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DEFERRED PROSECUTION: AN ADDED TECHNIQUE FOR RESOLVING FEDERAL CRIMINAL INVESTIGATIONS OF ORGANIZATIONS

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PREFACE

This *Briefly*, by Richard M. Cooper, is a must read for any business facing the prospect of federal prosecution.

The author begins by tracing the evolution of corporate criminal culpability and proceeds to a discussion and analysis of alternatives for the disposition of criminal investigations in today's environment of heightened enforcement, and, particularly, the role of deferred prosecution agreements. Such agreements have become an important means for prosecutors to achieve their objectives without risking the destruction of organizations, as occurred in the case of Arthur Andersen.

Mr. Cooper describes the common features of deferred prosecution agreements and the challenges and complexities presented in considering that option in light of the "Principles of Federal Prosecution of Business Organizations," the so-called Thompson Memorandum. To better understand the costs, benefits, implications, and undertakings associated with deferred prosecution agreements, Mr. Cooper provides detailed examples of recent deferred prosecution agreements and the widely varying outcomes.

Finally, the author discusses common criticisms of deferred prosecution agreements from both a policy and practical standpoint in the larger context of promoting public confidence in the administration of our criminal laws.

We believe you will find this monograph to be both informative and valuable. We just hope you will never need it.

Richard A. Hauser
President
National Legal Center

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DEFERRED PROSECUTION: AN ADDED TECHNIQUE FOR RESOLVING FEDERAL CRIMINAL INVESTIGATIONS OF ORGANIZATIONS

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The federal prosecution of Arthur Andersen in 2002 led to the demise of the firm, the loss of many thousands of jobs, and a significant reduction in the number of American accounting firms that can meet the needs of very large corporations.[1] Subsequently, federal prosecutors have increasingly used against corporations and other business organizations the technique of deferred prosecution as a means to avoid the kind of collateral damage that destroyed Arthur Andersen.[2] This monograph explores the nature and history of deferred prosecution and assesses its current role among the techniques for enforcing the criminal law against corporations and other business organizations.

I. CORPORATE CRIMINAL LIABILITY

Until modern times, corporations generally had no criminal liability at common law. Blackstone wrote in 1765: "A corporation cannot commit treason, or felony, or other crime, in it's [sic] corporate capacity: though it's [sic] members may, in their distinct individual capacities."[3] It was thought that a corporation had no mind to form the *mens rea* necessary for criminal liability; and, when imprisonment replaced the death penalty as the principal form of punishment of individuals, it could not be applied to a corporation.[4] As Edward, First Baron Thurlow, put it: "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?"[5] Moreover, a fine levied against a corporation imposes a cost on its shareholders at the time of the fine, who may have had no involvement in the corporation's conduct and may not have benefited from it.[6] Because corporations played a very limited role in the economies of premodern societies, the failure of the criminal law to

apply directly to their conduct did not create a significant gap in social control because, as Blackstone noted, the individuals who acted for them could be prosecuted for their own conduct.

In the United States, during the second half of the nineteenth century and the early twentieth century, as corporations became more significant in economic and social life, they became subject to criminal liability under "public welfare" statutes, violations of which did not require *mens rea*.[7] Gradually, at both the state and federal levels, corporate criminal liability spread to other types of offenses, on the theory of *respondeat superior*.[8]

In 1909, the Supreme Court upheld the constitutionality of a provision of the Elkins Act that made it a misdemeanor for a railroad corporation to give a prohibited rebate.[9] In rejecting arguments that punishing the corporation was, in effect, punishing the stockholders without due process of law, that application of *respondeat superior* in the criminal context deprived the corporation of the presumption of innocence, and that a corporation was incapable of committing the type of crime charged, the Court stated plainly the modern rationale for corporate criminal liability:

> Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.
>
> It is true that there are some crimes which, in their nature cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. . . .
>
> It is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law. . . .
>
> . . . .

> We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted [sic] authority to act in the subject-matter. . . . [T]he law . . . cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands . . . .[10]

Despite the establishment of the theoretical grounds for corporate criminal liability, a sense remains that criminal prosecution of corporations is problematic, both as to the basis for liability and as to the appropriate punishment. Since corporations can act only through their directors, officers, and other employees, and since those individuals can be prosecuted and punished, it is far from self-evident that the traditional purposes of the criminal law (retribution, deterrence, incapacitation, and rehabilitation)[11] are served by prosecuting corporations as well as individuals. Moreover, although most prosecutions of individuals unavoidably harm innocent people (e.g., the spouse and children of the offender), prosecutions of business organizations may harm far greater numbers of innocent people, who may not have benefited from the criminal conduct (e.g., employees, shareholders, creditors, suppliers, customers, entire communities where corporate facilities are located, and the families of those directly harmed).

Some have argued that a corporation should be prosecuted only if it is pervasively and incorrigibly criminal.[12] Plainly, that view has not prevailed; and debate continues over the kinds of circumstances that justify prosecution of a corporation (in addition to individuals) and the kinds of measures that should be applied to a corporation that has committed a crime. As discussed *infra*, deferred prosecution provides prosecutors an additional option between declining prosecution and prosecuting until a judgment of conviction is obtained.

Some aspects of corporations make it easier to justify applying the criminal law to them than to individuals. Because corporations are not human beings and so do not have human rights, it is easier to justify ascribing to corporations than to individuals vicarious criminal liability on the basis of *respondeat superior*.[13] It is also easier to "reform" a

corporation than an individual: it is possible for society to intervene in the decision-making apparatus of a corporation (its Board, management, and supervisors; its internal organizational structure; and its methods of operating and communications processes) in ways that would be flatly unacceptable as to an individual: a corporate decision-making apparatus may be replaced entirely, modified in any of a multitude of ways, or closely monitored.[14] Corporations can change their conduct, habits, and ways of doing things more easily than adult individuals. Consequently, reform can justifiably predominate in the punishment of corporations in a way that it cannot in that of individuals; and society can have more justified confidence that the criminal justice system can, indeed, reform corporations than that it can reform individuals. Because corporations are organized, governmentally chartered aggregations of human, financial, and material resources, society generally has a stronger justification for exercising controls intended to bring about their proper functioning— than it does as to individuals.

Precisely because, in some circumstances, a corporation's criminal liability is vicarious (e.g., where the criminal conduct was initiated by relatively low-level employees and was not authorized or condoned by the Board or senior management), the corporation is deserving of less retributive punishment than the individual(s) who actually committed the offense.[15] Consequently, the balance between retribution and reform in the disposition of criminal investigations of corporations may justifiably be quite different from that in the disposition of criminal investigations of individuals.

In the United States, such considerations have influenced the development of corporate criminal liability, the evolution of actual enforcement of the criminal law against corporations, and also the recent emergence of deferred prosecution.[16] The original concerns of the common law, as reflected in Blackstone, have not disappeared, however. In 1910, the year after the Supreme Court's decision in *New York Central*, Woodrow Wilson reiterated the principal concerns about imposing criminal liability on corporations:

> You cannot punish corporations. Fines fall upon the wrong persons; more heavily upon the innocent than upon the guilty; as much upon those who knew nothing whatever of the transactions

> for which the fine is imposed as upon those who originated and carried them through—upon the stockholders and the customers rather than upon the men who direct the policy of the business. If you dissolve the offending corporation, you throw great undertakings out of gear. You merely drive what you are seeking to check into other forms or temporarily disorganize some important business altogether, to the infinite loss of thousands of entirely innocent persons and to the great inconvenience of society as a whole. Law can never accomplish its objects in that way. It can never bring peace or command respect by such futilities.[17]

The demise of Arthur Andersen renews such worries, which continue today to influence the disposition of corporate criminal investigations and to support recourse to deferred prosecution.

II. DEFERRED PROSECUTION BEFORE THE *ARTHUR ANDERSEN* CASE

Deferred prosecution originated as a means of disposing of criminal charges against individuals, initially juveniles and later also minor drug offenders, without imposing on them the stigma and collateral consequences of formal criminal charges and convictions.[18] Those consequences may include a criminal record (which may make it more difficult for an individual to obtain employment); exclusion from certain fields of professional or business activity; loss of certain educational opportunities, social benefits, and services; and the loss of certain rights, including the right to vote and to possess firearms.[19]

The first federal deferred prosecution agreement with a business organization was that by the Office of the United States Attorney for the Southern District of New York with Prudential Securities in 1994.[20] There were few successors until after the *Arthur Andersen* case in 2002.[21]

In 1997, the Department of Justice established formal guidelines for pretrial diversion as an alternative to normal prosecution of certain types of offenders.[22] Under the guidelines, the "major objectives" of the program are "[t]o prevent future criminal activity among certain offenders by diverting them from traditional processing into

community supervision and services"; "[t]o save prosecutive and judicial resources for concentration on major cases"; and "[t]o provide, where appropriate, a vehicle for restitution to communities and victims of crime."[23] Although evidently formulated with individuals in mind, these objectives are readily adaptable to organizations.

Pretrial diversion is implemented through a standard agreement. Under it, *inter alia*, the government defers prosecution for a specified period not to exceed 18 months,[24] and will not prosecute for the offense(s) specified (and will dismiss any charges previously filed) if the individual complies with the conditions imposed by the agreement throughout the deferral period; the individual accepts responsibility for his/her behavior (but does not admit guilt), waives the statute of limitations and the right to a speedy trial, and is required to avoid violation of any law (federal, state, or local), to attend school or work regularly, to report to the designated supervisor if arrested or questioned by a law enforcement officer and otherwise as directed, and to follow any special conditions imposed. Supervision is provided by the U.S. Probation Service. If the individual violates a condition of the diversion, the government is free to prosecute for the specified offense(s). [25]

Thus, deferred prosecution originated as a means for prosecutors to deal with individuals in criminal trouble by deferring the filing or actual prosecution of criminal charges so as to avoid the stigma and collateral consequences of a criminal conviction (and, in some cases, even a criminal charge), by arranging for social services so as to promote reform (and thereby avoid future crimes), and, in some cases, by arranging for restitution to victims. The extension of deferred prosecution to corporations and other business organizations is also an extension to them of these types of social control.

III. DISPOSITION OF CRIMINAL INVESTIGATIONS OF ORGANIZATIONS

There are six broad categories of dispositions of federal criminal investigations of individuals and organizations: (i) simple declination; (ii) declination plus civil or administrative proceedings or referral for criminal, civil, or administrative proceedings in another jurisdiction;

(iii) nonprosecution agreement; (iv) deferred prosecution agreement; (v) plea agreement; and (vi) full prosecution.

Under the Principles of Federal Prosecution promulgated by the Department of Justice, simple declination is warranted where the admissible evidence probably will not be sufficient to obtain and sustain a conviction or no substantial federal interest would be served by prosecution. Whether evidence is sufficient is a matter for professional judgment by prosecutors. Many factors are relevant to an assessment of the potential federal interest in a prosecution.[26]

Cases are to be disposed of by declination plus initiation, or referral for consideration of initiation, of other proceedings where the Department of Justice concludes that some other proceedings are or may be the appropriate response to the conduct at issue. Numerous considerations enter into such assessments.[27] In some investigations that are or might become criminal, resolution by a purely civil settlement, involving an injunction, administrative agreement, and/or payment of money, may be the least unfavorable outcome for the organizations involved.

Under the Principles, a nonprosecution agreement is appropriate "in exchange for a person's cooperation when . . . the person'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."[28] Thus, in original conception, a nonprosecution agreement is essentially an exchange of immunity from prosecution for cooperation needed to make a prosecution of some other party or parties successful.

The obstacle the government usually faces in obtaining cooperation from an individual is the Fifth Amendment privilege against self-incrimination. The Department recognizes three means of obtaining the desired cooperation besides a nonprosecution agreement: (i) prosecuting the individual and obtaining a conviction, thereby defeating the Fifth Amendment privilege as to the crime(s) of which the individual was convicted,[29] (ii) a plea agreement obligating the individual to cooperate, and (iii) an immunity order under 18 U.S.C. §§ 6001-6003.[30] A nonprosecution agreement is an alternative to these approaches.

A corporation or other "collective entity" has no Fifth Amendment privilege.[31] The cooperation the government may want from a corporation may be information protected by the corporation's

attorney-client privilege and/or the work-product doctrine, information the government does not know enough even to ask about with particularity, use of the corporation's influence with individuals to induce them to be more robustly cooperative with the government, and/or denial of the corporation's support to individuals or other organizations that are targets or subjects of an investigation. A non-prosecution agreement is a technique for the government to obtain such cooperation from an organization.[32]

An example of a nonprosecution agreement with a business organization is a settlement in 1992 by which the Department of Justice and the SEC resolved an investigation of Salomon Inc. and Salomon Brothers Inc.[33] The Salomon settlement consisted of a non-prosecution and civil settlement agreement, under which the companies paid $290 million "to resolve charges arising out of alleged misconduct in Treasury auctions and government securities trading."[34] The payment resolved civil liability under the False Claims Act,[35] and also included an asset forfeiture under an agreed disposition of an antitrust complaint that alleged an agreement among competitors to raise prices by withholding supply. The government said it had decided not to proceed criminally because "Salomon had cooperated extensively in the investigation and had taken decisive and extraordinary actions to restructure its management to avoid future misconduct. The cooperation included providing detailed information concerning the firm's own internal investigation, turning over documents and making employees available for interviews and testimony."[36] A criminal conviction could have led to exclusions from acting as a broker-dealer and as an investment adviser.[37]

The Salomon agreement illustrates the fact that nonprosecution agreements can contain provisions that are well beyond cooperation—including provisions for financial penalties, payments to victims, and organizational reform. Indeed, some nonprosecution agreements contain provisions more onerous than those in some deferred-prosecution agreements.[38] For example, Canadian Imperial Bank of Commerce agreed to cease certain business activities for three years.[39] Boeing agreed to pay $615 million.[40]

Deferred prosecution agreements will be considered more fully *infra*.

A plea agreement involves a requirement that the defendant plead guilty or *nolo contendere* to a criminal charge or charges, in return for

the government dropping another possible charge or charges and/or taking a particular position on sentencing.[41] Under the Principles, numerous considerations apply to the decisions whether the government should enter into a plea agreement with a particular defendant and what charges the defendant should be required to plead to.[42] Some corporate plea agreements require that corporations implement measures to prevent recurrence of the type(s) of criminal conduct that led to the plea.[43]

Finally, full prosecution is the mode of disposition when the prosecutors believe that the admissible evidence probably will be sufficient to obtain and sustain a conviction, a substantial federal interest would be served by prosecution, and none of the other types of disposition is appropriate.[44]

The Department of Justice characterizes pretrial diversion (deferred prosecution) as "an alternative to prosecution."[45] In fact, it is an alternative to all the other possible dispositions of a criminal investigation.

IV. PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS

On January 20, 2003, Deputy Attorney General Larry D. Thompson issued a memorandum titled Principles of Federal Prosecution of Business Organizations.[46] The memorandum states "the general purposes of the criminal law" as "assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities."[47] In furtherance of those purposes, the memorandum identifies nine factors to be considered in deciding whether to prosecute a corporation:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime . . . ;

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management . . . ;

3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it . . . ;

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection . . . ;

5. the existence and adequacy of the corporation's compliance program . . . ;

6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies . . . ;

7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution . . . ;

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance;

9. the adequacy of remedies such as civil or regulatory enforcement actions . . . .[48]

In the course of its discussion of cooperation and voluntary disclosure, the memorandum expressly calls attention to the possibility of "granting a corporation immunity or amnesty <u>or pretrial diversion</u>."[49] The memorandum's express endorsement, in factor 7, of consideration

of collateral consequences provides further support for deferred prosecution of business organizations in some cases.

V. COMMON FEATURES OF DEFERRED PROSECUTION BY THE U.S. DEPARTMENT OF JUSTICE

Since the issuance of the Thompson Memorandum in January 2003, the number of deferred prosecutions of business organizations by the U.S. Department of Justice has increased substantially.[50] A report published on December 28, 2005, identified 17 such prosecutions: one in 1994, one in 1996, one in 2001, five in 2003, six in 2004, and three in 2005.[51] There also have been at least one more in 2005 after the publication of the report and at least six in 2006.[52] The report also identified 17 nonprosecution agreements during the period 1992–2005 (nine during 2003–05).[53]

Deferred prosecution by the Department of Justice of a business organization commonly includes the following features:

- the Department and the organization enter into a written deferred prosecution agreement;[54]
- the government files a criminal complaint or information against the organization in a U.S. district court;[55] on motion of the government, the court defers further proceedings on the complaint or information pursuant to the agreement;[56]
- in the agreement, the organization, *inter alia*,
  - waives the statute of limitations, its right to a speedy trial on the charges set forth in the complaint or information, all objections to the admissibility against it of statements it made (or will make) or information it provided (or will provide) to the government, and any judicial review of decisions made by the government under the agreement, including whether the organization breached the agreement;[57]
  - accepts and acknowledges its responsibility for the conduct described in an appended statement of facts, which the organization agrees not to contradict in any public statement (the statement of facts amounts to an admission of all the elements of the crimes alleged in the complaint or information);[58]

  - agrees to cooperate fully in the ongoing investigation(s) relating to its conduct, including waiver of the organization's attorney-client privilege and work-product protection;[59]
  - agrees not to commit further violations during the specified deferral period;
  - agrees to provide specified compensation to victims and to pay to the government a specified amount as a penalty;[60]
  - agrees to implement specified remedial actions (in addition to those already implemented) to prevent future violations, including measures affecting corporate governance and compliance with applicable laws, and engagement of an independent examiner or monitor with wide-ranging authority to assess compliance with the agreement and applicable laws and to issue reports thereon to enforcement agencies; and
  - agrees that, if the government initially determines that the organization has committed a willful material breach of the agreement, the government will notify the organization in writing of that determination, the organization will have two weeks to show that no such breach occurred, and the government's final determination as to breach shall not be reviewable by any court;[61]

- in the agreement, the government agrees to seek dismissal of the complaint or information with prejudice if, throughout the specified deferral period, the organization has complied with all its obligations under the agreement;
- the agreement provides that, if, during the deferral period, the organization commits any crime or otherwise breaches the agreement, the government is free to prosecute the organization for any crimes by it of which the government has knowledge that were not time-barred when the agreement was signed.

These features of deferred prosecution agreements with business organizations have significant antecedents. Written agreements have been used to resolve criminal investigations of organizations by a plea or by declination conditioned on cooperation (and, sometimes, other undertakings). Pretrial diversion as to individuals is the precedent for the technique of filing a set of charges and deferring further proceedings,

and obtaining from the defendant waivers of the statute of limitations and the right to a speedy trial, acknowledgment and acceptance of responsibility for the conduct charged, and an agreement to pay restitution or compensation to victims.

The *Sentencing Guidelines*, issued by the U.S. Sentencing Commission, make self-reporting, cooperation, and acceptance of responsibility elements in the "culpability score" used in determining the fine for an organization.[62] The *Guidelines* also provide for organizational probation, under conditions similar to some of the provisions in deferred prosecution agreements.[63] Many of the provisions in deferred prosecution agreements are similar to provisions authorized by the *Guidelines* for inclusion in sentences of organizations convicted of a crime—e.g., payments to the government (similar to a fine), restitution to or compensation of victims,[64] disgorgement of gain from the conduct that led to the agreement,[65] and reform of internal processes and activities (similar to conditions of probation).[66] The demands for compensation of victims and for remedial actions to prevent future violations also are encouraged by the precedent of pretrial diversion of individuals and the Thompson Memorandum.[67]

Prosecutorial demands for cooperation to the point of waiver of the attorney-client privilege and work-product protection are encouraged by the Thompson Memorandum, which emphasizes

> scrutiny of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution.[68]
>
> One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or

> immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances.[3] The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation.
>
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> [3] This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.[69]

The Thompson Memorandum also directs federal prosecutors to consider another form of cooperation:

> Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise to support culpable employees and agents, either through the advancing of attorneys fees, [4] through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation. By the same token, the prosecutor should be wary of attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty.
>
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> [4] Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate.[70]

The pressure prosecutors have put on companies, as a result of this passage, to cut off all support for officers and employees whom prosecutors view as "culpable" but who have not been convicted of, or even formally charged with, any crime, has been controversial.[71] In *United States v. Stein*, the United States District Court for the Southern District of New York held that pressure by prosecutors to induce a company to refuse to advance legal fees to former employees under criminal investigation violated their Fifth Amendment right to due process and their Sixth Amendment right to counsel.[72]

The Justice Department explains and defends its increased demands for cooperation under the Thompson Memorandum as reflecting a need to conduct criminal investigations of business organizations more quickly than in the past:

> Simply put, speed matters in corporate fraud investigations. The days of five-year investigations, of agreement after agreement tolling the statute of limitations—while ill-gotten gains are frittered away and investor confidence sinks—are increasingly a thing of the past.
>
> . . . .
>
> To conduct these complex investigations quickly and thoroughly, we've simply got to secure the companies' true cooperation, where appropriate. Sometimes, we'll prosecute only the guilty employees and executives, but in other cases, we seriously consider prosecuting the company itself. Our message on this point is two-fold: Number one, you'll get a lot of credit if you cooperate, and that credit can make the difference between life and death for a corporation. Number two, you'll only get credit for cooperation if it's authentic. You have to get all the way on board and do your best to help the Government.[73]

The following chart presents certain features of a sample of deferred prosecution agreements:

Deferred Prosecution Agreements

Company	Date	Deferral Period (Mos.)	Compen-sation ($ million)	Penalty ($ million)	Crime Charged
Banco Popular[74]	1/16/03	12	$0	$21.6	Failure to file SARs[75]
NY Racing Ass'n[76]	12/11/03	18	$0	$3	Tax
Computer Associates[77]	9/22/04	18	$225	$0	Securities; obstruction
AmSouth Bancorp.[78]	10/12/04	12	$0	$40	Failure to file SARs
AIG-FP[79]	11/30/04	12	$0	$126.366	Securities
AOL[80]	12/15/04	24	$150	$60	Securities
Monsanto[81]	1/6/05	36	$0	$1	FCPA[82]
B-MS[83]	6/15/05	24	$350	$100	Securities
KPMG[84]	8/26/05	16, max 80 optional	$228 (IRS)	$228	Tax
UMDNJ[85]	12/29/05	24, poss. 36	$4.9	$0	Fraud
FirstEnergy[86]	1/20/06	11+	$0	$28	False Statements
Roger Williams Med. Ctr.[87]	1/27/06	24	$4 in add'l free healthcare	$0	Mail Fraud
OMI[88]	2/8/06	24	$0	$2[89]	Environ-mental
HVB[90]	2/13/06	18	$7	$22.6	Tax
BankAtlantic[91]	4/26/06	12	$0	$10	Lack of anti-money-laundering program
WesternGeco[92]	6/16/06	12	$0	$19.6	Visa fraud

The chart shows a range of initial deferral periods; 12 months is the most common; 36 months is the longest. The figures for compensation and penalties have ranged widely, presumably in response to the facts of individual cases. The kinds of offenses appear to be those for which the Department of Justice would be expected to prosecute. It appears that the technique of deferred prosecution is not being used to address esoteric offenses outside the mainstream of federal criminal enforcement.

Some agreements refer in detail to remedial actions the organizations had taken before entering into them. For example, at the time of its agreement, Bristol-Myers Squibb had:

- retained an "Independent Advisor, to conduct a comprehensive review of the implementation and effectiveness of the internal controls, financial reporting, disclosure, planning, budget and projection processes and related compliance functions of the Company, as well as to serve additional supervisory and monitoring functions described" in the agreement;
- reached with the SEC a settlement involving payment of a civil penalty of $100 million and of $50 million to a shareholder fund, "as well as . . . an array of remedial measures . . . together with extensive supervisory and monitoring responsibilities to be carried out by the Independent Advisor . . .";
- paid "an additional $300 million to compensate present and former BMS shareholders in connection with [private civil] lawsuits";
- "ma[de] significant personnel changes," including replacing the former Chief Financial Officer, the President of the Worldwide Medicines Group, and the Controller, and establishing certain new positions;
- "[c]hang[ed] its budget process";
- "[f]orm[ed] a business risk and disclosure group that includes senior management, the Independent Advisor and counsel to the Independent Advisor";
- "implement[ed] actions to improve the effectiveness of its disclosure controls and procedures and internal controls, including enhancing its resources and training with respect to financial reporting and disclosure responsibilities, and reviewing such actions with its Audit Committee and independent auditors";

- "[i]mplement[ed] a formal review and certification process of its annual and quarterly reports filed with the [SEC]"; and
- "[p]rovid[ed] . . . a confidential hotline and e-mail address, of which BMS employees are informed and can use to notify BMS of any concerns about wholesaler inventory levels or the integrity of the financial disclosures, books and records of BMS."[93]

At the time of its agreement, Computer Associates had terminated "officers and employees who were responsible for the improper accounting, inaccurate financial reporting, and obstruction of justice set forth in the Information and Stipulation of Facts" and "officers and employees who had refused to cooperate with [the company's] internal investigation or who otherwise took steps to obstruct or impede that investigation," had "appoint[ed] new management, including . . . an Interim Chief Executive Officer, a new Chief Operating Officer and Chief Financial Officer, a new Head of Worldwide Sales, and a new General Counsel," and had shared with the U.S. Attorney's Office, the FBI, and the SEC "the results of its internal investigation," which had been conducted by an outside law firm.[94]

Some agreements impose new prospective restrictions on the organizations' business activities.[95] Some of the organizations entering into deferred prosecution agreements with the Department of Justice also entered into agreements with other agencies.[96]

The changes in corporate governance required by deferred prosecution agreements have been quite varied. For example, in addition to the measures it had taken prior to its agreement,[97] Bristol-Myers Squibb agreed:

- to appoint a Nonexecutive Chairman of its Board of Directors;
- to appoint an additional Nonexecutive Director acceptable to the U.S. Attorney's Office;
- that its "CFO, General Counsel, and Chief Compliance Officer regularly shall brief and provide information to the Non-Executive Chairman, in a manner to be determined by the Non-Executive Chairman. In addition, the Nonexecutive Chairman shall have the authority to meet with, and require reports on any subject from, any officer or employee of the Company";

- to appoint a Monitor (who may be the Independent Adviser) to monitor the company's compliance with the agreement; the Monitor will "have authority to require BMS to take any steps he believes are necessary to comply with the terms of [the] Agreement," will make reports to the U.S. Attorney's Office at least quarterly and cooperate with and provide information to the SEC, monitor BMS's compliance with other agreements it reaches in private civil litigation, and "monitor the information received by the confidential hotline and e-mail address" set up under the agreement
- that its "[CEO], Nonexecutive Chairman, and General Counsel will meet quarterly with the [U.S. Attorney's] Office and the Monitor in conjunction with the Monitor's quarterly reports";
- to "adopt all recommendations contained in each report submitted by the Monitor to the [U.S. Attorney's] Office unless BMS objects to the recommendation and the Office agrees that adoption of the recommendation should not be required";
- that, as directed by the U.S. Attorney's Office, the Monitor "may also disclose his reports . . . to any other federal, state or foreign law enforcement or regulatory agency in furtherance of an investigation of any other matters discovered by, or brought to the attention of, the [U.S. Attorney's] Office in connection with the Office's investigation of BMS or the implementation of [the] Agreement";
- that "[t]he Nonexecutive Chairman and the Compensation Committee of the Board of Directors shall set goals and objectives relevant to compensation of the CEO, evaluate the CEO's performance in light of those goals and objectives, and recommend to the Board of Directors compensation based on this evaluation";
- to detailed provisions relating to "training and education" of "officers, executives, and employees" involved in specified functions;
- to arrange a meeting between the U.S. Attorney and others from the U.S. Attorney's Office and "senior executives and any senior financial personnel, and any other BMS employees who the Company desires to attend . . . for the purpose of communicating the goals and expected effect of [the] Agreement";

- that for one year the Nonexecutive Chairman and the General Counsel would monitor the quarterly conference calls for analysts and would "attend and participate in any preparatory meetings held among the CEO, the CFO, the General Counsel and other members of BMS senior management in anticipation of the analyst calls";
- that the CEO and CFO "shall prepare and submit to the Non-Executive Chairman, Chief Compliance Officer and the Monitor . . . written reports on [specified] subjects"; and
- to make specified types of disclosures in its quarterly and annual public filings with the SEC.[98]

The Roger Williams Medical Center agreed to revisions of its corporate compliance program.[99] By contrast, no change in governance or corporate compliance programs was required in the agreement with BankAtlantic.[100]

Forms of cooperation commonly include: disclosing "all information" about the activities of the organization, its affiliates, and employees as requested by the prosecutors, gathering documents and other evidence for the prosecutors, waiving privileges, using best efforts to make present and former directors, officers, and employees available for questioning by prosecutors and for testimony before a grand jury or in federal trials, and providing corporate witnesses as requested by prosecutors to establish foundations for admission of evidence.[101]

Deferred prosecution agreements contain some form of a provision that the organization "shall not, through its attorneys, board of directors, agents, officers or employees, or any other representative make or adopt any public statement contradicting any statement contained in this Agreement or the Statement of Facts [setting forth the organization's criminal conduct] . . . ."[102] Such broad language waives First Amendment rights. It also raises the specter of improper influence on testimony by an organization's employees at public trials of individuals whom the government prosecutes. Some agreements are more careful than others on this point. For example, the Bristol-Myers Squibb agreement further provides: "This paragraph is not intended to apply to any statement by any former BMS employee, officer or

director, or any BMS employee, officer or director testifying in any proceeding in an individual capacity and not on behalf of BMS."[103]

VI. DEFERRED PROSECUTION'S ADVANTAGES AND DISADVANTAGES FOR AN ORGANIZATION

For an organization, a deferred prosecution agreement, considered by itself and other things equal, plainly is less advantageous than a declination or a nonprosecution agreement. Under a deferred prosecution agreement, an organization is formally and publicly charged with one or more crimes, and is subject to the threat of prosecution throughout the deferral period. Public disclosure of the criminal investigation, the criminal charge(s), and the agreement creates adverse publicity. Even without a conviction, the formal criminal charge can trigger seriously adverse collateral consequences, such as suspension from federal contracting.[104] Moreover, the organization publicly admits the facts necessary for a conviction under the deferred charge(s), and the admission of those facts may wholly or partially establish a basis for civil liability to third parties and/or for debarment or other adverse actions by governmental agencies. The organization's waiver of the attorney-client privilege and work-product protection relevant to its past conduct may make otherwise confidential information available to plaintiffs in civil lawsuits against the organization. The organization's role in terminating officers and employees whom the government considers culpable, in cutting off assistance to them, and in affirmatively helping the government's prosecution of them may create serious dissension among members of the Board of Directors and remaining officers and employees.[105]

If governmental cooperation can be obtained, some of these adverse effects can be mitigated. The harm from adverse publicity may be reduced if the government's press release and statements at any press conference include references to the organization's past and prospective remedial and restitutionary efforts, and if the organization has made peace not only with the prosecutors but also with other governmental agencies that might take adverse action against it on the basis of the facts admitted. The scope and detail of the statement of facts may meet the government's needs without containing additional details of potential benefit to civil plaintiffs, or may even contain

statements helpful to the organization.[106] Some agreements contain provisions intended to minimize the scope of the waiver of the attorney-client privilege.[107] The risk of debarment can be mitigated in the agreement.[108] In some circumstances, it may even be possible to reduce employee ill-will by obtaining, in the deferred prosecution agreement, immunity for employees involved in the conduct that led to the agreement.[109]

Moreover, as compared to a plea agreement or full prosecution, a deferred prosecution agreement has significant advantages. As compared to a plea agreement, it avoids the certainty of a criminal conviction and the additional collateral consequences that follow from a conviction.[110] In some fields of activity, a conviction can result in organizational death.[111] As compared to a full prosecution, deferred prosecution avoids a prolonged period during which criminal charges are pending and there is uncertainty as to the outcome and the organization's future. Such prolonged uncertainty can be devastating to a company's market capitalization, retention of customers and employees, access to credit, business opportunities generally—indeed, the prolonged pendency of charges may destroy a business.

As compared to both a plea agreement and full prosecution, a deferred prosecution agreement presumably reflects a considered judgment by both the prosecutors and the organization's Board and management that it is likely that the organization, aided by the remedial measures in the agreement, will avoid significant future violations of law. That implicit judgment on the part of the prosecutors, together with the complete resolution of the organization's criminal liability if it fully performs the agreement, may greatly reduce the harm to the organization's reputation and business prospects that otherwise would result from adverse publicity about the conduct that led to the agreement, even as such publicity continues along with the investigation and prosecution of former employees.

Presumably, the organizations that have entered into deferred prosecution agreements have concluded that, for them and in their circumstances, the advantages outweigh the disadvantages.

VII. COMMON CRITICISMS OF DEFERRED PROSECUTION AGREEMENTS

There are many criticisms of deferred prosecution agreements. Most, however, address aspects of such agreements that are not unique or essential to them.

A. Lack of Standards

The Department of Justice has not established clear standards to distinguish organizational cases appropriate for a nonprosecution agreement, a deferred prosecution agreement, or a plea agreement.[112] Plainly, it should do so, to the limited extent the subject matter permits.[113] Although prosecutorial judgments can never be completely determined by general rules or guidelines, the reality and the perception of evenhandedness in the administration of the criminal law are critical to sustained public support for the law.

B. Prosecutorial Overreaching

It is asserted that prosecutors have enormous power over business organizations against which a crime could be proved, that consequently bargaining over deferred prosecution agreements is one-sided (and out of public view), and that such agreements contain abusive provisions demanded by prosecutors.[114]

It is true that prosecutors have enormous power over organizations that are candidates for a deferred prosecution agreement, and that bargaining is predominantly one-sided and out of public view.[115] This problem, however, is not unique to deferred prosecution agreements. The same power applies whether an organization enters into a non-prosecution agreement, a deferred prosecution agreement, or an agreement for a plea to fewer than all the potential charges. All three types of agreement may contain abusive provisions.

Our criminal justice system gives great power to prosecutors. Their decisions whether to prosecute are subject to their "absolute discretion," and, therefore, are not judicially reviewable.[116] In upholding a conviction of an individual under a statute that dispensed with *mens rea*, the Supreme Court observed: "Hardship there doubtless may be

under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. . . . In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted."[117] Reliance on "the good sense of prosecutors," their diligence, integrity, and sense of fairness, and on effective supervision of line prosecutors by their superiors is a significant and inescapable part of our criminal justice system.

Federal deferred prosecutions generally involve the filing of the agreement and a criminal complaint or information in a federal district court; and, for a deferral to occur, the court must grant a motion to defer. Thus, the court has an opportunity to review the agreement. There is no party objecting to it, however; and it is not evident that any nonparty would have standing to object, though the court might choose to hear from affected nonparties. Thus far, judges presiding over deferred prosecutions have not questioned the provisions of deferred prosecution agreements.[118]

The requirement that organizations waive their attorney-client privilege and work-product protection as part of a deferred prosecution agreement has engendered very substantial controversy.[119] Such waivers also occur, however, in nonprosecution agreements.[120] Whether compelling such waivers as the price of a deferred prosecution or nonprosecution agreement is appropriate generally, in some cases, or never is a topic beyond the scope of this monograph. In principle, such agreements could exist without them, though prosecutors' interest in entering into such agreements without such waivers might well diminish.

Requiring organizations, as the price of a deferred prosecution or nonprosecution agreement, to discharge (or otherwise discipline) and to withdraw all support from, individual officers and/or employees whom the prosecutors suspect are culpable but who have not been convicted, or even formally accused, of any crime and/or individuals who merely exercise their Fifth Amendment privilege to refuse to answer prosecutors' questions is oppressive, unfair, and unconstitutional.[121] Deferred prosecution agreements could exist without such requirements. They are unlikely to disappear, however, unless courts in cases involving adversely affected individuals rule against them.[122]

There has been sharp criticism of provisions required by prosecutors in deferred prosecution agreements that are outside the concerns of the

criminal law—e.g., endowment of a chair at a law school that was the senior prosecutor's *alma mater*, promotion of a state's economic development, and installation of slot machines at racetracks to raise revenue for a state.[123] Such provisions could also occur in non-prosecution agreements and plea agreements. At the Justice Department, such abuses should be prevented by better supervision. In the states, where senior prosecutors (and many judges) are elected, the only recourse may be the press and the voters.

It has been argued that the provisions in deferred prosecution agreements for organizational reform are inappropriate because prosecutors have no particular expertise in corporate governance or management.[124] Although companies will argue against provisions that would impair their economic efficiency, candidates for deferred prosecution agreements have very limited bargaining power. From corporate investigations and from applying the *Sentencing Guidelines* provisions on an "effective program to prevent and detect violations of law,"[125] experienced prosecutors may well have some expertise in assessing corporate arrangements intended to maximize compliance with law. Nevertheless, negotiations of corporate "reforms" in deferred prosecution agreements provide significant opportunities for prosecutorial overreaching. In the absence of effective judicial review of the terms of these agreements, close supervision by, and opportunities for companies to appeal to, senior officials in U.S. Attorneys' Offices and at Main Justice are warranted. In addition, where relevant and requested by a company, prosecutors should seek the views of program personnel (not just lawyers) in government agencies with knowledge of the kind of business that is being addressed in an agreement, for example, the SEC and banking regulators.

It has also been argued that deferred prosecution agreements are becoming an "automatic alternative" to a declination of prosecution.[126] A federal prosecutor's demand for a deferred prosecution agreement where declination would be the appropriate disposition of an investigation would be contrary to the Principles of Federal Prosecution and the Thompson Memorandum. The appropriate remedy would appear to be stronger supervision by the Criminal Division or, if necessary, the Deputy Attorney General.

The argument may be, however, that at one time prosecutors were declining to prosecute organizations in cases that met the standard for prosecution but portended collateral consequences (e.g., destruction of the organization) that were unacceptable, but that, now, prosecutors are demanding and obtaining deferred prosecution agreements in such cases. This is the very class of cases for which deferred prosecution is intended.

C. Undue Leniency

The *Corporate Crime Reporter* and its editor, Russell Mokhiber, have argued that, by enabling corporations to avoid actual judgments of conviction, deferred prosecutions let companies "off the hook,"[127] that they "undermine justice by entrenching the double standard between the powerful institutions of society and the less powerful individuals,"[128] and that there is a "good chance that the rise of these [deferred prosecution and nonprosecution] agreements has undermined the general deterrent and adverse publicity impact that results from corporate prosecutions and convictions."[129] They call deferred prosecution "amnesty."[130]

The Justice Department's view is that deferred prosecution agreements provide

> 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. The DP won't result in a criminal conviction if the defendant complies with the agreement, but filing charges publicly condemns the company's conduct.[131]

What are missing from a deferred prosecution, as compared to a plea agreement or successful contested prosecution, are: a criminal conviction and the collateral consequences of a conviction (as compared to the consequences of a criminal charge as to which the factual basis is publicly admitted by the organization). Those consequences may include more seriously adverse publicity and mandatory (as distinct from permissive) exclusion or debarment from certain kinds of work and government contracting.

Professor Henry Hart, Jr., argued:[132]

> What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition. As Professor Gardner wrote not long ago, in a distinct but cognate connection:
>
> > The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a court-room; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.
>
> If this is what a "criminal" penalty is, then we can say readily enough what a "crime" is. It is not simply anything which a legislature chooses to call a "crime." It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a "criminal" penalty. It is conduct which, if duly shown to have taken place, will incur the formal and solemn pronouncement of the moral condemnation of the community.

What the *Corporate Crime Reporter* and Mr. Mokhiber may be pointing out is that deferred prosecution agreements omit the truly distinctive aspect of criminal law that makes criminal conduct "criminal": what Professor Hart called "the formal and solemn pronouncement of the moral condemnation of the community." Only the courts are authorized to make that pronouncement, and the only way they are authorized to make it is by entering a judgment of conviction following a trial or plea of guilty or *nolo contendere*. Denunciation by the Department of Justice (and, perhaps, other governmental agencies), even when supported by public admission of the relevant facts by the errant organization, does not amount to "the

formal and solemn pronouncement of the moral condemnation of the community."

Deferred prosecution agreements do, indeed, provide "many of the same benefits as a conviction." Some have provided huge monetary penalties, very substantial compensation to victims, admissions useful to plaintiffs still making civil claims, highly valuable cooperation in the prosecution of individuals, extensive organizational reforms, and significant adverse publicity. These considerable benefits help justify deferred prosecution agreements. The agreements achieve these and other benefits, however, by transforming a criminal process into essentially a civil process.

When, pursuant to a deferred prosecution agreement, a criminal information or complaint is filed in court, the filing is entered in the criminal docket, and the prosecution is given a criminal case number. It is, in form, a criminal case. If the judge approves the deferral, however, the intent of the parties is that, if all goes well, their only further involvement with the court will be the dismissal of the criminal charges and the termination of the case without a final judgment. The relationship between the parties will be governed entirely by their contract. All the benefits flow from the public announcement of that contract and from the contract itself. The organization has incurred bad publicity and certain obligations that are likely to be distasteful (public acceptance of responsibility, cooperation), expensive (financial penalties, compensation to victims, invigorated collateral civil litigation, possible exclusion from government contracting), and burdensome (the monitor, institutional reforms). These, however, are essentially added costs of doing business. They are analogous to other costs that may be imposed by market competition, by statutes, by regulation, or by civil litigation.

Increasing costs while subtracting moral condemnation does not necessarily reduce antisocial behavior. In a recent study, economists found that, when certain day-care centers instituted a charge of $3 per child for late pickups, the late pickups *increased*.[133] Evidently, what was intended as a deterrent fine was viewed as a price, and a quite reasonable one, for additional child care. Economist Steven Levitt and journalist Stephen Dubner note that the $3 charge was too low, and that a $100 charge probably would have eliminated the late pickups, albeit at the cost of ill-will among the parents.[134] They also comment, however:

> Some of the most compelling incentives yet invented have been put in place to deter crime. Considering this fact, it might be worthwhile to take a familiar question—why is there so much crime in modern society?—and stand it on its head: why isn't there a lot *more* crime?
>
> After all, every one of us regularly passes up opportunities to maim, steal, and defraud. The chance of going to jail—thereby losing your job, your house, and your freedom, all of which are essentially economic penalties—is certainly a strong incentive. But when it comes to crime, people also respond to moral incentives (they don't want to do something they consider wrong) and social incentives (they don't want to be seen by others as doing something wrong). . . .
>
> . . . .
>
> But there was another problem with the day-care center fine [besides its being too low]. It substituted an economic incentive (the $3 penalty) for a moral incentive (the guilt that parents were supposed to feel when they came late). For just a few dollars each day, parents could buy off their guilt. Furthermore, the small size of the fine sent a signal to the parents that late pickups weren't such a big problem. If the day-care center suffers only $3 worth of pain for each late pickup, why bother to cut short the tennis game? Indeed, when the economists eliminated the $3 fine in the seventeenth week of their study, the number of late-arriving parents didn't change. Now they could arrive late, pay no fine, *and* feel no guilt.[135]

The financial penalties under deferred prosecution agreements generally have not been analogous to the $3 lateness charge. Nor, however, have they been analogous to the $100 charge: that is, they have not been unbearable. Arguably, they have been at economically appropriate compensatory and deterrent levels. But, divorced from "the formal and solemn pronouncement of the moral condemnation of the community," they may have become, or may yet become, mere prices.[136] Such a transformation would implicitly signal that, as to organizations, the crimes that have led to deferred prosecutions—including frauds of various sorts, bribes, tax violations, non-compliance with money-laundering laws—will not incur the moral

condemnation of the community, but only significant economic penalties. The sending of such a message constitutes a loss to the criminal justice system.

The next question is whether, for society, that loss is outweighed by gains from deferred prosecutions.

VIII. AN ASSESSMENT OF DEFERRED PROSECUTION

There is something odd about applying criminal liability to a corporation or other business organization. A business organization is an economic institution: it possesses economic resources so that it can participate in the economy. It can respond to economic incentives. Because the various aspects of its reputation (of its goodwill) have economic value, it also can respond to social incentives. Because it has no soul or conscience, however, it cannot respond to moral incentives: it cannot feel guilt. Yet, the application of a moral incentive—the threat of imposing the formal moral condemnation of the community—is *the* characterizing incentive deployed by the criminal law. Baron Thurlow had a point.[137]

So, too, did Woodrow Wilson. In their press releases stating their reasons for not fully prosecuting business organizations, prosecutors sometimes acknowledge as one of their reasons the collateral harms to a significant organization and/or to others that would flow from a full prosecution and conviction.[138] The extensive body of law that attaches painful collateral consequences to criminal convictions is evidence that our society generally takes criminal convictions seriously. In deferred prosecution agreements, prosecutors seek to achieve some of the objectives of the criminal law without judgments of conviction and their distinctive consequences. Implicitly, they have concluded that the additional gains to society from "the moral condemnation of the community" (i.e., a judgment of conviction) and its collateral consequences do not justify, in Woodrow Wilson's words, "throw[ing] great undertakings out of gear," and "disorganiz[ing] some important business altogether, to the infinite loss of thousands of entirely innocent persons and to the great inconvenience of society as a whole."

Deferred prosecution is a means for avoiding the *actual application* of the criminal law to business organizations, while using the *threat* of its application to achieve some of the objectives of the criminal law

through the ordinarily civil means of a contract. The technique of deferred prosecution creates a criminal remedy for breach of contract.[139]

In 1991, before the application of the technique of deferred prosecutions to corporations, Professor Coffee observed that "the criminal law seems much closer to being used interchangeably with civil remedies."[140] He was referring to the statutory authorization of both criminal and civil sanctions for the same conduct and to the extension of the criminal law to conduct previously subject only to civil redress. Deferred prosecution can be viewed as both applying the threat of criminal prosecution for what is normally a civil wrong (breach of contract), but also as using, for purposes of criminal enforcement, some techniques of social control of institutions that, prior to the *Sentencing Guidelines*, were, and to a substantial extent still are, considered civil—e.g., restitution and other forms of compensation, institutional reform under governmental supervision, independent monitoring, provisions analogous to a negative injunction (but backed by the threat of criminal prosecution rather than by the threat of a contempt sanction).[141]

A deferred prosecution agreement can achieve a degree of retribution through adverse publicity flowing from the public filing of criminal charges, the public issuance of an agreed statement of facts amounting to an admission of criminal conduct, and a press release (and, sometimes, a press conference) calling attention to these events. The agreement further inflicts retribution through the costs, burdens, and collateral consequences of its substantive provisions. Such an agreement can achieve deterrence of corporate crime in essentially the same way that the threat of civil liability (including punitive damages) achieves deterrence: through the threat of economic loss. It can achieve some degree of incapacitation and reform of the offending organization through interventions into its internal affairs that could equally well be achieved through a civil consent decree (backed up by the contempt power of a court). All this a deferred prosecution agreement can achieve without a judgment of conviction.

In addition, Blackstone, too, had a point: even if prosecutors draw back from fully prosecuting a business organization, they can fully prosecute the individuals whose conduct of the organization's affairs created the acts of the organization that led to the agreement. Unlike

corporations, individuals can respond to moral incentives: the criminal law's characterizing method—"the formal and solemn pronouncement of the moral condemnation of the community"—evolved precisely to provide a moral incentive to individuals.[142]

Indeed, the provisions for organizational cooperation in deferred prosecution agreements probably are the principal reason that prosecutors enter into them. They convert organizations and their lawyers into extensions of the prosecutors. Cooperation provides an affirmative benefit to prosecutors and society because it enhances the likelihood that prosecutors will develop sufficient evidence for successful prosecution of individuals.[143] Thereby, even as such agreements (as compared to full prosecution of organizations) arguably weaken somewhat the deterrence of organizations, they strengthen the deterrence of individual corporate officers and employees. Because the cliché that an organization can act only through individuals, like most clichés, is true, the increase in the deterrence of organizational personnel probably is more beneficial to society than the decrease in the deterrence of organizations is harmful.[144]

I think that, at least in the short term, this favorable balance holds even though, over time, as the list of well-known companies that go through the deferred prosecution process increases, the reputational harm inflicted by the process may diminish. The favorable balance will be maintained principally by the continued successful prosecutions of individual wrongdoers and by the reform of organizations that have had to go through that process.

Thus, on balance, deferred prosecution agreements probably strengthen the overall deterrence of corporate crime. Officers or employees who would engage in conduct that may involve violation of a criminal statute are on notice from the news media reports of deferred prosecution agreements and of organizations turning against employees who are targeted by prosecutors that, if they engage in such conduct and it later becomes subject to a criminal investigation, their organization probably will turn against them. Such knowledge is likely to have a deterrent effect. It is precisely because prosecutors use deferred prosecution (and nonprosecution) agreements to strengthen their prosecutions of individual corporate officers and employees that society can afford the loss to deterrence of organizations and to the criminal justice system as a whole from prosecutorial decisions to deal

with errant organizations through contract rather than through public pleas or trials leading to judgments of conviction. Even in investigations that result, as to an organization, in a deferred prosecution (or nonprosecution) agreement, the moral and educational force of the criminal law is sustained by prosecuting to conviction, after plea or trial, in most (not necessarily all) cases the individuals who are the real, not the vicarious, committers of serious crimes.

A further significant affirmative benefit of deferred prosecution, as compared to full prosecution, is that it is probably as effective a technique as is available for changing law-violating institutions into law-abiding institutions and thereby preserving, and perhaps enhancing, their capacity to contribute to the economy and society. If an organization is reformed by new management and/or new governance and operating arrangements and procedures and/or effective monitoring, and/or by the continuous threat during the deferral period of a virtually certain criminal conviction if it breaches its contract with the government, it, its various constituencies, and society as a whole are the beneficiaries. Very substantial social resources are invested in some organizations that, at some time, engage in criminal conduct. Their reformation is far more beneficial to society than their destruction would be. Therefore, where prosecutors see a reasonable likelihood of organizational reform, deferred prosecution is preferable to full prosecution.[145] If, after diligent inquiry, they see no such likelihood, they ought to prosecute to the full measure of the law.

Thus, for the purposes of law enforcement, deferred prosecution is an appropriate technique for disposing of cases in which the standards for prosecution of an organization are satisfied and where there is a reasonable likelihood of organizational reform. It does not follow, however, that all the standard provisions of recent agreements are appropriate. As experience with such agreements accumulates and as criticisms of particular types of provisions are considered, there ought to be, and there is a reasonable prospect that there will be, some changes in the standard provisions.

Over the long term, however, the continuing public spectacle of organizations committing serious crimes, admitting to them publicly, but not being prosecuted to conviction, may erode the general norm-defining and educational functions of the criminal law.[146] It is this potential effect of deferred prosecutions that Mr. Mokhiber rails

against. If the moral force of the criminal law were eroded, the effects would occur (but would be very difficult or impossible to identify) in individual conduct unrelated to organizational activity even if wrongdoing by individuals acting for organizations were strongly deterred. If the advantages of deferred prosecution were considered worth preserving but the risk of erosion of the criminal sanction generally were viewed as unacceptable, a theoretically possible remedy would be to eliminate corporate criminal liability altogether and substitute a noncriminal regimen of economic penalties, requirements of cooperation, and intrusive social controls similar to those now employed in deferred prosecution agreements.[147] Such a regimen could be judicially enforceable under an injunction; an agreement between the parties could be embodied in a consent decree. The criminal sanction could be fully applied against individuals.

With respect to current practices, two particular sets of changes warrant particular attention. Prosecutorial demands for waiver of the attorney-client privilege may defeat the larger purpose of law enforcement by undermining the ability or willingness of organizations to obtain legal advice so that they can conduct their businesses lawfully. With a view to this potentially large unintended effect, the Department of Justice should very significantly narrow the circumstances in which it demands a waiver as part of the price for an agreement.

In addition, even apart from the constitutional concerns, which are very serious,[148] requirements that organizations terminate all support for officers and employees whom prosecutors merely suspect of wrongdoing may make employees less loyal to the organizations that employ them, and may adversely affect the efficiency of even lawful organizational activities. Whether the probable increase in deterrence is worth the possible adverse effects on lawful corporate operations cannot be determined without more experience with deferred prosecution agreements and empirical analyses of their effects.

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ENDNOTES

Notes to Section I

[1] Andersen's conviction was reversed in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), but the reversal came too late to save the firm.

[2] Professor John Coffee has expressed the view that the company "was already dead" at the time the government decided to prosecute it. *Interview with John C. Coffee*, CORP. CRIME RPTR., Aug. 29, 2005, at 8, 14. "Arthur Andersen was destroyed by the reputational damage" resulting from its involvement with Enron. *Id.* at 13, 14. "Arthur Andersen committed suicide. It wasn't murdered by prosecutors." *Id.* at 14.

[3] 1 WILLIAM BLACKSTONE, COMMENTARIES 464 (1st ed. 1765) (footnote omitted). There has been some dispute as to whether indictments of corporations had previously been sustained. *See* Frederick P. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 4 & n.5 (1928).

[4] 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.5(a), at 382 (2d ed. 2003).

[5] *Quoted in* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981).

[6] *See* Lee, *supra* note 3, at 2, 13.

[7] *See*, *e.g.*, Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 827-28 (1927).

[8] The first British case expressly upholding the indictment of a corporation was in 1840, and the offense was contempt for failing to comply with a judicial order to repair a bridge. *See* Lee, *supra* note 3, at 4 (discussing *Queen v. Birmingham & Gloucester Ry.*, 9 CAR. & PAYNE 469 (1840)).

[9] N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909). In *United States v. A & P Trucking Co.*, 358 U.S. 121, 123-24 (1958), the Court held that a partnership is subject to criminal liability, and indicated that the same result would apply to other forms of business organization, such as a joint stock company or an individual proprietorship.

[10] *N.Y. Cent. & Hudson R.R.*, 212 U.S. at 494-95. *See also*, *e.g.*, Jennifer Arlen, *Evolution of Corporate Criminal Liability: Implications for Managers*, *in* LEADERSHIP AND GOVERNANCE FROM THE INSIDE OUT (Robert Grandossy & Jeffrey Sonnenfeld, eds., 2004); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 433-35 (1963). In 2002, Deputy Attorney General Larry D. Thompson stated:

> Large corporations[] develop their own methods and culture that guide employees' thoughts and actions. That culture is a web of attitudes and practices that tends to replicate and perpetuate itself beyond the tenure of any individual manager. That culture may instill respect for the law or breed contempt and malfeasance. The organization itself must be held accountable for the culture and the conduct it promotes. Without this tool, the public would have no adequate deterrent to corporate criminal conduct because the culture that

> condoned, or at least acquiesced in, that behavior would be beyond the criminal law's power to correct. Only by clearly preserving the possibility of prosecuting the corporation itself can we ensure systemic reform.

Larry D. Thompson, Deputy Att'y Gen., *Final Remarks to the Citizens' Crime Commission, New York, New York* 3 (July 25, 2002), *available at* <http://www.usdoj.govdag/speech/2002/072502citizenscrimecomm.htm>.

In a discussion of the place of corporations in ethical theory, Paul Thompson has argued that some corporate crimes result less from individual immorality than from defective or inappropriate institutional arrangements. In a hypothetical example, a defective container for a product causes harm to a consumer. Part of the background of the defective container is a corporate culture in which people responsible for product safety are not well rewarded. As a result, there is frequent turnover among them; and those on the job at any particular time tend to be "inexperienced or perfunctory" in their work. Paul B. Thompson, *Why Do We Need a Theory of Corporate Responsibility?*, *in* SHAME, RESPONSIBILITY AND THE CORPORATION 113, 122 (Hugh Curtler ed., 1986). He argues: "One practical use of the theory of responsibility is to pinpoint the need for reform. If the thing that needs reforming is the system, it is both unfair and counter-productive to place the blame on a *CEO*," though he acknowledges that "[i]t may be quite proper to suggest that the [CEO] has a duty to see to it that the system is reformed; but this is quite a different matter from saying that she is responsible for the original harm." *Id.* at 119 (emphasis omitted). Paul Thompson further argues:

> [I]t will not be enough simply to make businessmen more moral. Business ethics and corporate management must become sensitive to the way that corporate organizations have been designed to facilitate the intentional coordination of individual contributions to a collective action. It will, I should think, be unusual to find cases where corporate structure intentionally pursues immoral ends; but there can be cases in which harm is the collateral effect of actions which are innocent in their intended aims. These harms are not mere coincidences or acts of God; they are the effects of actions performed intentionally (albeit corporately). Corporate structure must, therefore, be held accountable for them.

Id. at 123.

[11] *See*, *e.g.*, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1231 (1979).

[12] *See, e.g., Interview with F. Joseph Warin*, CORP. CRIME RPTR., Mar. 6, 2006, at 11, 13 ("Generally, I do not believe that the Justice Department should prosecute corporations unless the corporation is rotten to the core."); *see also Interview with Mary Jo White*, CORP. CRIME RPTR., Dec. 12, 2005, at 11, 13 ("But clearly your exercise of discretion in the vast majority of cases should involve nothing criminal vis-à-vis the company—assuming the company has responded appropriately to the government investigation and addressed the problem."), *available at* <http://www.corporatecrimereporter.com/maryjowhiteinterview010806.htm>.

[13] Because, under federal law, an organization generally may be criminally liable for the conduct of any of its employees acting on its behalf and within the scope of their employment, it generally is easier for prosecutors to gather sufficient evidence to support a prosecution of an organization than to gather sufficient evidence to support a prosecution of a particular employee.

[14] *See* Paul B. Thompson, *supra* note 10, at 127. It is also true, however, that corporate "reforms" may be merely cosmetic.

[15] Larry May, *Negligence and Corporate Criminality*, *in* Curtler, *supra* note 10, at 149.

[16] For a survey of corporate criminal liability in several other national legal systems, see Markus Wagner, *Corporate Criminal Liability[:] National and International Responses*, Background Paper for the International Society for Reform of Criminal Law, 13th Int'l Conf.[:] Commercial and Financial Fraud: A Comparative Perspective (1999), *available at* <http://www.icclr.law.ubc.ca/Publications/Reports/CorporateCriminal.pdf>; Gerry Ferguson, *Corruption and Corporate Criminal Liability* (1998) (discussion of Canadian law), *available at* <http://www.icclr.law.ubc.ca/Publications/Reports/FergusonG.PDF>.

[17] Woodrow Wilson, The Lawyer and the Community, Address at the 33rd Annual Meeting of the American Bar Association, 35 REPORTS OF AMERICAN BAR ASSOCIATION 427 (1910), *quoted in* CHRISTOPHER D. STONE, WHERE THE LAW ENDS[:] THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 58 (1975).

Notes to Section II

[18] *See generally* James K. Robinson, Philip E. Urofsky & Christopher R. Pantel, *Deferred Prosecutions and the Independent Monitor*, 2 INT'L J. DISCLOSURE & GOVERNANCE 325, 326-27 (2005); Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1866-71 (2005).

[19] *See generally*, *e.g.*, Office of the Pardon Attorney, *Federal Statutes Imposing Collateral Consequences Upon Conviction* (undated; research completed in early Fall 2000), *available at* <http://www.usdoj.gov/pardon/collateral_consequences.pdf>; Nancy Kaufman, *Collateral Consequences of a Criminal Conviction* (undated), *available at* <http://www.mass.gov/obcbbo/convict.htm>; Robin Levi & Judith Appel, *Collateral Consequences: Denial of Basic Social Services Based Upon Drug Use* (2003), *available at* <http://www.drugpolicy.org/docUploads/Postincarceration_abuses_memo.pdf>; MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (2005), *available at* <http://www.nicic.org/Library/020693>.

[20] *Interview with Mary Jo White*, *supra* note 12, at 11. For a discussion of the Prudential Securities case and three other corporate criminal investigations in the early and mid 1990s that were resolved by agreements that did not involve a criminal conviction, *see* F. Joseph Warin & Jason C. Schwartz, *Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants*, 23 J. CORP. L. 121 (1997).

[21] Warin & Schwartz, *supra* note 20. One of the early successors, however, was Arthur Andersen, which entered into such an agreement with the U.S. Attorney's Office for the District of Connecticut in 1996. *See Crime Without Conviction: The*

Rise of Deferred and Non Prosecution Agreements, CORP. CRIME RPTR., Dec. 28, 2005, at 20-22, *available at* <http://www.corporatecrimereporter.com/deferredreport.htm>.

[22] *See generally* U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-22 (1997), *available at* <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm>; U.S. Dep't of Justice, CRIMINAL RESOURCE MANUAL § 712 (1997), *available at* <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00712.htm>.

[23] U.S. Attorneys' Manual § 9-22.010.

[24] *Id.*

[25] CRIMINAL RESOURCE MANUAL § 715, Form 186—Pretrial Diversion Agreement (1997), *available at* <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00715.htm>.

Notes to Section III

[26] *See* Principles of Federal Prosecution, *in* U.S. Attorneys' Manual §§ 9-27.220, 9-27.230.

[27] *See id.* §§ 9-27.220.A.2, 9-27-240, 9-27-250.

[28] *Id.* § 9-27.600. The government retains the right to prosecute if it determines that the other party has not fulfilled its obligations under the agreement. *See*, *e.g.*, Letter Agreement between the Department of Justice, by the Enron Task Force, & Merrill Lynch & Co., Inc. ¶ 10 (letter from Leslie R. Caldwell to Robert S. Morvillo, Esq. & Charles Stillman, Esq.) (Sept. 17, 2003), *available at* <http://www.usdoj.gov/opa/pr/2003/September/enronagree.pdf>.

[29] The privilege becomes inapplicable because an individual cannot be further incriminated as to an offense for which he or she has already been convicted. Further prosecution for that offense by the same prosecuting authority would violate the Double Jeopardy Clause of the Fifth Amendment.

[30] *Id.*

[31] *See*, *e.g.*, Braswell v. United States, 487 U.S. 99, 102, 104 (1988); Bellis v. United States, 417 U.S. 85, 88-89 (1974).

[32] Governmental inducements to a party to deny assistance to other parties in a criminal investigation raise controversial constitutional issues. *See infra notes*. 71, 72 & 148.

[33] For other examples of nonprosecution agreements, see, U.S. Att'y's Office for the S. Dist. of New York, Press Release, Austrian Bank "BAWAG" To Pay $337.5 Million for Restitution to Victims of Refco Fraud (June 5, 2006) ("Press Release re BAWAG"), *available at* <http://www.usdoj.gov/usao/nys/Press%20Releases/June%2006/BAWAG%20Non-prosecution%20Agreement%20PR.pdf>; Press Release, U.S. Att'y's Office for the S. Dist. of New York, U.S. Enters Into Non-Prosecution Agreement With Tommy Hilfiger, U.S.A., Which Will File Amended Tax Returns (Aug. 10, 2005), *available at* <http://www.usdoj.gov/usao/nys/Press%20Releases/August%2005/ Hilfiger%20Agreement%20PR.pdf>; Press Release, U.S. Att'y's Office for the S. Dist. of New York, U.S. Decides Not to Prosecute Shell (June 29, 2005), *available at* <http://www.usdoj.gov/usao/nys/Press%20Releases/June%202005/Shell%20PR.pdf>.

[34] Press Release, U.S. Dep't of Justice, Department of Justice and SEC Enter $290 Million Settlement with Salomon Brothers in Treasury Securities Case (May 20, 1992) ("DOJ Press Release re Salomon"), *available at* <http://www.usdoj.gov/atr/public/press_releases/1992/211182.htm>. *See also* Greenblum, *supra* note 18, at 1872.

[35] 31 U.S.C. §§ 3729-3733 (2000 & 2006 Supp.).

[36] DOJ Press Release re Salomon, *supra* note 34.

[37] *See* 15 U.S.C. §§ 78o(b)(4)(B), 80b-3(e) (2000).

[38] *Compare* the Salomon agreement, *supra* note 34, *with* the BankAtlantic agreement, *infra* note 91. *See also*, *e.g.*, Press Release, U.S. Dep't of Justice, Boeing To Pay United States Record $615 Million To Resolve Fraud Allegations (June 30, 2006 ("DOJ Press Release re Boeing")), *available at* <http://www.usdoj.gov/opa/pr/2006/June/06_civ_412.html>; F. Joseph Warin & Peter E. Jaffe, *The Deferred Prosecution Jigsaw Puzzle: A Modest Proposal for Reform* 5 (2005), *available at* <http://media.gibsondunn.com/fstore/documents/pubs/WarinJaffeWCCDeferredPros0905.pdf>.

Former prosecutor David Pitofsky views nonprosecution agreements and deferred prosecution agreements with organizations as "practically identical." Together, they "provide[] the prosecutor with the ability to send a graded message about the seriousness of the misconduct." *Interview with David Pitofsky*, CORP. CRIME RPTR., Nov. 28, 2005, at 8, 13.

[39] "As part of an agreement reached with the Department of Justice, CIBC will cease engaging in most structured finance transactions with U.S. public companies for a period of three years." Press Release, U.S. Dep't of Justice, Canadian Imperial Bank of Commerce Agrees to Cooperate with Enron Investigation, Exit Structured Finance Business, Implement Reforms, with Oversight by Monitor (Dec. 22, 2003).

[40] "The $615 million settlement includes a $565 million civil settlement and a $50 million monetary penalty according to a separate criminal agreement. The amount is a record for government procurement fraud, for the Department of Defense (DOD), and for NASA." DOJ Press Release re Boeing, *supra* note 38.

[41] *See generally* Principles of Federal Prosecution, *in* U.S. Attorneys' Manual § 9-27.400.

[42] *Id.* §§ 9-27.420, 9-27.430.

[43] *See*, *e.g.*, Press Release, U.S. Att'y's Office for the Dist. of Mass., Ship Management Company To Pay $10.5 Million for Covering Up Oil Pollution (Dec. 19, 2005), *available at* <http://www.usdoj.gov/usao/ma/pa/Dec2005/ MSC%20Ship%20Management-Information.htm>; Press Release, U.S. Att'y's Office for the Dist. of Massachusetts, Serono Labs Pleads Guilty to the Illegal Marketing of AIDS Drug (Dec. 15, 2005), *available at* <http://www.usdoj.gov/usao/ma/pa/ Dec2005/serono-plea-sentencing.htm>.

For other examples of plea agreements with organizations, see Plea Agreement Between Cartwright International Van Lines, Inc. and the United States (Apr. 29, 2004), *available at* <http://www.usdoj.gov/atr/cases/f203800/203858.htm>; Plea Agreement Between Akzo Nobel Chemicals International B.V. and the United States (May 17, 2006), *available at* <http://www.usdoj.gov/atr/cases/f216300/216369.pdf>.

In 2002, Ashland Inc. entered into a combined plea agreement and deferred prosecution agreement with the U.S. Attorney's Office for the District of Minnesota and the Department of Justice, in which it agreed to plead guilty to two misdemeanor

violations of the Clean Air Act, and prosecution of a third charge was deferred. *See* Ashland Inc. Form 10-K for 2004, at 13 (2005), *available at* <http://media.corporate-ir.net/media_files/irol/72/72503/pdfs/AR_2004.pdf>.

[44] *See* Principles of Federal Prosecution, *in* U.S. Attorneys' Manual §§ 9-27.200, 9-27.220.

[45] U.S. Attorneys' Manual § 9-22.010.

Notes to Section IV

[46] Larry D. Thompson, Memorandum: Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) ("Thompson Memorandum"), *available at* <http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm>. The Thompson Memorandum was a revision of an earlier memorandum: Eric H. Holder, Memorandum: Federal Prosecution of Corporations (June 16, 1999, updated March 9, 2000), *available at* <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html#Federal%20Prosecution%20of>. The Thompson Memorandum binds federal prosecutors. *See* U.S. Dep't of Justice, Criminal Resource Manual § 163 (2005) ("The Thompson Memorandum sets forth nine factors that federal prosecutors must consider in determining whether to charge a corporation or other business organization."), *available at* <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm>.

[47] Thompson Memorandum 4.

[48] *Id.* at 3-4. Two aspects of the Thompson Memorandum's discussion of "cooperation" considered under factor 4 have been particularly controversial: the pressure the memorandum puts on corporations for waiver of their attorney-client privilege and work-product protection, *see* Thompson Memorandum 6, and the pressure it puts on them to terminate corporate support (e.g., advancement of attorneys' fees, continued employment) for individual employees whom prosecutors suspect of wrongdoing (and whom the memorandum refers to as "culpable") but who have not even been charged with any crime, *see id.* at 7-8.

[49] *Id.* at 6 (emphasis added). This passage recognizes deferred prosecution as an alternative not to prosecution, but to corporate immunity (presumably, under a non-prosecution agreement) in return for cooperation.

[50] The establishment of the Corporate Fraud Task Force by Executive Order 13271 (July 9, 2002), *available at* <http://www.usdoj.gov/dag/cftf/execorder.htm>, has contributed to the increase in deferred prosecutions of business organizations. In addition, individual U.S. Attorney's Offices have used the technique. The interest of prosecutors in deferred prosecution agreements has, of course, been matched on the defense side:

> One of the fallouts from Andersen is that corporations are much more willing to say yes to deferred prosecution agreements, because they can see what happened to Andersen. What major corporation is now going to gamble that the Justice Department is going to go away and issue a declination? That's one of the reasons you are seeing a dramatic rise in deferred prosecution agreements and non-prosecution agreements.

Interview with Andrew Weissman, CORP. CRIME RPTR., Feb. 27, 2006 at 11, 13. Thus, on both sides, the understandings and expectations that shape the resolution of federal criminal investigations of corporations have come to include the possibility of deferred prosecution.

States also are using the technique. *See, e.g.,* Press Release, Office of Travis County, Texas, Attorney, Travis County Attorney David Escamilla and the Republican Party of Texas Have Entered into a Deferred Prosecution Agreement Regarding the Republican Party's Spending of Corporate Donations During the 2002 Election Cycle (Nov. 17, 2005), *available at* <http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/Escamilla%20press%20release.pdf>; Deferred Prosecution Agreement Between the State of Oklahoma and WorldCom, Inc. (Mar. 12, 2004), *available at* <http://www.oag.state.ok.us/oagweb.nsf/0/ de767479566b3a1286256e55005e99cf/$FILE/Deferred_Prosecution_Agreement.pdf>.

Notes to Section V

[51] Crime Without Conviction, CORP. CRIME RPTR., *supra* note 21, at 2-3.

[52] See chart on p. 16 *infra*. There also may have been additional federal deferred prosecutions that have not been publicly disclosed.

[53] *Crime Without Conviction, supra* note 21, at 2.

[54] A written agreement is required for the deferral period to be excluded under 18 U.S.C. § 3161(h)(2) from the time within which, under the Speedy Trial Act, the trial of the defendant must begin.

In general, prosecutors must perform contracts they make with parties in a criminal investigation. *See*, *e.g.*, Santobello v. New York, 404 U.S. 257, 262 (1971); United States v. Norris, 439 F.3d 916 (8th Cir. 2006); Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 183 (3d Cir. 2006).

[55] On January 26, 2005, the Fraud Section of the Department of Justice and the U.S. Attorney's Office for the Southern District of Ohio resolved a criminal investigation of AEP Energy Services, Inc. by entering into an agreement that contains many of the standard provisions of a deferred prosecution agreement, but also provides that, if the company complies with its obligations under the agreement for 15 months, the government will not pursue further, as to the company, its investigations of the matters set forth in the statement of facts attached to the agreement. Agreement Among AEP Energy Services, Inc., the Fraud Section of the Department of Justice, and the U.S. Atty's Office for the S. Dist. of Ohio ¶¶ 10, 11 (undated), *available at* <http://www.usdoj.gov/dag/cftf/chargingdocs/aepesagreement.pdf>. The Department's press release refers to the agreement as a "deferred prosecution agreement." Press Release, U.S. Dep't of Justice American Electric Power, Inc. To Pay $30 Million Penalty To Resolve Criminal Allegations (Jan. 26, 2005), *available at* <http://www.usdoj.gov/opa/pr/2005/January/05_crm_032.htm>. In substance, however, the agreement is a nonprosecution agreement.

[56] The necessity for the court to approve the deferral (to avoid a violation of the Speedy Trial Act) gives the court an opportunity to review the deferred prosecution agreement. Presumably, neither the prosecutors nor the defendant will object in court to any provision of the agreement they have signed. The court could, however, hear

from parties that may be adversely affected by the agreement and may not have an alternative forum, e.g., shareholders, employees, customers.

[57] In *Zedner v. United States*, 126 S. Ct. 1976 (2006), the Court held that a defendant may not prospectively waive the application of the Speedy Trial Act. In the case of a deferred prosecution agreement, however, a waiver is not necessary because the period of deferral can be excluded under 18 U.S.C. § 3161(h)(2) from the computation of the time within which the defendant's trial must begin.

Paragraphs 17 and 18 of the AOL Agreement refer to determinations by the Department of Justice "in its reasonable discretion and in good faith," thereby arguably creating a standard for judicial review. *See* Deferred Prosecution Agreement Among America Online, Inc., the U.S. Att'y's Office for the E. Dist. of Virginia, and the U.S. Department of Justice ("AOL Agreement"), ¶¶ 17, 18, *available at* <http://www.corporatecrimereporter.com/documents/aol.pdf>.

[58] The Computer Associates agreement includes a section titled "Acknowledgement of Violation of Law and Acceptance of Responsibility." Deferred Prosecution Agreement Among Computer Associates International, Inc. and the U.S Att'y's Office for the E. Dist. of New York 2, *available at* <http://www. corporatecrimereporter.com/documents/ca.pdf>.

[59] The AOL Agreement has an unusual provision with respect to waiver of AOL's attorney-client privilege:

> If the Department of Justice, in furtherance of a criminal investigation concerning any of the Covered Transactions, requests production of material protected by the attorney-client or work-product privileges pursuant to this subparagraph 8.b, and if AOL does not comply with such request, it shall not be considered a breach of this Agreement pursuant to paragraph 17, but the Department of Justice may, in its sole discretion, withdraw its release of liability set forth in paragraph 4.c with regard to the transaction subject to the request. . . .

AOL Agreement, *supra* note 57, ¶ 8.b.

[60] In the past, it was taken as obvious that "the criminal law is not meant to be used for purposes of restitution, and 'it is a rough instrument for the purpose,'" Bruce Coleman, *Is Corporate Criminal Liability Really Necessary?*, 29 SW. L.J. 908, 921 (1975) (quoting John Andrews, *Reform in the Law of Corporate Liability*, 1973 CRIM. L. REV. 91, 94). Now, it is used for restitution. *See*, *e.g.*, U.S. SENTENCING GUIDELINES MANUAL, § 8B1.1 (2006) (hereinafter "U.S.S.G.").

[61] The Third Circuit recently held that the government's decision that a corporate party to a nonprosecution agreement had breached and therefore could be prosecuted was not subject to preindictment judicial review. Stolt-Nielsen, S.A. v. United States, 442 F.3d 177 (3d Cir. 2006).

Warin and Jaffe report that two deferred prosecution agreements involving the U.S. Attorney's Office for the Southern District of Illinois provide for preindictment judicial review of an alleged breach. Warin & Jaffe, *supra* note 38, at n.25.

[62] U.S.S.G. § 8C2.5(g) & Application Note 12 (eff. Nov. 15, 2006), as amended by 71 Fed. Reg. 28,063, 28,073 (May 15, 2006). The most recent amendment to Section 8C2.5(g) & Application Note 12 was to delete a sentence that "could be

misinterpreted to encourage waivers" of the attorney-client privilege. *Id.* at Historical Notes for Proposed 2006 Amendments.

The *Sentencing Guidelines* are issued under the authority of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended at 18 U.S.C. §§ 3551-3742, 28 U.S.C. §§ 991-998 (2003)). The first *Guidelines* were issued in 1987. U.S.S.G. § 1.A1.1.

Cooperation also is considered in disposing of matters reported under the Voluntary Disclosure Program of the Department of Defense, which began in 1986. *See* U.S. Department of Defense, *Department of Defense Voluntary Disclosure Program Guidelines—A Description of the Process* (May 24, 2000), *available at* <http://www.dodig.osd.mil/Inspections/IPO/vdpam.pdf>. The Fraud Section of the Criminal Division of the Department of Justice also administers the program through its Federal Procurement Fraud Unit. *See* Criminal Resource Manual § 931, Department of Defense Voluntary Disclosure Program (1997), *available at* <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00931.htm>.

Voluntary disclosure also is encouraged by the Office of Inspector General ("OIG") of the Department of Health and Human Services, which has authority under 42 U.S.C. § 1320a-7(b)(7) to exclude from federal health care programs providers that OIG determines have engaged in certain kinds of prohibited conduct. *See generally* Publication of the OIG's Provider Self-Disclosure Protocol, 63 Fed. Reg. 58,339 (Oct. 30, 1998), *available at* <http://oig.hhs.gov/authorities/docs/selfdisclosure.pdf>; An Open Letter to Health Care Providers (Mar. 9, 2000), *available at* <http://oig.hhs.gov/fraud/docs/openletters/openletter.htm>; and a general description of the HHS OIG self-disclosure program, *available at* <http://oig.hhs.gov/fraud/cia/docs/assessment.htm>. To resolve some investigations, the OIG enters into corporate integrity agreements and (less onerous) certification of compliance agreements with providers (both of which in some ways resemble deferred prosecution and non-prosecution agreements). *See generally* <http://oig.hhs.gov/fraud/cias.html>; An Open Letter to Health Care Providers (Apr. 24, 2006), *available at* <http://oig.hhs.gov/fraud/docs/openletters/ Open%20Letter%20to%20Providers%202006.pdf>. Under a corporate integrity agreement and a certification of compliance agreement, OIG retains the right to exclude the provider from federal health care programs if the provider materially breaches the agreement.

[63] *See* U.S.S.G. §§ 8D1.1–8D1.4 (2006).

[64] *See id.* §§ 8B1.1, 8B1.2 (2006).

[65] *See id.* § 8C2.9 (2006).

[66] *See id.* §§ 8D1.1–8D.1.4. Societal intervention into the internal processes of corporations that have been involved in criminal conduct was recommended in CHRISTOPHER D. STONE, WHERE THE LAW ENDS[:] SOCIAL CONTROL OF CORPORATE BEHAVIOR 120-21 (1975).

[67] *See* pp. 6, 10, *supra*.

[68] Thompson Memorandum 1.

[69] *Id.* at 7.

[70] *Id.* at 7-8.

[71] *See*, *e.g.*, Lynnley Browning, *Judges Press Companies That Cut Off Legal Fees*, N.Y. TIMES, Apr. 17, 2006, at C1.

[72] United States v. Stein, No. S1 05 Crim. 0888 (L.A.K.), 2006 U.S. Dist. LEXIS 42915 (S.D.N.Y. June 26, 2006) (Stein II). *The Wall Street Journal* reported that the government is expected to appeal, and quoted the U.S. Attorney for the Southern District of New York as saying that the government was disappointed by the decision, "which we respectfully believe is unsupported by the factual record and the applicable law." Laurie P. Cohen & Paul Davies, *Court Says Prosecutors Pressure White-Collar Defendants Unfairly*, WALL ST. J., June 28, 2006, at 1, 12.

[73] Christopher A. Wray, Assistant Attorney General, Criminal Division, *Remarks to the ABA White Collar Crime Luncheon* 2d & 4th unnumbered pages (Feb. 25, 2005) (emphasis omitted), *available at* <http://www.usdoj.gov/criminal/press_room/speeches/2005_3853_rmrkCrimLuncheon030205.pdf>.

[74] *See* Press Release, U.S. Dep't of Justice, Banco Popular De Puerto Rico Enters into Deferred Prosecution Agreement With U.S. Department of Justice (Jan. 16, 2003), *available at* <http://www.usdoj.gov/opa/pr/2003/January/03_crm_024.htm>. The agreement is available at <http://www.corporatecrimereporter.com/documents/banco.pdf>.

[75] SARs are "suspicious activity reports," required under 31 U.S.C. §§ 5318(g)(1), 5322(b) (2000).

[76] *See* Press Release, Office of the U.S. Att'y for the E. Dist. of New York, Court Appoints Monitor to Oversee Operations of the New York Racing Association, Inc. (Mar. 2, 2004), *available at* <http://www.usdoj.gov/tax/usaopress/2004/2004mar2.htm>; Press Release, Office of the U.S. Att'y for the E. Dist. of New York, The United States Moves to Dismiss Indictment Against the New York Racing Association (Sept. 13, 2005), *available at* <http://www.usdoj.gov/usao/nye/pr/2005sep13.htm>.

[77] *See* Press Release, U.S. Dep't of Justice, Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges (Sept. 22, 2004), *available at* <http://www.usdoj.gov/opa/pr/2004/September/04_crm_642.htm>. The agreement is available at <http://www.corporatecrimereporter.com/documents/ca.pdf>.

[78] *See* Press Release, Office of the U.S. Att'y for the S. Dist. of Miss., AmSouth Bank Agrees to Forfeit $40 Million (Oct. 12, 2004). The agreement is available at <http://sec.edgar-online.com/2004/10/12/0000891836-04-000358/Section7.asp>.

[79] *See* Press Release, U.S. Dep't of Justice, American International Group, Inc. Enters into Agreement With the United States (Nov. 30, 2004), *available at* <http://www.usdoj.gov/opa/pr/2004/November/04_crm_764.htm>. The agreement is available at <http://www.corporatecrimereporter.com/documents/aig.pdf>. AIG-FP's parent, AIG, entered into a separate agreement with the Securities and Exchange Commission, in which it agreed, *inter alia*, to pay into an SEC disgorgement fund approximately $46 million plus interest. Press Release, AIG, AIG Announces Final Settlement with the Securities and Exchange Commission and the U.S. Department of Justice on Brightpoint, Inc. and the PNC Financial Services Group, Inc. (Nov. 30, 2004), *available at* <http://ir.aigcorporate.com/phoenix.zhtml?c=76115&p=irol-newsArticle&ID=648471&highlight=>.

AIG entered into a nonprosecution agreement with the Department of Justice in February 2006; that agreement related to different transactions. *See* U.S. Dep't of Justice, Press Release, American International Group, Inc. Enters into Agreement with

the United States (Feb. 9, 2006), *available at* <http://www.usdoj.gov/opa/pr/2006/February/06_crm_070.html>.

[80] *See* Press Release, U.S. Dep't of Justice, America Online Charged With Aiding and Abetting Securities Fraud; Prosecution Deferred for Two Years (Dec. 15, 2004), *available at* <http://www.usdoj.gov/opa/pr/2004/December/04_crm_790.htm>. For the agreement, *see*, *supra* note 57.

[81] *See* Press Release, U.S. Dep't of Justice, Monsanto Company Charged With Bribing Indonesian Government Official: Prosecution Deferred for Three Years (Jan. 6, 2005), *available at* <http://www.usdoj.gov/opa/pr/2005/January/05_crm_008.htm>.

[82] Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 through 78dd-3 (2000).

[83] *See* Press Release, Office of the U.S. Att'y for the Dist. of New Jersey, Bristol-Myers Squibb Charged with Conspiring to Commit Securities Fraud; Prosecution Deferred for Two Years (June 15, 2005), *available at* <http://www.usdoj.gov/usao/nj/publicaffairs/NJ_Press/files/bms0615_r.htm>. The agreement is available at <http://www.bms.com/static/pdf/dpa.pdf>.

[84] *See* Press Release, U.S. Dep't of Justice, KPMG To Pay $456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case (Aug. 29, 2005), *available at* <http://www.usdoj.gov/opa/pr/2005/August/05_ag_433.html>. The agreement is available at <http://www.usdoj.gov/usao/nys/Press%20Releases/August%2005/KPMG%20dp%20AGMT.pdf>.

[85] *See* Press Release, Office of the U.S. Att'y for the Dist. of New Jersey, UMDNJ Accepts Federal Monitor of Operations; Health Care Fraud Prosecution Deferred (Dec. 29, 2005), *available at* <http://www.usdoj.gov/usao/nj/publicaffairs/NJ_Press/files/umdnj1229_r.htm>. The agreement is available at <http://www.usdoj.gov/usao/nj/publicaffairs/NJ_Press/files/pdffiles/UMDNJFINALDPA.pdf>. "UMDNJ" is the University of Medicine and Dentistry of New Jersey.

[86] *See* 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* <www.usdoj.gov/opa/pr/2006/January/06_enrd_029.html>. The agreement is available at <http://sec.edgar-online.com/2006/01/20/0001031296-06-000010/Section6.asp>.

[87] *See* Press Release, U.S. Dep't of Justice & U.S. Att'y, Dist. of Rhode Island, Hospital Prosecution To Be Deferred: Roger Williams Medical Center Agrees To Cooperate with the Government and to Provide $4,000,000 Worth of Free Health Care to the Public (Jan. 27, 2006), *available at* <http://www.usdoj.gov/usao/ri/press_release/jan2006/rwmc_deferred.pdf>. This deferred prosecution agreement is unusual in that it was entered into 22 days after the U.S. Attorney's Office had filed an indictment against the Hospital. *See id.* The agreement is available at <http://www.usdoj.gov/usao/ri/press_release/jan2006/rwmcdef.PDF>.

[88] *See* Press Release, U.S. Att'y's Office, Dist. of Connecticut, OMI and U.S. Enter into Deferred Prosecution Agreement (Feb. 8, 2006), *available at* <http://www.usdoj.gov/usao/ct/Press2006/20060208.html>. The agreement is available at <http://www.usdoj.gov/usao/ct/Documents/OMI%20Agreement.doc>. "OMI" is Operations Management International, Inc.

[89] The disposition of the $2 million is: "$1 million to the Greater New Haven Water Pollution Authority to pay for plant upgrades and, if those funds exceed proposed repairs, provide the remainder to two public interest organizations . . . and $1 million to assist in the funding of an Endowed Chair of Environmental Studies at the United States Coast Guard Academy, located in New London, Connecticut." Press Release, U.S. Att'y's Office, Dist. of Connecticut, OMI, *supra* note 88.

[90] *See* Letter from Michael J. Garcia to Christopher S. Rizek, Esq. 1 (Feb. 13, 2006), *available at* <http://lawprofessors.typepad.com/whitecollarcrime_blog/files/hvb_deferred_prosecution_agreement.pdf>. "HBV" is the Bayerische Hypo- und Vereinsbank AG.

[91] *See* Press Release, U.S. Dep't of Justice, BankAtlantic Enters into Deferred Prosecution Agreement, Forfeits $10 Million To Resolve Money Laundering and Bank Secrecy Act Violations (Apr. 26, 2006), *available at* <http://www.usdoj.gov/opa/pr/2006/April/06_crm_248.html>. The agreement is available at <http://www.usdoj.gov/usao/fls/060426-02.BankAtlanticDPA.pdf>.

[92] *See* Press Release, U.S. Dep't of Justice, U.S. Att'y's Office for the S. Dist. of Texas, Schlumberger Subsidiary To Pay $19.6 Million To Resolve Criminal Allegations (June 16, 2006), *available at* <http://www.usdoj.gov/usao/txs/releases/June2006/060616-WesternGeco.pdf>. The agreement is available at <http://www.usdoj.gov/usao/txs/releases/June2006/060616-WesternGecoAgreement.pdf>.

[93] Deferred Prosecution Agreement Between Bristol-Myers Squibb Company and the U.S. Att'y's Office for the Dist. of New Jersey, *supra* note 83, ¶ 5.

[94] Deferred Prosecution Agreement Between Computer Associates International, Inc. and the U.S. Att'y's Office for the E. Dist. of New York, *supra* note 77, ¶¶ 4, 5.

[95] For example, Bayerische Hypo- und Vereinsbank AG agreed to restrictions and controls on its banking practice. *See* Deferred Prosecution Agreement Between Bayerische Hypo- und Vereinsbank AG and the U.S. Att'y's Office for the S. Dist.of New York, *supra* note 90, ¶ 5.

[96] For example, Monsanto also settled with the SEC. *See* Dep't of Justice Press Release cited in note 81, *supra*. In an unusual arrangement, MCI entered into a deferred prosecution agreement and an economic development agreement with the State of Oklahoma; the latter agreement is available at <http://www.oag.state.ok.us/oagweb.nsf/0/5bc3baa6bebfa1d786256e550062044d/$FILE/CPU%20WorldCom%20Econ.pdf>. The Deferred Prosecution Agreement Between Bayerische Hypo- und Vereinsbank AG and the U.S. Att'y's Office for the S. Dist. of New York, *supra* note 90, ¶ 16, required the bank to enter into a closing agreement with the Internal Revenue Service. Of course, organizations generally want to resolve at one time as many potential adverse actions against them as possible.

[97] See pp. 17-18*supra*.

[98] *See* Deferred Prosecution Agreement Between Bristol-Myers Squibb Company and the U.S. Att'y's Office for the Dist. of New Jersey, *supra*, note 83, ¶¶ 7-25. Additional undertakings are set forth in *id.* ¶¶ 26-27.

[99] *See* Deferred Prosecution Agreement Between Roger Williams Medical Center and the U.S. Att'y's Office for the Dist. of Rhode Island, *supra* note 87, ¶¶ 16-20.

[100] *See* Deferred Prosecution Agreement Between BankAtlantic and the U.S. Department of Justice, Criminal Division, *supra* note 91.

[101] *See, e.g.,* Deferred Prosecution Agreement Between Computer Associates International, Inc. and the U.S. Att'y's Office for the E. Dist. of New York, *supra* note 77, ¶ 6.

[102] *See, e.g.*, Deferred Prosecution Agreement Among AmSouth Bancorporation, AmSouth Bank, and the United States, *supra* note 78, ¶ 3.

[103] Deferred Prosecution Agreement between Bristol-Myers Squibb Company and the U.S. Att'y's Office for the Dist. of New Jersey, *supra* note 83, ¶ 30, at 8. Similar provisions appear in Deferred Prosecution Agreement Between AIG-FP PAGIC Equity Holding Corp. and the U.S. Dep't of Justice, Criminal Div., Fraud Section, *supra* note 79, ¶ 4, at 2, and in Deferred Prosecution Agreement Between America Online, Inc. and the U.S. Att'y's Office for the E. Dist. of Virginia and the U.S. Dep't of Justice, Criminal Div., *supra* note 57, ¶ 12, at 6.

In United States v. Stein, No. S1 05 CRM 0888 (L.A.K.), 2006 WL 1063295 (S.D.N.Y. Apr. 5, 2006) (Stein I), the court, in denying a motion to dismiss an indictment against individuals, rejected the argument that the broad language put improper pressure on prospective witnesses. The court noted that the government "expressly disavows any intention of using this provision to pressure individuals, directly or through the agency of [the organization], to testify in any particular way or to limit access by the defense to potential witnesses" (footnote omitted). *Id.* at *2.

Notes to Section VI

[104] *See* 48 C.F.R. § 9.407-2 (2005). *See also*, *e.g.*, Gerald B. Silverman, *Milberg Weiss Firm Dropped From List Of* [sic] *Eligible Counsel to N.Y. Pension Fund*, 4 CORP. ACCOUNTABILITY REP. 597 (June 9, 2006).

[105] "[W]hat kind of corporate environment is created when employees know that an employee will be served up to the Government for the company's greater good?" Michael R. Sklaire & Joshua G. Berman, *Deferred Prosecution Agreements: What Is the Cost of Staying in Business?*, WLF OPINION LTR. (June 3, 2005), *available at* <http://www.wlf.org/upload/060305LOLSklaire.pdf>.

[106] For example, the statement of facts appended to the agreement between Operations Management International, Inc. and the U.S. Att'y's Office for the Dist. of Connecticut, *supra* note 88, states on its last unnumbered page: "There is no evidence that the reporting violations described above resulted in harm to human health or the environment."

[107] *See, e.g.,* Deferred Prosecution Agreement Between Roger Williams Medical Center and the U.S. Atty's Office for the Dist. of Rhode Island, *supra* note 87, ¶ 8(d)(II) ("[B]y producing privileged materials, RWMC does not intend to waive the protection of the attorney-client privilege, work-product protection, or any other applicable privilege as to third parties."). Such provisions may not succeed, however. *See*, *e.g.*, *In re* Quest Comm'n Int'l Inc. Sec. Litig., No. 06-1070 (10th Cir. June 19, 2006) (rejecting, on record before it, theory of selective waiver of privilege as to documents provided to governmental agencies despite confidentiality agreements between producing company and the agencies; summarizing prior appellate decisions on point); *but see also Proposed Federal Rule of Evidence Would Shield Waived Materials From Third Parties*, 79 CRIM. L. RPTR. 406 (June 28, 2006) (The Judicial Conference Advisory Committee on Evidence Rules has forwarded to the Committee

on Rules of Practice and Procedure an amendment to the Federal Rules of Evidence that would permit disclosure of information protected by the attorney-client privilege to a federal agency without creating a waiver as to third parties; the Advisory Committee did not recommend that Congress approve the amendment, but suggested that public comment on it be sought.).

[108] *See*, *e.g.*, Deferred Prosecution Agreement Between Roger Williams Medical Center and U.S. Att'y's Office for the Dist. of Rhode Island, *supra* note 87, ¶ 40 ("[T]he USAO-RI will recommend to any official vested with debarrment [sic] authority within HHS, or any official vested with authority to debar any medical provider from participation in any state or federal programs, that suspension or debarment of RWMC is not warranted based on RWMC's conduct in this case, because RWMC has agreed to the terms of this Agreement . . . .").

[109] The Deferred Prosecution Agreement Between AmSouth BanCorporation, AmSouth Bank, and the United States, *supra* note 78, provides in paragraph 18: "The United States agrees that if AmSouth complies with all of the terms of this Agreement and agrees to accept responsibility for all of the conduct described in the Statement of Facts, then the United States will not prosecute any current or former AmSouth employee based upon any of the conduct described in this Agreement and its exhibit, including the Statement of Facts."

[110] See note 37, *supra*, and accompanying text.

[111] *See generally* Office of the Pardon Attorney, Federal Statutes Imposing Collateral Consequences Upon Conviction, *supra* note 19.

Notes to Section VII

[112] *See* Warin & Jaffe, *supra* note 38, at 1; Warin & Schwartz, *supra* note 20.

[113]

> [A]ny sort of objective standard as to where the line is [between nonprosecution and deferred prosecution agreements], doesn't exist. Any trying to reverse-engineer the line based on the cases that have come out is more trouble than it's worth. Every case is so fact specific and the judgment of individual prosecutors is variable enough, that it is almost impossible to know where the line is. . . . From the perspective of business and defense lawyers, it is very aggravating that the result in Boston can be different from the result in New York, which can be different from the result in Washington. The Department of Justice has made efforts to bring some consistency to the decision making. But in a lot of respects, it is just impossible. Every case is different. The best you can do is put the guidance out there and hope there is consistency in its application. But you are going to have inconsistent application.

Interview with David Pitofsky, *supra* note 38, at 13, 15.

[114] *See generally*, *e.g.*, Greenblum, *supra* note 18.

[115] It has been reported, for example, that Arthur Andersen and the law firm of Milberg Weiss Bershad & Schulman were each offered a deferred prosecution agreement as an alternative to full prosecution, but rejected its terms as too onerous. *See*, *e.g.*, John C. Coffee, Jr., *Decoding the Andersen Incident: Myth and Reality*, N.Y.

L.J., Apr. 5, 2002, at 1; Greenblum, *supra* note 18, at 1887-88; Leigh Jones, *Milberg*

Weiss Case Highlights Waiver Controversy, NAT'L L.J. (June 1, 2006), *available at* <http://www.law.com/jsp/article.jsp?id=1149066334834>.

[116] *See generally* United States v. Nixon, 418 U.S. 683, 693 (1974).

[117] United States v. Dotterweich, 320 U.S. 277, 284-85 (1943).

[118] *But cf.* United States v. Stein, *supra* note 72. The court in *Stein* is presiding over a collateral prosecution of former employees, not the deferred prosecution of an organization.

[119] *See*, *e.g.*, *ABA Asks U.S. Attorney General To Stop Demands for Privilege Waiver*, 79 CRIM. L. REP. (BNA) 203 (2006) (the ABA's letter to Attorney General Gonzales is available at <http://www.abanet.org/poladv/acprivgonz5206.pdf>); Press Release, Association of Corporate Counsel, Heightened Demand for Corporate Transparency Places Attorney/Client Privilege at Risk (Apr. 6, 2005), *available at* <http://www.acca.com/about/press/item.php?key=20050406_26226>; Association of Corporate Counsel, *Survey: Is the Attorney-Client Privilege Under Attack?* (Apr. 6, 2005), *available at* <http://www.abanet.org/buslaw/attorneyclient/publichearing20050421/testimony/hackett1.pdf>; Submission of the Coalition to Preserve the Attorney-Client Privilege to Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary (Mar. 7, 2006), *available at* <http://www.acca.com/public/accapolicy/coalitionstatement030706.pdf>.

[120] *See*, *e.g.*, Press Release, Office of the U.S. Att'y for the S. Dist. of New York, U.S. Decides Not to Prosecute Shell (June 29, 2005), *available at* <http://www.usdoj.gov/usao/nys/Press%20Releases/June%202005/Shell%20PR.pdf>.

[121] *See Stein II*, *supra* note 72; United States v. Stein, No. S1 05 Crim. 0888 (L.A.K.), 2006 WL 2060430 (S.D.N.Y. July 25, 2006) (*Stein III*); *see also* Richard M. Cooper, *Federal Prosecutors Pressuring Companies, Society Will Pay the Price*, BUS. CRIMES BULL., Aug. 2004, at 1.

[122] *See* notes 72, 121, *supra*.

[123] Deferred Prosecution Agreement between Bristol-Myers Squibb Company and the U.S. Att'y's Office for the Dist. of New Jersey ¶ 20, at 6 (June 15, 2005), *supra* note 83; Deferred Prosecution Agreement Between the State of Oklahoma and WorldCom, Inc. ¶ 5 (Mar. 12, 2004), *supra* note 50; Greenblum, *supra* note 18, at 1878, 1893-94. The requirement of support for economic development was in an agreement with an elected state attorney general.

[124] *Interview with Mary Jo White*, *supra* note 12, at 14 ("Prosecutors are at their best when they decide to charge or not and not get into managing corporate America.").

[125] U.S.S.G, § 8A1.2, Historical Notes, 2004 Amendments 3(k).

[126] *Interview with Mary Jo White*, *supra* note 12, at 14.

[127] *See*, *e.g.*, *Computer Associates Gets Deferred Prosecution Agreement, Executives Indicted*, CORP. CRIME RPTR., Sept. 27, 2004, at 4 ("It's becoming the MO of the Justice Department's Criminal Division: bring indictments against ousted executives, and let the company off the hook with a deferred prosecution agreement.").

[128] Russell Mokhiber & Robert Weissman, *Don't Defer, Don't Prefer—Prosecute* (Apr. 12, 2002), *available at* <http://www.commondreams.org/cgi-bin/print.cgi?file=/views02/0412-03.htm>.

[129] CORP. CRIME RPTR., *Crime Without Conviction: The Rise of Deferred and Non-Prosecution Agreements*, *supra* note 21, at 3.

[130] *See No More Amnesty*, Corp. Crime Rptr., May 1, 2006, at 1, 1.

[131] Christopher A. Wray, *supra* note 73, at 6th unnumbered page.

[132] Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404-05 (1958) (footnote omitted). In *United States v. Park*, 421 U.S. 658 (1975), the individual defendant, the chief executive officer of a national retail food chain with 36,000 employees and 874 retail outlets, was convicted of five misdemeanors and fined a total of $250. His seeking of appellate review presumably did not result from the financial burden of the fine.

For an economic analysis of the criminal law, see, *e.g.*, Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

[133] STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS[:] A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 19-20 (William Morrow 2005).

[134] *Id.* at 23.

[135] *Id.* at 21-23.

[136] There is a substantial literature on prohibitions and prices in the criminal law. *See*, *e.g.*, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 228-30 (1991).

Notes to Section VIII

[137] The Baron has modern followers. For example: "The punishment of corporate entities is itself incompatible with the moral-educative mission of the criminal law. . . . Our efforts to stigmatize aggregations of people, most of whom are blameless, are unjustified in principle and may be less effective in practice than civil alternatives would be." Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 311-12 (1991).

[138] *See*, *e.g.*, Press Release, U.S. Dep't of Justice, U.S. Att'y, Dist. of Rhode Island, *supra* note 87 ("allowing the hospital to get on with the business of fulfilling its vital role in Rhode Island's health care system"); Press Release, U.S. Dep't of Justice, *supra* note 79 ("These agreements, including significant penalties and corporate reforms, will ensure AIG's compliance with the law while minimizing the collateral consequences to its employees and shareholders."). *See also* Press Release re BAWAG, *supra* note 33 ("The decision to enter into the non-prosecution agreement was based on, among other things, . . . the potential harm to BAWAG's depositors and innocent employees that would likely result from a criminal prosecution.").

[139] This effect is neither novel nor unique to deferred prosecution agreements. It has long applied to plea agreements, and also applies to nonprosecution agreements.

[140] Coffee, *supra* note 136, at 199.

[141] Deferred prosecutions constitute principally criminal rather than civil enforcement (despite their crucial reliance on contracts) because they result from criminal investigations; the governmental party to deferred prosecution agreements always is a law enforcement agency or office with responsibility for criminal enforcement; the public policies that shape such agreements are criminal enforcement

policies; and deferred prosecutions involve the filing of formal criminal charges.

[142] In some cases, one factor that may support full prosecution of a company is that, even with the company's cooperation, the responsible individuals could not be successfully prosecuted. *See Interview with David Pitofsky*, *supra* note 38, at 10 ("There are some cases where you cannot identify and fully prosecute the responsible individuals, so the only way to obtain justice and an adequate deterrent message is to go after the company.").

[143] In an interview of Tom Hanusik, a former prosecutor with the Fraud Section of the Department of Justice, by the CORP. CRIME REPORTER, the following exchange occurred:

> CCR: Ted Wells . . . told us that things have radically changed in the corporate crime field. A few years ago it was plead the corporation, save the individual. Now its [sic] plead the individual, save the corporation.
>
> HANUSIK: I agree with Ted Wells that things have changed. The emphasis has shifted and by and large that is a good thing. The government wants deterrent value out of prosecutions and they get more deterrent value when they prosecute individuals. It's hard for even a high level corporate officer to relate to the announcement of a corporate prosecution.
>
> But when they see other corporate officers being prosecuted successfully, that has deterrent value.

Interview with Tom Hanusik, CORP. CRIME RPTR., Mar. 13, 2006, at 10, 14-15.

[144] The difficulty of developing sufficient evidence for conviction of responsible corporate officers and employees is one of the grounds justifying corporate criminal liability. *See*, *e.g.*, HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 360-62 (1968). To the extent that deferred prosecution agreements (and nonprosecution agreements) facilitate the development of such evidence, they weaken that justification.

[145] Thus, reform or "treatment," which once was prominent in theories of the criminal law as applied to individuals may more effectively be applied to organizations.

[146] Professor Coffee summarizes the view of some sociologists who are critical of some libertarian theorists of the criminal law, such as Henry Hart, as that "the public learns what is blameworthy in large part from what is punished." Coffee, *supra* note 136, at 200.

[147] Organizations demonstrated in court to be currently unable or unwilling to comply with applicable laws could be ordered to shut down until they could satisfy a court that it was probable that they would comply if allowed to operate.

[148] *See* note 72, *supra*. *United States v. Stein* addresses only some of the constitutional concerns. The Stein court has held that prosecutorial pressure on organizations to deny advancement of legal fees and otherwise to take adverse action against employees who decline to answer prosecutors' questions or whom prosecutors view as culpable violates the Fifth and Sixth Amendments. Prosecutorial pressure on organizations to deny present or former employees access to documents during an investigation arguably denies fundamental fairness and due process of law.