

PROSECUTORIAL OVERREACHING IN DEFERRED PROSECUTION AGREEMENTS

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I. INTRODUCTION

When most people hear that Bernie Madoff, who recently plead guilty to eleven counts of fraud and money laundering in connection with the sixty-five billion dollar scheme he orchestrated over the last three decades, was sentenced to 150 years in prison, they unflinchingly say something like, “serves him right.”¹ In the year 2009, most Americans, embittered and vindictive after the inundation of corporate scandals that occurred at the turn of the century, want to take down individual white collar criminals, like Madoff, and take pleasure in the destruction of large offending corporations, like Enron. Whether or not a life sentence is appropriate retribution for a Ponzi scheme is debatable, but there is no denying the bellicose sentiment toward white collar crime that now pervades American culture. The Department of Justice (“DOJ”) and prosecutors’ offices across America have had to balance the public outcry for condemnation of corporate entities suspected of criminal activity with the deleterious ramifications of merely *charging* offending entities. Because indictment of a corporate entity carries devastating consequences for the entity and innocent parties, over the past decade prosecutors have increasingly relied on deferred prosecution agreements (“DPAs”) as a means of doling out some punishment without subjecting an entity to an indictment and the accompanying collateral consequences.

In theory, DPAs play a vital role in avoiding harm to innocent third parties that would result from indictment of a corporate entity while still accomplishing the criminal justice goals of retribution and deterrence. However, because of the draconian consequences of indictment, which often include the downfall of an entire business, corporate entities have little practical choice when faced with either indictment or accepting a

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¹ Patricia Hurtado & David Voreacos, *Madoff Jailing Prompts Cheers From Investors in Courtroom*, BLOOMBERG.COM, Mar. 14, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aj0BVlqHLtQw>; Thomas Zambito, *Madoff Heading to Federal Prison to Begin 150-Year Term*, DAILY NEWS, http://www.nydailynews.com/money/2009/07/13/2009-07-13_bernies_madoff_heading_to_federal_prison.html.

DPA. Hence, the government has enormous leverage in negotiating terms of DPAs, which has resulted in prosecutorial overreaching and deals which are unfair for corporate entities.

This Note argues that judicial oversight can cure many of the problematic terms in DPAs. It also posits that eliminating the concept of respondeat superior from the criminal justice realm is sensible and necessary if the foundations of criminal justice are not to be compromised. Part II sketches the recent history of DOJ guidance for prosecutors in making charging decisions and the development of DPAs. Parts III and IV address problems with DPAs, specifically observing terms that run afoul of contract law principles and discussing overarching corporate criminal liability issues. Part V proposes judicial intervention and oversight of DPAs as a means of mitigating the unfairness of unconscionable terms and agreements made under economic duress. Alternatively, Part V also advocates reforming corporate criminal liability to remove the doctrine of respondeat superior and demonstrates that eliminating vicarious liability for corporate entities would not jeopardize the underlying objectives of criminal justice. This Note concludes that judicial involvement may help curtail prosecutorial overreaching in DPAs, but that reforming corporate criminal liability would make DPAs unnecessary and best serve the interests of justice.

II. CHARGING DECISIONS

A. EFFECTS OF INDICTMENT

The consequences of indictment on a corporate entity can be dire. For practical purposes, the fate of a company suspected of wrongdoing hinges not on the outcome of a trial, but rather on a prosecutor's initial decision to bring criminal charges.² Indictment alone, prior to any litigation, usually results in the death of any business entity by means of reputational damage in the marketplace and damage to the financial interests of its shareholders and investors.³ As commentators have noted, even upon announcement of a criminal investigation, a company's market share can be reduced by half of its value.⁴ The mere possibility of criminal activity, such as an accounting fraud violation, undermines market confidence in a firm and the company's reputation is irreparably damaged regardless of any determination of guilt.⁵ Employees removed from any alleged wrongdoing can lose their jobs if the company cannot afford to keep them or simply goes out of business. Also, a market sector can suffer setbacks if one of its key participants disappears. Other collateral consequences may include: "the loss of licenses, the

² Christopher A. Wray & Robert K. Hur, *The Power of the Corporate Charging Decision Over Corporate Conduct*, 116 YALE L.J. POCKET PART 306, 306 (2007), <http://yalelawjournal.org/images/pdfs/529.pdf>.

³ *Id.*

⁴ Corporate Crime Reporter, *Interview with David Pitofsky*, 19 CORP. CRIME REP. 46 (8) (2005), available at <http://www.corporatecrimereporter.com/pitofskyinterview010806.htm>.

⁵ *Id.*

prospect of suspension, debarment or exclusion from federal programs, and analogous administrative effects on the company's core business."⁶ An indictment thus harms innocent third parties that are far removed from any misconduct.

Perhaps the most notorious example of indictment sounding the death knell for a firm was the collapse of Arthur Andersen after the DOJ indicted the firm on March 7, 2002.⁷ Though Andersen's conviction was ultimately reversed by the Supreme Court on May 31, 2005, the exculpation was a moot point because the firm had already lost its clients and had been forced to lay off the majority of its employees.⁸

As a result of the fact that indictment engenders collateral consequences serious enough to destroy a business, prosecutorial determination as to whether or not to *indict* becomes determinative of a corporate entity's future.⁹ In choosing whether to indict, defer, or decline prosecution prosecutors lend great weight to the harm indictment would cause to innocent third parties.

B. DOJ GUIDANCE

Over the past decade, the DOJ has issued several memoranda which set forth guidelines to aid prosecutors in determining whether to charge corporate entities and to provide some uniformity in corporate prosecutions. The various sets of guidelines have identified situations in which prosecutors may opt for deferred prosecution instead of indictment.¹⁰

The first attempt by the DOJ to implement a consistent policy on corporate prosecution was outlined in a memorandum issued on June 16, 1999, titled *Federal Prosecution of Corporations* (also known as the "Holder Memo").¹¹ It consisted of a nonbinding set of general principles and accompanying commentary designed to render corporate charging decisions more predictable.¹² The memo set forth nine factors to be considered in deciding whether to prosecute a corporation: (1) the "nature and seriousness of the offense"; (2) the "pervasiveness of wrongdoing within the corporation"; (3) the "corporation's history of similar conduct"; (4) the "corporation's timely and voluntary disclosure of wrongdoing"; (5) the corporation's "willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges"; (6) the "existence and adequacy of the corporation's compliance program"; (7) the "corporation's remedial

⁶ Wray & Hur, *supra* note 2, at 307.

⁷ *Id.*

⁸ *Id.*

⁹ Richard A. Epstein, Op-Ed., *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14.

¹⁰ Eugene Illovsky, *Corporate Deferred Prosecution Agreements: The Brewing Debate*, 21 CRIM. JUST. 36, 37 (2006).

¹¹ Wray & Hur, *supra* note 2, at 308.

¹² *Corporate Fraud Issues II*, 51 U. S. ATTY'S BULL. 6 (Nov. 2003) at 5, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5106.pdf.

actions”; (8) “collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable”; and (9) the “adequacy of non-criminal remedies.”¹³ Generally, the Holder Memo had little influence on prosecutors or defense attorneys until corporate America was besieged at the turn of the millennium by corporate scandals such as those involving Enron, Tyco, Adelphia, and WorldCom.¹⁴

Due to these large-scale scandals, on January 20, 2003, then Deputy Attorney General Larry Thompson issued a second memorandum titled *Principles of Federal Prosecution of Business Organizations* (the “Thompson Memo”) that expanded upon the Holder Memo with a few important additions.¹⁵ Perhaps the most significant was the addition of a tenth factor to be considered: evaluation of corporate cooperation and voluntary disclosure of information and wrongdoing.¹⁶ The Thompson Memo stated the new factor to be considered “is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction).”¹⁷ Additionally, the Thompson Memo, like the Holder Memo before it, advised prosecutors to consider waivers of attorney-client and work product protections.¹⁸ It continued to allow prosecutors to assess “a corporation’s willingness to waive its attorney-client and work product privileges in evaluating the corporation’s cooperation.”¹⁹ The Thompson Memo also had more force than its predecessor since, unlike the Holder Memo, it was binding on federal prosecutors.²⁰

The Thompson Memo met with criticism from corporate America, primarily due to its provisions in favor of seeking privilege waivers.²¹ In response, the DOJ issued yet another memorandum on December 12, 2006, entitled *Principles of Federal Prosecution of Business Organizations* (the “McNulty Memo”).²² The McNulty Memo contained much of the same substance as the Thompson Memo, but it restricted the ability of prosecutors to ask for waiver of attorney-client privilege and limited the practice of considering the advancement of attorney’s fees by an entity to

¹³ Memorandum from Eric H. Holder, Jr., Deputy Att’y Gen., to All Component Heads and United States Attorneys, *Bringing Criminal Charges Against Corporations* (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html> [hereinafter “Holder Memo”]. See also Barry A. Bohrer & Barbara L. Trencher, *Symposium: Corporate, Criminality: Legal, Ethical, and Managerial Implication: The Challenge of Cooperation: Prosecution Deferred: Exploring the Unintended Consequences and Future Corporate Cooperation*, 44 AM. CRIM. L. REV. 1481, 1484 (2007).

¹⁴ Bohrer & Trencher, *supra* note 13, at 1485.

¹⁵ *Id.*

¹⁶ U. S. ATTY’S BULL., *supra* note 12, at 5; *Federal Prosecutions of Business Organizations* (the Thompson Memo), Memorandum from Deputy Att’y Gen., Larry D. Thompson to the United States Att’ys’ Offices (January 20, 2003) (on file with the Department), www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm.

¹⁷ *Federal Prosecutions of Business Organizations*, *supra* note 16.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Bohrer & Trencher, *supra* note 13, at 1485.

²¹ *Id.* at 1486.

²² *Id.* at 1487.

individual employees in evaluating the entity's level of cooperation.²³ Nonetheless, the McNulty Memo emphasized that the key requirement in determining whether to prosecute an entity was the extent of cooperation with the government in the investigation of the entity's agents.²⁴

As a result of the *United States v. Stein* decision,²⁵ the DOJ again changed its policy regarding evaluation of corporate cooperation in the course of criminal investigations.²⁶ The revised policy, included in the United States Attorney's Manual and announced by current Deputy Attorney General Mark Filip, was issued on August 28, 2008, the same day that the 2nd Circuit upheld the dismissal of all charges against former partners and employees of KPMG in *Stein*.²⁷ The new guidelines prohibit prosecutors "from requesting disclosure of attorney-client privileged communications and work product, and considering whether a corporation is paying employees' legal fees when evaluating whether the company is cooperating in the investigation."²⁸ Previously, failure to waive the privilege and the payment of legal fees weighed negatively in assessing a corporation's cooperation with an investigation.²⁹ The guidelines also provide that prosecutors may not consider whether the corporation has entered into a joint defense agreement and whether a corporation disciplined or terminated employees in evaluating cooperation.³⁰

Additionally, the new guidelines can be read as adding an additional criterion (which supplements the unchanged nine factors of the 1999 Holder Memo, continued through the 2003 Thomson Memo) to assist in guiding prosecutors in considering whether to enter into a DPA. Previously, language in the DOJ Memos considered DPAs only perfunctorily, but under the new guidelines the language codified in USAM 9-28.1000 clearly explains that:

[w]here the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to

²³ *Id.*

²⁴ *Id.*

²⁵ See *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) (holding that the government had violated defendants' Sixth Amendment rights by pressuring KPMG to cut off payment of their legal fees.) The court found that KPMG's decision not to advance legal fees "followed as a direct consequence of the government's overwhelming influence, and that KPMG's conduct therefore amounted to state action." The Court held that "the government thus unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment, and that the government did not cure the violation." *Id.*

²⁶ John F. Savarese & David B. Anders, *Second Circuit Rules Against DOJ in KPMG Prosecution While DOJ Revises Policy on Corporate Prosecutions*, Wachtell, Lipton, Rosen & Katz Memorandum (Sep. 4, 2008), <http://blogs.law.harvard.edu/corpgov/files/2008/09/second-circuit-rules-against-doj-in-kpmg-prosecution-while-doj-revises-policy-on-corporate-prosecutions.pdf>.

²⁷ *Id.* See also; EXECUTIVE OFFICE FOR U.S. ATTYS, U.S. ATTYS' MANUAL, USAM 9-28.000. Principles of Prosecution of Business

Organizations, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28merm.htm; Mary Swanton, *Privilege Protection*, INSIDE COUNS. 12 (Oct. 2008).

²⁸ Swanton, *supra* note 27.

²⁹ Savarese & Anders, *supra* note 26.

³⁰ *Id.*

prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other.³¹

Hence, the updated policy affirms that collateral consequences of a conviction (or an indictment) are to play a determinative role in the consideration of whether to enter into a DPA.³²

Some commentators suggest that the revised guidelines are part of an effort by the DOJ to avoid passage of legislation that would limit the ability of prosecutors to force waiver of the attorney-client and work product privileges (The Attorney-Client Privilege Protection Act, re-introduced on June 26, 2008, would prohibit requesting waivers of privilege in all federal investigations).³³ Former Attorney General Dick Thornburgh remarked, “The new guidelines are a victory that is hollow unless or until legislation is enacted that guarantees there will be no more experimenting by the DOJ in this area.”³⁴ Nonetheless, the revised principles coupled with the *Stein* decision will certainly mitigate some of the aggressive DOJ “experimenting” with the terms of DPAs.

The revised principles still consider a corporation’s “timely and voluntary disclosure of wrongdoing” as a factor relevant in determining a corporation’s cooperation and the government’s decision to prosecute.³⁵ Additionally, nothing about the new principles suggests that corporations facing potential criminal investigations will cease needing to “seek cooperation credit by providing relevant business records, identifying relevant personnel and evidence, and conveying other pertinent information to government investigators.”³⁶ Thus, the DOJ retains the leverage it has always wielded to force one-sided terms upon corporate entities in DPAs. Also, the new principles have not changed the existing state of the law that allows a corporation to be criminally liable for acts of employees performed within the scope of their employment and with the intent to benefit the corporation.³⁷

³¹ U.S. ATTY’S MANUAL, *supra* note 27, USAM 9-28.1000 at 18.

³² See Lawrence D. Finder, Ryan D. McConnell et al., *Betting the Corporation: Compliance or Defiance?*, 27 CORP. COUNS. REV. NO. 1, May 2009. See also Letter from Michael J. Sullivan, United States Attorney, District of Massachusetts, regarding NeuroMetrix, Inc. to Joseph F. Savage, Jr., Attorney, Goodwin Procter, LLP, at p. 2 (Jan. 26, 2009), available at http://idea.sec.gov/Archives/edgar/data/1289850/000110465909007941/a09-5058_1ex10d1.htm [hereinafter *NeuroMetrix DPA*] (stating, “the USAO has determined that an indictment of NeuroMetrix may cause disproportionate harm to innocent individuals including current employees (who did not participate in the alleged wrong) . . . NeuroMetrix’s shareholders and customers who had no involvement in the criminal conduct under investigation”).

³³ Savarese & Anders, *supra* note 26; Sherry Karabin, *Thanks, But It’s Not Enough*, CORP. COUNS., Nov. 2008, at 24.

³⁴ Karabin, *supra* note 33; Savarese & Anders, *supra* note 26.

³⁵ Memorandum from Mark Filip, Deputy Att’y Gen., U.S. Dep’t of Justice to Heads of Department Components and United States Attorneys, *Principles of Federal Prosecution of Business Organizations* 4, 7, 14 (Aug. 28, 2008).

³⁶ Savarese & Anders, *supra* note 26.

³⁷ *Id.*

C. THE ORIGIN AND DEVELOPMENT OF DPAS

A DPA is a contract by which the government agrees to hold charges filed in abeyance pending the offender's admission of wrongdoing and commitment to rehabilitation by means of completion of specific requirements expressed as terms in the agreement.³⁸

Deferred prosecution became popular in the 1960s as an alternative to rehabilitate juvenile and drug offenders more effectively.³⁹ The objectives of a deferral were to avoid the stigma that attaches to a defendant during prosecution and to spare an offender from the serious collateral consequences of a possible conviction.⁴⁰

In the Speedy Trial Act of 1974, Congress officially recognized the practice of deferral by including assessment of deferrals among the tasks of pretrial service agencies.⁴¹ The mandate of these agencies was to evaluate individual defendants and assist in determining the progress and compliance with the terms of agreements of those individuals whose prosecution had been deferred.⁴² In 1997, the DOJ promulgated standards for deferral of prosecution, citing three principle objectives: (1) "preventing future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services"; (2) "saving prosecutive and judicial resources for concentration on major cases"; and (3) "providing, where appropriate, a vehicle for restitution to communities and victims of crime."⁴³ The effect of deferred prosecution, therefore, was to exact sanctions while simultaneously avoiding the severe collateral consequences of indictment and conviction.⁴⁴ Thus, the concept of deferred prosecution originated as a mechanism aimed at rehabilitating individual offenders and saving them from lasting adverse consequences of conviction. Only recently, beginning in the early 1990s, have DPAs been utilized to avoid indictment of business entities.⁴⁵

In theory, the DPA is an effective instrument to administer punishment to a guilty entity without destroying it or unjustly harming innocent employees through layoffs, investors through decreased share value, and a company's industry sector by forcing a key player out of business. In spite of the obvious benefits a corporate entity will receive by entering into a DPA and avoiding indictment, prosecutors are able to use their severely disproportionate leverage in the negotiation of DPAs to exact exceedingly burdensome obligations on business entities and force them to agree to

³⁸ See Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1867 (2005). See also Illovsky, *supra* note 10.

³⁹ Greenblum, *supra* note 38, at 1866.

⁴⁰ *Id.*

⁴¹ *Id.* See also Speedy Trial Act, Pub. L. No. 93-619, 3152-3154, 88 Stat. 2076, 2086-88 (1975) (codified as amended at 18 U.S.C. 3152-3154 (2000)).

⁴² Greenblum, *supra* note 38, at 1866.

⁴³ *Id.* at 1867. See also EXECUTIVE OFFICE FOR U.S. ATTYS, U.S. ATTY'S MANUAL 9-22.010 (1997).

⁴⁴ Greenblum, *supra* note 38, at 1867.

⁴⁵ Brandon Garrett, *Prosecution Agreements (Sorted by Date)*, http://www.law.virginia.edu/html/librarysite/garrett_date.htm.

onerous terms, as discussed in detail in Part III. The most common terms of DPAs are discussed below.

D. THE TERMS OF DPAS

The DOJ principles, which guide prosecutors' decisions of whether or not to criminally charge a corporate entity, translate into the terms of DPAs. Most DPAs contain fairly standardized terms. DPAs commonly contain: the corporate entity's admission of wrongdoing, waiver of statute of limitations, agreement by the entity that the DPA is admissible in court, agreement that the entity will not violate the same law in the future, agreement that the entity will cooperate with the government in building a case against individual offenders, and agreement that employees of the corporate entity will comply with the DPA.⁴⁶ Other provisions that may appear include: limits on public statements, restrictions on a company's ongoing business practices, enactment of significant internal reforms, payment of restitution by the entity, and the appointment of a government-selected monitor to oversee the company's compliance with the agreement's terms.⁴⁷ In consideration for the entity performing these tasks, the DOJ agrees to dismiss the charges in the case of a DPA and to forgo bringing charges in the case of a Non-Prosecution Agreement ("NPA"). However, if the entity fails to provide information, cooperate, or otherwise violates the agreement, it shall then be subject to prosecution for all criminal violations of which the United States Attorney's Office has knowledge.⁴⁸

E. CURRENT USAGE OF DPAS

Commentators have noted a sharp decline in the number of DPAs entered into between the DOJ and corporate entities in 2008.⁴⁹ There were only sixteen DPAs and NPAs in 2008, compared with forty in 2007.⁵⁰ Most caution against attributing the decline to the DOJ abandoning use of the DPA or changing its corporate-charging philosophy.⁵¹ In fact, in 2006 there were only nineteen DPAs and NPAs, which was followed by the aforementioned spike in the number of DPAs and NPAs in 2007.

⁴⁶ See Finder & McConnell, *supra* note 32, at 3.

⁴⁷ Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 160 (2008).

⁴⁸ Deferred Prosecution Agreement, *United States v. UBS AG*, No. 09-60033-CR-COHN 11 (S.D.Fla. Feb. 2009), <http://www.law.virginia.edu/pdf/faculty/garrett/ubs.pdf> [hereinafter *UBS DPA*]; Deferred Prosecution Agreement, *United States v. Lloyds TSB Bank PLC*, No. CR-09-007 6 (D.D.C. Jan. 2009), <http://www.law.virginia.edu/pdf/faculty/garrett/lloyds.pdf> [hereinafter *Lloyds DPA*]. See also *United States v. KPMG*, No. 05 Crim 903 (S.D.N.Y. Aug. 2005), <http://www.law.virginia.edu/pdf/faculty/garrett/kpmg.pdf> [hereinafter *KPMG DPA*].

⁴⁹ Finder & McConnell, *supra* note 32, at 9. See also Neil Gordon, *New Data on Deferred Prosecution and Non-Prosecution Agreements*, *Project on Government Oversight*, PROJECT ON GOVERNMENT OVERSIGHT, (Feb. 3, 2009), <http://pogoblog.typepad.com/pogo/2009/02/new-data-on-deferred-prosecution-and-nonprosecution-agreements.html>; Marcia Coyle, *Deferred and Nonprosecution Deals Fall by 60 Percent*, NAT'L L. J., Feb. 9, 2009, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202428013402>.

⁵⁰ Finder & McConnell, *supra* note 32, at 9.

⁵¹ *Id.*

Additionally, as a result of the new DOJ policies discussed above, there has been a decline in privilege waivers from fifty-seven percent of the agreements containing such terms from 2003-2006 down to seven percent in 2007 and thirteen percent in 2008. The number of agreements with provisions for compliance monitors, discussed below, also fell from sixty percent in 2003-2006 to around forty percent in 2007-2008.⁵² Indeed, despite the DOJ's attempts to curtail abusive practices, such terms remain in a significant number of DPAs.

III. PROBLEMATIC TERMS IN DEFERRED PROSECUTION AGREEMENTS

A. COOPERATION

Most DPAs provide that the corporate entity must “cooperate” in certain ways with the government investigation (this may include cooperation with a monitor, discussed below).⁵³ For example, a recent DPA, entered into between the United States Attorney's Office for the Southern District of Florida and UBS in February of 2009, provides: “UBS acknowledges and understands that . . . its pledge of continuing cooperation [is an] important and material factor . . . underlying the Government's decision to enter into this agreement . . . UBS agrees to cooperate fully with the Government regarding any matter related to the Government's criminal investigation or prosecution”⁵⁴

By the terms of the DPA with UBS, “cooperation” included, but was not limited to: disclosing all information to the United States Attorney's Office and the DOJ about which they inquire; assembling and providing information promptly; providing testimony or information necessary for documents to be admitted as evidence; and continuing to cooperate after the dismissal of the charges in any further investigation arising out of the same conduct.⁵⁵ Other DPAs consider additional or separate factors in assessing cooperation, including: making present and former directors, officers, employees, agents, affiliates and subsidiaries available to provide information and testimony related to the investigation; affirmatively disclosing all information respecting activities and concerning former employees; consenting to disclosures to government agencies and the prosecutor; identifying witnesses who may have material information; consenting to disclosure by the DOJ of information to other government agencies; and maintaining a lawful and capitalized entity.⁵⁶

⁵² *Id.* at 11.

⁵³ Finder & McConnell, *supra* note 32, at 4; Spivack & Raman, *supra* note 47, at 160.

⁵⁴ *UBS DPA*, *supra* note 48, at 7.

⁵⁵ *Id.* at 7-8. See also Deferred Prosecution Agreement, United States v. American Italian Pasta Co. 2 (Sep. 2008), <http://www.law.virginia.edu/pdf/faculty/garrett/americanitalianpasta.pdf> [hereinafter *American Italian Pasta Co. DPA*].

⁵⁶ Deferred Prosecution Agreement, United States v. Beazer Homes USA, No. 3:09cr113-W 5-6 (W.D.N.C. Jul. 2009), <http://www.law.virginia.edu/pdf/faculty/garrett/beazer.pdf> [hereinafter *Beazer DPA*]; *Neurometrix DPA*, *supra* note 32, at 3-4. See also Deferred Prosecution Agreement, United States v. Fiat S.p.A. 3 (Jul. 2009), <http://www.law.virginia.edu/pdf/faculty/garrett/fiat.pdf> [hereinafter *Fiat*].

B. UNILATERAL DETERMINATION OF BREACH WITHOUT JUDICIAL REVIEW

Furthermore, many DPAs contain provisions stating that the entity is subject to a prosecutorial, not judicial, determination of breach of the agreement. Thus, the prosecutor's office, who is a party to the agreement, has exclusive power to determine whether a breach of the agreement has occurred.⁵⁷ Additionally, most DPAs provide that not only will the government have sole discretion to determine a breach, but their decision will not be subject to judicial review. For example, the DPA with UBS reads:

UBS understands and agrees that the exercise of the Government's discretion under this Agreement is not reviewable by any court. Should the Government determine that UBS has committed a material violation of this Agreement, the Government shall provide prompt written notice to UBS . . . and provide UBS with a three week period . . . to make a presentation to the Government . . . to demonstrate that no material violation has occurred, or, to the extent applicable, that the material violation should not result in the exercise of those remedies or in an extension of the prosecution period. The parties to this Agreement expressly understand and agree that the exercise of discretion by the Government under this paragraph is not subject to further review in any court or other tribunal outside of the United States Department of Justice.⁵⁸

Hence, if the prosecutor's office determines a breach has occurred, the only remedy for a corporate entity is to make a presentation to that same office demonstrating that: (a) no breach has occurred, (b) the breach is not willful or material, or (c) the breach has been cured.⁵⁹ Most DPAs provide that if the entity does not make such a presentation usually within two or three weeks of the declaration of breach, then it shall be presumed that the entity is in breach of the DPA.⁶⁰ Moreover, many DPAs additionally provide that if the prosecutor's office determines that a breach has occurred, the admissions made by the company in connection with the DPA are admissible evidence in any ensuing prosecution.⁶¹

DPA]; Deferred Prosecution Agreement, *United States v. Lawson Products Inc.* 5-6 (N.E.III. Aug. 2008), <http://www.law.virginia.edu/pdf/faculty/garrett/lawson.pdf> [hereinafter *Lawson Products Inc. DPA*]; Deferred Prosecution Agreement, *United States v. ESI Entertainment Systems 4-5* (S.D.N.Y. Jun. 2008), <http://www.law.virginia.edu/pdf/faculty/garrett/esi.pdf> [hereinafter *ESI DPA*].

⁵⁷ See *Beazer DPA*, *supra* note 56, at 14; *UBS DPA*, *supra* note 48, at 11. See also *Lloyd's DPA*, *supra* note 47, at 8; *NeuroMetrix DPA*, *supra* note 32, at 5; *Fiat DPA*, *supra* note 54, at 5; *American Italian Pasta Company DPA*, *supra* note 55, at 4; *ESI DPA*, *supra* note 56, at 7.

⁵⁸ *UBS DPA*, *supra* note 48, at 14-15. See *Beazer DPA*, *supra* note 56, at 12. See also *Lloyd's DPA*, *supra* note 47, at 8; *NeuroMetrix DPA*, *supra* note 32, at 6.

⁵⁹ See *UBS DPA*, *supra* note 48, at 14; *Lloyds DPA*, *supra* note 48, at 7 (containing almost identical language); *NeuroMetrix DPA*, *supra* note 32, at 6; *American Italian Pasta Co. DPA*, *supra* note 55, at 3; *Lawson Products Inc. DPA*, *supra* note 56, at 8; *ESI DPA*, *supra* note 56, at 7.

⁶⁰ *UBS DPA*, *supra* note 48, at 14; *NeuroMetrix DPA*, *supra* note 32, at 6; *American Italian Pasta Co. DPA*, *supra* note 55, at 3-4; *Lawson Products Inc. DPA*, *supra* note 56, at 8.

⁶¹ *UBS DPA*, *supra* note 48, at 11; *Lloyds DPA*, *supra* note 48, at 8; *NeuroMetrix DPA*, *supra* note 32, at 6; *American Italian Pasta Co. DPA*, *supra* note 55, at 4; *Lawson Products Inc. DPA*, *supra* note 56, at 7; *ESI DPA*, *supra* note 56 at 6; *KPMG DPA*, *supra* note 48, at 15; Deferred Prosecution Agreement, *United States v. Republic Services 3* (S.D. Tex. Oct. 2008),

C. INDEPENDENT MONITOR

A common provision in DPAs is the requirement that the corporate entity accept the appointment of an independent monitor. An independent monitor is selected by the government to review the entity's compliance with the DPA, make recommendations necessary to comply with it, and implement other changes within the entity designed at mitigating the risk of recurrence depending on the nature of the alleged wrong.⁶² The DOJ issued a memorandum ("the Morford Memo") which guides prosecutors in the selection of a monitor and delegation of the monitor's duties.⁶³

The Morford Memo provides that a monitor may be appropriate in cases in which an entity's internal compliance program is insufficient.⁶⁴ It also states that a monitor shall be an independent third-party who is not "an employee or agent of the corporation or of the Government."⁶⁵ To ensure the selection of a qualified monitor, the Morford Memo mandates that the DOJ organize a selection committee that reviews candidates before their ultimate selection and "the office of the Deputy Attorney General must approve the monitor."⁶⁶ The DOJ typically chooses a monitor from a pool of former regulators and corporate prosecutors.⁶⁷ Additionally, the duration of monitorship depends on a few factors, according to the Morford Memo, including:

- (1) the nature and seriousness of the underlying misconduct; (2) the pervasiveness and duration of misconduct within the corporation, including the complicity or involvement of senior management; (3) the corporation's history of similar misconduct; (4) the nature of the corporate culture; (5) the scale and complexity of any remedial measures contemplated by the agreement, including the size of the entity or business unit at issue; and (6) the stage of design and implementation of remedial measures when the monitorship commences.⁶⁸

The DOJ's monitor guidelines establish general duties that may be drafted into DPAs and tailored to the alleged wrong committed by the entity. The monitor's primary duty is to assess an entity's compliance with the terms of the DPA and evaluate, propose, and implement internal controls and compliance programs.⁶⁹ This may include: having access to all non-privileged, and, in some cases, privileged documents; having authority to meet with any officer or agent; retaining consultants; sharing information

<http://www.law.virginia.edu/pdf/faculty/garrett/republicservices.pdf> [hereinafter *Republic Services DPA*].

⁶² Finder & McConnell, *supra* note 32, at 9, 13.

⁶³ Memorandum from Craig Morford, Acting Deputy Att'y Gen., U.S. Dept of Justice to Heat of Dep't Components and U.S. Attorneys (March 7, 2008), <http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf> [hereinafter Morford].

⁶⁴ Finder & McConnell, *supra* note 32, at 8.

⁶⁵ Morford, *supra*, note 63, at 4.

⁶⁶ *Id.* at 3; Finder & McConnell, *supra* note 32, at 7-8.

⁶⁷ Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 926 (2007) (noting that "those credentials nevertheless may not always prepare a monitor for the work of re-constituting a compliance program).

⁶⁸ Morford, *supra* note 63, at 7.

⁶⁹ *Id.* at 5.

with the DOJ and other agencies; and taking steps to maintain confidentiality of non-public information.⁷⁰ The monitor may also make periodic reports to the government and the entity, report previously undisclosed or new conduct to the government, have discretion to report evidence of other misconduct, and generally apply other necessary remedial measures to ensure compliance with a DPA and to reduce any risk of recidivism.⁷¹ Also, DPAs provide that compensation and expenses incurred by the monitor shall be paid by the corporate entity.⁷² Most importantly, noncooperation can result in the monitor recommending dismissal of employees or other disciplinary action.⁷³ Noncooperation with the monitor can also be interpreted as a breach of a DPA, which would result in prosecution of the corporate entity.⁷⁴ The terms of DPAs may also provide that the description of a monitor's authority be read to give the monitor broad authority to effectuate his or her oversight.⁷⁵

IV. LEGAL CONCERNS WITH TERMS IN DPAS

A. CONTRACT LAW ISSUES

Courts have recognized several defenses to contract formation that protect parties who enter into contracts with uneven bargaining power or who have unfair terms forced upon them in an agreement. Two of the defenses relevant to this discussion are: (1) economic duress, and (2) unconscionability.

1. *Economic Duress*

The doctrine of duress may be used to relieve a party of its obligations under an agreement that it entered into as a result of compulsion instead of genuine desire to enter into the contract. To establish duress, one must demonstrate that a threat has left the individual "bereft of the quality of mind essential to the making of a contract."⁷⁶ According to the Second Restatement of Contracts, "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."⁷⁷ To establish duress, courts have typically required (1) a threat, (2) that is improper, (3) that induces the party's manifestation of assent, and (4) that is considered sufficiently grave to justify the fact that the "assenting" party gave in to the threat and agreed to the coerced contract or term.⁷⁸ In its definition of "improper threat," the Restatement explicitly states that an

⁷⁰ Finder & McConnell, *supra* note 32, at 23.

⁷¹ Morford, *supra* note 63, at 6.

⁷² See generally KPMG DPA, *supra* note 48, at 24.

⁷³ *Id.*

⁷⁴ *Id.* at 14.

⁷⁵ *Id.* at 20.

⁷⁶ Alexander v. Standard Oil Co., 423 N.E.2d 578, 582 (Ill. App. Ct. 1981).

⁷⁷ RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (1981).

⁷⁸ Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 26 (2007).

improper threat may occur if “what is threatened is a criminal prosecution.”⁷⁹ The comment to Restatement §176 states, “[m]odern decisions have recognized as improper a much broader range of threats, notably those to cause economic harm. The rules stated in this Section recognize as improper both the older categories and their modern extensions under developing notions of ‘economic duress’ or ‘business compulsion.’”⁸⁰ Moreover, the illustrations to the Restatement explain that when a threat of prosecution is made, the fact that the party making the threat honestly believes the other party to be guilty is immaterial and does not defeat the characterization as an improper threat.⁸¹

The doctrine of economic duress contemplates that a contract may be unenforceable where one party has taken unjust advantage of the other party’s economic necessity.⁸² The doctrine provides that when one party with greater bargaining power “coerces the other party into agreeing to a contract out of severe economic necessity, the contract may be avoided if the economic realities were such that it would effectively destroy the weaker party’s business.”⁸³

2. *Unconscionability*

Because neither the Uniform Commercial Code (“UCC”) nor the Restatement offers a precise definition of unconscionability, courts have generally had to assess the circumstances and make determinations on a case-by-case basis. However, a widely accepted statement of the doctrine is that, “[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”⁸⁴ Most courts agree that in order to invalidate a contract, there must be both procedural and substantive unconscionability.⁸⁵ In order to satisfy the procedural unconscionability requirement, courts examine the unequal bargaining stances of the contracting parties, and while disparity in bargaining power alone is not sufficient, most courts adhere to the Restatement’s statement that “*gross* inequality of bargaining power, together with terms unreasonably favorable to the stronger party . . . may show that the weaker party had no meaningful choice” and thus warrant a finding of procedural unconscionability.⁸⁶ The Restatement’s comments also delineate certain other factors that may militate toward finding procedural unconscionability:

[B]elief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial

⁷⁹ RESTATEMENT (SECOND) OF CONTRACTS § 176(1)(b) (1981).

⁸⁰ RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. a (1981).

⁸¹ *Id.* at § 176 cmt. c.

⁸² *Capps v. Georgia-Pacific Corp.*, 453 P.2d 935, 938 (Or. 1969).

⁸³ *Zierdt & Podgor*, *supra* note 78, at 27.

⁸⁴ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

⁸⁵ *Zierdt & Podgor*, *supra* note 78, at 31.

⁸⁶ RESTATEMENT (SECOND) OF CONTRACTS § 208, com. d (1981) (emphasis added).

benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests.⁸⁷

In assessing substantive unconscionability, courts look to the entire fairness of the agreement at the time it was made, an inquiry that relates closely to the investigation into procedural unconscionability. The analysis requires “an examination of the actual terms of the contract and the relative fairness of the obligations assumed by each party.”⁸⁸ Terms inherently so one-sided as to result in an imbalance in the obligations imposed by the agreement militate toward finding substantive unconscionability. As stated in the UCC, “[t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the term or contract involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”⁸⁹

If a court finds a contract or some of its terms unconscionable, it can invalidate the entire contract, eliminate only the unconscionable term and enforce the remainder of the agreement,⁹⁰ or alter the contract in order to avoid the unconscionable term or terms.⁹⁰

B. CONTRACT LAW IN THE CRIMINAL CONTEXT

In our criminal justice system, deferred prosecution and other agreements (such as plea agreements) play a vital role in alleviating overcrowded dockets and achieving retributive and deterrent goals without the necessity of a trial in every single conflict. Without these agreements, the criminal justice system would be crippled by the proliferation of cases that would require judicial resources related to holding trials.⁹¹ In spite of the vital role these agreements play, courts typically scrutinize these agreements more carefully and are hesitant to apply contract law principles that would benefit the government in recognition of the government’s severe leverage in negotiating the agreement’s terms.⁹² Yet, there seems to be a mystifying lack of judicial oversight or scrutiny of DPAs, despite the fact that the government is a party to every agreement. As discussed, this results in the government imposing one-sided terms on corporate parties who have no choice but to accept them.

C. CONTRACT LAW APPLIED TO DPAS

1. *Privilege Waivers*

The attorney-client and work product privileges are important concepts in the United States Justice system, having both constitutional and ethical

⁸⁷ *Id.*

⁸⁸ *Batory v. Sears, Roebuck & Co.*, 456 F. Supp. 2d 1137, 1140 (D. Ariz. 2006).

⁸⁹ U.C.C. § 2-302 cmt. n.1 (2003).

⁹⁰ Zierdt & Podgor, *supra* note 78, at 33.

⁹¹ *Id.* at 34-35.

⁹² *Id.* at 37.

underpinnings. The privileges are intended to allow, “full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.”⁹³ The Model Rules of Professional Conduct for attorneys mandate that attorneys have an ethical duty of loyalty to their clients, which includes a duty of confidentiality.⁹⁴ Many commentators even suggest that the Sixth Amendment right to counsel encompasses a right to protected communication because “meaningful” representation could not be accomplished without the attorney-client privilege.⁹⁵ Though the most recent DOJ policies, announced by Deputy Attorney General Mark Filip on August 28, 2008, and discussed above, prohibit consideration of waiver of attorney-client privilege or work product protection in evaluating an entity’s cooperation with a government investigation, waiver was a key component in three DPAs in 2007 and two in 2008.⁹⁶ The fact that waiver has been an overwhelmingly important component of DPAs in the past points to the unequal bargaining stance between the government and a corporate entity and the reality that many of the terms of DPAs are inequitable. In spite of the new DOJ policies restricting evaluation of corporate cooperation to the disclosure of only non-privileged information, there still remain many problematic terms that are common in DPAs and which raise contract law concerns, and there are still a small percentage of DPAs that have waiver provisions.⁹⁷

2. *Cooperation*

Requiring cooperation of corporate entities has become an open-ended provision in which the government can exploit its immense leverage to require exhaustive disclosure of information and adoption of sweeping new policies. Prosecutors employ general terms that require broad corporate obedience in any and all matters related to the investigation. The government inserts language into the agreements requiring corporate entities “[to disclose] all information as may be requested” and “to cooperate fully with the Government regarding any matter related to the Government’s investigation.”⁹⁸ These nonspecific terms that call for comprehensive cooperation give government investigators broad authority to compel disclosure of information and force internal changes, while leaving companies virtually defenseless. Moreover, if an entity complies and discloses incriminating information and then is determined by the prosecutor to have breached the DPA, all of the information it voluntarily disclosed can be used to prosecute it. These terms clearly favor the

⁹³ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

⁹⁴ ABA Model Rule 1.6 (2008).

⁹⁵ Zierdt & Podgor, *supra* note 78, at 11.

⁹⁶ See Illovsky, *supra* note 10, at 37 (noting that the government often insists that waiver is critical to its efforts to get fully at what wrongdoing occurred); Finder & McConnell, *supra* note 32, at 11.

⁹⁷ Finder & McConnell, *supra* note 32, at 12, 15.

⁹⁸ *UBS DPA*, *supra* note 48, at § 10-12, p. 8. See also *American Italian Pasta Co. DPA*, *supra* note 55, at § 6, p. 2.

prosecutor and are only accepted by entities because they have no ammunition at the bargaining table.

3. *Unilateral Determination of Breach Without Judicial Review*

It should be clear that prosecutorial determination of breach followed by prosecutorial review of rightful determination of breach, without any judicial oversight, places the corporate entity's fate at the whim and caprice of the prosecutor who effectively becomes judge, jury, and executioner. Corporate entities that disagree with a determination of breach must plead their case before the same party that declared it. The unfairness and one-sidedness of such an arrangement appears blatantly unconscionable and can only be the result of economic duress. There is no other reason for a corporate entity to subject itself to the final determination of an authority that opposes its interests. Further, the lack of a meaningful forum to contest a determination of breach raises due process concerns (discussed in greater detail in Part V). Overall, an entity entering into a DPA has very little recourse to contest a governmental determination of breach⁹⁹ and has no right to appeal to an independent, impartial judicial authority.⁹⁹

4. *Independent Monitors*

Despite the provision in the Morford Memo that "the monitor's responsibilities should be no broader than necessary to address and reduce the risk of recurrence of the corporation's misconduct," the chief problem with the implementation of an independent monitor is the unchecked authority the monitor has to alter corporate infrastructure and accumulate expenses without accountability.¹⁰⁰ If the corporate entity disagrees with a recommendation of the monitor, its grievance is assessed by the prosecutor's office, which selected the monitor in the first place.¹⁰¹ Entities thus have very little practical recourse for contesting perceived abuses or forcibly adopted policies. Additionally, "if the corporation chooses not to adopt recommendations made by the monitor . . . the Government may consider this conduct when evaluating whether the corporation has fulfilled its obligations under the agreement."¹⁰² Hence, entities also feel immense pressure to comply with a monitor even if their suggestions are unreasonable in order to appear cooperative and thereby prevent a prosecutorial determination of breach.

Again, the lack of judicial oversight of the monitor's jurisdiction and authority may result in excessive and unfair burdening of corporate entities. For example, "some suggest that Bristol-Myers may have fired their CEO and general counsel to induce their monitor not to seek removal of the DPA," an indication of the extraordinary power monitors exert over entities

⁹⁹ See Zierdt & Podgor, *supra* note 78, at 16.

¹⁰⁰ Morford, *supra* note 63, at 5.

¹⁰¹ See, e.g., *KPMG DPA*, *supra* note 48, at § 15, p. 22.

¹⁰² Morford, *supra* note 63, at 6.

that can only hope to appease them with compliance.¹⁰³ Moreover, critics have also noted that the presence of a monitor is inimical to some of the key objectives of deferred prosecution, such as restoring shareholder confidence and promoting corporate activity with other market players.¹⁰⁴

Some commentators have contemplated imposing fiduciary duties on monitors to ensure that, to the extent they make decisions affecting an entity's potential profitability, they act in the entity's best interest financially.¹⁰⁵ In the way of reform, those same commentators propose delineating the role of a monitor with greater specificity and clarity in DPAs.¹⁰⁶ However, in order to achieve more narrowly defined terms that, in effect, *limit* the scope of the monitor's authority by defining his role in greater detail, entities would somehow need to achieve equal footing with the government at the bargaining table. As long as prosecutors can intimidate entities with the formidable threat of indictment, they can and will continue to broadly define a monitor's powers.

The guidelines of the Morford Memo allow the DOJ great flexibility in choosing a monitor, defining the scope of their authority, and choosing the duration of monitorship. Hence, though these guidelines purport to help the DOJ regulate itself in the assignment of monitors and delegation of their duties, they are insufficient to mitigate the likelihood of the government skewing the terms in its own favor.

5. *Unrelated Terms*

Egregious overreaching and abuse of prosecutorial leverage in negotiating terms of DPAs has also been illuminated by the insertion of terms into DPAs that force entities to engage in forms of purported restitution that are wholly unrelated to the entities' alleged criminal conduct or helping those harmed by the conduct. For example, in the 2005 DPA entered into between the New Jersey United States Attorney's Office and Bristol-Meyers Squibb, the company was required to endow a chair at the former law school of the United States Attorney.¹⁰⁷ In the DPA for the New York Racing Association ("NYRA"), the prosecutor forced terms upon the NYRA which required it to install slot machines at its location in order to raise money for public education.¹⁰⁸ The 2004 DPA entered into by WorldCom required it to generate hundreds of jobs in the state of Oklahoma.¹⁰⁹

New DOJ guidelines restrict inserting requirements into DPAs that oblige payment by the business entity of restitution to charitable organizations and the like. The guidelines, recently incorporated into the

¹⁰³ Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1721 (2007).

¹⁰⁴ Epstein, *supra* note 9, at A14.

¹⁰⁵ Khanna, *supra* note 103, at 1737.

¹⁰⁶ *Id.* at 1737.

¹⁰⁷ Spivack & Raman, *supra* note 47, at 174.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Federal Rules of Criminal Procedure, state that DPAs “should *not* include terms requiring the defendant to pay funds to a charitable, educational, community, or other organization or individual that is not a victim of the criminal activity.”¹¹⁰ The fact that the DOJ had to intervene to regulate prosecutorial overreaching in negotiating these unrelated terms further evidences the far superior bargaining position of the government and the resulting unfair obligations imposed on business entities in DPAs.

D. CONTRACT LAW CONCLUSIONS

The improper threat of government indictment alone is sufficient to conclude that DPAs are made under a condition of economic duress. Surely, without the improper threat of government prosecution (improper under the Restatement to Contracts), corporate entities would not agree to the one-sided terms discussed above. As detailed, the serious economic collateral consequences of an indictment are sufficiently grave to induce an entity to accept terms that are exceedingly adverse to its interests. Thus, it is clear that the government takes advantage of an entity’s economic necessity to stay in business. It is indeed a Hobson’s choice between indictment, which amounts to corporate death, and an inequitable agreement that at least allows the business to subsist. Thus, the circumstances surrounding the negotiation and entrance into DPAs clearly seem to satisfy all of the elements of economic duress.

The gross inequality in bargaining power combined with obviously one-sided terms also clearly evince unconscionability. This inequality in bargaining power, which is derived from the government’s ability to indict and destroy a firm, is the impetus behind economic duress and also militates toward finding procedural unconscionability. Additionally, the government clearly knows that corporate entities have no meaningful choice and are unable to reasonably protect their interests. This results in the unbalanced terms in DPAs. Terms such as forcing broad cooperation, allowing one party to the agreement to unilaterally declare a breach without judicial oversight, and providing for a nearly unregulated monitor to alter corporate policy are substantively unconscionable because they result in an imbalance in the obligations imposed in the agreement.

Commentators have noted that given corporate incentives to avoid the devastation wrought by indictment, DPAs have shifted from serving the public interest to becoming, “like the confessions of a Stalinist purge trial, as battered corporations recant their past sins and submit to punishments wildly in excess of any underlying offense.”¹¹¹ One prominent lawyer has stated that the process of negotiating a DPA is really not a negotiation at all because, “[a]ny push back by the company on a provision that the government requests is not only going to be shot down, but the government

¹¹⁰ USAM 9-16.325, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/16mcrm.htm; Corporate Crime Reporter, *Corporate Pre-Trial Agreements Down 60 Percent*, 22 CORP. CRIME REP. 5 (2009), available at <http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf> (emphasis added).

¹¹¹ Epstein, *supra* note 9, at A14.

may see it as a reflection that the company's claimed contrition is not genuine."¹¹² This fear of offending the government by seeming uncooperative renders entities passive and acquiescent, unwilling to controvert unfair terms or stand up for themselves "for fear it will cause the government to look at you differently and decide that a deferral isn't appropriate."¹¹³ Such observations only underscore the government's use of economic duress to insert egregiously one-sided and ultimately unconscionable terms into DPAs.

E. CRIMINAL LAW ISSUES

1. *Actus Reus and Mens Rea*

In our criminal justice system, any criminal act requires an actus reus and mens rea.¹¹⁴ The actus reus is the commission of a voluntary act or omission that violates the law and the mens rea is the subjective culpability of the actor.¹¹⁵ To show actus reus, courts require a voluntary act because the law cannot deter an involuntary act; therefore, commission of a voluntary wrong is necessary for just punishment.¹¹⁶ The mens rea requirement for a criminal act is necessary to punish only those who intended, to some degree, to engage in the actus reus.¹¹⁷ The Model Penal Code provides that, "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense."¹¹⁸ From a Kantian, deontological approach, if just deserts and the appropriate level of deterrence are to be achieved, then the punishment should be connected with the degree of blame, ranging from intentional to negligent harm.¹¹⁹

2. *Goals of Criminal Justice*

Generally, there are two chief justifications for punishment in the criminal justice system: Retributivism and Utilitarianism. While on the one hand "a Retributivist claims that punishment is justified because people deserve it; a utilitarian believes that justification lies in the useful purposes that punishment serves."¹²⁰ Retribution is "essentially backward looking" insofar as it seeks to justify punishment based on the offender's past behavior, including a determination of wicked intent and harm caused.¹²¹ The requisite element of retribution is thus a wicked intention on the part of

¹¹² Corporate Crime Reporter, *supra* note 4, at 13.

¹¹³ *Id.*

¹¹⁴ See MODEL PENAL CODE § 2.01 (Proposed Official Draft 1962); MODEL PENAL CODE § 2.02(1) (Proposed Official Draft 1962); Martin v. State, 31 Ala. App. 334 (1944); Regina v. Cunningham, 2 Q.B. 396 (1957).

¹¹⁵ *Id.*

¹¹⁶ See MODEL PENAL CODE § 2.01 (Proposed Official Draft 1962).

¹¹⁷ See Sanford H. Kadish et. al., CRIMINAL LAW AND ITS PROCESSES 213 (Wolters Kluwer 2007). See also MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

¹¹⁸ MODEL PENAL CODE § 2.02(1) (Proposed Official Draft 1962).

¹¹⁹ See H.L.A. Hart, Responsibility and Retribution, in Punishment and Responsibility 231-32 (1968).

¹²⁰ Kent Greenawalt, *Punishment*, 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1338 (1st ed. 1983).

¹²¹ Kadish, *supra* note 117, at 79. See also CALIFORNIA PENAL CODE § 1170.

the offender because this subjective culpability is necessary in order to be held blameworthy.

By contrast, utilitarian rationales are forward looking because they justify punishment based on the positive consequences it will produce in the future.¹²² Utilitarianism perceives the function of punishment as instrumental in the prevention of future crime through the creation of deterrence. Deterrence, rather than seeking to achieve just deserts for criminals, is concerned with maximizing the social welfare by preventing crimes from being committed in the first place.¹²³ Utilitarianism asserts that “in matters of importance every one calculates,” meaning that criminals weigh, consciously or subconsciously, the costs and benefits of their crimes, factoring in the cost of punishment.¹²⁴ Of course, criminal punishments must be of a magnitude “sufficient to deter a thinking individual from committing a crime.”¹²⁵ Also, quite obviously, criminals must be *aware* of potential punishments in order for those penalties to exact any deterrent force. The criminal justice system engenders deterrence in the general population by making examples of criminals through meting out severe, public punishments.

3. *Corporate Criminal Liability: A System of Strict Liability*

Near the turn of the Twentieth Century, the Supreme Court decided to extend the tort doctrine of respondeat superior into the criminal realm, making corporate entities liable for the acts of their agents within the scope of their employment.¹²⁶ The Court repudiated the notion that an entity cannot commit a crime in its corporate capacity even though its individual members may, explaining that to give a corporate entity immunity from all punishment would eliminate “the only means of effectually controlling . . . the abuses aimed at.”¹²⁷ Later decisions expanded the doctrine to impose corporate liability for acts of agents even when those acts are contrary to express company orders.¹²⁸ As it stands today, under the doctrine of respondeat superior, a corporate entity may be held criminally liable for the actions of any one of its agents who: (1) commits a crime, (2) within the scope of the agent’s employment, and (3) with intent to benefit the corporation.¹²⁹ The “scope of employment” requirement, as discussed above, does not call for the activity to have been ratified or approved by the entity, and courts may determine an act to be within the scope of employment even if expressly prohibited by the entity.¹³⁰ The requirement

¹²² Kadish, *supra* note 117, at 79. See also MODEL PENAL CODE § 1.02(2)(a) (Proposed Official Draft 1962).

¹²³ Jeremy Bentham, *Principles of Penal Law*, Pt. II, bk. 1, ch. 3 (J. Bowring ed. 1843).

¹²⁴ *Id.* at 41.

¹²⁵ Paul H. Robinson and John M. Darley, *The Role of Deterrence in the Formulation of Criminal Code Rules*, 91 GEO. L.J. 949, 951, 953 (2003).

¹²⁶ *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909).

¹²⁷ *Id.* at 496.

¹²⁸ See *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (1972).

¹²⁹ *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247 (1979).

¹³⁰ *Id.* at 1249-50.

merely requires the offending agent to have been engaged in a work-related activity.¹³¹ The “intent to benefit the corporation” element requires no evidence of actual benefit received, but rather is loosely construed to a finding of any ancillary benefit to the entity, even when the primary intent is the advancement of the offending agent’s own personal interests.¹³² With these two requirements thus weakened, “a court may hold a corporation criminally liable whenever one of its agents (even an independent contractor in some circumstances) commits a crime related in almost any way to the agent's employment.”¹³³

The mens rea requirement for criminal liability has been altered with respect to corporate defendants because corporate entities are legal fictions or abstract entities that cannot formulate their own intentions. As discussed above, when the Supreme Court expanded respondeat superior to encompass criminal wrongs, it reasoned that vicarious liability, which includes the element of intent, was the only way to adequately regulate business behavior.¹³⁴ Mens rea is thus imputed on corporate entities because “without vicarious criminal liability, the mens rea requirement will often present our hypothetical prosecutor with an insurmountable barrier to successful prosecutions.”¹³⁵ Moreover, the conception of vicarious intent was later expanded so that a corporate entity may be ascribed the aggregate knowledge of numerous employees, even though no single employee possesses the knowledge or intent to commit the crime; “the sum of the knowledge of all the employees” is sufficient for finding corporate intent.¹³⁶

Respondeat superior allows prosecutors to escape the pesky mens rea requirement, making it easier to indict and convict corporate entities. It also imposes on entities greater burdens and incentives to: (1) monitor the behavior of all of its employees since merely giving instructions not to engage in certain conduct is not exculpatory, and (2) review corporate activities macroscopically to avoid potential liability attributable to knowledge of multiple employees.¹³⁷ Ultimately, vicarious liability for corporate entities amounts to a form of strict liability because the offense requires no mens rea for conviction and does not permit the lack of mental culpability as a defense.¹³⁸

¹³¹ *Id.* at 1250.

¹³² See *United States v. Sun-Diamond Growers of California*, 138 F.3d 961 (D.C. Cir. 1997) (holding that an illegal contribution scheme using company funds which was hidden from members of the company, engaged in by one employee to benefit a third party due to personal friendship, was nonetheless a scheme designed to further the interests of the company because it provided some reputational benefit).

¹³³ Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L. Q. 329, 334 (1993) [hereinafter *Organizational Sentencing*].

¹³⁴ John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U.L. REV. 579, 597 (2005).

¹³⁵ *Id.* at 593.

¹³⁶ *United States v. Bank of New Eng.*, 821 F.2d 844, 854-855 (1st Cir. 1987).

¹³⁷ Hasnas, *supra* note 134, at 599.

¹³⁸ See generally Charles Babbitt et al., *Discretion and the Criminalization of Environmental Law*, 15 DUKE ENVTL. L. & POLY. F. 1 (2004).

The Model Penal Code (“MPC”) adopts a slightly different approach to the respondeat superior theory of liability. It provides that an entity incurs liability for infractions performed by a corporate agent acting within the scope of his employment and on behalf of the entity, much like the common law approach.¹³⁹ But, the MPC attempts to restrict the scope of respondeat superior by requiring that the commission of an offense be approved in some manner by a “high managerial agent” in order for the entity to be liable.¹⁴⁰ Under the MPC approach, the wrongful act must have been, “authorized, requested, commanded, performed or recklessly tolerated” by the board of directors or a corporate officer who, by virtue of their authority, may be regarded as representing corporate policy.¹⁴¹ The MPC provides that it is a defense to liability if the corporate entity can show by a preponderance of evidence that its high managerial agent used due diligence to prevent the commission of the crime.¹⁴² In this regard, the MPC attempts to scale back the sweeping strict liability of the common law respondeat superior doctrine under which any attempts to prevent criminal acts are immaterial and not exculpatory.

Opponents have criticized the MPC approach for being both overinclusive and underinclusive. It can be overinclusive by extending corporate liability to minor acts and underinclusive by requiring too great of a burden of proof that high managerial agents ratified individual employees’ misconduct.¹⁴³ One commentator has argued that the MPC standard discourages senior employees from properly supervising lower-level employees because such supervision could be construed as a form of authorization or reckless tolerance of the misconduct.¹⁴⁴ Others believe the MPC approach to be a sensible improvement, especially because the due diligence defense encourages effective self-regulation while simultaneously avoiding draconian results and collateral consequences for entities that make good faith efforts to prevent the misconduct.¹⁴⁵ Only a few states, however, have integrated the due diligence defense into their state statutes, including Illinois, Montana, New Jersey, Ohio, and Pennsylvania.¹⁴⁶

4. *Corporate Criminal Liability Problem: Lack of Criminal Intent*

The abrogation of the intent requirement for corporate defendants destabilizes the essential framework of criminal justice by punishing those who have no subjective culpability. “The critical weakness in both the

¹³⁹ MODEL PENAL CODE § 2.07(1)(a) (Proposed Official Draft 1962).

¹⁴⁰ MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962).

¹⁴¹ *Id.*; Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 596-98 (1988).

¹⁴² MODEL PENAL CODE § 2.07(3)(a) (Proposed Official Draft 1962).

¹⁴³ See generally Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Criminal Liability*, 19 U. PITT. L. REV. 21, 41 (1957); Brickey, *supra* note 141, at 626.

¹⁴⁴ See generally Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN L. REV. 1095, 1099-1101, 1145 (1991) [hereinafter *Corporate Ethos*].

¹⁴⁵ Andrew Weissman et. al., *Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM 7, October 2008, http://www.instituteforlegalreform.com/get_ilr_doc.php?id=1218.

¹⁴⁶ *Id.* at 18.

traditional respondeat superior and MPC standards is that by automatically imputing the agent's criminal liability to the corporation, they fail to consider the culpability of the corporation itself.¹⁴⁷ Refusing to recognize subjective culpability results in several detrimental effects that undermine the fundamental criminal justice goals of deterrence and retribution.

First, compliance with the law "will wane . . . if the law is viewed as unjust, unfair, or arbitrary."¹⁴⁸ This perception of the law can occur amidst a system of strict liability in which a corporate entity, who prohibits illegal conduct and has no knowledge of such conduct amongst its employees, will nonetheless be punished if an employee engages in such conduct. Clearly, a system which holds an entity liable for a wrong that it has strived to avoid can hardly be said to serve retributive justice, whose key component is wicked intent. Also, in such an environment, when corporate officers recognize the system as inequitable, the law will cease to deter their misconduct because they perceive it as capricious and arbitrary.¹⁴⁹ Moreover, prosecutors have broad discretion in choosing which entities to charge and which to subject to some sort of pre-indictment arrangement, such as a DPA. Decision-makers of corporate entities are subject to the whims of a prosecutor which, albeit are purportedly guided by DOJ standards, are variable depending on jurisdiction and personal proclivities.¹⁵⁰ Hence, the inconsistent enforcement of criminal corporate law wrought by wide prosecutorial discretion compounds the perceived arbitrariness of liability.

The mens rea requirement promotes predictability and consistency in the enforcement of the law. If prosecutors were forced to charge only organizations that exhibited criminal intent (discussed in Part V), the law would have more predictability and associated deterrent force. Additionally, being able to predict that prosecution hinges on criminal intent would allow corporate entities to better plan their actions and decisions based on their exposure to criminal liability.¹⁵¹ This is to say that corporate executives would be able to "assess more accurately the costs of engaging in unlawful behavior" and have incentive to engage in lawful behavior.¹⁵² Strict liability for corporate entities causes executives to view criminal law not as a just and deterrent force, but rather as one that punishes regardless of culpability, and thus they may choose to ignore it. Punishing misconduct without requiring subjective culpability undermines the goals of deterrence and retribution. As one scholar noted, strict liability is inefficacious because punishing conduct unaccompanied by awareness of the factors making it criminal does not mark the actor as one who needs to be punished, deterring him or others from behaving similarly in the future, nor does it

¹⁴⁷ *Organizational Sentencing*, *supra* note 133, at 336.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 336-37.

¹⁵⁰ *Id.* at 337.

¹⁵¹ *Id.* at 338.

¹⁵² *Id.*

single him out as a socially dangerous individual who needs to be incapacitated or reformed.¹⁵³

V. SOLUTIONS

A. JUDICIAL OVERSIGHT

As suggested throughout this Note, the application of judicial review to DPAs through existing or new legislation could mitigate or eliminate many of the problematic terms born by prosecutorial overreaching. Judicial oversight can tip the bargaining scale back toward the corporate entity's side by neutralizing the unbalanced negotiating leverage that clearly favors the prosecutor. However, the role of a judge in reviewing a DPA must be balanced with the deference to prosecutors in making the charging decision and drafting the agreement. The Constitution grants prosecutors, as delegates of the Executive branch, wide discretion to assist the President in his duty to "take Care that the Laws be faithfully executed."¹⁵⁴ Prosecutors thereby have exclusive power to choose to indict or enter into an arrangement like a DPA, and "courts presume that they have properly discharged their official duties" in making that decision.¹⁵⁵ Judicial review need not intervene so early in the charging process as to manipulate a charging decision or dictate the terms of a DPA.¹⁵⁶ Rather, courts may more appropriately intervene to approve or reject a completed agreement immediately after being drafted, or to invalidate DPAs later in the process under contract law, criminal law, or Constitutional principles.

1. *Speedy Trial Act as Warrant for Judicial Oversight*

DPAs are filed with the relevant court pursuant to the Speedy Trial Act.¹⁵⁷ It states that there are exceptions for specified delays in filing information, including delays "during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct."¹⁵⁸ Though the statute contemplates expediting charging and trials, the language "with the approval of the court" can be interpreted broadly as a mandate for judicial oversight to approve any deferral of prosecution. Read in this way, the Speedy Trial Act empowers courts to review DPAs and reject them if their terms appear to be unbalanced, particularly if they are perceived to be unconscionable or the result of economic duress. The textual mandate of the Speedy Trial Act would limit a court's supervisory authority to all-or-

¹⁵³ Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109 (1962).

¹⁵⁴ U.S. CONST., art. II, § 3.

¹⁵⁵ *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

¹⁵⁶ Greenblum, *supra* note 38, at 1898-1899.

¹⁵⁷ See 18 U.S.C. § 3161 (2007) [hereinafter "the Act"].

¹⁵⁸ *Id.* at § 3161 (h)(2).

nothing approval—it would not grant the power to modify certain terms.¹⁵⁹ Nonetheless, the Speedy Trial Act’s grant of judicial oversight could improve the terms of DPAs by discouraging prosecutors from exploiting their severe leverage for fear of having their agreements rejected by a court.

In turn, judicial scrutiny of agreements could thereby narrow the broad cooperation requirements, reduce the unwieldy power of independent monitors, and prevent the government’s ability to unilaterally declare breach of a DPA. Additionally, the language of the Speedy Trial Act could be interpreted to give courts power to assess whether the corporate offender has substantially performed its obligations under the agreement.

2. *New Legislation*

Application of judicial oversight could be accomplished by finding textual mandate in the Speedy Trial Act. But, such a solution would require affirmative action by judges to step in and review DPAs, which is unlikely. A more viable solution would be the passage of new legislation that explicitly requires judicial approval of DPAs. An advantage of passing new legislation purposefully directed at judicial oversight over straining to find textual warrants in existing laws is that a new act could clearly delineate the scope of a judge’s authority to approve DPAs and even to strike out problematic terms that are found to be unconscionable or are a result of economic duress. Hence, judges would not have to be limited to approving or denying an entire agreement, but could re-work the terms with the parties to achieve a balanced agreement.

Moreover, new laws addressing DPAs could provide for a judicially organized monitoring program, effectuated by pretrial service agencies, as discussed further below. The legislation could also provide for pre-indictment relief in the form of corporate entities’ defenses to breach. Recognizing such defenses makes sense given that the chief purpose for entering into a DPA is to avoid indictment. Or, the legislation could restrict or forbid unilateral prosecutorial determination of breach, just as the proposed legislation aims to prohibit requesting privilege waivers or considering advancement of attorney’s fees in assessing cooperation.¹⁶⁰ Overall, passage of new legislation is probably the most effective way to eliminate the detrimental effects of DPAs agreed to under conditions of economic duress and mitigate the severely disproportionate benefits of unconscionable terms.

3. *Monitors*

It makes little sense to contend that a judge would be more qualified than an independent monitor to evaluate a corporate entity’s compliance with a DPA and oversee reform efforts; however judicial, rather than independent scrutiny of an entity’s progress, would eliminate monetary and other incentives monitors have to extend their own stay or recommend

¹⁵⁹ Garrett, *supra* note 67, at 922.

¹⁶⁰ See Savarese & Anders, *supra* note 26; Karabin, *supra* note 33, at 24.

indictment. Judicial monitoring would also allow for less stringent enforcement of unnecessary recommendations. Although the Morford Memo attempts to ensure the selection of a qualified monitor, the legitimacy and impartiality of the monitor's recommendations is abated by the fact that the DOJ selects the monitor and the prosecutor approves the monitor's selection. The monitor is an independent third party but is hired by, and reports directly to the government, similar to the relationship between an employer and an independent contractor. The superior objectivity and impediments to abuse which would be engendered by judicial supervision are those which are inherent in the separation of powers.

More importantly, courts may have the power to modify the terms of supervision in order to adjust them to the level of cooperation and progress being made. If a business quickly adopts effective remedial and compliance measures, then a judge can scale back the internal controls forced upon the entity by the agreement. Because a monitor's duties encompass evaluating compliance with the DPA and recommending internal controls to facilitate compliance, the process of corporate cooperation with both the DPA and with the monitor is dynamic and not static. Courts have authority to model supervision according to changing circumstances whereas independent monitors are more likely to adhere strictly to predetermined parameters of cooperation delineated in DPAs.

As discussed above, pretrial service agencies can assist judges in evaluating the compliance of corporate entities with the terms of DPAs, as was their mandate in the Speedy Trial Act. The imposition of judicial supervision implemented by pretrial service agencies, instead of independent monitors, would result in increased impartiality and legitimacy. First, it would eliminate the perceived unfairness of having to address disagreements with the monitor's recommendations solely with the prosecutor's office. Challenges to the agencies' recommendations, by contrast, could be brought directly before the judge presiding over them. Additionally, pretrial service agencies are not compensated by the corporate entity and do not report to a prosecutor and thus have no incentive to extend their own stay, accumulate expenses, or impose unnecessary obligations on the entity to appease a prosecutor. Thirdly, the broad terms that open the door to these abuses would be stricken from DPAs, which could simply provide for judicial oversight through pretrial service agencies. The scope of these judicial monitors' authority would be limited by their traditional roles under the Speedy Trial Act or could be further controlled by the courts.¹⁶¹ The terms would allow for greater flexibility in the requirements imposed upon the entities and increased objectivity on behalf of the monitoring agencies.

¹⁶¹ See 18 U.S.C.S. § 3154 (stating pretrial services functions include supervising persons released into its custody as well as collecting, verifying, and preparing reports for the United States attorney's office of information pertaining to the pretrial diversion of any individual who is or may be charged with an offense).

The result would be that terms reviewed by a judicial monitor would have far less risk of being unconscionable. Additionally, the disproportionate bargaining stance of the parties would not result in the government coercing the entity into accepting unfair terms, thus mitigating the chances of economic duress.

4. *Unilateral Determination of Breach*

In addition to judicial intervention into monitoring, principles of due process and contract law should enable courts to invalidate unilateral prosecutorial assertions of a breach of a DPA or at least reduce the grave consequences thereof. As discussed, nearly all DPAs contain provisions that the prosecutor's office or the DOJ can, in its sole discretion, determine that the agreement has been breached, and this determination is not reviewable by any court.¹⁶² Additionally, most DPAs also provide that any information volunteered by the corporate entity can later be used against it if the DOJ decides to indict, making conviction of the entity highly likely.¹⁶³

Judicial application of due process should result in the invalidation of the terms calling for unilateral prosecutorial determination of breach by requiring a court to approve any finding of breach. The Fifth and Fourteenth Amendments require that the federal and state governments, respectively, shall not deprive any person "of life, liberty, or property without due process of the law."¹⁶⁴ Due process includes the opportunity for a meaningful hearing¹⁶⁵ in front of an impartial decision maker.¹⁶⁶ Indeed, many federal courts have held that due process prevents prosecutors from solely declaring a breach without judicial involvement: one court noted, "[i]n the context of non-prosecution agreements the government is prevented by due process considerations from unilaterally determining that a defendant is in breach and nullifying the agreement."¹⁶⁷

Due process should demand that courts review the prosecutorial assertion of breach before prosecutors can proceed with an indictment. Courts should thus invalidate language in DPAs that "the government's discretion is unreviewable by any court" on the ground that it is unconstitutional and allow for a corporate entity to raise the defense before a judge that no material violation has occurred. Instead of presenting its case to the prosecutor, procedural due process affords the entity the right to challenge the determination of breach before a court. Hence, the safeguards of due process, specifically requiring judicial review of prosecutorial determination of breach, vitiate a prosecutor's unilateral power to terminate an agreement and begin an indictment.

¹⁶² See notes 57-59.

¹⁶³ See Garrett, *supra* note 67, at 927.

¹⁶⁴ U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

¹⁶⁵ See *e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

¹⁶⁶ See *e.g.*, Gibson v. Berryhill, 411 U.S. 564 (1973) (it is a violation of due process for a decision maker to be able to gain personally from their decision).

¹⁶⁷ See Garrett, *supra* note 67, at 928; United States v. Meyer, 157 F.3d 1067, 1076 (7th Cir. 1998); accord United States v. Miller, 406 F.3d 323, 334 (5th Cir. 2005).

Additionally, principles of contract law prevent the government from declaring a breach and rescinding a contract if the corporate defendant has substantially performed.¹⁶⁸ Currently, there are no clearly defined standards or identifiable thresholds for a prosecutor to determine corporate breach of an agreement, leaving the prosecutor free to declare breach at almost any time during the course of performance by the corporate entity. If entities are able to raise the defense of substantial performance before a court then they can reduce the arbitrariness and injustice resulting from the prosecutor's declaration of breach far into the process of performance.

Substantial performance is a defense if a failure occurs late, after substantial preparation or performance, because such substantial performance renders any breach not material.¹⁶⁹ The defense of substantial performance has been recognized by courts with respect to plea agreements, in which the defendant agrees to plead guilty or *nolo contendere* to some crimes and usually cooperate in an investigation, in return for reduction of the severity of the charges or dismissal of some of the charges.¹⁷⁰ In this context, courts have held that the government cannot declare breach and rescind an agreement if the corporate offender has substantially performed its obligations under the agreement.¹⁷¹

Currently, all but one Circuit (the Seventh) do not allow for pre-indictment relief from the prosecutor unilaterally finding breach of an agreement.¹⁷² This means that even if a corporate entity desires to raise the defense of substantial performance, it can only do so after indictment, which is the grave consequence it aimed to avoid from the outset. Thus, courts should recognize the defense before the possibility of indictment, immediately after a prosecutor's office has found a breach. Judicial oversight in the form of acknowledging pre-indictment defenses such as substantial performance will mitigate the consequences of unconscionable terms that allow a prosecutor to determine breach at any time during the course of corporate performance.

B. ABOLISH RESPONDEAT SUPERIOR

Judicial oversight may alleviate some of the unconscionable or otherwise harsh terms of DPAs that result from the weaker bargaining stance of a corporate entity; however, a far more comprehensive solution would be to change the way that our justice system holds corporate entities criminally liable. The goal of respondeat superior is to incentivize corporate entities to maintain the maximum level of supervision and control over their employees to curtail wrongful employee conduct. But, it

¹⁶⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 45 (1981); RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981); Garrett, *supra* note 67, at 928. See also Ricketts v. Adamson, 483 U.S. 1, 9 (1987); United States v. Crawford, 20 F.3d 933, 935 (8th Cir. 1994).

¹⁶⁹ RESTATEMENT (SECOND) OF CONTRACTS § 241, illus. 2(d) (1981).

¹⁷⁰ See The Free Legal Dictionary by Farlex, <http://legal-dictionary.thefreedictionary.com/Plea+agreement> (last visited Sept. 7, 2009).

¹⁷¹ Garrett, *supra* note 67, at 930.

¹⁷² *Id.*

erodes the basis of criminal liability by ignoring the key element of intent. Holding corporate entities liable for wrongs of individuals places them in the position of having to enter into DPAs which, as stated, can be unfair but are the only way to save themselves from indictment. A better solution would be to eliminate respondeat superior.

Congress should repeal the doctrine of respondeat superior for corporate criminal liability and institute a regime that considers intent as a necessary element. The government could either prosecute only individual employees for their wrongful conduct performed in the course of employment or prosecute corporate entities only when they *encouraged* the criminal conduct or bred it as a product of a pervasive insidious corporate policy. Under such systems, the government would not need to threaten indictment and enter into DPAs to punish entities and force them to reform. Currently, prosecutors enter into DPAs to mitigate collateral consequences of indictment and to avoid unfairly destroying an entity for the wrongs of one or a few of its employees. But, the stability wrought through prosecuting only employees or entities with criminal intent or both would obviate the concern of unjustly destroying a corporate entity through indictment.

First, if the DOJ opted only to prosecute individuals and forgo indicting corporate entities altogether, the interests of justice and the criminal system would still be served. As many scholars have noted, vicarious criminal liability for corporate entities gives the government “unwarranted and arbitrary power over corporations,” which, as discussed, reduces deterrent effects and penalizes innocent parties.¹⁷³ Prosecuting the human criminals within corporate entities would better serve retributive and utilitarian goals. First, it would punish exactly those individuals who committed crimes without harming third parties who are removed from the misconduct. Commentators have recognized the massive collateral consequences of indictment, rhetorically asking, “[w]hat is gained by the government, the market, or anyone else, by holding responsible, in addition to the people who are responsible, people who just aren’t?”¹⁷⁴ It would also create deterrence for individual decision makers and actors within entities to no lesser extent than did vicarious liability. There is no practical difference between sending a deterrent message to a corporation and impressing one upon the *individuals* within the corporation who make key decisions.¹⁷⁵ As one lawyer sardonically noted, “CFOs, CEOs and general counsels are [not] sitting in their offices . . . saying – I guess I’ll take the risk of committing the crime, because even though I may be disgraced and separated from my family for 15 to 25 years, the company will get off with a deferred prosecution.”¹⁷⁶ The point is that indicting individuals will have a similar deterrent force for corporate officers, who guide company policy, as would indicting the entity itself.

¹⁷³ Epstein, *supra* note 9.

¹⁷⁴ Corporate Crime Reporter, *supra* note 4.

¹⁷⁵ *Id.* at 14.

¹⁷⁶ *Id.* at 8.

Secondly, in the extreme case in which a corporate entity is corrupt to the core and can be found to have encouraged wrongdoing, no one can have qualms about indicting and convicting it. Difficulty may arise in attempting to assign a singular intent to an entity comprised of multiple actors and decision-makers, each with subjective intentions. However, an entity's singular intent can be ascertained from corporate culture and policies. If the criminal conduct is not the product of an accident or the isolated actions of a rogue employee, but rather has been promoted, encouraged or deliberately overlooked by the entity as part of a sustained practice, then the entity can be said to have *intended* to commit the wrongful act insofar as it is consistent with its goals.¹⁷⁷ Determining corporate intent and the charging decision of a prosecutor would then be predictable. The strict liability imposed by respondeat superior does not deter organizations misconduct because they will be held liable for an employee even if they attempted to prevent his crime. By contrast, if entities have to engage in an action of encouragement or an omission of supervision in order to be held criminally liable then they will be deterred because they can take steps to prevent liability. As discussed, predictability in punishment creates deterrence and proportionate retribution because the application of law can be viewed as stable, foreseeable and fair.

An added benefit of punishing only corrupt corporate entities is that this method rewards those that make efforts to curb employee wrongdoing, thus giving an incentive to entities to adopt effective internal controls. In this vein, adopting a form of liability that includes a version of the MPC's due diligence defense may also be wise. One way to determine that wrongful conduct was not part of a pervasive criminal culture is to recognize a defense that a high managerial agent attempted to prevent the commission of the crime.

VI. CONCLUSION

Deferred prosecution originated as a means to both punish and rehabilitate offenders without subjecting them to the severe collateral consequences of indictment or conviction. When extended into the corporate realm, however, the positive effects of deferral have come to be nearly overshadowed by detrimental terms in DPAs spawned by prosecutorial abuse of leverage. The severe consequences of indictment for corporate entities render them powerless to vigorously negotiate for evenhanded terms. Prosecutors have in turn capitalized on the severe necessity of entities to avoid indictment by forcing terms into DPAs that are unconscionable and made under economic duress.

¹⁷⁷ See *Corporate Ethos*, *supra* note 144, at 1099-1101, 1145. (contending that each corporate entity has an identifiable ethos, and the "government can convict a corporation under this standard only if it proves that the corporate ethos encouraged agents of the corporation to commit the criminal act); Bucy suggests the consideration of several factors in assessing corporate intent of criminal conduct: "(1) the corporate hierarchy; (2) the corporation's goals and policies; (3) the corporation's historical treatment of prior offenses; (4) the corporation's efforts to educate and monitor employees' compliance with the law; and (5) the corporation's compensation scheme, especially its policy on indemnification of corporate employees." *Organizational Sentencing*, *supra* note 133, at 346.

Additionally, the increasing prevalence of DPAs over the last few years should merit revisiting the jurisprudence of corporate criminal liability. Corporate entities are currently held strictly liable for criminal acts of employees performed to benefit the entities and within the scope of employment, regardless of any supervision or efforts to run a law-abiding business. As many commentators have noted, strict liability in the corporate context undermines the goals of retribution and deterrence upon which criminal law is founded.

This Note, while acknowledging the importance of deferred prosecution in the corporate context, maintains that it must be administered with at least some oversight from a judicial authority or else it can harm the very interests that it was designed to safeguard. Judicial intervention in place of independent monitors, judicial approval of determinations of breach and recognition of pre-indictment contract law defenses will restrain prosecutors from transforming their immense leverage into unfair terms and provide a practical recourse for corporate entities.

Nonetheless, though judicial oversight can curb prosecutorial abuse, a wholesale reform of corporate criminal liability would make DPAs unnecessary and obsolete. Because prosecutors aim to avoid collateral consequences that harm innocent investors, shareholders and employees, they enter into DPAs as a way of punishing the corporate entity without destroying it. But, a more precise method of penalizing those responsible while avoiding collateral harm is not to simply scale back punishment on the corporate entity by means of a deferral, but rather to punish to the fullest extent *only* those who are responsible—the individuals who committed the crime. Adopting a regime that holds liable only offending employees or corporate entities that encouraged criminal conduct would not undermine criminal justice, but quite to the contrary, it would conform to the foundational principles of criminal law.

