prosecution Agreement (Dec. 11, 2012), *available at* http://lib.law.virginia.edu/Garrett/prosecution_agreements/press_release/HSBC.pdf.

249. *But see* United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *13-20 (E.D.N.Y. July 1, 2013) (approving the HSBC deferred prosecution agreement despite "heavy public criticism" and stating that the "decision to approve the DPA is easy, for it accomplishes a great deal").

250. Thompson Memo, *supra* note 103, at 6 (citing USAM § 9-27.600).

251. USAM § 9-27.600.

252. *Id.*

operation cannot be obtained through a plea agreement or an alternative that preserves the Department's ability to prosecute criminally.

Of course, it is not possible for us to know what steps the Justice Department took to secure cooperation in the nearly 300 cases it has resolved by deferred prosecution or non-prosecution. Given how frequently other parts of the Department obtain cooperation using plea agreements, however, it is likely that the Department is not limiting deferred prosecution and non-prosecution to cases where it cannot obtain cooperation by other means. Rather, it seems apparent that the Department is electing to enter deferred prosecution and non-prosecution agreements whenever it opportunistically chooses to forego criminal prosecution, not because it must to obtain cooperation.

Second, the United States Attorney's Manual describes the balancing that prosecutors must do if they "conclude[] that a non-prosecution agreement would be the only effective method for obtaining cooperation."²⁵³ Prosecutors are advised to consider the cost of foregoing prosecution against the benefit of cooperation and determine whether non-prosecution is in the public interest.²⁵⁴ The public interest test requires weighing (1) the importance of the case; (2) the value of the cooperation; and (3) the relative culpability and criminal history of the defendant.²⁵⁵ In this regard, the Justice Department policies are different than its pretrial diversion policies, inasmuch as non-prosecution only is allowed in "cases in which the cooperation sought concerns the commission of a serious offense."²⁵⁶ Significantly, however, the Department makes clear that "[s]ince the primary function of a Federal prosecutor is to enforce the criminal law, he[] should not routinely or indiscriminately enter into non-prosecution agreements, which are, in essence, agreements not to enforce the law under particular conditions."²⁵⁷

By 2008, the Justice Department had shifted its rationale for deferred prosecution and non-prosecution agreement to the avoidance of collateral consequences.²⁵⁸ The Department provided little guidance about how that decision should be made other than to state tautologically that "the appropriateness of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a prag-

253. USAM § 9-27.600.

254. *Id.* § 9-27.620.

255. *Id.*

256. *Id.*

257. *Id.*

258. *See supra* text accompanying note 108.

matic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law."²⁵⁹ The blanket authorization to enter "fair" deferred prosecution and non-prosecution agreements with corporations stands in stark contrast to the Department's restrictive approach to non-prosecution in all other contexts.

Moreover, the Justice Department's reliance on collateral consequences as a justification for deferred prosecution and non-prosecution agreements is inconsistent with the Department's policies on *nolo contendere* or "no contest" pleas.²⁶⁰ For decades, the Justice Department has opposed efforts by defendants to enter no contest pleas, which corporations sought both as a way to limit their admissions about criminal conduct and to avoid the collateral estoppel effect of guilty pleas in parallel civil litigation. The Department requires prosecutors to "oppose the acceptance of a plea *nolo contendere* unless the Assistant Attorney General with supervisory responsibility over the subject matter concludes that the circumstances of the case are so unusual that acceptance of such a plea would be in the public interest."²⁶¹ The United States Attorney's Manual quotes former Attorney General Herbert Brownwell, Jr., who stated:

One of the factors which has tended to breed contempt for Federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of *nolo contendere*. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty.²⁶²

Attorney General Brownwell's concerns about the use of no contest pleas as a matter of course—and his view that they should not as part of "everyday practice" be used as a vehicle for avoiding the collateral consequences of pleading guilty—would appear to apply with equal or greater force to the more favorable outcome of deferred prosecution or non-prosecution.

It is revealing that the Justice Department continues to vehemently oppose no contest pleas—which at least result in a criminal

259. USAM § 9-28.1000.

260. Compare USAM § 9-27.520 (discussing the strict prosecutorial policies on *nolo contendere*), with *id.* § 9-28.1000 (allowing prosecutors to consider collateral consequences when dealing with corporate criminal liability).

261. *Id.* § 9-27.500.

262. *Id.*

conviction—but routinely allows companies to enter deferred prosecution and non-prosecution agreements. In the past, to avoid entering a guilty plea for criminal violations, a corporation would have to convince the Department that it was the extraordinary situation where a no contest plea should be authorized by an Assistant Attorney General. Today, the same corporation can obtain an even better outcome with little or no showing of extraordinary circumstances and no requirement of Assistant Attorney General approval.

C. Deferred Prosecution and Non-Prosecution Distorts the Role of the Criminal Prosecutor

As the preceding Sections demonstrate, the frequent use of deferred prosecution and non-prosecution agreements is not consistent with the theoretical purposes of corporate criminal prosecution or the Justice Department's policies. In addition, the use of such agreements distorts the role of the criminal prosecutor, makes it appear that companies can buy their way out of criminal prosecution, and reveals ambivalence in the government's approach to prosecuting corporate crime.

Prosecutors regularly exercise discretion about which violations warrant criminal prosecution and which should be declined. There may be no more essential role for prosecutors than the fair exercise of discretion to decide which criminal violations warrant criminal prosecution and the possible imposition of criminal sanctions, if the defendant is found guilty. It would be difficult to overstate the power conferred on prosecutors when they decide whether to bring criminal charges, since a mere accusation can have devastating effects on the defendant, even if the case goes to trial and the defendant is acquitted.²⁶³

We can and should expect prosecutors to exercise sound judgment in the threshold decision about whether a particular violation of the law warrants criminal prosecution. If, in accordance with the Principles of Federal Prosecution,²⁶⁴ the prosecutor determines that a case warrants prosecution, charges should be brought. If she determines the case does not justify criminal prosecution, the case should be declined. The choice is fundamental to the fair administration of our criminal justice system. There should be no middle ground between criminal prosecution and declination, unless to serve some de-

263. Cf. Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1588 (discussing how it is improper for prosecutors to bring charges against the innocent or those who they know will be acquitted).

264. USAM § 9-27.000.

fined and limited purpose like rehabilitation of first-time offenders who commit non-serious crimes or when necessary to obtain essential cooperation. It may be appropriate to also allow deferred prosecution or non-prosecution in exceptional cases like WakeMed, where the government was able to demonstrate that innocent third parties would suffer unacceptable harm.²⁶⁵ But those cases, like instances warranting no contest pleas, should occur rarely and only with Assistant Attorney General approval.

The government erodes corporate criminality by using deferred prosecution and non-prosecution agreements as a substitute for criminal prosecution. When a prosecutor concludes that the conduct involved is too egregious to decline criminal charges—that the conduct must be addressed in the criminal justice system—the prosecutor should seek criminal charges. The decision to pursue a non-criminal alternative betrays the prosecutor’s determination about the inherent wrongfulness and criminality of the defendant’s conduct. Worse, it creates the appearance that a corporate defendant can “undo” the criminal nature of its conduct if the company offers attractive enough terms to entice the government to agree to a deferred prosecution or non-prosecution.

Conversely, the government misuses its criminal enforcement authority by entering deferred prosecution and non-prosecution agreements as a substitute for declination. When a prosecutor concludes that criminal prosecution is unwarranted—that criminal charges and criminal sanctions are too severe—the prosecutor should decline criminal charges. Under these circumstances, negotiating the terms of a non-criminal disposition is an abuse of prosecutorial authority. In effect, the prosecutor is leveraging the threat of criminal charges that she believes should not be brought to coerce the defendant into entering a deferred prosecution or non-prosecution agreement. Just as prosecutors who have decided to decline should not use the threat of criminal prosecution to obtain civil settlements,²⁶⁶ it is inappropriate for the government to use the threat of criminal prosecution to obtain a deferred or non-prosecution agreement, when the prosecutor does not intend to prosecute.

It could be argued that prosecutorial discretion does not involve such a binary set of choices between prosecution and declination. After all, prosecutors regularly exercise discretion over which charges to

265. See *supra* text accompanying note 169.

266. See, e.g., ENRD DIRECTIVE 0802: PARALLEL PROCEEDINGS POLICY 8 (2008) (“Criminal prosecution shall not be used as a threat to obtain civil settlement.”).

pursue. Prosecutors properly offer defendants the opportunity to plead guilty to lesser charges than might be pursued at trial. In still other circumstances, prosecutors may decide that conduct, while criminal, is not serious enough to warrant criminal prosecution. But even in these scenarios, prosecutors are making a fundamental choice about whether the conduct will be handled criminally.

It also merits emphasis that much corporate crime occurs in the regulatory context or involves conduct like fraud where civil remedies also are available to the government. In those cases, the use of deferred prosecution and non-prosecution is a particularly egregious distortion of the role of the criminal prosecutor. For most regulatory violations, the government has a range of enforcement options that include criminal, civil, and administrative enforcement.²⁶⁷ If a particular violation does not warrant criminal enforcement—in other words when it is not necessary to impose a criminal punishment or label the underlying conduct as criminal—the government can and should use civil or administrative enforcement to impose penalties and any corrective actions. There is no evidence that the government requires a fourth option in addition to those it already possesses. Nor is there any indication that Congress intended to provide for more than criminal, civil, or administrative enforcement for regulatory violations (although some regulatory schemes offer only civil or administrative enforcement as alternatives to criminal prosecution, not both).

Ultimately, what may be most disconcerting about the Justice Department's approach to deferred prosecution and non-prosecution agreements is its willingness to consider non-criminal resolutions even in egregious cases of corporate crime. When the most serious criminal violations can be handled outside the criminal justice system—cases involving deaths and double-sets of books or hundreds of millions of dollars in fraud claims—it raises questions about the Department's commitment to prosecuting corporate crime. And in the process, the concept of corporate criminality is eroded and the rule of law is weakened.

The Justice Department still prosecutes corporate crime. It does so because corporate wrongdoing can have devastating effects that warrant punishment under retributive and utilitarian theories. It prosecutes criminally because labels matter, and we communicate far more about our condemnation of wrongdoing when we call conduct

267. See, e.g., 33 U.S.C. §§ 1319(a)-(c) (2006) (allowing the government to pursue administrative, civil, or criminal enforcement for violations of the Clean Water Act).

criminal, whether the defendant is a corporation or an individual.²⁶⁸ As a law enforcement institution, the Justice Department does not believe that criminal prosecution of corporations serves no purpose. So it is all the more curious that the Department is pursuing such an ambivalent approach to corporate prosecution: extolling its virtues and essential role in upholding the rule of law when it prosecutes; indulging a results-oriented, ends-justify-the-means approach that discounts the criminal sanction when it does not.

IV. CONCLUSION

The Justice Department can and should be expected to make principled decisions about whether criminal prosecution of corporations is warranted. If the law and the facts justify prosecution, charges should be brought; they should not be sacrificed in favor of deferred prosecution or non-prosecution. If the conduct does not rise to the level that warrants criminal prosecution, the matter should be declined. Deferred prosecution and non-prosecution agreements, if they occur at all, should be limited to relatively minor cases where civil or administrative enforcement is not available or the exceptional case where other non-criminal alternatives are inadequate. Non-criminal alternatives should never be allowed in egregious cases like the Upper Big Branch mining disaster, unless there is insufficient evidence to support criminal prosecution.

The Justice Department should amend its corporate prosecution policies to make clear when deferred prosecution and non-prosecution agreements may be considered, as well as the categories of criminal activity that cannot be resolved by such agreements. The Assistant Attorney General approval requirements that govern no contest pleas also should apply to deferred prosecution and non-prosecution agreements. By developing guidelines that curtail the overuse of deferred prosecution and non-prosecution agreements, the Justice Department will ensure a principled and consistent approach to the prosecution of corporations, uphold the rule of law, and restore confidence in the Department's efforts to combat corporate crime.

268. See Diamond, *supra* note 243, at 311 (discussing how criminalizing certain conduct clearly marks it as outside the boundaries of acceptable behavior).