

NOTES

WHAT HAPPENS TO A PROSECUTION DEFERRED? JUDICIAL OVERSIGHT OF CORPORATE DEFERRED PROSECUTION AGREEMENTS

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Deferred prosecution was created as an alternative disposition to rehabilitate juvenile and drug offenders more effectively. Prosecutors procure an indictment, but defer its prosecution in exchange for commitments to reform and restitution. If the offender meets his or her obligations, the indictment is dismissed and the offender moves forward without the conviction which triggers debilitating collateral consequences. Federal prosecutors have extended deferred prosecution to corporations amidst the recent wave of corporate crime, yet the extension has glossed over the traditional concern that deferral removes offenders from the purview of the court. Corporate offenders are uniquely susceptible to the license forfeiture and ineligibility for government contracts that may be triggered by a conviction. Therefore, they are vulnerable to demands to waive attorney-client privilege, submit to prosecutorial adjudications of agreement breach, as well as substantial obligations unrelated to the underlying conduct that can be imposed in corporate deferral.

Judges have thus far held a pro forma position in corporate deferral, rendering them ineffective in dealing with these vulnerabilities. Prosecutors may therefore be jeopardizing the interests of the very employees, investors, and markets the mechanism aims to protect. Narrowly tailored but effective judicial involvement could curb prosecutorial overreaching, minimize the negative externalities of the corporate deferral process, and ensure that deferral achieves its purpose. In particular, this Note argues that judges could act as fiduciaries for constituencies otherwise unrepresented in the corporate deferral process whose interests may be unnecessarily compromised by the unilateral imposition of deferral terms by prosecutors.

INTRODUCTION

The recent wave of white collar crime has revived the seminal question of when criminal liability should attach to the corporate body itself, a question that generations of prosecutors have answered differently but with the same result: Prosecutions of corporations have been exceedingly rare.¹ The Justice Department, however, has recently developed a unique

1. In fiscal year 2002, for instance, 252 organizational defendants were convicted and sentenced in the federal courts, a figure representing less than one percent of the 64,366 convicts sentenced overall. U.S. Sentencing Comm'n, 2002 Sourcebook of Federal Sentencing Statistics tbls.3 & 51 (2003), available at <http://www.ussc.gov/ANNRPT/2002/SBTOC02.htm> (on file with the *Columbia Law Review*). This figure has been fluctuating. See U.S. Sentencing Comm'n, 2002 Annual Report 46 (2004), available at <http://www.ussc.gov/ANNRPT/2002/ch5-2002.PDF> (on file with the *Columbia Law Review*).

approach to this problem in the form of deferred prosecution, which allows prosecutors to reform corporate offenders without collaterally damaging the interests of the employees, investors, and markets that rely upon these corporations to survive criminal liability.

In a deferred prosecution, a prosecutor procures an indictment against an offender but defers prosecution in exchange for an admission of wrongdoing, a commitment to rehabilitation, and, in the case of a corporation, the purging of guilty executives.² Offenders waive the right to a speedy trial.³ Moreover, any admissions can be used to impeach the offender at trial.⁴ If the prosecutor agrees at the close of the deferral period that the offender has cooperated with the authorities, been rehabilitated, and made restitution when applicable, the prosecutor may dismiss the indictment and free the offender from criminal liability in that jurisdiction. If the offender has breached the agreement, the prosecutor can prosecute the indictment, using the offender's admissions against him.⁵ Deferral is a powerful prosecutorial tool because it is negotiated and implemented exclusively by the prosecutor. The prosecutor presents the judge with the *fait accompli* of a deferral agreement and, at the close of the deferral period, with uncontested assertions of the offender's preparedness to emerge from the shadow of criminal liability.

Deferred prosecution, also known as pretrial diversion, was traditionally used against juvenile and drug offenders; prosecutors have only recently extended its use to corporations. Some commentators have lauded this extension as a "worthy trend."⁶ Prosecutors contend that, aside from the deterrent and retributive purposes of corporate criminal liability, deferral reforms corporations by purging them of wrongdoers and instituting compliance mechanisms. Moreover, deferral protects stakeholders by minimizing the negative externalities associated with attaching criminal liability to the corporation.⁷ Recognition of the collateral impact of

[hereinafter 2002 Annual Report] (noting that 2002 figure is 5.9% increase from 2001 and 17.1% decrease from 2000).

2. Vanessa Blum, *Justice Deferred*, *Legal Times*, Mar. 21, 2005, at 1.

3. See U.S. Dep't of Justice, *Criminal Resource Manual* § 712 (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00000.htm (on file with the *Columbia Law Review*) [hereinafter *Criminal Resource Manual*].

4. See *id.* § 715.

5. See Blum, *supra* note 2 (quoting Justice Department official as stating that "[t]he ultimate enforcement mechanism is that at the end of the deferral period it is up to the U.S. Attorney's Office to determine whether the company satisfactorily lived up to their end of the deal").

6. E.g., Alan Vinegrad, *Deferred Prosecution of Corporations*, N.Y.L.J., Oct. 9, 2003, at 4 [hereinafter *Vinegrad, Deferred*] (quoting former U.S. Attorney); see also F. Joseph Warin & Jason C. Schwartz, *Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants*, 23 J. Corp. L. 121, 133 (1997) (urging prosecutors to continue deferring prosecution of corporations wherever the collateral impact of prosecution would outweigh its benefits).

7. See Bloomberg News, *U.S. Deferring Cases Against Firms Promising to Behave*, *Chi. Trib.*, Jan. 5, 2005, § 3, at 2 (noting that deferred prosecutions of corporations "have

prosecuting corporations is a step in the right direction, yet an important question remains unanswered because corporate deferral is an untested phenomenon: Is the deferral process properly structured to protect the corporate offender in what is effectively an extrajudicial contract? While corporations are generally better able to fend off coercion than the individual offenders for whom deferral was conceived, this Note will argue that they are also uniquely vulnerable to the consequences of a conviction, which deferral avoids. As a result, prosecutors are able to unilaterally impose the conditions of deferral, harming the corporate offender's constituent interests instead of mitigating the collateral damage of a conviction. Today's corporate deferral process therefore undercuts the legitimacy and effectiveness of a mechanism developed to counteract, rather than exacerbate, the impact of criminal liability when the fate of more than just the offender is at stake.

This Note argues that judicial involvement in the corporate deferral process will counterbalance prosecutors' unfettered power in what is currently an extrajudicial area of white collar crime prosecution. Part I traces the adaptation of deferral from the individual to the corporate offender, demonstrating a concerted shift in Justice Department policy toward corporate offenders in the late 1990s followed by a more widespread and varied use of the deferral mechanism within the last two years. Part II focuses on the negotiation phase of corporate deferrals, highlighting the prosecutorial leverage created by the newfound availability of deferral and the legal obligations that deferring prosecutors are able to impose on corporate offenders. As a response to this prosecutorial leverage, Part III proposes a model for judicial involvement in the corporate deferral process to ensure that deferral is a robust yet accountable mechanism. This Note concludes that judicial involvement in the deferral process will ensure that deferral reforms corporations without increasing the externalities of criminal liability that it is intended to mitigate.

I. PROSECUTORIAL CREATIVITY: ADAPTING DEFERRAL TO THE CORPORATE CONTEXT

Deferred prosecution is by no means new to the prosecutorial landscape, but its application to corporate offenders is a relatively recent phenomenon. Part I.A reviews the historical development of deferred prosecution and its adaptation to the corporate offender. Part I.B highlights significant corporate deferrals and the importance of the mechanism as a

been on the rise since the collapse of Enron Corp. in December 2001 kicked off a wave of federal probes of corporate fraud," and quoting Justice Department officials as calling deferred prosecution "a good tool for use in prosecuting large corporations with lots of . . . stakeholders" and "showing compassion for the people who work for the company"). For a comprehensive discussion analogizing the externalities associated with prosecuting corporations to those associated with prosecuting individuals, see 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, 400-05 (1981).

weapon in the federal prosecutor's arsenal. Part I.C considers the import of a lack of judicial involvement in the corporate deferral process.

A. *The Development of Deferred Prosecution into a Prosecutorial Tool*

1. “*Having been found guilty, he is stamped with a criminal record.*”⁸ — The Chicago Boys’ Court conceived deferred prosecution in 1914 in an attempt to process juvenile offenders without “branding them as criminals.”⁹ The Judicial Conference formally endorsed the practice in 1947,¹⁰ and deferred prosecution rose to prominence in the 1960s as a way to divert adjudication of some juvenile offenses from the courts.¹¹ Deferred prosecution allowed offenders to “avoid the stigma associated with formal processing and the resultant change in self-image, associations, and behavior associated with the negative societal reaction to the stigma.”¹² Deferral joined the war on drugs in the wake of the Supreme Court’s 1962 ruling in *Robinson v. California* that punishing drug addiction was cruel and unusual.¹³ Today, the mechanism is widely considered to be of primary application in these contexts,¹⁴ though its use remains comparatively rare.¹⁵

In practical terms, deferral reduces docket congestion and avoids costs typically associated with court processing.¹⁶ Furthermore, deferral saves individual offenders from the potentially lifelong collateral consequences of a felony conviction, such as exclusion from jury service, gov-

8. James A. Inciardi et al., *Drug Control and the Courts* 25 (1996) (quoting Chicago Judge Jacob Braude referring to the psychological impact of prosecution and conviction on juvenile offenders).

9. *Id.* In New York, deferral of juveniles has been traced to discussions in 1936 between a U.S. Attorney and local probation officials on developing alternatives to prosecution. Joel Cohen & Jonathan Liebman, *Pretrial Diversion: An Alternative to Full Federal Prosecution?*, N.Y.L.J., Apr. 6, 1994, at 1.

10. Cohen & Liebman, *supra* note 9.

11. See *Developments in the Law—Alternatives to Incarceration*, 111 Harv. L. Rev. 1863, 1902–03 (1998) [hereinafter *Alternatives to Incarceration*] (analyzing diversion from prosecution as a treatment-based alternative to incarceration).

12. Gennaro F. Vito & Deborah G. Wilson, *The American Juvenile Justice System* 22 (1985).

13. 370 U.S. 660, 667 (1962).

14. See, e.g., Yale Kamisar et al., *Advanced Criminal Procedure* 20 n.h (10th ed. 2002) (noting that deferral is “[t]ypically” offered to “first-offenders charged with non-violent offenses”); see also *infra* note 27.

15. See U.S. Sentencing Comm’n, *Compendium of Federal Justice Statistics* 30–31 tbl.2.4 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs02.pdf> (on file with the *Columbia Law Review*) [hereinafter 2002 *Compendium*] (finding that, in 2002, only 1.5% of all federal cases not prosecuted were deferred).

16. Vito & Wilson, *supra* note 12, at 23. But see Charles Shireman & Frederic Reamer, *Rehabilitating Juvenile Justice* 139 (1986) (noting that deferral programs can be “at least as costly if not more so than traditional ways of handling juvenile offenders”).

ernment benefits, public housing, educational grants, and voting.¹⁷ Of particular relevance to corporate offenders (and this Note), felony convictions can also bar offenders from government contracts and licensed industries.¹⁸

2. *The Advent of Pretrial Services Agencies and Standards for Deferral.* — In a nod to prosecutors' increasing use of deferred prosecutions, Congress formally recognized the practice in 1975 by including deferrals within the mandate of newly established pretrial service agencies.¹⁹ Pretrial service agencies gather information about criminal defendants to help judges determine whether a defendant should be released pending trial, and play an important role in supervising and reporting on the progress of defendants whose prosecution was deferred.²⁰ Responsibility for deferred offenders is shared with a network of organizations that specialize in oversight and rehabilitation.²¹ This partnership takes responsibility for and attempts to steer the individual offender away from recidivistic behavior and is an important information clearinghouse for the deferral process.²²

Further, the Justice Department promulgated standards for deferral of federal prosecution in 1997, delineating three purposes for the mechanism: "prevent[ing] future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services," "sav[ing] prosecutive and judicial resources for concentration on major cases," and "provid[ing], where appropriate, a vehicle for restitution to communities and victims of crime."²³ Deferral cannot be offered to an offender with two or more prior felony convictions.²⁴ Deferees must waive the right to a speedy trial, stripping the judge of the power to force prosecutors to either prosecute or dismiss the indictment

17. Cf. Anthony C. Thompson, Navigating the Hidden Obstacles to Ex-Offender Reentry, 45 B.C. L. Rev. 255, 258 (2004) (arguing that ex-offenders should not have to manage their own reintegration into society).

18. Thus a corporation convicted of an applicable offense would, as one uniform body, be subject to these consequences. See *infra* Part II.A.1.

19. See Speedy Trial Act of 1974, Pub. L. No. 93-619, §§ 3152-3154, 88 Stat. 2076, 2086-88 (1975) (codified as amended at 18 U.S.C. §§ 3152-3154 (2000)).

20. See Barry Mahoney et al., Nat'l Inst. of Justice, Pretrial Services Programs: Responsibilities and Potential 3-11, 45-46 (2001); see also 18 U.S.C. § 3154(f) (indicating that pretrial service agencies will "[s]upervise persons released into [their] custody").

21. Deferred juvenile offenders are typically supervised by organizations that offer crisis intervention, family counseling, employment counseling, and residential placement. See Shireman & Reamer, *supra* note 16, at 132. Deferred drug offenders are typically referred to government-sponsored treatment facilities. See *Alternatives to Incarceration*, *supra* note 11, at 1903-04.

22. See generally Mahoney et al., *supra* note 20, at 49-56 (discussing pretrial services information collected and shared among various organizations).

23. U.S. Attorneys' Manual § 9-22.010 (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm (on file with the *Columbia Law Review*) [hereinafter U.S. Attorneys' Manual].

24. *Id.* § 9-22.100.

within seventy days.²⁵ Deferees must also waive the right to presentment within applicable statutes of limitation and the right to challenge the admissibility of confessions in a later criminal proceeding.²⁶ The drafters of the Justice Department's standards likely did not contemplate the use of deferral on corporations, as they were looking back at thirty years of deferral of individual offenders.²⁷

3. *Deferred Prosecution as a Unique Prosecutorial Mechanism.* — Deferred prosecution is a unique balance of the tools available to the prosecutor. In a deferred prosecution, the state exacts sanctions, yet the offender emerges without a criminal record.²⁸ Deferral allows prosecutors to “avoid the black-and-white decision of indicting.”²⁹ The mechanism is thus importantly different from both declining to prosecute and plea bargaining, which together constitute the vast majority of dispositions of federal criminal allegations.³⁰

Declining prosecution, or declination, virtually defines prosecutorial discretion and is “the most important function exercised by the prosecutor.”³¹ Judges play no role in the decision to decline prosecution, and such decisions are not subject to review.³² Declination typically does not involve a formal agreement with the offender;³³ though such agreements

25. See Criminal Resource Manual, *supra* note 3, § 712. Judges would otherwise be able to use the Speedy Trial Act to force the prosecutor to move forward. See 18 U.S.C. § 3161.

26. See *supra* text accompanying note 4.

27. That the Criminal Resource Manual requires that the offender notify his pretrial supervisor of any “job or school changes” and of his “whereabouts” lends further credence to this conclusion. See Criminal Resource Manual, *supra* note 3, § 715. The public perception also accords with this conclusion. See, e.g., Charles Forelle, CA Is in Talks to End Fraud Inquiry, *Wall St. J.*, Sept. 20, 2004, at A3 (reporting that “[d]eferred prosecution is frequently used by state and local prosecutors dealing with first-time offenders accused of minor crimes [It] is ‘very unusual’ in prosecutions of corporations.” (quoting former U.S. Attorney)); Robert E. Kessler, NYRA Deal to Be OKd; Will Retain Monopoly, *Newsday* (N.Y.), Dec. 9, 2003, at A27 (noting that deferred prosecutions are “commonly used for minor criminals and rare for corporations”).

28. An offender whose indictment was dismissed after deferral is *not* a felon, and judges do not consider deferrals evidence of prior criminal conduct. See U.S. Sentencing Guidelines Manual § 4A1.2(f) (2004).

29. Bloomberg News, *supra* note 7.

30. In 2002, 27.1% of all federal cases resulted in declination of prosecution. Of the 89.3% of defendants convicted, 95.7% had pled guilty. 2002 Compendium, *supra* note 15, at 29, 58.

31. Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 *BYU L. Rev.* 669, 671.

32. As the Supreme Court held in *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, “[I]t is entirely clear that the refusal to prosecute cannot be the subject of judicial review.” 482 U.S. 270, 283 (1987).

33. The most notable exception is the nonprosecution agreement, which is in fact substantially similar to a deferral agreement, and has also been used in the corporate context. See *infra* note 60.

may be informal,³⁴ they are a far cry from deferrals, which are enforceable contracts between the prosecutor and the offender.³⁵ Declination offers no possibility of sanctions and is thus less likely to reform the offender.

In contrast to declination, a plea bargain exchanges the risks of trial for a more efficient and certain disposition. Both prosecutors wary of reasonable doubt and offenders wary of retributive juries take advantage of plea bargains.³⁶ In practice, “judges have every reason to listen to the recommendations of the parties and to follow the outlines of their agreement.”³⁷ A guilty plea results in a conviction and collateral consequences attach no differently than if the offender had been convicted in a trial.³⁸

Deferred prosecution offers prosecutors an intermediate option between declination and plea bargaining, as deferrals exact sanctions while circumventing the collateral consequences of a conviction.³⁹ Deferral is not a “bargain basement plea bargaining system.”⁴⁰ Rather, deferral is to be used in cases where “the putative defendant could be successfully prosecuted.”⁴¹

Importantly, the judicial role in deferred prosecutions is minimal. The decision to defer is generally not subject to judicial review unless an applicable statute provides otherwise.⁴² For instance, the U.S. Code does

34. Consider the police officer who takes the juvenile offender for a ride in the squad car but releases him or her without formal processing. See Shireman & Reamer, *supra* note 16, at 132.

35. See *infra* note 44 and accompanying text.

36. See generally Jeff Palmer, Note, Abolishing Plea Bargaining: An End to the Same Old Song and Dance, 26 *Am. J. Crim. L.* 505, 512–28 (1999) (describing justifications for and against plea bargaining).

37. Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 *Stan. L. Rev.* 29, 39 (2002). “[I]n an adversary system, judges will naturally be inclined to assume the competing interests of the government and the citizen are fully reflected in any bargain.” *Id.* at 88.

38. Nevertheless, a judge accepting a guilty plea does not necessarily have to warn of all the collateral consequences that could result. See *Cuthrell v. Dir.*, Patuxent Inst., 475 F.2d 1364, 1365–66 (4th Cir. 1973).

39. Deferral does not result in a conviction, see *Commonwealth v. Knepp*, 453 A.2d 1016, 1019 (Pa. Super. Ct. 1982), nor is it “tantamount to a guilty plea; it is a form of preconviction sentencing or probation.” *Michel v. City of Richland*, 950 P.2d 10, 13 (Wash. Ct. App. 1998) (citing *Abad v. Cozza*, 911 P.2d 376, 381–82 (Wash. 1996)).

40. Cohen & Liebman, *supra* note 9.

41. *Id.*

42. See, e.g., *Cleveland v. State*, 417 So. 2d 653, 654 (Fla. 1982) (stating that though statutory recognition of deferral process can create right to judicial review which would not otherwise exist, the statute did not so provide); see also *State v. Curry*, 988 S.W.2d 153, 158 (Tenn. 1999) (holding that prosecutor’s decision to decline request for deferral is “presumptively correct, and it is subject to review by the trial court only for an abuse of discretion”). While some states have reversed the presumption against review by statute, see, e.g., *Mont. Code Ann.* § 46-16-130(3) (2003) (“After a charge has been filed, a deferral of prosecution may be entered into only with the approval of the court.”), twelve states have enacted statutes reiterating that prosecutors have exclusive control over deferral. See *Nora V. Demleitner et al.*, *Sentencing Law and Policy* 660 (2004).

not provide judicial review for federal deferral decisions.⁴³ As to offenders seeking to challenge the prosecutor's discretion in pursuing prosecution at the close of the deferral period, federal courts have intervened only insofar as the deferral agreement represents a contract with enforceable terms.⁴⁴ Courts have justified the limited nature of their review in this context by referring to both separation of powers concerns and the potential for a flood of civil litigation.⁴⁵

The judiciary's limited role in deferred prosecutions may explain the substance of criticisms lodged against the deferral mechanism. Such criticisms take three forms. First, some academics argue that "extralegal factors such as age, race, and social class" can distort the prosecutor's deferral decision;⁴⁶ accordingly, they call for more transparency in individual offender deferral.⁴⁷ Second, critics note that research has yet to prove that deferral successfully reduces recidivism.⁴⁸ Third, and most signifi-

43. Instead, 18 U.S.C. § 3154(10) (2000) provides only that each federal district can create its own deferral program; courts seem to have construed this absence as an invitation for prosecutorial administration of the programs. Cf. *Buell v. Brennan*, No. 98-CV-1567 (ARR), 1998 U.S. Dist. LEXIS 23336, at *12-*13 (E.D.N.Y. July 13, 1998) (equating pretrial services officers with prosecutors for purposes of immunity from suit). The federal courts have thus declined to insert themselves into the question of whether to defer prosecution. See, e.g., *United States v. Richardson*, 856 F.2d 644, 647 (4th Cir. 1988) ("A defendant has no right to be placed in pretrial diversion. The decision . . . is one entrusted to the United States Attorney." (citations omitted)); *Buell*, 1998 U.S. Dist. LEXIS 23336, at *11-*12 ("[T]he integrity of the judicial process depends on a prosecutor's ability to exercise his judgment in deciding whom to indict [or offer a plea bargain], so a prosecutor's discretion to divert an indictee from trial . . . is an integral part of a properly functioning judicial process." (quoting *Davis v. Grusemeyer*, 996 F.2d 617, 630 (3d Cir. 1993))).

44. See, e.g., *United States v. Hicks*, 693 F.2d 32, 33 (5th Cir. 1982), cert. denied, 459 U.S. 1220 (1983) ("The diversion agreement is a contract. . . . The [district] court was entitled to hear evidence on the violations to make sure that the government had lived up to its side of the bargain."); *United States v. Garcia*, 519 F.2d 1343, 1345 (9th Cir. 1975) (extending to deferral context Supreme Court's holding in *Santobello v. New York*, 404 U.S. 257, 262 (1971), that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled").

45. See, e.g., *Grusemeyer*, 996 F.2d at 629 ("[W]hether to continue a prosecution through to trial is at the heart of the prosecutorial decisionmaking process and should not be chilled by fear of civil sanction."); *Hicks*, 693 F.2d at 34 n.1 ("Since pretrial diversion is a program administered by the Justice Department, considerations of separation of powers and prosecutorial discretion might mandate an even more limited standard of review.").

46. Vito & Wilson, *supra* note 12, at 23; see also Shireman & Reamer, *supra* note 16, at 133 ("In too many instances the demographic traits of a juvenile, or local administrative or political idiosyncrasies, have greater influence on the way in which juvenile offenders are handled than do the nature of the offense and the genuine risk the youths represent to themselves and others.").

47. See, e.g., Vito & Wilson, *supra* note 12, at 25 (arguing that "policies and procedures should be . . . made more visible and open to review").

48. See *id.* ("Evaluative research on [youth] diversion programs has not been done to any great extent. What research is present has not been done well."); see also Inciardi et al., *supra* note 8, at 30 ("Many programs have never been evaluated, and estimations of

cantly with respect to judicial involvement, deferral raises due process concerns because by its “nature [deferral] requires removal [of the offenders] from the system prior to a determination of guilt or innocence.”⁴⁹ Given that it is “always in lieu of court processing—a strong coercive agent,” deferral may not be a voluntary choice for the offender because the alternative is far less favorable.⁵⁰ Critics raised these concerns about deferral well before prosecutors extended the mechanism to corporate offenders in the 1990s.⁵¹

B. Deferred Prosecution in the Federal Prosecution of Corporations

Before the Justice Department recognized and promulgated standards specific to corporate deferral in 1999,⁵² prosecutors were understandably hesitant to resort to the mechanism, explaining its infrequent use in the 1990s. In the last two years, however, prosecutors have deferred the prosecution of more than a dozen of the nation’s leading corporations. The ensuing analysis highlights both the earliest deferrals and the more prominent deferrals of the last two years. All of the corporate deferees discussed below waived their rights to speedy trial, to presentment within applicable statutes of limitation, and to challenge the admissibility of their statements in subsequent criminal proceedings.⁵³ Many, though not all, waived assertion of the attorney-client privilege.⁵⁴ Most importantly, the agreements explicitly disavowed any judicial role in

their effectiveness have been based on little more than . . . hunches.”). Accordingly, some states have developed specialized drug courts that assign judges a critical role in the rehabilitation of a drug offender. See James R. Brown, Note, Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-Related Crime?, 23 New Eng. J. on Crim. & Civ. Confinement 63, 91 (1997) (crediting “the active involvement of drug court judges” and the “personal connection between the judge and the client” with keeping drug offenders in treatment programs).

49. Vito & Wilson, *supra* note 12, at 24; see also Shireman & Reamer, *supra* note 16, at 135 (noting that “[t]he central due process issue stems from the lack of judicial oversight that frequently accompanies decisions to detain, release, or divert. . . . [Such] decisions . . . are often truly autonomous and subject to no review.”).

50. Vito & Wilson, *supra* note 12, at 24; cf. Shireman & Reamer, *supra* note 16, at 135 (“The police may in effect function as both judge and jury when they offer youths an ultimatum: either accept an offer of referral to a diversion program . . . or take a ride to the precinct.”).

51. For instance, Vito & Wilson, *supra* note 12, were published in 1985, and Shireman & Reamer, *supra* note 16, were published in 1986.

52. See *infra* Part II.B.2.

53. The waiver of these three rights is the limited extent of the correlation between corporate deferral agreements and the individual deferral standards. Cf. *supra* text accompanying notes 25–26. Some of the corporate deferral agreements, for instance, exceed the Justice Department’s eighteen-month limit for individual deferral. See Criminal Resource Manual, *supra* note 3, § 712(F). A prime example is the deferral of the prosecution of Prudential for three years. See *infra* note 66 and accompanying text.

54. See *infra* Part II.B.2.

changing the proposed terms of deferral⁵⁵ or in later determining whether the deferee had committed a prosecutable breach.⁵⁶ In some cases, the agreements created a separate adjudicatory process that was administered by federal prosecutors and was entirely unreviewable by courts.⁵⁷ In short, all of the agreements were extrajudicial contracts with onerous terms that threatened to undermine the purpose of deferred prosecution.

1. *Early Extensions of the Deferral Mechanism to the Corporate Offender.* — In 1992, the Justice Department formally agreed not to prosecute Salomon Brothers for its false and unauthorized bids for government securities⁵⁸ in violation of the antitrust laws.⁵⁹ The nonprosecution agreement,⁶⁰ in which a judge's role is reduced from rubber stamp to nonexistent,⁶¹ required Salomon to pay \$290 million in fines, forfeitures, and restitution; cooperate in ongoing investigations; and institute compliance procedures.⁶² Prosecutors offered the agreement because of Salomon's "full and complete" cooperation,⁶³ its waiver of privilege,⁶⁴ and their own fear of the collateral impact of a conviction on Salomon shareholders and employees.⁶⁵

55. See, e.g., Deferred Prosecution Agreement para. 3, *United States v. Am. Online, Inc.*, No. 1:04M 1133 (E.D. Va. Dec. 15, 2004) (on file with the *Columbia Law Review*) [hereinafter AOL Agreement] (stipulating that if court did not approve agreement as written it would be void).

56. See *infra* Part II.B.3.

57. See *infra* Part II.B.3.

58. The bids therefore violated the False Claims Act, 31 U.S.C. § 3729 (2000).

59. 15 U.S.C. §§ 1–7 (2000).

60. Nonprosecution differs from deferred prosecution only in that no indictment is filed; thus instead of a deferral period, the agreement has an expiration date beyond which criminal prosecution is no longer possible. Vinegrad, *Deferred*, *supra* note 6. Nonprosecution agreements have their own set of guidelines in the U.S. Attorneys' Manual, which requires that prosecutors consider the following:

[t]he importance of the investigation or prosecution to an effective program of law enforcement[,] . . . [t]he value of the person's cooperation to the investigation or prosecution[,] . . . and [t]he person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his/her history with respect to criminal activity.

U.S. Attorneys' Manual, *supra* note 23, § 9-27.620(A). Just as in the deferral context, the Manual's guidance is focused on nonprosecution of *individuals*. See *id.* § 9-27.600–.650 (referring repeatedly to offenders as "person[s]").

61. See Greg Burns, *Corporations Avoid Criminal Cases*, Chi. Trib., Mar. 20, 2005, § 5, at 1 ("In non-prosecution agreements, typically no charge is filed, and though terms are put in writing, no judge needs to review them.").

62. Press Release, U.S. Dep't of Justice, DOJ, SEC Enter \$290 Million Settlement with Salomon Brothers (May 20, 1992) (on file with the *Columbia Law Review*).

63. Richard Breeden, Chairman, Sec. & Exch. Comm'n, Statement at Press Conference Announcing Filing of Complaint Against Salomon Brothers (May 20, 1992) (on file with the *Columbia Law Review*) [hereinafter Breeden Statement].

64. *Id.*

65. Jed S. Rakoff, *Corporate Indictment and the Guidelines*, N.Y.L.J., Jan. 13, 1994, at 3. A conviction could have barred the firm from acting as a broker-dealer, see 15 U.S.C.

The Justice Department deferred prosecution of Prudential Securities for three years in 1994 to resolve allegations of fraud in the sale of oil and gas interests.⁶⁶ Prosecutors extracted \$330 million in restitution and a promise to install an independent director.⁶⁷ Prosecutors, aware that conviction could have the collateral consequence of barring the firm from investment advising⁶⁸ and mindful of the resulting impact on “innocent employees and investors”⁶⁹ were clearly interested in keeping Prudential in business.⁷⁰

In 1996, Coopers & Lybrand entered a two-year nonprosecution agreement to resolve allegations of using inside information to bid for a state contract.⁷¹ In addition to restitution, the firm agreed to retain independent counsel to monitor compliance.⁷² Prosecutors took the extraordinary step of reserving the unilateral right to fine the offender an additional \$100,000 for any breach of the agreement that they chose not to prosecute, without the requirement of any formal judicial findings.⁷³

This provision is noteworthy because it built into the agreement an extrajudicial adjudicatory process for the duration of the deferral period; many of the corporate deferrals now in force have replicated this provision in some form.⁷⁴ Similarly, agreements with some of the corporations alleged to have facilitated the fraud at Enron have followed the nonprosecution agreement signed by Salomon Brothers.⁷⁵ These early forays into the extension of the deferral mechanism to corporate offenders thus laid the groundwork for the more widespread and varied use of the mechanism in the modern era.

2. *Policy Shifts in Prosecuting Corporations: The Thompson Memorandum.* — The prosecutors who applied deferral to corporate offenders in the 1990s were “left to their own discretion, with few if any *applicable stan-*

§ 78o(b)(4)(B) (2000), or from acting as an investment advisor pursuant to 15 U.S.C. § 80b-3(e).

66. Letter from Mary Jo White, U.S. Att’y for S. Dist. of N.Y., to Scott W. Muller & Carey R. Dunne, Prudential Counsel (Oct. 27, 1994) (on file with the *Columbia Law Review*) [hereinafter Prudential Agreement].

67. Id. The offender had violated 15 U.S.C. §§ 78j(b), 78ff; 17 C.F.R. § 240.10b-5 (2004); and 18 U.S.C. § 2 (2000) by “falsely instruct[ing] its brokers that the investment was safe, low risk and suitable for all investors.” Complaint at 1–3, *United States v. Prudential Sec., Inc.*, No. 94-2189 (S.D.N.Y. Oct. 27, 1994) (on file with the *Columbia Law Review*).

68. See *supra* note 65.

69. Warin & Schwartz, *supra* note 6, at 126.

70. A felony conviction would have had consequences similar to those for Salomon. See *supra* note 65.

71. Press Release, U.S. Att’y for Cent. Dist. of Cal., Coopers & Lybrand Agrees to Settlement in Government Investigation of Arizona Governor and Bid-Rigging of State Contract (Sept. 19, 1996) (on file with the *Columbia Law Review*).

72. Warin & Schwartz, *supra* note 6, at 127.

73. Id.

74. See *infra* Part I.B.3.

75. See *infra* Part I.B.3.c (describing nonprosecution agreements with Merrill Lynch and CIBC); see also *infra* note 80 (describing fraud at Enron and company’s collapse).

dards upon which to rely.”⁷⁶ The U.S. Attorneys’ Manual’s directives to deferring prosecutors to consider the imposition of social services, including psychiatric care and job training, were “nonsensical in the corporate context.”⁷⁷ The subsequent introduction of formal standards for prosecuting corporations would thus bring order to an otherwise idiosyncratic corporate deferral process.⁷⁸

In 1999, Deputy Attorney General Eric Holder issued a memorandum entitled *Federal Prosecution of Corporations*, outlining eight factors for deciding whether to prosecute a corporation: (1) the nature and seriousness of the offense, (2) the pervasiveness of the wrongdoing, (3) the corporation’s history of similar conduct, (4) any voluntary disclosure of wrongdoing and ensuing cooperation, (5) the existence and adequacy of a compliance program, (6) efforts at remediation, (7) the potential for collateral consequences that could harm innocent third parties, and (8) the availability of civil or regulatory remedies.⁷⁹ With the increasing visibility of corporate crime in the post-Enron era⁸⁰ and the creation of the President’s Corporate Fraud Task Force,⁸¹ Deputy Attorney General Larry Thompson revised the directive in January 2003.⁸² Department officials characterized the “Thompson Memo” as merely adding a ninth factor for consideration: the authenticity of an offender’s proffered cooper-

76. Warin & Schwartz, *supra* note 6, at 130 (emphasis added).

77. *Id.*

78. As a consequence of prosecutors’ tendency to use sentencing factors in the charging decision, see Ian Weinstein, *Fifteen Years after the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 Am. Crim. L. Rev. 87, 124 (2003) (arguing that prosecutors “changed their charging behavior in response to the Guidelines”), the enactment of the Organizational Sentencing Guidelines in 1991 is also likely to have played a role in the Justice Department’s dissemination of formal corporate prosecution standards. Cf. Kathryn Keneally, *Corporate Compliance Programs: From the Sentencing Guidelines to the Thompson Memorandum—and Back Again*, *Champion*, June 2004, at 42, 43 (noting that Thompson Memorandum, described at *infra* text accompanying notes 82–84, “draws on many of the same factors that are considered under the guidelines”).

79. See Memorandum from Eric Holder, Deputy Att’y Gen., U.S. Dep’t of Justice, to Component Heads and U.S. Att’ys, *Federal Prosecution of Corporations* (June 16, 1999), at Part II, available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html#Federal%20Prosecution%20of> (on file with the *Columbia Law Review*).

80. Enron collapsed in 2001 amidst charges of widespread fraud involving off-balance-sheet entities, insider trading, and other improper financial dealings; the case prompted a nationwide upheaval over corporate ethics. See Kurt Eichenwald, *Enron’s Skilling is Indicted by U.S. in Fraud Inquiry*, *N.Y. Times*, Feb. 20, 2004, at A1.

81. President George W. Bush created the Task Force “to oversee and direct all aspects of the Department’s manifold efforts to investigate and prosecute corporate fraud.” Andrew Hruska, *The President’s Corporate Fraud Task Force*, U.S. Att’ys’ Bull., May 2003, at 1.

82. Memorandum from Larry D. Thompson, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (on file with the *Columbia Law Review*) [hereinafter *Thompson Memo*].

ation.⁸³ However, this focus on cooperation, in combination with a continued awareness of collateral consequences, “explicitly opened the door to the use of deferred prosecution agreements.”⁸⁴ Since the dissemination of the Thompson Memo, no corporation has been charged in a major corporate fraud investigation outside of a deferral agreement.⁸⁵

3. *Corporate Deferred Prosecution as a Formal Prosecutorial Tool.* — The shift in Justice Department policy may appear subtle, but its impact was not: This subpart highlights a substantial increase in corporate deferrals within the last three years. Many attribute the increase to the high-profile prosecution of Arthur Andersen and the resulting loss of 28,000 jobs.⁸⁶ The policy shift has resulted in a prosecutorial boldness and creativity in using deferrals to resolve allegations of white collar crime at the heart of a corporation.

a. *Banco Popular de Puerto Rico.* — In January 2003, Banco Popular de Puerto Rico procured a deferral after admitting to a failure to disclose suspicious deposit patterns that had allowed a drug dealer to launder over \$20 million; the deferral carried with it a \$21.6 million forfeiture.⁸⁷ Deferral saved the firm from the collateral consequences of a conviction,

83. See, e.g., Sean R. Berry, Revised Principles of Federal Prosecutions of Business Organizations: An Overview, U.S. Att’y’s Bull., Nov. 2003, at 5 (stating opinion of federal prosecutor).

84. Vinegrad, *Deferred*, supra note 6. One former U.S. Attorney wrote at the time that “[w]hile deferred prosecution . . . is not new to the corporate arena, it has become more visible in the wake of recent revisions to the Justice Department’s policy on corporate prosecution.” *Id.* Some went as far as to characterize the memo revision as a stark policy shift attributable to the intervening change of administrations. See, e.g., Kessler, supra note 27 (reporting that Thompson Memo represented policy shift towards leniency on corporate offenders notwithstanding Attorney General Ashcroft’s reining in of prosecutorial discretion in most other areas of federal prosecution). There is consensus, however, that the Thompson Memo was ultimately a catalyst for an increase in corporate deferrals. See, e.g., Blum, supra note 2.

85. Blum, supra note 2.

86. See, e.g., *id.* (reporting that for prosecutors, Arthur Andersen’s fall was “a reminder that indictments have real-world consequences,” which led to the increase in corporate deferrals); Burns, supra note 61 (noting that avoiding “so-called collateral damage became a priority” after the collapse of Andersen). For an in-depth discussion of the Andersen case, see *infra* Part II.A.3.

87. 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) (on file with the *Columbia Law Review*). The offender had thus violated 31 U.S.C. §§ 5318(g)(1) and 5322(b) (2000) of the Bank Secrecy Act. Deferred Prosecution Agreement para. 1, *United States v. Banco Popular de Puerto Rico*, No. Cr-03-017 (D.P.R. Jan. 16, 2003) (on file with the *Columbia Law Review*) [hereinafter BP Agreement]. Other banks have been accused of such conduct, and have similarly sought deferral. See Glenn Simpson, Bank of New York Seeks to Avert Charges, Wall St. J., Nov. 30, 2004, at A3 (reporting that Amsouth Bancorp had received deferral and that Bank of New York was seeking one). At least one bank, however, was unable to procure deferment for similar conduct, and its guilty plea delayed its acquisition by a larger bank. See Eric Dash, Riggs Pleads Guilty in Money-Laundering Case, N.Y. Times, Jan. 28, 2005, at C7 (reporting that Riggs Bank pled guilty to failing to report suspicious banking activity by Chilean leader Gen. Augusto Pinochet and by leaders of the government of Equatorial Guinea, and stating that “Riggs would have

which could have barred it from the highly regulated banking sector.⁸⁸ Banco Popular further agreed that should it willfully and materially breach the agreement during its twelve-month duration, it would have two weeks to defend itself in a “presentation” to Justice Department officials.⁸⁹ If the Justice Department had decided to terminate the deferral and prosecute, its decision would not have been subject to review by any court and, moreover, the contents of Banco Popular’s failed presentation to Justice Department lawyers could have been used against it at trial.⁹⁰ This provision, like the one foisted upon Coopers & Lybrand,⁹¹ circumvented the limited judicial review that would otherwise apply to a deferral agreement as an enforceable contract.⁹²

b. *PNC Bank*. — In a deferral initiated in June 2003, PNC Bank admitted having transferred over \$700 million in poorly performing loans and venture capital investments to off-balance-sheet entities.⁹³ In exchange for a twelve-month deferral, PNC agreed to pay \$115 million in criminal fines and restitution and to waive attorney-client privilege.⁹⁴ The deferral also mandated an extrajudicial hearing procedure, similar to that imposed on Banco Popular, through which the decision to prosecute a breach of the agreement would rest in prosecutors’ “sole discretion.”⁹⁵

c. *Merrill Lynch and CIBC*. — In late 2003, the Justice Department entered into nonprosecution agreements with both Merrill Lynch and Canadian Imperial Bank of Commerce (CIBC) for their complicity in Enron’s fraud.⁹⁶ Merrill Lynch admitted purchasing assets from Enron with the understanding that Enron would purchase them back after its earnings had been inflated.⁹⁷ In exchange for a twenty-one-month defer-

preferred a deferred prosecution settlement because it is less restrictive than a guilty plea”).

88. For instance, convictions under the Bank Secrecy Act would have barred the firm from investment advising. See 15 U.S.C. § 80a-9(a)(2) (2000).

89. BP Agreement, *supra* note 87, para. 12.

90. *Id.*

91. See *supra* text accompanying note 73.

92. See *supra* note 46.

93. Press Release, U.S. Dep’t of Justice, PNC ICLC Corp. Enters into Deferred Prosecution Agreement with the United States (June 2, 2003) (on file with the *Columbia Law Review*). These transfers were intended to land in so-called Special Purpose Entities and were found to violate 18 U.S.C. § 371 (2000). Deferred Prosecution Agreement para. 1, *United States v. PNC ICLC Corp.*, No. 2:03-mj-00187-ARH-ALL (W.D. Pa. July 29, 2003) [hereinafter PNC Agreement].

94. PNC Agreement, *supra* note 93, paras. 5(c), 7–10.

95. *Id.* para. 11. Prosecutors would then be able to use the offender’s cooperation against it. See *id.* para. 12.

96. See Kurt Eichenwald, *Canadian Bank Will Pay Fine and Drop Unit in Enron Accord*, N.Y. Times, Dec. 23, 2003, at C1; Kurt Eichenwald, *Merrill Reaches Deal with U.S. in Enron Affair*, N.Y. Times, Sept. 18, 2003, at A1; see also *supra* note 80.

97. See Letter from Leslie R. Caldwell, Dir., Enron Task Force, to Robert S. Morvillo & Charles Stillman, Merrill Lynch Counsel, paras. 1–2 & n.1 (Sept. 17, 2003) (on file with the *Columbia Law Review*) [hereinafter Merrill Lynch Agreement].

ral, the firm pledged new internal oversight over such transactions.⁹⁸ However, it was not forced to waive privilege, and its cooperation was explicitly limited to nonprivileged materials.⁹⁹ CIBC admitted to complicity in securities fraud at Enron but received a three-year deferral, during which it was required to employ a monitor who would report to the Justice Department.¹⁰⁰ Like Merrill Lynch, CIBC did not waive its attorney-client privilege.¹⁰¹

The agreements contained identical language leaving to the “sole discretion” of prosecutors the determination as to whether the offender had breached the agreement.¹⁰² Given that these were nonprosecution agreements that were not even filed with the court when executed, these clauses removed whatever judicial review might have remained over the agreements as enforceable contracts, and they did so without the hearing procedure provided to Banco Popular and PNC.¹⁰³

d. *New York Racing Association*. — In December 2003, federal prosecutors simultaneously unveiled both a deferral agreement and a previously sealed indictment for the New York Racing Association (NYRA), a state-franchised horse racing facility operator.¹⁰⁴ NYRA admitted having helped its tellers illegally deduct \$19 million in falsely reported “shorts”;¹⁰⁵ not only had it been aware of the fraud, it had actively sought to cover it up.¹⁰⁶ In exchange for an eighteen-month deferral, prosecutors exacted \$3 million in criminal fines, a commitment to hire an independent law firm to monitor compliance, and a waiver of attorney-client

98. See *id.* at app. A, paras. 8–9, 13.

99. See *id.* para. 4.

100. See Letter from Leslie R. Caldwell, Dir., Enron Task Force, to Gary Naftalis, CIBC Counsel, paras. 1–2, 7, 9–10 (Dec. 22, 2003) (on file with the *Columbia Law Review*) [hereinafter CIBC Agreement].

101. See *id.* para. 4.

102. See *id.* para. 11; Merrill Lynch Agreement, *supra* note 97, para. 10.

103. See PNC Agreement, *supra* note 93, para. 12; BP Agreement, *supra* note 87, para. 12.

104. Press Release, U.S. Dep’t of Justice, The New York Racing Association, Two Former Directors of the Pari-mutuel Department and Four Former Pari-mutuel Tellers Charged in a Multi-million Dollar Scheme to Defraud the United States (Dec. 11, 2003) (on file with the *Columbia Law Review*) [hereinafter NYRA Release]. The Justice Department had procured an indictment one week earlier; unveiling it simultaneously with the deferral agreement mitigated adverse publicity just as if both had been filed simultaneously. See *infra* notes 162–164 and accompanying text.

105. “Shorts” are disparities between a teller’s actual and reported intake; here, tellers systematically falsely reported shorts and reimbursed their employer accordingly, but—with their employer’s assistance—deducted the reimbursement from their taxable income. NYRA Release, *supra* note 104, paras. 5–7.

106. *Id.* paras. 17–19. The firm was indicted for conspiracy to defraud and for aiding tax fraud under 18 U.S.C. § 371 (2000) and 26 U.S.C. § 7206(2) (2000), respectively. Deferred Prosecution Agreement para. 1, *United States v. N.Y. Racing Ass’n*, No. 03-1295 (E.D.N.Y. Dec. 11, 2003) (on file with the *Columbia Law Review*) [hereinafter NYRA Agreement].

privilege.¹⁰⁷ The decision to defer was widely acknowledged to have been driven by fear of the effect a NYRA conviction would have had on the state's economy.¹⁰⁸

State officials were still concerned that any criminal penalty, even if imposed by a deferral, would frustrate their plan to install at racing facilities the slot machines whose revenues were expected to fund court-mandated improvements in public education.¹⁰⁹ Thus, far outside the typical provisions of deferral, the agreement bound NYRA to either install the slot machines itself or to make "commercially reasonable" efforts to subcontract another party to do so before the expiration of the deferral period.¹¹⁰ By conditioning dismissal of the indictment on the installation of slot machines—which were completely unrelated to the underlying tax fraud—prosecutors were using the deferral's threat of criminal prosecution to go far beyond reforming NYRA and, in effect, to implement the state's public policy.

e. *Computer Associates*. — Computer Associates signed a deferral agreement in September 2004, admitting to a widespread fraud whereby more than \$2 billion in revenues had been backdated to inflate earnings reports.¹¹¹ The size of the corporation's locally-based workforce likely

107. See NYRA Agreement, *supra* note 106, paras. 5(c), 5(g), 11.

108. Prosecutors believed that "in allowing NYRA to survive, they [we]re not being soft on a politically connected" offender but were instead avoiding "harming the state's economy." Kessler, *supra* note 27. The "uncommon resolution . . . [was] one the government considered prudent given the number of people NYRA employs and the importance of thoroughbred racing in New York." James M. Odato, NYRA Deal in the Works, *Times Union* (Albany, N.Y.), Dec. 6, 2003, at A1.

109. See Odato, *supra* note 108 (reporting that "Gov. George Pataki and legislative leaders are counting on the gambling hall to help balance the state budget. They have hoped that NYRA will be cleared so that gaming companies will help finance and manage the proposed casino" and projecting that the slots would generate \$500 million for state coffers); cf. Bill Finley, With Addition of Slots, Racing Is Horse of Another Color, *N.Y. Times*, Jan. 28, 2004, at D2 ("The arrival of the slot machines at Aqueduct was delayed by the [NYRA]'s legal problems . . ."). The increase in public education spending was mandated in *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 328, 348 (N.Y. 2003) (holding that New York "has obligated itself constitutionally to ensure the availability of a 'sound basic education' to all its children" and ordering that sufficient funds be appropriated to New York City schoolchildren to meet this educational standard).

110. NYRA Agreement, *supra* note 106, para. 10. Prosecutors were to "evaluate whether NYRA [had] made all commercially reasonable and legally permissible efforts" to install the terminals. *Id.* There is no reason to believe that this provision was not one for which "a knowing breach" would leave NYRA two weeks to explain itself in a nonreviewable hearing, potentially followed by prosecution. See *id.* para. 17. This provision may have been designed to substitute for a preexisting incentive to complete the installation of the terminals: NYRA has a state-granted franchise to operate the state's racing facilities, Odato, *supra* note 108, and had NYRA completed the project by March 2004, its franchise would automatically have been extended until 2013. Joe Drape, Deal to Indict N.Y.R.A. in the Works, *N.Y. Times*, Dec. 5, 2003, at D2.

111. Forelle, *supra* note 27. These activities constituted securities fraud pursuant to 15 U.S.C. § 78j(b) (2000), and the firm's attempts to cover up its wrongdoing led to an additional count of obstruction of justice under 18 U.S.C. § 1512(c). Deferred

weighed heavily on prosecutors,¹¹² and deferral allowed the firm to avoid suspension of the government contracts upon which it relies heavily.¹¹³ Indeed, the Deputy Attorney General offered this particular deferral as evidence that his agency's "focus is not on doing harm for harm's sake."¹¹⁴

In exchange for an eighteen-month deferral, the firm agreed to pay \$225 million in restitution, waive attorney-client privilege, add independent directors to its Board, commit to corporate governance reforms, and hire a monitor to assess its compliance.¹¹⁵ The agreement provided for a hearing procedure, similar to those mandated in the Banco Popular and PNC deferrals, whereby Computer Associates had two weeks to defend itself after an alleged breach. A failure to appear allowed the Justice Department to "conclusively presume . . . knowing, intentional and material breach" for purposes of resuming the prosecution and obtaining a conviction.¹¹⁶

f. *American International Group*. — In December 2004, prosecutors deferred prosecution of a subsidiary of American International Group (AIG), the world's largest insurer, for having aided two insureds in hiding balance sheet losses.¹¹⁷ The twelve-month deferral required an \$80 million criminal fine, a \$46 million disgorgement, a waiver of privilege, an audit of past similar transactions, and the hiring of an "independent con-

Prosecution Agreement para. 1, *United States v. Computer Assocs. Int'l, Inc.*, No. 04-837 (E.D.N.Y. Sept. 22, 2004) (on file with the *Columbia Law Review*) [hereinafter CA Agreement].

112. The fourth largest independent software maker in the country, Computer Associates employs 16,000 and is based in Islandia, New York, in the same jurisdiction where the deferral was filed. Alex Berenson, *Computer Associates Restates Timing of \$2.2 Billion in Sales*, N.Y. Times, Apr. 27, 2004, at C1.

113. Computer Associates is one of the computer industry's largest government contractors and, barring any breach of its deferral agreement, was expected to profit substantially from increased government spending on homeland security. See The Kiplinger Letter: *Forecasts for Management Decisionmaking*, July 25, 2003, at 1 (reporting that "[a]bout \$44 billion will be spent on homeland security [in 2004]. Companies large and small are going to profit from procurement of security-oriented hardware and software."). The firm thus took care to inform investors that, without a deferral, its government contracts would be in jeopardy. See Press Release, Computer Assocs. Int'l, Inc., CA Issues Statement (Apr. 8, 2004), available at <http://www3.ca.com/press/PressRelease.aspx?CID=57655> (on file with the *Columbia Law Review*) (warning that pending outcome of ongoing investigation, which had already produced guilty pleas from executives, "suspensions or debarments from government contracts" were possible).

114. Andrew Countryman, U.S. Indicts Former Software Firm Chief, Chi. Trib., Sept. 23, 2004, § 3, at 1.

115. See CA Agreement, *supra* note 111, paras. 6(c), 8, 12–19.

116. *Id.* para. 28.

117. See Deferred Prosecution Agreement para. 1, *United States v. AIG-FP Equity Holding Corp.*, No. 04-453M (W.D. Pa. Nov. 30, 2004) (on file with the *Columbia Law Review*) [hereinafter AIG Agreement] (charging the defendant with violations of 15 U.S.C. § 78j, 78ff(a) (2000), 17 C.F.R. § 240.10b-5 (2004), and 18 U.S.C. § 2 (2000)); Press Release, U.S. Dep't of Justice, *American International Group, Inc. Enters into Agreements with the United States* (Nov. 30, 2004) (on file with the *Columbia Law Review*).

sultant" to monitor compliance.¹¹⁸ The agreement provided for a hearing procedure identical to that mandated for Computer Associates, leaving breach determinations to the discretion of prosecutors, whose decisions would "not [be] subject to review in any court or tribunal outside the Criminal Division of the Department of Justice."¹¹⁹

g. *America Online*. — Weeks after signing the AIG deferral, prosecutors reached a deferral agreement with America Online (AOL) for aiding an advertiser in inflating revenue for their reciprocal benefit.¹²⁰ In exchange for a two-year deferral, AOL paid \$150 million in restitution and \$60 million in criminal fines and committed to hire a monitor to review advertising transactions and report semiannually to the Justice Department.¹²¹ Prosecutors touted deferral as "minimiz[ing] the collateral consequences of an indictment, which would have been borne by innocent employees and investors."¹²² The agreement included the (now standard) two-week hearing provision.¹²³ However, the waiver of privilege was notably modified. Though AOL could invoke the privilege in certain circumstances, invocation would release prosecutors from their commitment not to prosecute with respect to the transactions over which the privilege was asserted.¹²⁴

C. *Deferral's Unique Consequences for the Corporate Offender*

In some respects, federal prosecutors have transplanted deferral from the individual to the corporate offender. For example, imposing monitors on corporate deferees is analogous to prosecutors' customary reliance on pretrial service agencies better capable of monitoring drug and juvenile offenders.¹²⁵ Yet corporations are by nature a vastly differ-

118. AIG Agreement, *supra* note 117, para. 5 & exhibit A paras. 3, 5(c), 11.

119. *Id.* at exhibit A para. 15.

120. AOL Agreement, *supra* note 55, at app. A paras. 14–38. America Online is a wholly owned subsidiary of Time Warner, which received a nonprosecution agreement predicated on AOL's and its own cooperation. See Letter from Paul J. McNulty, U.S. Att'y for E. Dist. of Va., to Richard Cullen, Time Warner Counsel (Dec. 15, 2004) (on file with the *Columbia Law Review*).

121. See AOL Agreement, *supra* note 55, paras. 4, 13.

122. James Comey, Deputy Att'y Gen., U.S. Dep't of Justice, Statement at Press Conference on Charges and Settlement Against America Online for Aiding and Abetting Securities Fraud (Dec. 15, 2004) (on file with the *Columbia Law Review*) [hereinafter AOL Press Conference]. One reporter challenged this justification, arguing that "if [the] Justice Department wanted to minimize collateral damage, they'd never indict anybody." *Id.* Comey responded that "when we prosecute companies, we can't put them in jail; what we do is get money from them. So here we have gotten significant funds from them but have not imposed upon them . . . the penalty that comes with a felony conviction, that has significant collateral consequences." *Id.*

123. AOL Agreement, *supra* note 55, para. 20.

124. See *id.* para. 8(a)–(b).

125. See *supra* text accompanying notes 20–22. For a discussion of corporate monitors, see, e.g., Sue Reisinger, Companies in Trouble Get Their Own Monitors, N.Y.L.J., Oct. 7, 2004, at 5 (describing roles, duties, and credentials of corporate monitors); Dean Starkman, Corporate Monitors Form a New Industry, Wall St. J., Dec. 1, 1997, at B12.

ent type of criminal than a drug addict or juvenile offender. Prosecutors deciding between deferral and prosecution of a corporate offender must consider not only rehabilitation, but also the collateral impact that either approach will have on constituencies that rely on the corporation to survive its run-in with the criminal justice system.

In particular, deferred prosecution attempts to avoid harming the employees, investors, and markets that rely upon corporations to survive criminal liability. Federal prosecutors have become wary of causing the massive job losses often associated with a corporation's conviction.¹²⁶ Prosecutors have also identified investors, who are so often the victims of corporate wrongdoing, as an important constituency to consider in resolving the corporation's liability.¹²⁷ The viability of markets for specific products is still another factor in the modern prosecutor's calculus.¹²⁸

Yet some of the obligations that prosecutors have been able to extract from corporations seeking deferral demonstrate that the current structure of the corporate deferral process fails to account for this collateral impact. Corporate deferees waive the attorney-client privilege with alarming frequency, jeopardizing the relationship between the defense attorney, the corporation, and its employees by creating an "atmosphere of mutual suspicion."¹²⁹ Further, prosecutors have creatively circumvented any possibility of a judicial role in determining whether a corporate deferee has fulfilled its obligations, building extrajudicial hearing

(describing monitors' roles in overseeing Consolidated Edison's probation for asbestos related offense).

126. See *supra* note 86 and accompanying text.

127. See Blum, *supra* note 2 (quoting Department of Justice official as saying that "[d]eferred prosecutions give a company the chance to reform itself without creating a situation where a lot of people are going to lose their jobs and a lot of investors are going to lose more money").

128. Consider the cases of the accounting firm KPMG, LLP, and the telecommunications firm WorldCom. In deciding whether to defer prosecution of KPMG, prosecutors are facing the prospect of "reducing the number of big accounting firms able to review the books of large public companies," a cadre already shrunk by the conviction of Arthur Andersen. See Albert B. Crenshaw & Carrie Johnson, *Regretful KPMG Asks for a Break*, Wash. Post, June 17, 2005, at D1; *infra* Part II.A.3. WorldCom was spared prosecution, perhaps due in part to the concerns of many that a prosecution would jeopardize not only the national economy, but also the telecommunications market. See, e.g., Yochi J. Dreazen, *WorldCom's Federal Contracts May Be Vital*, Wall St. J., July 10, 2002, at B2 (quoting former Federal Communications Commission Chairman as cautioning that "[t]he government needs to realize that it has the power to dramatically alter the telecommunications market through its actions"); Eric Holder, *Don't Indict WorldCom*, Wall St. J., July 30, 2002, at A14 [hereinafter Holder, *Don't Indict*] (noting that substantial portions of U.S. internet and telephone traffic were carried by WorldCom and urging prosecutors not to prosecute).

129. Daniel Fisher & Peter Lattman, *Rattled Out*, Forbes, July 4, 2005, at 49, 50 (discussing consequences for individual employees when their employees waive privilege); see also *infra* Part II.B.2.

mechanisms into the deferral process.¹³⁰ Finally, the NYRA agreement's requirement that the deferee install slot machines, wholly unrelated to the tax fraud for which the offender was indicted, could portend the broader use of deferred prosecution agreements as a guise to fulfill a jurisdiction's public policy goals.¹³¹

Aside from the traditional judicial aversion to interfering with the deferral decision, clauses barring judicial modification of proposed deferral terms have further removed these provisions from judicial oversight.¹³² The use of these provisions outside such oversight indicates that the extension of the deferral mechanism to the corporate offender may be exacerbating the negative externalities of prosecuting the corporate body that prosecutors had set out to reduce. Prosecutors' abuse of the deferral mechanism may therefore harm some of the very interests that it was designed to protect. As a result, some scholars have begun to call for a closer examination of corporate deferral.¹³³ Part II takes up that examination with an analysis of the context for deferring prosecutions of corporations.

II. REFLECTING ON A TREND: THE CONTEXT FOR CORPORATE DEFERRAL

The appropriate starting point for a critique of corporate deferral is, logically, where the critics of individual offender deferral left off: First, *which* offenders are successful in having their prosecutions deferred? Second, does deferral reduce recidivism among those offenders? And third, as deferral allows for the imposition of criminal sanctions outside the confines of the courtroom, does it leave offenders vulnerable to violations of due process?¹³⁴

As to the first question, there are plausible concerns about which corporations are receiving deferrals and which are instead being prosecuted.¹³⁵ Yet if we accept the conventional wisdom that prosecutors have traditionally preferred to prosecute executives and not corporations, deferral of corporate offenders is replacing declination, not prosecution,

130. See *infra* Part II.B.3.

131. See *infra* Part II.B.4.

132. See, e.g., CA Agreement, *supra* note 111, para. 32; Merrill Lynch Agreement, *supra* note 97, para. 14; PNC Agreement, *supra* note 93, para. 18; BP Agreement, *supra* note 87, para. 18.

133. See, e.g., Burns, *supra* note 61 (reporting that "critics say that putting off a corporate prosecution can be appropriate, but they worry the guidelines are too loose, and judicial oversight too limited," and quoting Professor John C. Coffee, Jr.: "It's probably a sensible thing to do, but it is too unstructured.").

134. Recall the discussion at *supra* text accompanying notes 46–51.

135. The NYRA deferral, for instance, was criticized as a bow to an offender "whose trustees are wealthy horse enthusiasts and generous contributors to state and federal elected officials." Odato, *supra* note 108; see also Kessler, *supra* note 27 (noting that prosecutors were "stung by the perception that they may have given in to political pressures in the case").

thus diminishing concerns about bias in corporate deferral.¹³⁶ To the extent that any prosecutor is in fact choosing between deferral and prosecution, the Thompson Memo offers explicit criteria for the decision, and there is no evidence that these criteria are being ignored.¹³⁷

The second question is whether corporate deferrals reduce recidivism.¹³⁸ While the purging of culpable executives is typically a precondition for deferral, this question is inseparable from a broader inquiry into the efficacy of monetary sanctions and compliance measures in reforming corporate offenders because these have been the backbone of corporate deferral.¹³⁹ This inquiry, however, is not specific to the deferral context, and to the extent that it is, it should be preserved until a statistically significant number of corporate deferees have emerged from the shadow of criminal liability and the success of the attempts at reform can be measured.¹⁴⁰

In sharp contrast to concerns about bias and efficacy in deferral, concerns about "removal from the system prior to a determination of guilt or innocence" are very much applicable to the corporate deferral process,

136. This proposition is supported by the fact that the number of corporations prosecuted and convicted has remained minuscule, see *supra* note 1, relative to the upturn in corporate deferrals that this Note identifies. Further, it is consistent with the widely perceived reluctance of prosecutors to prosecute corporations. See, e.g., Jed S. Rakoff, *Four Postulates of White-Collar Practice*, N.Y.L.J., Nov. 12, 1993, at 3 ("[W]hite-collar criminal prosecutions are largely confined to personal defendants. . . . [A] company is still a federal prosecutor's defendant of last resort."). This historical shift, however, does not change the fact that a prosecutor offering the prospect of deferral does so with the lurking threat of prosecution.

137. The Thompson Memo's criteria, see *supra* text accompanying notes 79, 83, may be precisely the transparency that critics have called for in the individual deferral context.

138. This inquiry would hinge on the choice of baseline: Should the impact of deferral on recidivism be compared to the corresponding impact of declination or of prosecution? The declination baseline would likely be lower than that of prosecution because the latter should rationally be a stronger deterrent.

139. The literature is rife with debates over the deterrent effect of monetary penalties, see, e.g., V. S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 *Harv. L. Rev.* 1477 (1996), and over the value of corporate compliance programs. See, e.g., John C. Coffee, Jr., "Carrot and Stick" Sentencing: Structuring Incentives for Organizational Defendants, 3 *Fed. Sent'g Rep.* 126, 126 (1990) (describing "the degree to which compliance plans and internal monitoring reduce criminal activity" as "unknown variables"). These debates are beyond the scope of this Note.

140. Another inquiry that will be worthy of consideration is whether, in its circumvention of the collateral consequences of a conviction, see *infra* Part II.A.1, corporate deferral undermines the purpose of those consequences. Cf. *Shane Meat Co. v. U.S. Dep't of Def.*, 800 F.2d 334, 338 (3d Cir. 1986) ("A criminal sentence constitutes punishment for *past* wrongdoing. In contrast, a debarment is designed to insure the integrity of government contracts in the immediate present and into the future."). It has also been posited that contracting debarment is intended to "induce contractors to perform Government contracts in ways that will further fundamental social and economic goals, such as equal employment opportunity, the payment of prescribed minimum wages, and environmental protection." John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 455 (3d ed. 1998).

and are ripe for analysis.¹⁴¹ Corporate deferees must accept both courts' aversion to interfering with the decision to defer and clauses barring judicial modification of deferral terms or involvement in the determination of prosecutable breach. Therefore, not only is the imposition of sanctions by deferral beyond the court's reach, so too are curtailments of the attorney-client privilege, extrajudicial processes for adjudicating breach, and, at least in the case of the NYRA deferral, the use of the deferral mechanism to impose a substantial legal obligation unrelated to the underlying offense. This Part analyzes the structural dynamics of the corporate deferral process in which these provisions are imposed on corporate offenders. Part II.A discusses the corporate offender's incentives to procure deferral rather than endure a prosecution, resulting in a substantial bargaining advantage for the prosecutor. Part II.B explores the substance and import of the provisions exacted as a result of this bargaining imbalance, and Part II.C considers the practical impact of enforcing these provisions in the absence of judicial involvement.

A. *The Corporate Offender's Incentives to Deal*

One commentator has posited that prosecutors hold the "sword of Damocles" above corporations only after the deferral period has begun, because it is then that prosecutors can unilaterally declare breach and prosecute using the fruits of the offender's cooperation against it.¹⁴² At that point, prosecutors are virtually assured of a conviction.¹⁴³ Prosecutors have reinforced this conception to deflect criticism of deferral as too lenient.¹⁴⁴ Any argument that prosecutors enjoy too much power over deferees suggests the retort that the corporation agreed to the terms of the deferral and must live with them.

141. Vito & Wilson, *supra* note 12, at 24.

142. See Forelle, *supra* note 27 (quoting defense attorney). Greek mythology tells the story of hapless Damocles, who lived with a sword hanging above his head by a hair. Christine Ammer, *The American Heritage Dictionary of Idioms* 629 (1997). Other attorneys have echoed this sentiment. See, e.g., Burns, *supra* note 61 (quoting former federal prosecutor, "if [the corporations] so much as spit on the sidewalk, the sword comes down"); Sharon Walsh & Jay Mathews, *Prudential Accused of Fraud, but Gets Chance to Avoid Trial*, *Wash. Post*, Oct. 28, 1994, at A1 (quoting defense attorney as saying, "The government holds over Prudential's head a very large hammer. . . . It should put the fear of God into management over the next three years."). But see *id.* (quoting Professor John C. Coffee, Jr. as saying, "I suspect that, though [the government] is preserving the right to prosecute, this means no criminal prosecution of Prudential—ever.").

143. See Blum, *supra* note 2 (quoting prosecutor who oversaw Computer Associates deferral as saying that if Department of Justice decides to prosecute after deferral agreement has been breached, it "has a statement of facts sufficiently incriminating that a prosecutor could put it in as Exhibit A, and that would pretty much be the end of the case").

144. See, e.g., AOL Press Conference, *supra* note 122 (quoting Deputy Attorney General James Comey as saying, "If AOL fails to comply with the agreement, the deal is off and they are in a world of trouble because we can proceed to trial based on the stipulated statement of facts that was filed.").

This Note proposes to shift the focus earlier, to the negotiation phase directly preceding the signing of the deferral agreement. Once an investigation has begun but before charges are filed, corporate offenders—faced with the prospect of prosecution and conviction—are most vulnerable to coercion by prosecutors. The newfound availability of the deferral mechanism in the corporate context thus presents the offender with a stark choice. The offender can choose either to agree to the terms of deferral as defined by the prosecutor, or to reject the deferral and face the adverse publicity of a trial and the potential collateral consequences of a felony conviction. The corporate offender's unique vulnerability to adverse publicity and collateral consequences sets the stage for a deferral negotiation that "stack[s] the deck against defendants"¹⁴⁵ and calls into question whether the choice to enter into deferral is really a choice at all.

1. *Collateral Consequences.* — Collateral consequences facing corporations convicted of a felony are perhaps just as diverse, though more detrimental, than those that attach to individuals.¹⁴⁶ Corporations can be debarred from government contracting and have their professional licenses revoked. Debarment is initiated either by statute or by administrative process. Statutory debarment is inherently narrow in scope because it is limited to violation of particular laws.¹⁴⁷ In the administrative context, all convicted corporations—regardless of the law they violate—may be excluded from contracting.¹⁴⁸ While indictment alone can be sufficient for debarment, deferral would likely forestall such debarment in the absence of a conviction.¹⁴⁹ Due process guarantees prevent debarment from automatically following a conviction,¹⁵⁰ but "as a practical matter, indictment and conviction often result in suspension or debarment."¹⁵¹

145. Blum, *supra* note 2 (paraphrasing white collar defense attorney).

146. Recall the discussion of consequences at *supra* text accompanying notes 17–18.

147. See H. Lowell Brown, The Corporate Director's Compliance Oversight Responsibility in the Post *Caremark* Era, 26 Del. J. Corp. L. 1, 94–95 (2001) [hereinafter Brown, Compliance] (describing specific statutory disbarment provisions); Steven D. Gordon, Suspension and Debarment from Federal Programs, 23 Pub. Cont. L.J. 573, 574 (1994) (describing statutory debarment as a "hodgepodge of discrete" debarment programs). For a sample demonstrating the breadth and disparateness of these provisions, see Brown, Compliance, *supra*, at 94 n.438.

148. For purposes of debarment there is no distinction made between conviction by trial verdict or by guilty plea. See 48 C.F.R. § 9.403 (2004).

149. Though this question remains unanswered because of the relative novelty of corporate deferred prosecutions, the factors that prosecutors use to determine eligibility for corporate deferral correlate with those used as mitigating factors in the debarment process. Compare *supra* notes 79, 83 and accompanying text (listing eligibility factors for deferral) with Gordon, *supra* note 147, at 583–84 (listing mitigating factors against debarment). Furthermore, all corporate deferral agreements stipulate that prosecutors will bring the offender's cooperation to the attention of state and federal regulators. See, e.g., AOL Agreement, *supra* note 55, para. 22; AIG Agreement, *supra* note 117, para. 12; Prudential Agreement, *supra* note 66, at 4.

150. See Gordon, *supra* note 147, at 591–603.

151. Brown, Compliance, *supra* note 147, at 98 n.457.

License forfeiture can be an equally debilitating result of a felony conviction. Securities trading,¹⁵² investment advising and asset management,¹⁵³ accounting,¹⁵⁴ and commodities trading¹⁵⁵ are only some of the many industries in which a corporation can lose the right to operate if convicted of a felony. State regulations can also require license forfeiture.¹⁵⁶

For a corporation faced with the prospect of a trial, these collateral consequences are the difference between bankruptcy and survival. Deferral eliminates the most common pretext for the invocation of collateral consequences, and so the increasing availability of deferral in the corporate context naturally increases the incentive to do what it takes to have prosecution deferred. Prosecutors are thus in a position to unilaterally impose the terms of deferral.¹⁵⁷

2. *Adverse Publicity.* — The adverse publicity that accompanies a prosecution can devastate a corporation, particularly one that relies heavily on its reputation in the marketplace,¹⁵⁸ because of the effect on relationships with customers,¹⁵⁹ creditors, and the public at large.¹⁶⁰ Adverse publicity is so widely feared that it has even been proposed as a penalty in and of itself.¹⁶¹ While a deferral involves indictment, the indictment is accompanied by the government's assurance that the firm is cooperating, making amends, and will be free of criminal liability at the close of the deferral period. Indeed, nearly all of the corporate deferrals discussed in Part I were filed simultaneously with the corresponding indictments, as-

152. 15 U.S.C. § 78o(b)(4)(b) (2000).

153. 15 U.S.C. § 80a-9(a); 29 U.S.C. § 1111 (2000).

154. 17 C.F.R. § 201.102(e)(2) (2004).

155. 7 U.S.C. § 12a(2)(D) (2000).

156. See, e.g., White Collar Crime Comm., *Collateral Consequences of Convictions of Organizations*, 1991 A.B.A. Sec. Crim. Just. 34, 65 & n.141 (describing state "blue sky" statutes under which broker-dealer and investment adviser licenses may be revoked).

157. An argument that such unilateral imposition is justified by prosecutorial discretion must fail, because deferral is about more than prosecution versus declination; it carries with it the infliction of sanctions, outside the confines of the courtroom and the purview of a judge.

158. See Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 Wash. U. L.Q. 329, 352 (1993) ("In some instances adverse publicity alone can cause corporate devastation . . ."); Holder, *Don't Indict*, *supra* note 128 ("[F]or a firm that trades on its reputation . . . the effect of the indictment and conviction was close to a death sentence.").

159. See Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 Rutgers L. Rev. 605, 634 (1994) ("[T]he criminal prosecution and conviction of a corporation can have a profound effect on consumer preferences and purchasing decisions.").

160. See Stephen A. Saltzburg, *The Control of Criminal Conduct in Organizations*, 71 B.U. L. Rev. 421, 431 (1991) (noting that "a conviction seriously impairs an organization's ability to convince the public that it is a responsible community member").

161. See Andrew Cowan, Note, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. Cal. L. Rev. 2387 (1992) (reviewing current modes of punishing corporate offenders and arguing that formal publicity would be highly effective).

suring the public that short of a breach of the deferral agreements, the offenders would not face prosecution.¹⁶² This simultaneity typically re-dounds to a much reduced stigma¹⁶³ and avoids the paralysis that can grip an indicted corporation unsure of the impending resolution of its legal problems.¹⁶⁴ In contrast, corporations that are prosecuted and convicted are considered “put down.”¹⁶⁵

Concerns about adverse publicity are largely unique to corporate offenders. While individuals certainly bear the adverse publicity of a conviction, the difference in reputational impact between an indictment followed by a conviction and an indictment accompanied by deferral is never cited as a rationale for individual deferral, which was instead designed to avoid the self-labeling effect of contact with the criminal justice system.¹⁶⁶ Corporate deferral, in contrast, is intended to save the reputation of a corporation in the eyes of third parties.¹⁶⁷

3. “*If you want to kill us, go kill us.*” — The tale of Arthur Andersen and the deferral that eluded it demonstrates the pressure that collateral consequences and adverse publicity exert on a corporation to procure deferral at any price. On March 7, 2002, prosecutors secured a sealed indictment against the firm for obstructing justice in the Enron investigation.¹⁶⁸ Unaware that prosecutors had already gone to a grand jury,

162. The exception is the NYRA Agreement, which was filed a week after the indictment; however, the indictment and deferral were unveiled simultaneously to achieve the same effect. See *supra* note 104.

163. Cf. John C. Coffee, Jr., *Decoding the Andersen Incident: Myth and Reality*, N.Y.L.J., Apr. 5, 2002, at 1 [hereinafter *Coffee, Decoding*] (noting that “[i]n comparison to an indictment, a deferred prosecution is far less stigmatizing”); Alan Vinegrad, *Government Likely to Go After Corporations*, Nat’l L.J., Mar. 10, 2003, at A27 (“While obviously not as favorable as a grant of immunity or a declination, [deferral] does provide another means by which a corporation that has engaged in criminal wrongdoing can ultimately avoid the stigma and collateral consequences of a conviction.”).

164. See *Coffee, Decoding*, *supra* note 163 (“[T]he practical issue for Andersen was whether it could hold itself together and keep its clients from departing over the indeterminate period between indictment and the trial’s outcome. Over this period, Andersen was predictably going to be paralyzed.”). For a discussion of Arthur Andersen and the deferral that escaped it, see *infra* Part II.A.3.

165. Deputy Attorney General James Comey has thus described the result of convicting a corporation. James Comey, Deputy Att’y Gen., U.S. Dep’t of Justice, Statement at Press Conference on Computer Associates Indictments (Sept. 22, 2004) (on file with the *Columbia Law Review*) [hereinafter *CA Press Conference*].

166. See, e.g., Vito & Wilson, *supra* note 12, at 18 (“[O]fficial processing has negative consequences for juveniles. . . . The effect on self may be to alter the child’s self-concept to one of a bad or criminal person. The child . . . may act in ways that confirm his or her self-expectations.”).

167. Cf. Khanna, *supra* note 139, at 1500 (“For individuals, reputational loss connotes both the individual’s sense of shame and others’ increased reluctance to do business For corporations, however, reputational loss refers only to the reluctance of others . . . to deal with the corporation in the future.”).

168. See Indictment para. 13, *United States v. Arthur Andersen, LLP*, No. CR-H-02-121 (S.D. Tex. Mar. 7, 2002), available at <http://www.usdoj.gov/dag/cftf/chargingdocs/andersenllpindictment.pdf> (on file with the *Columbia Law Review*); Richard B. Schmitt, et

Andersen CEO Joseph Berardino told Justice Department officials, "If you want to kill us, go kill us. If you want to keep us alive, we can get through this, but we can't take an indictment."¹⁶⁹

Prosecutors unsealed the indictment on March 14, and the firm immediately began to come apart at the seams.¹⁷⁰ Deferral negotiations ensued; a deferral would have allowed the firm to admit wrongdoing without pleading guilty.¹⁷¹ Negotiations ultimately failed because Andersen rejected the idea of ongoing monitoring and feared that the proposed cooperation requirements would jeopardize the employment prospects of departing executives.¹⁷² In the firm's view, the proposed deferral gave "an awful lot of power and discretion to the Justice Department."¹⁷³ Andersen chose trial instead, and after being convicted by a jury in June 2002 began hemorrhaging clients and preparing for the onset of license revocation.¹⁷⁴ The firm closed its doors in the wake of the verdict and is today defunct.¹⁷⁵ Though the Supreme Court ultimately overturned the conviction in May 2005,¹⁷⁶ the damage was irreversible.¹⁷⁷ Twenty-eight thousand people lost their jobs.¹⁷⁸

If Andersen's is the paradigmatic case of the corporate offender who dares to reject federal prosecutors' terms for deferral, then it also sug-

al., *Behind Andersen's Tug of War with U.S. Prosecutors*, Wall St. J., Apr. 19, 2002, at C1 (reporting that indictment was initially sealed).

169. Schmitt, *supra* note 168. Though some believe that the government was keeping the indictment sealed in order to leverage a guilty plea from Andersen, see *id.*, defense counsel had made clear from the outset of negotiations that a guilty plea was tantamount to a "death sentence" for their client, and was thus off the table. Robert L. Bartley, *Andersen: A Pyrrhic Victory?*, Wall St. J., June 24, 2002, at A17.

170. See Schmitt, *supra* note 168 (reporting that following its indictment, "foreign affiliates began splitting off" from Andersen).

171. *Id.*; see also Criminal Resource Manual, *supra* note 3, § 715 (sample deferral agreement stipulating that offenders accept responsibility for wrongdoing).

172. Bartley, *supra* note 169 ("[T]he government insisted on a clause specifying that any firm hiring former Andersen partners would have to guarantee their cooperation in Enron or other investigations of Andersen. No hiring firm . . . would accept this liability."). Similar clauses were subsequently included in deferral agreements reached with other corporate offenders. See, e.g., AIG Agreement, *supra* note 117, exhibit A para. 5(d) (requiring offender to use "reasonable best efforts" to make former executives available to the ongoing investigation, including formal testimony).

173. Schmitt, *supra* note 168.

174. See Kurt Eichenwald, *Andersen Guilty in Effort to Block Inquiry on Enron*, N.Y. Times, June 16, 2002, § 1, at 1 (noting that Andersen informed SEC after the verdict that it would cease auditing public companies unless otherwise instructed and had already lost 690 of its 2,311 public clients).

175. See Bartley, *supra* note 169 (citing reports that the firm would close its doors pending appeal).

176. See *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2137 (2005).

177. Linda Greenhouse, *Justices Reject Auditor Verdict in Enron Scandal*, N.Y. Times, June 1, 2005, at A1 (reporting that despite its overturned conviction, Andersen "has no chance of returning as a viable enterprise").

178. Blum, *supra* note 2.

gests the potentially catastrophic result that may await at trial.¹⁷⁹ Just because Andersen took the risk of rejecting prosecutors' preconditions for deferral does not mean that other corporate offenders will have a meaningful choice in analogous circumstances, particularly given that Andersen's choice appears to have been the wrong one in retrospect.¹⁸⁰ Part II.B therefore explores the substance of the provisions that prosecutors have been exacting from corporate offenders seeking a deferral.

B. Between Carrot and Stick: Corporate Deferral at Any Price

Part I identified three areas in which prosecutors have been able to use the deferred prosecution mechanism to exact legal obligations from corporate offenders: the waiver of attorney-client privilege, the establishment of extrajudicial hearing processes to determine breach and, in some cases, to unilaterally assess fines, and the imposition of obligations entirely unrelated to the underlying offense. This Part evaluates these provisions in the course of a broader inquiry into whether the absence of substantive judicial involvement in the corporate deferral process leaves the corporate offender uniquely vulnerable to coercion.

1. *Monetary Sanctions.* — Monetary sanctions assessed against organizational defendants can come in the form of restitution penalties or criminal fines,¹⁸¹ and corporate deferral terms have not diverged from this pattern.¹⁸² Under the U.S. Sentencing Guidelines, restitution depends on the loss incurred by victims and fines are calculated using a base fine corresponding to the offense and a culpability multiplier.¹⁸³ Yet given that the guidelines do not bind prosecutors in setting the terms of a corporate deferral, prosecutors could potentially impose excessive monetary sanctions against corporate deferees.

One analysis of the Justice Department's initial forays into corporate deferral found that the sanctions matched those that the offenders would

179. See Leonard Orland, *Management Can Matter*, Nat'l L.J., Oct. 13, 2003, at 38 (contrasting the dispositions of Andersen and Merrill Lynch cases, and concluding that though "[t]he underlying misconduct of Merrill executives was at least as serious as that of Andersen executives," Merrill had learned the lesson of Andersen: "Corporations faced with serious wrongdoing by corporate executives" may avoid "the risk of indictment, conviction and even corporate death").

180. Cf. Coffee, *Decoding*, supra note 163 (advocating before trial that "both sides . . . move to the center" and "see the sense in an intermediate disposition").

181. See 2002 Annual Report, supra note 1, at 47 (noting that of 252 organizational defendants sentenced in federal courts in 2002, restitution was ordered in 112 cases and fines imposed in 166 cases).

182. See, e.g., AOL Agreement, supra note 55, paras. 9–10 (mandating \$150 million in restitution and \$60 million in fines); CA Agreement, supra note 111, para. 8 (mandating \$225 million in restitution).

183. See U.S. Sentencing Guidelines Manual § 8B1.1 (2004) (providing for orders of restitution pursuant to specific federal statutes); *id.* § 8C2 (providing for imposition of criminal fines on organizational defendants).

have received if convicted.¹⁸⁴ The spate of more recent corporate deferrals has not undergone such an analysis, but corporate deferees are either “buying” their way out of a conviction¹⁸⁵ or are willing to pay up to the cost of the dissolution that could result from the collateral consequences and adverse publicity of a conviction.¹⁸⁶ While the latter scenario seems more likely given the bargaining advantage of the prosecutor, there is not yet hard evidence to show that the potential for abuse in the imposition of monetary sanctions has become reality.

2. *Waivers of the Attorney-Client Privilege.* — Waiving the attorney-client privilege enhances the value of a corporate offender’s cooperation not only during the deferral period but also during the investigations that precede deferral and rely on disclosures from insiders such as corporate counsel.¹⁸⁷ Consequently, waiving the privilege can serve as a mitigating factor at sentencing or lead to the avoidance of prosecution altogether.¹⁸⁸ Some argue that these incentives force corporations to submit to invasion of their privilege, discouraging their counsel from advising them openly and thereby inhibiting the corporations’ cooperation. Corporations that waive the privilege are also put in the position of violating the trust of employees who—however misguidedly¹⁸⁹—thought their ad-

184. Warin & Schwartz, *supra* note 6, at 129 (arguing that in Salomon Brothers, Prudential, and Coopers & Lybrand deferrals, sanctions were “similar to those which would have resulted from a criminal conviction”).

185. Cf. Walsh & Mathews, *supra* note 142 (noting that when announcing Prudential deferral, “U.S. Attorney Mary Jo White rejected suggestions that the penalty was little more than an expensive traffic ticket”).

186. Cf. AOL Press Conference, *supra* note 122 (quoting Deputy Attorney General James Comey as saying, “So here we have gotten significant funds from [AOL] but have not imposed upon them, at least if they behave themselves for two years and follow the agreement, the penalty that comes with a felony conviction, that has significant collateral consequences.”). In economic terms, deferees would probably discount the value of a deferral by the probability of prevailing at trial while accounting for the adverse publicity of the trial itself.

187. See generally David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 *Am. Crim. L. Rev.* 147 (2000) (arguing that attorney-client privilege has increasingly yielded to aggressive corporate prosecutions). A corporation’s assertion of the privilege is not an entirely straightforward matter: Though the Supreme Court firmly recognized the corporate attorney-client privilege in *Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981), the “application of the . . . privilege often turns on which corporate officials and employees sufficiently personify the corporate entity as a client.” Thomas R. Mulroy & Eric J. Muñoz, *The Internal Corporate Investigation*, 1 *DePaul Bus. & Com. L.J.* 49, 51 (2002).

188. The Thompson Memo directs that a waiver is representative of the cooperation that is integral to the charging or deferral decision. See Thompson Memo, *supra* note 82, at Part VI(A). At sentencing, the U.S. Sentencing Guidelines provide for a reduction in the culpability score that factors into the fine equation if the defendant “fully cooperated in the investigation,” U.S. Sentencing Guidelines Manual § 8C2.5(g), and for a downward departure from the mandated sentencing range if the defendant has provided “substantial assistance” to prosecutors. *Id.* § 8C4.1.

189. Directors that waive a corporation’s privilege do so out of a fiduciary duty to act in the corporation’s best interests. However, that duty would weigh less heavily on

missions privileged, and of providing damaging information to civil litigants.¹⁹⁰ While Justice Department officials have pledged self-imposed limitations on waivers,¹⁹¹ battles continue to rage among scholars and practitioners about the prevalence and propriety of these waiver demands.¹⁹² There is no question, however, that these waivers have the collateral effect of exposing the corporation in civil litigation and leaving its employees liable to criminal or civil penalties.¹⁹³

By contrast, there is little dispute over the proposition that corporate deferral has become a mechanism commonly used to incentivize waiver of the privilege. A corporation faced with waiving privilege as a precondition for the deferral that is “an alternative to the death penalty” can hardly be said to have chosen waiver.¹⁹⁴ Thus the availability of deferral and the deferee’s vulnerability during the deferral period pose unique concerns about the Justice Department’s incursions into the attorney-client privilege.¹⁹⁵ The waiver was a component of many of the corporate

directors if the newly available prospect of deferral did not make waiver so overwhelmingly in the best interests of the corporation.

190. Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 Wake Forest L. Rev. 587, 595–96 (2004) (noting that “waiving privilege[] exposes the company to civil litigation, because third parties will now be able to obtain the information”).

191. For example, waivers might be limited to “factual internal investigation and any contemporaneous advice given to the corporation” and would not include, except in rare circumstances, “communications and work product related to advice concerning the government’s criminal investigation.” See Buchanan, *supra* note 190, at 596 (quoting Thompson Memo, *supra* note 82, at n.3). Indeed, many deferral agreements incorporate similar language into the privilege waiver. See, e.g., CA Agreement, *supra* note 111, para. 6(c) (barring assertion of “any claims of attorney-client privilege or attorney work-product doctrine as to any [materials] related to: (i) factual internal investigations concerning the conduct set forth in the Information and the Stipulation of Facts; or (ii) legal advice given contemporaneously with, and related to, such conduct”). Some question the degree to which these limitations actually buffer the invasion of the attorney-client relationship. See, e.g., Zornow & Krakaur, *supra* note 187, at 155–56 (concluding that, despite nominal limitations, federal prosecutors remain effectively “unfettered” in seeking waivers).

192. See Julie R. O’Sullivan, *Some Thoughts on Proposed Revisions to the Organizational Guidelines*, 1 Ohio St. J. Crim. L. 487, 495–99 (2004) (noting that prosecutors and defense lawyers “seem to be living in different worlds”); Zornow & Krakaur, *supra* note 187, at 147 (lamenting that “[t]he sound you hear coming from the corridors of the Department of Justice is a requiem marking the death of privilege in corporate criminal investigations”).

193. See Blum, *supra* note 2 (noting that waivers turn the corporation against its own employees while still leaving it “exposed to expensive civil litigation”).

194. Countryman, *supra* note 114 (quoting Villanova Law School Dean Mark Sargent on the Computer Associates deferral). This lack of choice violates the principle that “the decision to waive the privilege must be made by the corporation.” Buchanan, *supra* note 190, at 597.

195. In the deferral context specifically, one U.S. Attorney has argued that waivers of the privilege are “necessary to ensure that the full scope of the corporate wrongdoing is disclosed.” Miriam Miquelon, *Dispositions in Criminal Prosecutions of Business Organizations*, U.S. Att’y’s Bull., May 2003, at 35. However, this seems to circularly justify the waiver by resort to its result.

deferrals considered in Part I,¹⁹⁶ and in at least one case the form of its imposition was particularly troubling. In the AOL case, the agreement permitted assertion of the privilege in certain circumstances, but stipulated that prosecutors were free to prosecute any transaction over which the privilege was asserted.¹⁹⁷ Replication of this provision in future deferral agreements could render meaningless the Justice Department's promises to tread carefully on the attorney-client privilege because it prevents the corporate deferee from having a meaningful choice as to the confidentiality of its legal communications. Moreover, "prosecutors may be squelching the very type of internal communications companies need to make sure they're complying with the law."¹⁹⁸ Substantive judicial involvement in the corporate deferral process could help ensure a balance between reforming corporate offenders and invading the attorney-client privilege.

3. *Extrajudicial Hearing Processes.* — Corporate deferral agreements typically provide for a unique procedure if the offender is accused of breach. Ordinarily, the offender has two weeks after having been notified of a suspected breach to explain or refute the alleged conduct to Justice Department officials, whose decision is not, under any circumstances, subject to judicial review.¹⁹⁹ The Merrill Lynch and CIBC non-prosecution agreements left such discretion to the Justice Department without any hearing procedure at all.²⁰⁰ The Coopers & Lybrand agreement went even further, stating that the finding of breach in a hearing would—in place of triggering the trial process—automatically result in a \$100,000 fine.²⁰¹ Offenders seeking deferral at any price are thus forced in advance to submit to adjudicatory processes outside the reach of any judicial review, where prosecutors alone determine the deferee's compliance. These processes may result in penalties that harm not only the cor-

196. See AOL Agreement, *supra* note 55, para. 8 (waiving privilege); NYRA Agreement, *supra* note 106, para. 5(c) (same); PNC Agreement, *supra* note 93, para. 5(c) (same); Breeden Statement, *supra* note 63 (noting that Salomon Brothers' deferral was granted in part due to waiver of privilege).

197. See AOL Agreement, *supra* note 55, para. 8(b). The Justice Department pledged that "[a]ny such request for privileged material will not extend beyond any contemporaneous legal opinion or advice given to AOL personnel," *id.*, but it is hard to see how such a pledge—given the sole discretion of the prosecutor to enforce this provision and all other terms of the deferral agreement—provides a reliable shield for the privilege.

198. Fisher & Lattman, *supra* note 129, at 50. The increasing frequency and boldness with which prosecutors demand waivers of the privilege "set up a Hobson's choice for employees caught up in an internal investigation: Talk to in-house lawyers and risk that they will tell all to prosecutors (who will come after you later), or get fired for failing to cooperate." *Id.*

199. See AOL Agreement, *supra* note 55, para. 20; AIG Agreement, *supra* note 117, para. 10; CA Agreement, *supra* note 111, para. 28; NYRA Agreement, *supra* note 106, para. 17; PNC Agreement, *supra* note 93, para. 12; BP Agreement, *supra* note 87, para. 12.

200. See CIBC Agreement, *supra* note 100, para. 11; Merrill Lynch Agreement, *supra* note 97, para. 10.

201. See *supra* note 73 and accompanying text.

poration itself but also the collateral interests that deferred prosecution was designed to protect.

Introducing judicial involvement here has practical appeal. Beyond the judge's baseline familiarity with adjudicating disputes, these particular disputes are fundamentally contractual in nature. Deferral agreements are not archetypal contracts, but to the extent that they are an exchange of promises between the prosecutor and the offender, courts have treated them as enforceable contracts.²⁰² Circumvention of the traditional judicial role in determining breach is even more disconcerting where criminal rather than civil consequences can result, particularly when they can result automatically as in the *Coopers & Lybrand* deferral. Furthermore, where the deferral agreement's terms are legally problematic,²⁰³ judicial involvement may preserve the core of the contract.²⁰⁴

4. *The Imposition of Unrelated Obligations.* — The most disconcerting provision of the various agreements discussed in Part I is the imposition of unrelated obligations upon the New York Racing Association.²⁰⁵ In exchange for deferral of the indictment, NYRA was required to install slot machines at its facilities.²⁰⁶ The machines bore no relationship whatsoever to the underlying crimes, and prosecutors' insertion of the clause was clearly intended to placate state officials who were concerned that any form of criminal liability for NYRA could complicate efforts to fund

202. See *supra* note 44. Interpretation of contractual terms is often considered a question of law for a judge, see E. Allan Farnsworth, *Contracts* § 7.14 (3d ed. 1999), and this judicial power is not so boundless as to merit complete circumvention. Cf. Restatement (Second) of Contracts § 201 cmt. c (1981) ("The objective of interpretation . . . is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding: 'the courts do not make a contract for the parties.'").

203. Consider, for example, the possibility that the waivers of attorney-client privilege discussed *supra* Part II.B.2 may be legally problematic when they expose an individual executive in his own separate prosecution (which was not deferred). Notwithstanding that some privilege waivers expressly disavow an impact on third parties, see, e.g., *CA Agreement*, *supra* note 111, para. 6(c), some have posited that a waiver for the corporation can render meaningless an employee's Fifth Amendment right against self-incrimination. See *Zornow & Krakaur*, *supra* note 187, at 153, 157. If the executive were to collaterally challenge the validity of his employer's waiver, he would have a colorable claim that could in turn call into question the legitimacy of the entire deferral agreement, given that the waivers are so often integral to the deferral.

204. The relational contract theory embodies the idea that courts can use their equity powers to reform an existing contract in order to preserve its core. See generally Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 *New Eng. L. Rev.* 265 (1999); Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 *Nw. U. L. Rev.* 823 (2000). Indeed, if the characteristics of a relational contract are (1) extended duration, (2) open terms and reserved discretion, and (3) an interdependence between the parties that impacts third parties, *id.* at 823–24, then deferral agreements between prosecutors and corporate offenders may well be the prototypical relational contract.

205. See *supra* Part I.B.3.d.

206. See *supra* notes 109–110 and accompanying text.

court-ordered spending on the public schools.²⁰⁷ Similarly unrelated obligations were imposed on WorldCom in a deferral initiated with the state of Oklahoma in March 2004: In exchange for deferral of charges stemming from fraud on the state's pension fund, the firm pledged that it would create hundreds of jobs in the state.²⁰⁸ Prosecutors fined WorldCom when it failed to do so.²⁰⁹

The imposition of unrelated obligations can damage the interests of the shareholders, employees, and markets that lie behind the inanimate corporate form, the protection of which motivated the extension of deferral to the corporate offender. And even if these particular deferrals were the extreme case of abuse of the deferral mechanism, federal prosecutors are routinely subject to external pressures that can obstruct their ability to act impartially.²¹⁰ Of course, political pressures do not always affect prosecutorial decisionmaking, but deferral offers prosecutors a unique way to impose these obligations while bowing to them.

A backstop against the use of deferrals to leverage the threat of prosecution would ensure that "[c]riminal sanctions are not simply another enforcement tool in the regulator's arsenal to promote public policy objectives . . . [and would] be reserved for the more culpable subset of offenses and not used solely for their ability to deter."²¹¹ Judicial involvement offers such a backstop because the judge would enter only at the contractual interpretation phase of the deferral process and only to prevent prosecutors from abusing the deferral mechanism. In the NYRA case, for example, judicial involvement would prevent a deferee's failure to help the state meet revenue targets from triggering criminal liability.²¹²

207. See *supra* note 109.

208. Barbara Hoberock, MCI Coughs Up \$280,000 Payment to State, *Tulsa World*, Mar. 31, 2005, at A1. Though this was a state deferral, it involved a national corporation and suggests that NYRA is not the only corporate deferee to suffer the imposition of obligations unrelated to its wrongdoing.

209. *Id.*

210. See Dan M. Kahan, Is *Chevron* Relevant to Federal Criminal Law?, 110 *Harv. L. Rev.* 469, 497 (1996) (noting "the incentives that individual U.S. Attorneys have to bend the law to serve purely local interests"); Michael Edmund O'Neill, When Prosecutors Don't: Trends in Federal Prosecutorial Declinations, 79 *Notre Dame L. Rev.* 221, 230 (2003) (positing that while federal prosecutors are not subject to the pressures of elective office, they are nonetheless "subject to certain political pressures—most ostensibly coming from Washington or arising within their particular districts").

211. Richard J. Lazarus, Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime, 27 *Loy. L.A. L. Rev.* 867, 883 (1994). As Justice Anthony Kennedy has put it, "The criminal law defines a discrete category of conduct for which society has reserved its greatest opprobrium and strictest sanctions" *Foucha v. Louisiana*, 504 U.S. 71, 95–96 (1992) (Kennedy, J., dissenting).

212. Effectively, the judge would "sever" the deferral agreement's slot machine clause from its breach enforcement clause.

C. *A Place for Corporate Deferral?*

Permitting prosecutors to leverage the threat of conviction free from any oversight has troubling consequences, as the Coopers & Lybrand automatic fining provision, AOL attorney-client privilege waiver, and NYRA slot machine provision demonstrate. At first glance, due process concerns about a deferring prosecutor's power over an offender seem more applicable to a juvenile than to a multinational corporation. Upon closer inspection, however, the different practical implications of deferral for individual and corporate offenders reveal due process concerns unique to the corporate context. The adverse publicity and collateral consequences of a conviction are tantamount to a death penalty for corporations, but not for individuals. As a result, corporate offenders are under unique pressure to accept deferral at virtually any price.²¹³ Without judicial involvement in the deferral process, prosecutors wield unchecked power over vulnerable corporate offenders.

The coercive power of the deferring prosecutor over the corporate offender, however, does not necessarily suggest that deferred prosecution is inappropriate in corporate criminal adjudication. The mechanism has shown promise by providing a new tool to prosecutors who seek to reform corporate offenders, and by accounting for the reality that, particularly for a corporation's constituent interests, "criminal justice is not cost-free."²¹⁴ In this sense, the concerns about due process in the corporate deferral context are more practical than legal in nature.²¹⁵

Deferred prosecution was originally conceived as a mechanism for reducing the negative externalities of corporate criminal convictions.

213. Of course, given that the stakes are higher, so too are the corporate offender's resources to defend itself. For a compelling argument that concerns about excessive governmental power in white collar crime investigations are mitigated by the information and resource advantages that corporate defendants enjoy, see Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 *Ohio St. J. Crim. L.* 521, 526–29 (2004). This argument is beyond the scope of this Note, which argues that the abuse of the deferral mechanism by a prosecutor using the threat of prosecution and its resulting impact on the firm to unilaterally impose the terms of deferral undermines the mechanism's legitimacy.

214. Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 *Tex. L. Rev.* 1383, 1426 (2002) [hereinafter Brown, *Third-Party Interests*].

215. This not to say that there are not legally valid due process concerns about the corporate deferral process, but rather that such concerns are likely not as determinative as the practical ones expressed here. Though the Supreme Court has not disturbed its foundational holding that corporations are persons with respect to due process, *Smyth v. Ames*, 169 U.S. 466, 522 (1898), abrogated on other grounds by *Fed. Power Comm'n v. Natural Gas Pipeline Co. of Am.*, 315 U.S. 575 (1942), neither has it "agreed to a wholesale application of the bill of rights protections to corporate entities." Elizabeth Salisbury, Note, *The Case for Applying the Eighth Amendment to Corporations*, 49 *Vand. L. Rev.* 1313, 1317 (1996). Questions about constitutional protections for corporations in turn evoke broader questions about the theory of the corporation. See generally Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *Hastings L.J.* 577 (1990) (examining different theories of the corporation as part of broader inquiry into extension of bill of rights to corporations).

The conviction and downfall of Arthur Andersen prodded both prosecutors and corporate offenders toward the middle ground of deferred prosecution because of the employees and investors who were sacrificed.²¹⁶ Yet the substance of many of the corporate deferrals that followed, in particular the troublesome provisions noted in this Part, suggest that deferring prosecutors are simply trading old externalities for new ones. Employees, investors, and markets are being jeopardized by the deferred prosecutions instead of by the convictions that were understood to carry excessive negative externalities.²¹⁷ Judicial involvement in the corporate deferral process can curb the prosecutorial power that creates these new negative externalities, and it can reshape corporate deferred prosecution into a more effective and accountable mechanism for reforming delinquent corporations.

III. LOOKING AHEAD: PROPOSING A MODEL FOR JUDICIAL INVOLVEMENT

Deferred prosecution is unique in the way that it punishes offenders outside the purview of the court. When a prosecutor declines to prosecute, any commitment that an offender makes in exchange is unenforceable.²¹⁸ At the other extreme, plea bargaining often results in collateral consequences, such as contracting debarment and license forfeiture, and in any case such pleas trigger sanctions within the ranges mandated by the sentencing guidelines, with few exceptions.²¹⁹ In deferred prosecutions, the problem—initially evident in the context of individual offenders—is that the offenders “have not been found guilty and have none of the protections a court adjudication can provide.”²²⁰

Two important distinctions between corporate and individual offender deferral point to a heightened need for judicial involvement in corporate deferrals. First, whereas deferral is an alternative to prosecution and conviction in individual offender drug and juvenile crime cases, it has instead replaced declination in the corporate context.²²¹ If the collateral consequences of a conviction traditionally gave prosecutors

216. See Blum, *supra* note 2.

217. An argument for minimizing the negative externalities of corporate criminal liability should not be confused with an argument that some corporate offenders are “too big to fail.” One commentator has noted the slippery slope down which prosecutors might be led were they to accept such an argument in favor of dispositions other than prosecution. See Coffee, *Decoding*, *supra* note 163.

218. See *supra* text accompanying notes 33–35.

219. See *supra* text accompanying note 38. The most notable exception, so-called downward departures, is for providing substantial assistance in the investigation. For a discussion of the prevalence and significance of this practice, see generally Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor’s Expanding Power Over Substantial Assistance Departures*, 50 Rutgers L. Rev. 199 (1997). These departures occur at sentencing, however, and have no direct effect on the collateral consequences of the conviction which precedes it.

220. Vito & Wilson, *supra* note 12, at 24.

221. See *supra* note 136 and accompanying text.

pause before criminally punishing corporate offenders, then deferral overcomes that obstacle and makes the corporate offender vulnerable in a way that it once was not.²²²

The second difference between individual and corporate deferral that highlights the need for judicial involvement is an extension of the first. Individual deferral emerged from the idea that incarcerating a juvenile delinquent or a drug addict could increase the probability of recidivism.²²³ Whereas both individual deferral and corporate deferral are primarily rehabilitative mechanisms, corporate deferral has an infinitely larger punitive and investigative byproduct. Prosecutors reforming corporations through deferral also impose substantial fines and restitution penalties.²²⁴ Further, the ongoing monitoring that has become a staple of the corporate deferral agreement can serve both a backward-looking investigative function and a forward-looking compliance function. Therefore, the punitive and investigative nature of corporate deferrals is markedly different from the strictly rehabilitative purpose of individual deferrals.²²⁵

If deferred prosecution was traditionally rehabilitative, while its modern extension to corporate offenders carries substantial punitive and investigative byproducts, an important question remains unanswered: Should the deferral mechanism accommodate such an extension without a corresponding enhancement of judicial oversight? Part II demonstrated that it should not, given the uniquely vulnerable position of corporate offenders facing prosecution and the important corporate constituencies that deferral is supposed to protect. Part III.A therefore turns to an assessment of the potential for judicial supervision in the negotiation phase of deferrals, and Part III.B discusses judicial supervision in the im-

222. One could argue that through declination, corporations are merely escaping the punishment they deserve. This argument returns us to the central question of corporate criminal liability: Should corporations themselves be held criminally liable for the acts of agents? Today's prosecutors answer affirmatively in large part because deferral allows them to impose criminal liability without some of its attendant negative externalities.

223. See *supra* text accompanying note 12. Thus, rather than incarcerating these offenders, prosecutors place them in the hands of pretrial service agencies who, in conjunction with social service providers, certify that the offender has met the terms of deferral. See *supra* text accompanying notes 20–22. Restitution and fines are not inconsistent with individual offender deferral, but they are clearly not its primary aims.

224. Consider that the monetary sanction imposed on Computer Associates was the second highest financial fraud penalty in U.S. history. See Countryman, *supra* note 114.

225. See, e.g., AIG Agreement, *supra* note 117, at exhibit A para. 3, where supervision included both auditing completed transactions and monitoring future ones. The investigative nature of the corporate deferrals stems from the prosecutors' interest in pursuing the individual executives that remain subject to prosecution. See, e.g., CA Press Conference, *supra* note 165 (quoting Deputy Attorney General James Comey at announcement of Computer Associates deferral as stating that "[t]he agreement with the corporation . . . shows our commitment to reforming companies that have been hijacked by corrupt executives . . . [W]e are continuing to focus on the role of professionals in the frauds we investigate."). Consequently, many of the executives involved in the Computer Associates fraud have been convicted and others are under indictment. *Id.*

plementation of the terms of deferrals. Part III.C concludes by considering ways to supplement judicial involvement in this context.

A. The Potential for Judicial Involvement in a Corporate Deferral's Negotiation Phase

The circumstances and context of a corporate deferral leave the prosecutor with unchecked leverage to impose deferral preconditions and force the offender to forgo any judicial review. While judicial involvement in the negotiation phase would, at least superficially, counterbalance this power, legal and practical obstacles to such involvement abound, and ultimately militate against it.

First, to the extent that judicial involvement in setting the terms of deferral creates a judicial role in deciding whether or not to defer prosecution at all, it violates the tradition of the deferral decision as a uniquely prosecutorial one. Courts have consistently refused to override a prosecutor's choice of prosecution over deferral.²²⁶ Though some states have reversed this presumption, no such reversal exists in the federal code.²²⁷ Indeed, the deferral decision goes to the very core of prosecutorial discretion, as demonstrated by the similarity between the factors outlined in the Thompson Memo for corporate crime prosecutors and the factors generally considered to be a part of any prosecutor's charging decision.²²⁸

Second, practical considerations militate against judicial involvement at the negotiation stage. Until an indictment is filed, no federal judge would be in a position to intervene in deferral negotiations. Even after an indictment is filed, there is no legally defined threshold past which deferral negotiations may be initiated, so it is not clear at what point a judge would intervene.²²⁹ Finally, even after a deferral proposal is filed with the court for a judge's approval, no judge would have a substantive basis for altering its proposed terms given the lack of a formal adversarial dispute between the parties.

Third, one can conceive of how corporate offenders themselves would fear judicial involvement in setting the terms of deferral and thus might agree, free from coercion, to provisions barring judicial modifica-

226. See *supra* note 42.

227. See *supra* notes 42–43 and accompanying text.

228. Compare the Thompson Memo's factors for the prosecution of corporations, *supra* text accompanying notes 79, 83, with those used by prosecutors more generally. See A.B.A. Standards for Criminal Justice: Prosecution Function and Defense Function Standard 3-3.9 (3d ed. 1993), available at http://www.abanet.org/crimjust/standards/pfunc_blk.html (on file with the *Columbia Law Review*) (including as factors in charging decision "the extent of the harm caused by the offense," "the disproportion of the authorized punishment in relation to the particular offense or the offender," "cooperation of the accused in the apprehension or conviction of others," and "availability and likelihood of prosecution by another jurisdiction").

229. Note that deferral's circumvention of the Speedy Trial Act, see *supra* note 25 and accompanying text, eliminates an otherwise standard entry point for judicial intervention on an indictee's behalf.

tion of the proposed terms. Offenders on the verge of deferral may fear, for instance, that the judge before whom the agreement is filed would heed public calls for retribution and increase sanctions above the proposed level.²³⁰ In such a situation, judicial involvement at the tenuous deferral negotiation stage, before the offender has had the opportunity to formally showcase its cooperation to the public, may run contrary to the offender's interests.

Finally, the potential for abuse inherent in deferral provisions may never materialize, making judicial involvement unwarranted. For example, the Coopers & Lybrand Agreement's automatic fine provision would have become problematic only if prosecutors had indeed imposed the fine. Similarly, the New York Racing Association deferral agreement's reservation of the right to prosecute if NYRA did not demonstrate "commercially reasonable" efforts to install slot machines would become most problematic when enforced, though of course the provision's imposition in the first place remains troublesome. Finally, the AOL Agreement's vitiating of any attorney-client privilege not already waived, which was achieved by permitting the Justice Department to prosecute any transaction over which the privilege was asserted, would have become problematic only if AOL in fact saw fit to assert the privilege over a particular transaction. A wait-and-see form of judicial involvement in corporate deferral would shield the prosecutor-offender relationship unless and until the prosecutor abused the leverage of the deferral mechanism. This conception of a judicial role in corporate deferral is considered in Part III.B.²³¹

B. *Judicial Involvement in the Implementation of the Corporate Deferral*

The need for judicial involvement in corporate deferral and the pitfalls of inserting such involvement in the deferral negotiation stage point to the need for a wait-and-see form of judicial intervention. A defined role for the judiciary in interpreting and applying the terms of deferral agreements could help prevent prosecutorial overreaching. Specifically,

230. Recall the criticism that prosecutors received for deferring prosecution of the New York Racing Association, *supra* note 135. Others have criticized corporate deferral more broadly. See, e.g., Burns, *supra* note 61 (quoting a plaintiff's attorney as arguing that "government should be going after these people tooth and nail," and editor of *Corporate Crime Reporter* as saying, "we're pulling our punches on some of the most powerful institutions in the world").

231. The notion of judicial involvement in setting the terms of the agreement might not be abandoned altogether insofar as it could reduce problems in the implementation of the agreement. Judge Posner has written that

litigants may negotiate with more confidence if they know that a neutral third party, namely the judge presiding over their case, will look over the settlement agreement and note any ambiguities or other flaws in it that might frustrate or complicate its enforcement should the parties ever come to blows over its meaning.

Jessup v. Luther, 277 F.3d 926, 929 (7th Cir. 2002).

judicial involvement in determining whether the agreement was breached could curb prosecutors' abuse of deferral provisions without intruding on prosecutorial discretion.

1. *The Wait-and-See Approach to Judicial Intervention.* — A wait-and-see approach would permit a judge to vitiate provisions that attempt to contract around judicial review and encroach on prosecutorial discretion only where this discretion is in fact abused. Part II pointed to the unnecessary infringement on the attorney-client privilege, the use of extrajudicial hearings to determine breach, and the enforcement of unrelated obligations as examples of this abuse. Under the wait-and-see approach, the deferral decision itself is insulated, but the enforcement of legal obligations during the deferral period is monitored. Though a rational corporate offender might willingly bar judicial modification of agreed-upon terms, it is harder to envision what the same offender would have to lose from judicial oversight of the implementation of those terms. Even were the judge to rule against the corporate offender—determining, for instance, that AOL could in fact be prosecuted for a transaction purely because it had chosen to assert its attorney-client privilege over the transaction—the offender would likely be no worse off than in the present state of affairs, where there is no judicial involvement.

As a threshold matter, limiting judicial involvement to the definition of breach overcomes many of the legal and practical obstacles to judicial involvement in deferred prosecution. The filing of the deferral agreement identifies a particular judge and a cabined role for judicial involvement in a specific dispute over an alleged breach. Prosecutorial discretion in deciding to defer prosecution and in setting the terms of the deferral would be preserved. In effect, this form of involvement does no more than place an outer bound on the "sole discretion" that prosecutors usually reserve to themselves in corporate deferrals.²³² Furthermore, there is precedent for this form of judicial intervention between a prosecutor and an offender. In the plea bargaining context, after the Supreme Court recognized plea bargains as enforceable agreements,²³³ the Federal Rules of Criminal Procedure delineated a cabined role for the judge in determining what types of plea bargains are permissible and how they are to be executed.²³⁴

Judicial involvement could thus remedy each of the problematic deferral provisions highlighted in Part II. During the deferral period, corporate deferees would no longer need to rely on prosecutorial good will to keep a privilege waiver within self-imposed limitations. Neither

232. See, e.g., NYRA Agreement, *supra* note 106, para. 16; Merrill Lynch Agreement, *supra* note 97, para. 10.

233. See *Santobello v. New York*, 404 U.S. 257, 261–62 (1971).

234. See Shayna M. Sigman, Comment: An Analysis of Rule 11 Plea Bargain Options, 66 U. Chi. L. Rev. 1317, 1320–21 (1999) (discussing *Santobello* and Fed R. Crim. P. 11(e), and indicating that "courts have employed principles from contract law to regulate plea bargaining").

would corporate deferees—whose admissions leave them highly vulnerable—be forced to submit to the sole discretion of prosecutors sitting in extrajudicial hearings and standing between them and certain conviction. Finally, in scenarios resembling NYRA's, the proposed judicial actor would ensure that criminal prosecution, with its attendant collateral consequences, would not be thrust upon the offender merely because of its frustration of state public policy.

2. *The Judge as a Fiduciary.* — Under the wait-and-see model, the judge is not only a neutral adjudicator defending corporate offenders vulnerable to collateral consequences, but also a fiduciary for constituencies otherwise unrepresented in the corporate deferral process and potentially vulnerable to negative externalities. In this fiduciary capacity, the judge protects parties whose interests may be unnecessarily compromised by the prosecutor's unilateral imposition of the deferral terms. In particular, the judge would look out for the employees whose jobs or attorney-client confidences are jeopardized and for the investors who bear much of the brunt of penalties and obligations imposed on the corporation. Federal judges are familiar with the fiduciary role, as they often serve as fiduciaries for absent members of a class action.²³⁵

Judges involved in the implementation of corporate deferral agreements will ensure that the deferral mechanism is not abused. Were a publicly held corporation to be subjected to the extrajudicial criminal fining procedure foisted on Coopers & Lybrand, for instance, its shareholders would ultimately bear the brunt of the penalty.²³⁶ Similarly, with respect to attorney-client privilege, the judge would have the opportunity to review the waiver and determine on a case-by-case basis whether the corporation or its employees should be exposed to additional civil or criminal liability.²³⁷ The purpose of deferred prosecution is to reform

235. See, e.g., *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002) (“We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.”). Judges have taken a similar role on behalf of creditors in a bankruptcy. See *In re Boston & Providence R.R. Corp.*, 673 F.2d 11, 12 (1st Cir. 1982) (noting that because “[b]ankruptcy proceedings, by definition, coerce the bankrupt’s creditors into a compromise of their interests . . . the supervising court must play a quasi-inquisitorial role, ensuring that all aspects of the reorganization are ‘fair and equitable’” (citation omitted)).

236. See Khanna, *supra* note 139, at 1495 (arguing that sanctions reduce corporation’s net worth, which in turn reduces values of corporation’s shares). That shareholders may have benefited from the fraud, and should thus suffer for it, may be an inadequate response in the case of investors who purchased stock whose value was already inflated by an accounting fraud, see, e.g., *supra* text accompanying note 111 (discussing Computer Associates fraud), and in cases where the criminal activity was not intended nor would it likely have increased the value of shares. See, e.g., *supra* note 87 and accompanying text (discussing Banco Popular’s violation of Bank Secrecy Act).

237. The corporation’s waiver of privilege can have the collateral impact of exposing both the corporation in subsequent civil proceedings and employees’ communications with corporate defense counsel. See Zornow & Krakaur, *supra* note 187, at 153. Some courts have indicated that even “selective waivers”—agreements that the provision of

corporate wrongdoers while minimizing the negative externalities of corporate criminal liability. The deferral process itself should account for these externalities.

3. *Empowering the Judge in the Corporate Deferral Context.* — This Note rejects judicial involvement in the negotiation phase of a corporate deferral in part because of the hypothetical and abstract context in which it would place the judicial inquiry. Shifting the involvement forward to the point at which theoretically problematic deferral provisions become ripe for intervention mitigates this concern, but the judge may still face information deficiencies in the newly delineated role of implementing the terms of a corporate deferral, such as the extent of the deferee's cooperation or the progress of the deferee in establishing compliance mechanisms to prevent the recurrence of the wrongdoing. These information deficiencies can be remedied if the pretrial services agencies that currently work with the court to rehabilitate individual deferees develop competencies in dealing with corporate deferees.

Today's pretrial service agencies deal specifically with human offenders whose prosecution has been deferred or who have been released on bail.²³⁸ In the corporate offender context, properly equipped pretrial service agencies could formally document the collateral consequences which led to deferral,²³⁹ interact with the independent monitors frequently tasked with overseeing the deferee,²⁴⁰ coordinate the multitude of federal agencies that may still seek to sanction or regulate the of-

certain privileged information will not constitute a waiver all of all privileged materials—may not be upheld. *Id.* at 153 n.31. In the case of exposing individual executives, Deputy Attorney General James Comey has acknowledged that “[w]hile there is varying case law in this area, it is true that courts have held that waiver to the Government during a criminal investigation can result in a waiver with respect to civil litigants.” Interview with United States Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection, U.S. Att'ys' Bull., Nov. 2003, at 1, 4.

238. See Mahoney et al., *supra* note 20, at 6 (including in the type of information that pretrial service agencies gather: “family ties,” “employment,” “character and mental condition,” “length of time at current residence,” and “appearance record at court proceedings”). Consider that the answering machine of the Pretrial Services Agency in the Southern District of New York announces: “To report in, press 3. To have monitor hours adjusted, press 4. If your call pertains to drug testing, press 5.” Telephone Answering Machine Message, S. Dist. of N.Y. Pretrial Servs. Office (July 20, 2005).

239. A valuable derivative of collecting this information for the judge's potential involvement is that it will increase the transparency of the consideration of collateral consequences in the deferral decision more broadly. Cf. Brown, *Third-Party Interests*, *supra* note 214, at 1407 (“[W]e can get wrong the assessment of third-party consequences and the role they should play. . . . [This] points to the need, at minimum, for a more conscious and deliberate, if not more transparent, method for determining their role in criminal justice . . .”).

240. While judicial involvement may increase the cost of a mechanism that is based in part on efficiency, see *supra* text accompanying notes 16, 23, if matched with an increase in pretrial service agency resources the effect should be negligible.

fender,²⁴¹ and present a neutral account of the dispute over the deferral implementation that has triggered judicial involvement. The development of these capabilities, particularly in districts where corporate deferrals are frequently filed and funded by only a small proportion of the criminal fines that are exacted, will not only expand the currently narrow purview of modern pretrial service agencies to include the deferred prosecution of corporations, but also complement judicial involvement in that process.²⁴²

C. *An Accountable and Balanced Corporate Deferral Process*

Part II did not call for an end to corporate deferrals but instead identified potential minefields in the mechanism's extension from the individual offender context. Similarly, Part III has not proposed an incursion into prosecutorial discretion, but rather has defined a backstop against the abuse of prosecutorial discretion in the corporate offender context. This is an important distinction. The availability of deferral to corporate offenders gives prosecutors substantial leverage in deciding whether to prosecute, a decision which the proposed judicial involvement will not wrest from them. The pro forma role that judges currently play in the corporate deferral process—compounded by the use of deferral provisions that explicitly contract around substantive judicial involvement—can be augmented to check this leverage without significantly disturbing the mechanism.

The existence of this judicial backstop alone should curb egregious cases of prosecutorial overreaching. Prosecutors may argue that judicial involvement in implementation will reduce their willingness to defer, to the detriment of the offenders that judicial involvement seeks to protect. However, this argument ignores the historical proposition that deferral is replacing declination rather than prosecution. Further, it fails to weigh the prosecutor's own incentives to defer, even with judicial involvement in implementation. Working together with judicial monitors, prosecutors will be able to take credit for reforming some of the nation's leading corporations while truly minimizing the negative externalities of corporate criminal liability.²⁴³

241. Pretrial service agencies are already charged with an analogous role in the individual offender context. Cf. 18 U.S.C. § 3154(6) (2000) (indicating that each pretrial service agency will "serve as coordinator for other local agencies which serve or are eligible to serve as custodians . . . and advise the court as to the eligibility, availability, and capacity of such agencies").

242. Though it appears too soon to tell if corporate deferral will succeed in reducing recidivism amongst errant corporations, see *supra* text accompanying notes 138–140, pretrial service agencies could also play a role in answering this important question.

243. The U.S. Attorney for the Eastern District of New York's handling of both the NYRA case, see *supra* Part I.B.3.d, and the Computer Associates case, see *supra* Part I.B.3.e, is ample proof of the prosecutorial instinct to reform corporate wrongdoers while protecting their constituencies from the impact of criminal liability. See also Burns, *supra*

CONCLUSION

Deferred prosecution developed as an alternative disposition for juvenile and drug offenders that would rehabilitate them more effectively. Federal prosecutors have extended deferred prosecution to corporations amidst the recent wave of corporate crime to catalyze corporate reform while avoiding the externalities of a criminal conviction. However, this extension has glossed over the traditional concern that deferred prosecution removes the deferred offender from the criminal justice system. The corporate offender's unique vulnerability to prosecution and conviction amplifies due process and fairness concerns in the corporate deferral context. Judges have thus far held a pro forma position in the corporate deferral process, rendering them ineffective in dealing with this unique vulnerability. Prosecutors can therefore abuse corporate deferrals and jeopardize the interests of the very employees, investors, and markets the mechanism aims to protect. Instead of reducing the negative externalities they cause when they prosecute corporate offenders, prosecutors are trading those externalities for different ones.

This Note recognizes that the extension of deferred prosecution to corporate offenders is sensible, but argues that judicial involvement is necessary. Wait-and-see intervention should occur not during the negotiation phase of deferral, but rather during implementation of the deferral terms, where dissolution of the agreement can result in prosecution and the stakes are highest. Narrowly tailored but effective judicial involvement could curb prosecutorial overreaching, minimize the negative externalities of the corporate deferral process, and ensure that deferral achieves its purpose. One should not be sanguine about the inability of corporations to protect themselves from prosecutors with the power to defer their prosecution, because protecting the corporation is the fundamental purpose of the deferred prosecution mechanism.

note 61 (noting that avoiding "collateral damage became a priority after the collapse of Chicago's Andersen accounting firm in 2002").