

ARTICLES

STRUCTURAL REFORM PROSECUTION

*Brandon L. Garrett**

*I*n what I call a structural reform prosecution, prosecutors secure the cooperation of an organization in adopting internal reforms. No scholars have considered the problem of prosecutors seeking structural reform remedies, perhaps because until recently organizational prosecutions were themselves infrequent. In the past few years, however, federal prosecutors have adopted a bold strategy under which dozens of leading corporations have entered into demanding settlements, including *AIG*, *America Online*, *Boeing*, *Bristol-Myers Squibb Co.*, *Computer Associates*, *HealthSouth*, *KPMG*, *MCI*, *Merrill Lynch & Co.*, and *Monsanto*. To situate the DOJ's latest strategy, I frame alternatives to the pursuit of structural reform remedies as well as alternative methods prosecutors can use to pursue structural reform. To better understand what the DOJ accomplished by choosing to pursue structural reform and then doing so at the charging stage, I conducted an empirical study of the terms in all agreements the DOJ has negotiated to date. My study reveals imposition of deep governance reforms, consistent with the purposes of the *Sentencing Guidelines*, but also some indications of overreaching, if perhaps not abuse of prosecutorial discretion. I conclude by framing the issues that such prosecutions raise where, given the breadth of prosecutorial discretion and the deferential, limited nature of judicial review, the DOJ's emerging structural regime for deterring organizational crime raises important questions for all actors involved and affected.

* Associate Professor, University of Virginia School of Law. I gratefully acknowledge invaluable comments from Ken Abraham, Kerry Abrams, Richard Bierschbach, Richard Bonnie, Samuel Buell, Julie Cohen, Anne Coughlin, Viet Dinh, Chris Elmendorf, Theodore Garrett, Rachel Harmon, Toby Heytens, Robert Hur, James Jacobs, Ed Kitch, Greg Klass, Jody Kraus, Donald Langevoort, The Honorable Gerard Lynch, Paul Mahoney, Greg Mitchell, Erin Murphy, Richard Myers, Jed Purdy, Dan Richman, Jonathan Rusch, George Rutherglen, David Sklansky, Dan Solove, Susan Sturm, George Yin, and David Zaring; participants at the University of Virginia School of Law and Georgetown University Law Center faculty workshops, the 2006 Junior Criminal Law Conference, and the Washington & Lee Works in Progress Conference; and research assistance from Michelle Morris, Richard Rothblatt, and Erin Montgomery.

INTRODUCTION.....	854
I. STRUCTURAL REFORM AND PROSECUTORIAL DISCRETION ...	861
A. <i>The KPMG Prosecution Deferred</i>	861
B. <i>The Classic Civil Structural Reform Model</i>	869
C. <i>Alternatives to Structural Reform Prosecution</i>	875
1. <i>Prosecuting All Organizations</i>	875
2. <i>Prosecuting Individuals Not Organizations</i>	882
3. <i>Deferring to Private Litigation and Regulators</i>	883
II. THE DOJ'S NEW MODEL FOR STRUCTURAL REFORM	
PROSECUTION.....	886
A. <i>The Making of the DOJ's Structural Approach</i>	887
B. <i>Empirical Analysis of the DOJ's Agreements</i>	893
C. <i>Alternative Stages to Pursue Structural Reform</i>	
<i>Prosecutions</i>	902
1. <i>The Prevention Stage</i>	903
2. <i>The Charging Stage</i>	904
3. <i>The Plea Bargaining Stage</i>	906
4. <i>The Probation Stage</i>	908
5. <i>Civil Actions</i>	910
III. PROSECUTORS, COURTS, AND REMEDIAL DISCRETION	913
A. <i>Defining Abuse of Power in Organizational</i>	
<i>Prosecutions</i>	913
B. <i>Judicial Review</i>	919
1. <i>Approval</i>	922
2. <i>Implementation</i>	925
3. <i>Termination</i>	927
C. <i>Rethinking Remedies for Organizational Crime</i>	931
CONCLUSION.....	936
APPENDIX A: CHART OF POST-THOMPSON MEMO DEFERRED	
AND NONPROSECUTION AGREEMENTS	
(JAN. 20, 2003–JAN. 2007).....	938
APPENDIX B: PRE-THOMPSON MEMO DEFERRED AND	
NONPROSECUTION AGREEMENTS (BEFORE JAN. 20, 2003).....	954

INTRODUCTION

In the past few years, federal prosecutions of organizations have sharply accelerated under a new paradigm that I call “structural reform prosecution.” Traditionally, federal prosecutors rarely pursued entire organizations. Broad federal statutes and respondeat

superior standards allowed prosecutors to charge an entity with a crime for the act of a single agent. Organizations feared the catastrophic punitive fines and severe reputational consequences of a conviction—what one court described as a “matter of life and death.”¹ But despite their substantial power, federal prosecutors seldom exercised it, out of concern for the collateral consequences to an organization and also the harm to employees, stockholders, and the public. Recently, however, the Department of Justice (“DOJ”) adopted a novel strategy by prosecuting large organizations far more often, but leveraging the prosecutions to secure adoption of sweeping internal reforms.² Without obtaining an indictment, much less a conviction, the DOJ recently prevailed on thirty-five leading corporations to enter into demanding settlements, including AIG, America Online, Boeing, Bristol-Myers Squibb Co., Computer Associates, HealthSouth, KPMG, MCI, Merrill Lynch & Co., and Monsanto, as well as several public entities.³

This new settlement approach avoids the collateral consequences of an indictment, while using the prosecution as a “spur for institutional reform.”⁴ By entering into agreements with organizations, prosecutors imposed rigorous requirements to promote compliance. For example, in 2005, KPMG International agreed to shut down its entire private tax practice, to cooperate fully in the investigation of former employees, and to retain an independent monitor—a former Securities and Exchange Commission (“SEC”) chairman—for three years, in order to implement an elaborate compliance program.⁵ Such agreements became common as prosecutors initiated more organizational prosecutions than before in re-

¹ *United States v. Stein*, 435 F. Supp. 2d 330, 381 (S.D.N.Y. 2006), appeal docketed, No. 06-4358 (2d Cir. Sept. 19, 2006).

² Throughout this Article, I use “DOJ” to refer to federal prosecutors both at the main office and the various U.S. Attorneys’ Offices collectively. I do this only for convenience, because, as I will describe, the individual offices and line attorneys exercise substantial independence. I otherwise refer to individual U.S. Attorneys’ Offices, the central office, divisions, or task forces separately.

³ See *infra* Appendix A.

⁴ John Gibeaut, Junior G-Men, A.B.A. J., June 2003, at 46, 48 (quoting then-Assistant Attorney General Michael Chertoff).

⁵ See *infra* Section I.A.

sponse to post-Enron corporate fraud scandals.⁶ The agreements form a part of the larger fabric of federal response to a perceived breakdown in corporate culture that has also included passage of the Sarbanes-Oxley Act and enhanced regulatory enforcement targeting corporate fraud.⁷

Unlike those legislative and administrative responses, structural reform prosecutions raise questions about the reach of federal executive branch power. The Senate Judiciary Committee questioned tactics used by the DOJ, as did the American Bar Association and the Committee on Capital Markets Regulation.⁸ Other critics of the DOJ strategy with a different perspective, such as Ralph Nader, called failures to convict organizations a “shocking” and “systematic derogation” of the DOJ’s duty to seek justice.⁹ White collar defense practitioners complained in the press that federal prosecutors “exploit[] their virtually unchecked power to extract and coerce ever greater concessions.”¹⁰ Professor Richard Epstein stated that “the agreements often read like the confessions of a Stalinist purge trial.”¹¹ All sides agree that for good or ill, federal prosecutors exercise vast discretion; Professor John C. Coffee, Jr. commented

⁶ See *infra* Section II.A.

⁷ See, e.g., Public Company Accounting Reform and Investor Protection Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. § 7201 (2000 & Supp. IV 2004)); John C. Coffee, Jr., Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms, 84 B.U. L. Rev. 301, 303 (2004) (describing “pervasiveness of the sudden surge in financial irregularities in the late 1990s” and regulatory responses).

⁸ See Lynnley Browning, Justice Department Is Reviewing Corporate Prosecution Guidelines, N.Y. Times, Sept. 13, 2006, at C3; ABA Presidential Task Force on the Attorney-Client Privilege, <http://www.abanet.org/buslaw/attorneyclient/home.shtml> (last visited Feb. 3, 2007); Comm. on Capital Mkts. Regulation, Interim Report 13 (2006), http://www.capmksreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.

⁹ Letter from Ralph Nader & Robert Weissman to Alberto Gonzales, Attorney Gen. (June 5, 2006), posted at Multinational Monitor Editor’s Blog, <http://multinationalmonitor.org/editorsblog/index.php?/archives/26-The-Boeing-DOJ-Debate.html> (July 6, 2006, 15:34 EST); see Michael Seigel, Corporate America Fights Back, Wash. Post, Feb. 26, 2007, at A15.

¹⁰ N. Richard Janis, Taking the Stand: Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed, Wash. Law., Mar. 2005, at 32, 34, available at http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/march_2005/stand.cfm.

¹¹ Richard A. Epstein, Op-Ed., The Deferred Prosecution Racket, Wall. St. J., Nov. 28, 2006, at A14.

that they have “something close to absolute power” when negotiating organizational settlements.¹²

Some indications of overreaching already are apparent in instances where prosecutors exacted seemingly unrelated terms, although, as discussed below, what counts as an abuse is contested in an area where prosecutors retain such broad discretion. In 2003, the New York Racing Association (“NYRA”), a state-franchised operation, agreed to install “video lottery terminals,” or slot machines, at its race tracks. Federal prosecutors imposed this term only because state officials hoped to use the revenue from the slot machines to comply with a court ruling requiring adequate public school funding.¹³ Similarly, in 2004, MCI (the entity that replaced WorldCom) entered into an agreement with state prosecutors in Oklahoma to settle accounting fraud charges. State officials feared that MCI might face bankruptcy if indicted, leading to job losses and harm to state pension plans with MCI stock. The agreement required MCI to create 1600 jobs over ten years in Oklahoma. MCI was later fined when it did not create those jobs as promised.¹⁴

Nor do prosecutors quickly relinquish their power. They retain the authority to prosecute based on their unilateral decision that an organization breached the agreement.¹⁵ The agreements typically do not provide for judicial review of implementation or of any alleged breach, and they often require the organization’s permanent future cooperation.

This recent wave of structural reform prosecutions is not the first time that the litigation process has been used to effect organizational change. Beginning in the 1960s and 1970s, private attorneys general increasingly sought structural reform of public entities by bringing lawsuits against government entities, including challenges to school segregation, conditions in mental hospitals and prisons, and housing discrimination. These lawsuits were “structural reform” cases because they sought more than cease-and-desist orders by requiring ongoing judicial oversight of government institutions.

¹² John C. Coffee, Jr., *Deferred Prosecution: Has it gone too far?*, Nat’l L.J., July 25, 2005, at 13.

¹³ See *infra* notes 262–63.

¹⁴ See Barbara Hoberock, *MCI Coughs Up \$280,000 Payment to State*, *Tulsa World*, Mar. 31, 2005, at A1.

¹⁵ See *infra* Section II.B.

Courts later restricted the scope of prospective remedies for reasons of equitable restraint, federalism, comity, and countermajoritarian legitimacy, but over time, a consistent body of remedial law emerged to guide government actors in a range of contexts.

The emerging approach towards structural reform prosecutions knows no such bounds. Federal prosecutors, unlike civil rights plaintiffs, operate as politically accountable public actors to whom courts remain highly deferential. In the past, however, the DOJ had not sought to reshape Fortune 500 companies, much less to achieve “deterrence on a massive scale” of entire industries.¹⁶ We should be examining these prosecutions carefully because of their national importance and because structural reform is a new goal for federal criminal law. Legal scholars have not critically examined this bold new prosecutorial mission.¹⁷ Nor have any scholars explored the problem of structural reform of organizations through criminal prosecutions, perhaps due to the traditional view that structural reform occurred only in civil rights cases.¹⁸ Civil struc-

¹⁶ Memorandum from Larry D. Thompson, Deputy Attorney Gen., to the Heads of Dep’t Components, U.S. Attorneys 1 (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/business_organizations.pdf [hereinafter Thompson Memo].

¹⁷ Little scholarship to date has critically examined the DOJ’s recent deferral strategy, and none treats the problem as one of structural reform of organizational criminality. See Lawrence D. Funder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 *St. Louis U. L.J.* 1 (2006) (suggesting that corporations try to negotiate more lenient terms and describing variation between the agreements among different U.S. Attorneys’ Offices); Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 *Colum. L. Rev.* 1863, 1901 (2005) (proposing that courts act as fiduciaries for third parties affected by deferral agreements). The only additional commentary on recent structural efforts by the DOJ was written by current or former DOJ prosecutors and usefully explains DOJ policy and practice. See Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 *Am. Crim. L. Rev.* 1043 (2006) (praising the DOJ’s new approach); Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 *Am. Crim. L. Rev.* 1095, 1095–98 (2006) (describing DOJ practice and its impact). Several pieces criticize recent deferred prosecution agreements but only regarding the specific subject of privilege waiver, an issue tangential to this project but discussed *infra text* accompanying notes 251–52. See, e.g., George Ellard, *Making the Silent Speak and the Informed Wary*, 42 *Am. Crim. L. Rev.* 985, 993 (2005).

¹⁸ My hope is that this piece will begin to link criminal law structural reform scholarship to scholarship on civil structural remedies. Professor James Jacobs, in his land-

tural reform litigation engendered an important literature regarding the legitimacy and efficacy of such interventions.¹⁹ Similar questions should be asked again by courts, scholars, and practitioners about structural reform in criminal cases. In this piece, I shed light on why prosecutors chose to pursue structural reform, I provide an empirical description of these structural reform efforts by prosecutors, and I begin the project of exploring questions regarding their clarity, scope, effectiveness, the alternatives, and the ability of prosecutors and courts to police them.

This Article proceeds in three Parts. The first Part introduces the structural reform prosecution by describing the KPMG case and contrasting the classic civil structural reform model and its judicial limits with the vast discretion of prosecutors. I discuss how prosecutors might decide to exercise their discretion without seeking to accomplish structural reform at all. The DOJ could seek to impose optimally deterrent fines, but the dire collateral consequences of such an approach make it highly undesirable. Or the DOJ could wholly cease prosecuting organizations and focus on prosecuting individuals, deferring to civil litigation or federal regulatory actors with expertise in governance reform. This approach, however, would ignore direction from Congress to prosecute organizations.²⁰ The DOJ instead reserved prosecution for serious cases and in those cases sought structural reform remedies early to avoid the harsh effects of an indictment.

mark book on civil RICO labor racketeering prosecutions, is one of the few to recognize a need for scholarship connecting the history of structural reform litigation in civil rights cases and in federal organized crime prosecutions. See James B. Jacobs, *Mobsters, Unions, and Feds: The Mafia and the American Labor Movement* 246 (2006).

¹⁹ See *infra* Section I.B.

²⁰ Regarding the problem of overbroad and vague federal criminal law, see, for example, John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 244–45 (1985); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345; Stephen F. Smith, *Proportionality and Federalization*, 91 Va. L. Rev. 879, 908–25 (2005). Regarding the unique problem of organizational punishment, see Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. Legal Stud. 833 (1994); John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386 (1981); Robert Cooter, *Prices and Sanctions*, 84 Colum. L. Rev. 1523 (1984); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 Yale L.J. 857 (1984).

In Part II, I describe the current approach in which prosecutors obtain structural reform settlements at the charging stage through deferral or nonprosecution agreements. While the DOJ's current deferred prosecution approach raises concerns about executive power, it remains more complex than it first appears. I provide an empirical study of the terms in agreements the DOJ has negotiated to date (summarized in Appendices A and B) to assess how prosecutors have exercised their discretion in practice.²¹ This empirical analysis shows that the DOJ, in the four years after adopting its new policy in 2001, has by and large stayed true to its stated mission and consistently pursued compliance by negotiating the appointment of independent monitors and requiring compliance programs. Out of these agreements a consistent remedial approach emerged. These agreements tracked the federal Organizational Sentencing Guidelines, which already mitigate sentences for organizations with "effective" compliance programs. Yet the DOJ also exercised broad discretion to include terms unrelated to compliance and reserved for itself supervision of compliance and the unilateral power to declare a breach. Further, several alternative means to obtain structural reform were available, operating at later stages of a criminal case with greater judicial oversight. As another option, prosecutors could have sought parallel civil remedies. The DOJ chose to depart from those more traditional means for obtaining compliance. Instead, the DOJ chose to seek structural reform at the charging stage, chiefly to minimize the dire consequences of an indictment to an organization. Judicial review is also very deferential at the charging stage, however, giving prosecutors especially wide discretion.

In Part III, I explore issues raised by structural reform prosecutions, beginning with a section framing what "prosecutorial abuse" could mean in an area where prosecutors retain such broad discretion. In the civil context, the legitimacy of structural reform was questioned when private plaintiffs sought supervision of government by courts. Those concerns do not apply here. I develop how judicial review in the criminal context, unlike in civil cases, remains quite deferential, for doctrinal and institutional reasons, and particularly at the charging stage. Other concerns in civil cases related

²¹ See *infra* Appendices A & B.

to the broad reach of remedies. Those concerns were over time addressed in some respects by judicial limits and in others by common acceptance of the effectiveness of certain remedies. Given a limited role for judicial review, the DOJ itself may be the entity with the greatest ability to shape its structural reform approach, absent intervention by Congress. Already, organizations and Congress have created pressure leading the DOJ to moderate its approach. If the DOJ, and perhaps regulators, organizations, courts, or Congress, make explicit an understanding that prosecutors now pursue a structural reform approach, and then further clarify this set of remedial practices, structural interventions may evolve towards a more predictable crime deterrent.

I. STRUCTURAL REFORM AND PROSECUTORIAL DISCRETION

Prosecutors have long sought to combat organizational crime in various forms, but, in a paradigm shift, they increasingly attempt to reform institutions themselves rather than impose punitive fines and imprisonment upon individual offenders. I first present the story of the KPMG deferred prosecution to illustrate the scope of these structural reform efforts. In the second Section in this Part, I tie these efforts to the classic civil model for structural reform litigation. Prosecutors now employ some of the same tools developed by private attorneys general. Third, I explore the alternatives to pursuing structural reform that prosecutors could have chosen and suggest some reasons why they did not. I show how the structural reform agenda of prosecutors was shaped by the substance of federal criminal law and the power and discretion of prosecutors in our criminal system.

A. The KPMG Prosecution Deferred

One Assistant U.S. Attorney explained that what I term structural reform prosecutions provide “a way to get better results more quickly. . . . We’re getting the sort of significant reforms you might not even get following a trial and conviction.”²² The KPMG case provides a vivid illustration of the injunctive terms federal prosecu-

²² Vanessa Blum, *Justice Deferred: The Feds’ New Weapon of Choice Makes Companies Turn Snitch to Save Themselves*, *Legal Times*, Mar. 21, 2005, at 1 (quoting the lead Assistant U.S. Attorney in the Computer Associates case).

tors obtain in agreements resolving the most high-profile corporate prosecutions, and the successes and flaws of such settlements.

By 2005, it emerged that KPMG, one of the largest accounting firms in the world, engaged in tax fraud that resulted in \$2.5 billion in evaded taxes by wealthy individuals. As early as 2001, the Internal Revenue Service (“IRS”) investigated certain tax shelters and issued summonses to KPMG, with which KPMG did not comply, prompting the IRS to seek judicial enforcement in 2002.²³ A Senate Subcommittee began an investigation and at hearings in November 2003, KPMG employees were questioned.²⁴ By 2004, the IRS referred the case to the DOJ for possible criminal prosecution.²⁵

In 2004, a criminal complaint was filed by the DOJ against KPMG, “the largest criminal tax case ever filed.”²⁶ In 2004 and 2005, KPMG and prosecutors at the United States Attorney’s Office for the Southern District of New York entered into lengthy discussions. KPMG offered to cooperate and “clean house” to save the company and avoid an indictment.²⁷ The negotiations operated at a high level, with executives meeting directly with the U.S. Attorney.²⁸

On August 25, 2005, after the grand jury had been convened but before an indictment had been issued, the DOJ and IRS announced that the criminal prosecution of KPMG would not go forward, though prosecution of individual employees would proceed, because an agreement had been reached.²⁹ U.S. Attorney

²³ See *United States v. KPMG*, 316 F. Supp. 2d 30, 31–32 (D.D.C. 2004).

²⁴ See *United States v. Stein*, 435 F. Supp. 2d 330, 380 (S.D.N.Y. 2006), appeal docketed, No. 06-4358 (2d Cir. Sept. 19, 2006).

²⁵ See *id.* at 339.

²⁶ See Press Release, Dep’t of Justice, KPMG to Pay \$456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case (Aug. 29, 2005), http://www.usdoj.gov/opa/pr/2005/August/05_ag_433.html; Letter from David N. Kelley, U.S. Attorney, S. Dist. of N.Y., to Robert S. Bennett, Attorney for KPMG (Aug. 26, 2005), <http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf> [hereinafter KPMG Agreement].

²⁷ See *Stein*, 435 F. Supp. 2d at 341.

²⁸ See *id.* at 348.

²⁹ See *id.* at 349; see also Sue Reisinger, Mr. Clean, Corp. Counsel, Nov. 2005, at 82, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1131425800801>. The DOJ had been intent on pursuing a trial, in part because of perceived evasion by KPMG in not turning over documents. *Id.* at 85. Ultimately, negotiations that included KPMG’s new general counsel, former U.S. District Judge Sven Erik Holmes, produced an agreement. *Id.* at 87–88.

General Alberto Gonzales cited “the reality that the conviction of an organization can affect innocent workers and others associated with the organization, and can even have an impact on the national economy.”³⁰

Though federal courts have statutory authority to reject the deferral of a prosecution, District Judge Loretta A. Preska apparently ratified it on August 29, 2005, after a hearing and without any alterations to the terms.³¹ The resulting deferred prosecution agreement provided a remarkable blueprint for radical structural change at KPMG.

The agreement begins with a detailed admission of wrongdoing, stating that KPMG “[a]ssisted high net worth United States citizens to evade United States individual income taxes on billions of dollars in capital gain and ordinary income by developing, promoting and implementing unregistered and fraudulent tax shelters.”³² The agreement provided for a payment of \$456 million, including fines and full restitution to the IRS.³³ The provisions placed “permanent restrictions” on KPMG’s tax practice, barring taking on new private tax clients, terminating its tax and benefits practice, preventing it from issuing advice and selling certain pre-packaged tax products, and limiting work for individual clients.³⁴ The agreement is also “permanent” in that it requires continuing cooperation with the DOJ, without any time limit.

The compliance reforms reached further. KPMG agreed to “implement and maintain an effective compliance and ethics program that fully comports with the criteria set forth in Section 8B2.1 of the United States Sentencing Guidelines.”³⁵ Attorney General Gonzales called this the “most important” part of the agreement,

³⁰ Id. at 89.

³¹ See *United States v. KPMG LLP*, No. 1:05-CR-00903-LAP (S.D.N.Y. Aug. 29, 2005) (docket entries 1–4); see also KPMG Agreement, *supra* note 26, ¶ 11 (the Agreement “must be approved by the Court, in accordance with 18 U.S.C. § 3161(h)(2)”).

³² KPMG Agreement, *supra* note 26, ¶ 2.

³³ Id. ¶ 3; see also Mark W. Everson, Comm’r, IRS, Statement Regarding KPMG Corporate Fraud (Aug. 29, 2005), <http://www.irs.gov/newsroom/article/0,,id=146998,00.html> (noting importance of “blue chip firms like KPMG that, by virtue of their prominence, set the standard of conduct for others”).

³⁴ See KPMG Agreement, *supra* note 26, ¶ 6.

³⁵ Id. ¶ 16.

vital to “help prevent such wrongdoing in the future.”³⁶ The Guidelines, as discussed below, require a comprehensively defined series of compliance protocols, risk analysis, training programs, and auditing.

Beyond those efforts, KPMG created “a permanent compliance office and a permanent educational and training program relating to the laws and ethics governing the work of KPMG’s partners and employees.”³⁷ The program paid “particular attention to practice areas that pose high risks.”³⁸ The agreement added that whistleblowers shall be protected and rewarded, a hotline shall be created to report noncompliance, and “KPMG shall take such additional personnel actions for wrongdoing as are warranted.”³⁹ Further, the agreement mandated that “KPMG shall take steps to audit the Compliance & Ethics Program to ensure it is carrying out the duties and responsibilities set out in this Agreement.”⁴⁰ Thus the compliance program itself was to be evaluated so that compliance efforts would be continually improved. Such data collection tasks KPMG with not only detection of employee wrongdoing but also predicting and preventing future criminality among employees.

Overseeing these efforts, the agreement required KPMG to permit the DOJ to appoint an “independent monitor” to serve for three years.⁴¹ Richard Breeden, a former SEC Chairman, received the appointment (he previously served as a special master overseeing SEC compliance at MCI/WorldCom). Once his term expired, the IRS then was to monitor KPMG’s tax practice for two more years.⁴²

Breeden was empowered to “review and monitor KPMG’s compliance with this Agreement,” to “review and monitor KPMG’s maintenance and execution of the Compliance & Ethics Program,”

³⁶ Alberto R. Gonzales, U.S. Attorney Gen., Prepared Remarks at the Press Conference Regarding KPMG Corporate Fraud Case (Aug. 29, 2005), <http://www.usdoj.gov/ag/speeches/2005/082905agkpgmcorpfraud.htm>.

³⁷ KPMG Agreement, *supra* note 26, ¶ 16.

³⁸ *Id.*

³⁹ *Id.* KPMG then created and described on its website a 24-hour whistleblower website and telephone hotline for employees. See KPMG’s Ethics and Compliance Hotline, <http://www.us.kpmg.com/news/index.asp?cid=2012> (last visited Mar. 6, 2007).

⁴⁰ KPMG Agreement, *supra* note 26, ¶ 16.

⁴¹ See *id.* ¶ 18(e)(I). Up to two additional years may be added to the Monitor’s term if, in its sole discretion, the DOJ finds KPMG breached the agreement. *Id.*

⁴² *Id.* ¶ 19.

and to “recommend such changes as are necessary to ensure conformity with the Sentencing Guidelines and this Agreement, and that are necessary to ensure that the Program is effective.”⁴³ To accomplish those broad ends, he was invested with sweeping powers, such as unrestricted access to information, including any correspondence or email of KPMG employees, and inquisitorial powers, including the right to call a meeting or interview any KPMG partner, employee, or agent.⁴⁴ In addition, “[t]he Monitor shall have the authority to employ legal counsel, consultants, investigators, experts, and any other personnel necessary to assist in the proper discharge of the Monitor’s duties.”⁴⁵ Furthermore, “[t]he compensation and expenses of the Monitor, and of the persons hired under his or her authority, shall be paid by KPMG.”⁴⁶ The Monitor had the authority to “take any other actions that are necessary to effectuate his or her oversight and monitoring responsibilities.”⁴⁷ Neither the KPMG Monitor’s reports, nor any of its other actions, have been made public.

In addition to the ways it reshaped corporate governance within KPMG, the agreement had substantial effects on nonparties. Nineteen individual employees and former KPMG tax partners face criminal charges and must argue that KPMG’s admissions that the relevant tax shelters were illegal and intended to assist clients in breaking the law should not prejudice them or constitute a finding as a matter of tax law.⁴⁸ Further impeding their defense (and empowering their prosecution), the Monitor may interview any current employee for any reason.⁴⁹

Several of those employees filed motions complaining that the DOJ pressured KPMG to decline to pay for their criminal defense as part of its effort to show its cooperation. District Judge Lewis Kaplan ruled that the DOJ unconstitutionally pressured KPMG to cut off legal defense payments, and though the indictments would

⁴³ Id. ¶ 18(a).

⁴⁴ Id. ¶ 18(b).

⁴⁵ Id. ¶ 18(c).

⁴⁶ Id. ¶ 18(e)(VI).

⁴⁷ Id. ¶ 18(d).

⁴⁸ See Press Release, Dep’t of Justice, Superseding Indictment of 19 Individuals Filed in KPMG Criminal Tax Fraud Case (Oct. 17, 2005), http://www.usdoj.gov/opa/pr/2005/October/05_tax_547.html.

⁴⁹ KPMG Agreement, *supra* note 26, ¶ 18(b).

not be dismissed, the defendants could file ancillary civil actions for reimbursement.⁵⁰ Judge Kaplan, mincing no words, decried the power the DOJ exercises in organizational cases, stating:

Justice is not done when the government uses the threat of indictment—a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees—to coerce companies into depriving their present and even former employees of the means of defending themselves against criminal charges in a court of law.⁵¹

Judge Kaplan's rulings have continued to raise important issues for scholars to consider concerning the effects of these far-reaching agreements on employees. For example, Judge Kaplan recently excluded certain proffer statements made by two employees of KPMG as involuntary, ruling that the employees cooperated with prosecutors due to the threat that KPMG would not pay their legal fees, which was itself the product of government coercion.⁵² Again using strong language, Judge Kaplan complained that by "altering the manner in which suspected corporate crime has been investigated, prosecuted, and, when proven, punished," federal prosecutors have used "the exertion of enormous economic power by the employer upon its employees to sacrifice their constitutional rights."⁵³

The KPMG agreement may also have industry-wide effects. Given KPMG's prominence in the industry, any reforms adopted by the Independent Monitor may become established "best prac-

⁵⁰ See *United States v. Stein*, 435 F. Supp. 2d 330, 380 (S.D.N.Y. 2006), appeal docketed, No. 06-4358 (2d Cir. Sept. 19, 2006).

⁵¹ *Id.* at 381–82 (footnotes omitted).

⁵² See *United States v. Stein*, 440 F. Supp. 2d 315, 326–38 (S.D.N.Y. 2006) (ruling that while some employees did not offer evidence that they cooperated due to coercion, two offered "compelling" evidence that their proffers were the product of coercion).

⁵³ *Id.* at 337. Judge Kaplan also noted "more than a little tension" between two DOJ lines of argument: while the DOJ argued that these statements were uncoerced by the government, it simultaneously took the position that employees who make false statements to private attorneys representing their employer under investigation and cooperating with the DOJ may be obstructing justice. *Id.* at 337 & n.114.

tices” in the industry. The Monitor may thus wield tremendous influence.⁵⁴

The agreement may also create industry-wide effects in a regulatory manner. The agreement includes detailed factual findings regarding the criminality of particular tax shelters that had not previously been found illegal by a court nor been made illegal by an IRS regulation. Some tax experts predict that, using those stipulated findings, “[t]he IRS and Justice Department will attempt to use KPMG’s admissions as evidence in litigation with taxpayers on the merits of the shelters.”⁵⁵ In that sense, the agreement does an end run around time-consuming notice and comment rules.⁵⁶ More broadly, the process through which the agreement was reached reflects a collaborative approach by the DOJ, where the IRS was intimately involved from the investigation stage to the drafting and implementation of the agreement.

A different kind of effect on industry may also have been considered in negotiations between KPMG and the DOJ. Proceeding to trial against KPMG, a “big five” accounting firm (already reduced to a “big four” by the Andersen prosecution), might have weakened the accounting industry, which the DOJ counts on to audit corporations to prevent and detect corporate fraud.⁵⁷ Indeed, KPMG provides consulting on corporate compliance issues, including on technology to improve compliance programs and auditing.⁵⁸

⁵⁴ See Scott D. Michel & Kevin E. Thorn, *Deferred Prosecution Agreements: Implications for Corporate Tax Departments*, 58 *Tax Executive* 49, 53–54 (2006).

⁵⁵ *Id.* at 52. The DOJ obtained similar factual admissions in the related German Bank HVB deferred prosecution agreement.

⁵⁶ Raising additional questions regarding the KPMG tax shelters, nicknamed “Blips, Flip, Opis and SOS,” a newly discovered IRS document indicates that there was substantial debate within the IRS about whether such shelters had to be registered with the agency. See Lynnley Browning, *Document Could Alter KPMG Case*, *N.Y. Times*, Sept. 15, 2006, at C1. Nevertheless, the government’s case also relies upon other related frauds in addition to failure to register the shelters. See *id.* In an additional possible blow to the case, a federal judge in Texas ruled that the IRS cannot retroactively apply 2003 rules regarding these tax shelters to prior conduct. See Lynnley Browning, *Judge Rules a Tax Shelter In KPMG Case Is Legitimate*, *N.Y. Times*, July 21, 2006, at C3.

⁵⁷ See Albert B. Crenshaw & Carrie Johnson, *Regretful KPMG Asks for a Break*, *Wash. Post*, June 17, 2005, at D1.

⁵⁸ KPMG’s website describes its corporate compliance consulting services, including an annual “integrity survey” of compliance at firms nationwide. See KPMG Home

KPMG had every incentive to fully comply to protect its business in the compliance industry and to distance itself from wrongdoing employees.

The agreement ended on December 31, 2006, at which point the DOJ consented to the dismissal of the criminal information, stating that “monitorship . . . has been comprehensive and effective.”⁵⁹ Up until that point, the DOJ, in its sole discretion, could have found that KPMG breached the agreement,⁶⁰ and in that case, the DOJ could have added up to five years to the agreement term or, at its option, pursued a criminal proceeding. This would have nearly certainly resulted in conviction because the DOJ could have made full use of all statements and admissions by KPMG obtained in the agreement and through KPMG’s cooperation with the DOJ and the Monitor.⁶¹ The indictment was dismissed by the court on January 2, and shortly thereafter, the individual defendants filed motions with Judge Preska to intervene and appear as *amicus curiae* to vacate the dismissal order.⁶² The court accepted the filings, which were contradictory: one former employee argued that it was against public policy to allow the prosecution to be terminated given KPMG’s actions, while a group of former employees argued that the entire agreement should be rescinded and the fines returned, because the agreement provided the DOJ with unconstitutional power over KPMG.⁶³ Judge Preska rejected those arguments, questioning whether the intervenors had standing as nonparties to the deferred prosecution, noting that prosecutors have exceedingly broad discretion when deciding to terminate a prosecution, and affirming the dismissal of the indictment.⁶⁴ Now that the charges have been dismissed, the monitoring continues for two more years supervised by the IRS, and the DOJ still reserves

Page, <http://www.us.kpmg.com> (last visited Mar. 6, 2007); KPMG’s Audit Committee Institute, <http://www.kpmg.com/aci/international.asp> (last visited Mar. 6, 2007).

⁵⁹ Press Release, U.S. Attorney’s Office, S. Dist. of N.Y., Statement on the Dismissal of Charges Against KPMG (Jan. 3, 2007), <http://www.usdoj.gov/usao/nys/pressreleases/January07/kpmgdismissalstatement.pdf> [hereinafter Dismissal Statement].

⁶⁰ See KPMG Agreement, *supra* note 26, ¶¶ 10–12.

⁶¹ See *id.* ¶ 13.

⁶² See *United States v. KPMG LLP*, No. 1:05-CR-00903-LAP, 2007 WL 541956 (S.D.N.Y. Feb. 14, 2007).

⁶³ *Id.* at 8–9.

⁶⁴ *Id.* at 14–16.

the right to reinstate the charges or extend the time that the monitorship lasts should it determine that “KPMG has violated any provision of the [Deferred Prosecution Agreement].”⁶⁵

B. The Classic Civil Structural Reform Model

The KPMG example demonstrates the substantial power and discretion prosecutors may exercise when, for the reasons just described, they choose to pursue structural reform against an entity rather than an indictment or conviction. Structural reform refers to injunctive relief seeking to reform an institution, and its origins were in civil rights litigation. Stepping back several decades to take a longer view of the origins of the model, the structural reform ideal’s recent ascendance in criminal law follows its metamorphosis since the 1960s in civil rights law, reflecting shifts in policy goals of government and the public.

In civil rights law, structural reform litigation rose to assume central importance given a need for deep institutional change following efforts to end segregation in the wake of *Brown v. Board of Education*. As federal courts struggled to enforce decrees ordering desegregation of schools, the school desegregation decree became “[t]he prototype for the judiciary’s new supervisory role” in the 1970s as the model was then extended from schools to diverse areas such as prisons, medical care, public housing, disability assistance, and special education.⁶⁶ In his landmark article, Professor Abram Chayes describes such efforts as fundamentally unlike traditional civil litigation “settling disputes between private parties about private rights,” but rather constituting a new form of “public law litigation” involving multipolar disputes, institutional reform, outside involvement of parties such as “masters, experts, and oversight personnel,” and “a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer.”⁶⁷ In particular,

⁶⁵ Dismissal Statement, *supra* note 59.

⁶⁶ Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 Va. L. Rev. 43, 44 (1979).

⁶⁷ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1282, 1284, 1298 (1976).

structural reform involved courts changing “the operation of large-scale organizations.”⁶⁸

The legitimacy of the classic structural reform model in part was analogized to the model of the prosecutor. Civil rights lawyers were envisioned as “private attorneys general” that would define and then vindicate the public interest,⁶⁹ and were bolstered by statutes providing for attorney’s fees to reward successful litigation under that rationale.⁷⁰

Professors Chayes, Owen Fiss, and others argued that courts would inevitably move toward broad structural reform litigation and that in appropriate circumstances, judges should exercise great discretion, decoupling the remedy from the contours of the constitutional right when designing and implementing a structural remedy.⁷¹ A new body of remedial law developed. As courts and special masters continued to seek the means to remedy problems like school segregation, poor prison and mental hospital conditions, and housing discrimination, new remedial norms took hold in each particular context, which in turn helped to define the content of the underlying constitutional rights.⁷²

As remedies matured during years of experience implementing structural reform remedies, courts also limited the scope, duration, and content of structural reform remedies. While the Court ini-

⁶⁸ Owen Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *Harv. L. Rev.* 1, 5 (1979).

⁶⁹ See *Flast v. Cohen*, 392 U.S. 83, 119 (1968) (Harlan, J., dissenting) (describing origins of the term “private attorneys-general”); *Associated Indus. of New York State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) (first decision using the term); William B. Rubenstein, *On What A “Private Attorney General” Is—And Why It Matters*, 57 *Vand. L. Rev.* 2129 (2004).

⁷⁰ *The Civil Rights Attorney’s Fees Awards Act of 1976*, 42 U.S.C. § 1988 (2000); S. Rep. No. 94-1011, at 4–5 (1976) (explaining the Senate’s intent to shift fees to reward civil rights lawyers acting as “private attorneys general”).

⁷¹ See Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 *Harv. L. Rev.* 4, 45–46 (1982); Fiss, *supra* note 68, at 21–22; William Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 *Yale L.J.* 635 (1982); Donald Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 *Duke L.J.* 1265, 1268.

⁷² See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 *Yale L.J.* 87, 110–13 (1999); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *Colum. L. Rev.* 857, 873–82 (1999); David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 *UCLA L. Rev.* 1015, 1040 n.122 (2004) (noting a path dependency in adoption of structural remedies in certain contexts).

tially held that district courts could exercise broad discretion in exercising equitable powers,⁷³ during a decades-long period of retrenchment beginning in the early 1970s, the Court narrowed the scope of available structural remedies.⁷⁴ The Court enacted justiciability limits specific to actions seeking injunctive relief;⁷⁵ emphasized doctrines of federalism,⁷⁶ comity, and local control;⁷⁷ urged least restrictive remedies for civil rights violations;⁷⁸ and encouraged lower courts to modify, narrow, and terminate consent decrees.⁷⁹ Supreme Court Justices then disparaged overreaching in structural reform remedies as “wildly . . . intrusive,”⁸⁰ leaving courts “enmeshed in . . . minutiae,”⁸¹ and “judicial overreaching . . . [that] eviscerates a State’s discretionary authority over its own programs and budgets.”⁸² Particularly in school desegregation decisions, the Court instructed lower courts to limit the boundaries of remedies that departed too far from the scope of the constitutional violations

⁷³ See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 281 (1977) (“Once invoked, ‘the scope of a district court’s equitable powers to remedy past wrongs is broad.’”) (citation omitted); *Griffin v. County Sch. Bd.*, 377 U.S. 218, 221 (1964); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955); see also Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. Miami L. Rev. 173, 178–79 (2003); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. Ill. L. Rev. 1199, 1209.

⁷⁴ See, e.g., Brandon Garrett & James Liebman, *Experimentalist Equal Protection*, 22 Yale L. & Pol’y Rev. 261, 270–72 (2004); Paul Gewirtz, *Remedies and Resistance*, 92 Yale L.J. 585, 587 (1983); Jeffries, *supra* note 72, at 113.

⁷⁵ See *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (urging “restraint in the issuance of injunctions against state officers engaged in the administration of the States’ criminal laws”).

⁷⁶ See *Missouri v. Jenkins*, 515 U.S. 70, 112–13 (1995); *Younger v. Harris*, 401 U.S. 37, 53 (1971).

⁷⁷ E.g., *Milliken v. Bradley*, 433 U.S. 267, 281 (1977).

⁷⁸ See, e.g., *Jenkins*, 515 U.S. at 83–90 (condemning, as beyond the district court’s remedial powers, a plan to desegregate Kansas City schools by inducing white suburban children to transfer voluntarily).

⁷⁹ *Frew v. Hawkins*, 540 U.S. 431, 442 (2004); *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986).

⁸⁰ *Lewis v. Casey*, 518 U.S. 343, 362 (1996).

⁸¹ *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (disapproving orders that “enmeshed [lower courts] in the minutiae of prison operations”).

⁸² *Jenkins*, 515 U.S. at 125, 131 (Thomas, J., concurring); accord *Lewis*, 518 U.S. at 349 (“[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.”).

and to terminate oversight when substantial compliance was obtained.⁸³

The consensus account describes that as courts defined and limited the scope of remedies, the structural reform era passed, such that “[t]here are no contemporary examples of bold, *Brown*-like reformist judicial enterprises.”⁸⁴ Scholars produced a substantial body of literature critically examining concerns of countermajoritarian legitimacy, federalism, comparative institutional competence, and the need for coherent remedial limits for the classic structural reform model.⁸⁵

However, structural reform litigation still persists and succeeds in new forms, such as in state courts, in challenges brought by opponents of affirmative action,⁸⁶ in areas governed by statutes,⁸⁷ and in areas in which plaintiffs and government share incentives to enter into experimentalist arrangements, such as in consent decrees to resolve pressing public problems.⁸⁸ Rather than withering on the

⁸³ See *supra* notes 79–80.

⁸⁴ Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. Miami L. Rev. 143, 145 (2003); accord Resnik, *supra* note 73, at 193; Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270, 295 (1989) (“Institutional reform litigation generally has decreased since the mid-1970s.”); Russell L. Weaver, *The Rise and Decline of Structural Remedies*, 41 San Diego L. Rev. 1617, 1623–28 (2004).

⁸⁵ See, e.g., Ross Sandler & David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* (2003); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 Wash. & Lee L. Rev. 949, 951 (1978); Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. Pa. J. Const. L. 617, 630–36 (2003); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 Geo. L.J. 1355, 1359 (1991); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 Cal. L. Rev. 1121, 1122–24 (1996).

⁸⁶ Gilles, *supra* note 84, at 145–46.

⁸⁷ Statutes that permit injunctive remedies include the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12188(b)(2) (2000), the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1403 (2000), and 42 U.S.C. § 1437d(j) (2000) (permitting the Department of Housing and Urban Development to seek receivership of troubled housing projects). Regarding the persistence of such litigation, see, for example, Zaring, *supra* note 72, at 1033.

⁸⁸ See Diver, *supra* note 66, at 70–75 (identifying where various institutional actors have strategic incentives to cooperate in structural reform litigation); Brandon Garrett, *Remedying Racial Profiling*, 33 Colum. Hum. Rts. L. Rev. 41, 92–98 (2001); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1015, 1019–20 (2004); Margo Schlanger, *Civil Rights*

vine, the structural reform model instead adapted as it was reshaped by judicial review, political realities, and practical difficulties in implementation.

An emerging consensus regarding an “industry standard” or set of “best practices” was central to the development of each area where structural reform remedies were pursued. These practices then provided a template for attorneys, institutions, experts, and courts.⁸⁹ Early disputes over the scope of remedies led to experimentation until settled practices emerged that organizations could rely on to structure their own governance and avoid litigation. Thus, over time, not only did courts limit and clarify structural reform remedies, but a consensus emerged regarding a defined set of the most effective remedial practices.

The new and previously unexamined brand of structural reform litigation developed by prosecutors shares the ambitions, though not the form, of the Chayesian model.⁹⁰ The KPMG example illustrates how in structural reform prosecutions it is prosecutors, and not courts, who serve as the chief decisionmakers and create the clearinghouse for “multilevel” bargaining among parties and regulators.⁹¹ This structural reform litigation remains unsaddled with the history of civil rights litigation and the remedial limitations that federal courts elaborated to rein in private litigants seeking to reform public institutions. Here the paradigm is somewhat reversed, with federal, public actors seeking to reform private institutions (though also several local public institutions). The relevant “rights” being vindicated are also of a very different character. Prosecutors bring this modern wave of structural reform litigation in response

Injunctions Over Time: A Case Study of Jail and Prison Court Orders, 81 N.Y.U. L. Rev. 550, 554–55 (2006).

⁸⁹ See Garrett & Liebman, *supra* note 74, at 300–03; *supra* note 88; see also John C. Jeffries & George A. Rutherglen, *Structural Reform Revisited*, 95 Cal. L. Rev. (forthcoming 2007); see generally Zaring, *supra* note 72.

⁹⁰ Abram Chayes did briefly note in his seminal article that “securities fraud and other aspects of the conduct of corporate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management—cases in all these fields display in varying degrees the features of public law litigation.” Chayes, *supra* note 67, at 1284.

⁹¹ See Diver, *supra* note 66, at 64–67, 77 (discussing civil structural reform litigation as a bargaining process with the judge acting as a power broker between the parties); Sabel & Simon, *supra* note 88, at 1019.

to organizational crime and as government actors tasked with defining law enforcement goals.

Structural reform in criminal cases, at first blush, appears impossible. Injunctions are not technically available in criminal law. The common law rule since the demise of the Star Chamber has been that “equity will not enjoin a crime.”⁹² Only where a legislature authorizes it by a civil statute, such as in the RICO statute or federal fraud statutes, may courts enter civil injunctions.⁹³ As I discuss in Part II, civil RICO labor racketeering cases dating back to the early 1980s provide an important early civil model for the recent structural reform prosecutions, with similar provisions including independent monitoring and compliance programs. Yet even in a criminal case, prosecutors may, during pre-trial diversion or plea bargaining, impose injunctive conditions as alternatives to prosecution, just as courts do during probation. There is a long-standing practice of adopting programs to defer and ultimately withdraw individual prosecutions so long as the defendants comply with certain conditions; a federal statute permits deferral of prosecutions pursuant to written agreements.⁹⁴ When extending that approach to organizations, however, none of the well-developed limitations placed on civil structural remedies necessarily apply. After all, prosecutors are public attorneys general. Further, as the following Section explains, not only do civil remedial limits not apply to prosecutors, but their discretion, resources, and power in the criminal system permit far more expansive remedies than are available in civil cases brought by private attorneys general.

⁹² *SEC v. Carriba Air*, 681 F.2d 1318, 1321 (11th Cir. 1982). For some time, courts could issue limited injunctions to prevent crimes to property or nuisance. See *United States v. Dixon*, 509 U.S. 688, 694 (1993); *In re Debs*, 158 U.S. 564, 593–94 (1895). The Supreme Court later insisted that jury trial rights be provided during contempt proceedings and rejected “standardless” injunctions deeming behavior a public nuisance. See *Bloom v. Illinois*, 391 U.S. 194, 208 (1968).

⁹³ See 18 U.S.C. § 1964(a) (2000) (“The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders”); James M. Fischer, *Understanding Remedies* § 27 (1999) (describing modern “legislative supremacy” approach to enjoining criminality).

⁹⁴ See 18 U.S.C. § 3161(h)(2) (2000); *infra* note 166. Prosecutors have pursued deferred prosecution in individual cases dating back to the “Brooklyn Plan” agreements with first-time juvenile offenders in the 1930s. See, e.g., Stephen J. Rackmill, *Printzlien’s Legacy, the “Brooklyn Plan,” A.K.A. Deferred Prosecution*, *Fed. Probation*, June 1996, at 8, 8–15; see also *infra* notes 207–08.

C. Alternatives to Structural Reform Prosecution

The DOJ need not have pursued structural reform in the KPMG case, nor did it often pursue structural reform in the past. Unlike civil plaintiffs in the traditional structural reform litigation just discussed, prosecutors, federal prosecutors in particular, operate with broad and often nearly unfettered discretion that provides them with enhanced status in our criminal system.⁹⁵ Prosecutors are tasked with seeking justice in the criminal system by defining the state's enforcement goals and deciding when to prosecute those they deem deserving of criminal sanction.⁹⁶ The DOJ can pursue convictions or not prosecute organizations at all. This Section explores those alternatives to shed light on the dilemmas raised by organizational prosecutions and why, in response, the DOJ decided to pursue structural reform.

1. Prosecuting All Organizations

Rather than pursue structural reform, first, the DOJ could prosecute organizations to obtain deterrent fines. Following deterrence theory, which provides an economic justification for corporate criminal liability, prosecutors should seek to impose an optimal punishment based on the harm and the probability of

⁹⁵ See, e.g., Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. Pa. L. Rev. 550, 563–64 (1978); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 Stan. L. Rev. 1211, 1252–59 (2004); see also *United States v. Van Engel*, 15 F.3d 623, 629 (7th Cir. 1993) ("The Department of Justice wields enormous power over people's lives, much of it beyond effective judicial or political review."). Whereas local prosecutors primarily enforce criminal violations, federal prosecutors can often handpick their cases. The DOJ brings very few corporate prosecutions and typically only in egregious cases. See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum. L. Rev. 583, 608–12 (2005); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 Colum. L. Rev. 749, 758–67 (2003) (describing the structure and discretion of U.S. Attorneys' Offices).

⁹⁶ See *Standards for Criminal Justice: Prosecution Function & Defense Function* Standard 3-1.2(c), at 4 (1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); *Model Code of Prof'l Responsibility* EC 7-13 (1980) ("The responsibility of a public prosecutor . . . is to seek justice, not merely to convict."); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 Stan. L. Rev. 809, 843–47 (2000); William Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1090, 1123–25 (1988).

detection of the malfeasance.⁹⁷ In individual cases, by way of contrast, the DOJ now pushes for the most severe punitive sentence and does not seek leniency.⁹⁸ If punitive fines were imposed, organizations could then rationally decide what socially efficient compliance measures to pay for. An important reason for a fines-oriented approach is a lack of empirical evidence demonstrating whether structural reforms such as compliance programs create effective remedies. The Sarbanes-Oxley Act, industry regulators, and now the DOJ emphasize such reforms. Yet scholars raise important questions about whether compliance programs have utility, whether the move to excuse criminal liability may simply reward “cosmetic compliance,”⁹⁹ and whether firms may claim “good corporate citizenship” in order to shift blame to lower-level “wayward” employees.¹⁰⁰ All of those concerns suggest cause for skepticism regarding the current legislative, regulatory, and prosecutorial focus on compliance, and, in particular, these questions should be further explored now that the DOJ emphasizes compliance in organizational crime prosecutions.

To be sure, scholars point out that if prosecutors did seek punitive fines, firms might still be reluctant to adopt optimal precautions in response because doing so could also mean detecting and making a record of misconduct for which they could then be held

⁹⁷ See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 *Harv. L. Rev.* 869, 874–75 (1998); see also Guido Calabresi, *The Costs of Accidents* 26–30 (1970); Richard A. Posner, *Economic Analysis of Law* 165 (2d ed. 1977); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 *Geo. L.J.* 421, 421 (1998) (explaining principle of optimal deterrence).

⁹⁸ The DOJ more recently has added guidelines that prosecutors should seek “the most serious, readily provable offense” in individual prosecutions. Memorandum from John Ashcroft, Attorney Gen., to All Federal Prosecutors (Sept. 22, 2003), available at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

⁹⁹ William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 *Vand. L. Rev.* 1343, 1415 (1999).

¹⁰⁰ *Id.* at 1343 (“Given equivocal evidence of compliance effectiveness, the rise of the good corporate citizenship movement risks undermining the objectives and spirit of the corporate criminal law.”); see also Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 *Wash. U. L.Q.* 487, 504–05 (2003). For a study suggesting that compliance programs can prevent misconduct, see Christine E. Parker & Vibeke Lehmann Nielsen, *Do Corporate Compliance Programs Influence Compliance?* 3–5 (Univ. of Melbourne Legal Studies Research Paper No. 189, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=930238.

liable.¹⁰¹ Agency problems may also undercut the effectiveness of a punitive fine.¹⁰² Indeed, agency problems are exacerbated in the organizational crime context in ways that may explain why the DOJ now focuses on compliance and not on optimal punitive fines. Two features of federal organizational criminal law define the problem: (1) minimal respondeat superior requirements, and (2) open-textured federal criminal prohibitions.

First, organizational prosecutions raise unique problems of overbreadth not present in prosecutions of individual criminals, due to the fictional nature of such entities.¹⁰³ In criminal law, organizations are treated as individual persons. For that reason, organizations do possess some of the same protections as individual defendants. A corporate defendant has the right to a grand jury, to a jury trial, to be found guilty beyond a reasonable doubt, and to protection under the Double Jeopardy Clause.¹⁰⁴ However, unlike an individual, an organization may be criminally liable for the act of a single agent who violates a criminal law in the scope of employment and with intent to benefit the corporation.¹⁰⁵ That broad standard, in-

¹⁰¹ See Vikramaditya S. Khanna, *Should the Behavior of Top Management Matter?*, 91 *Geo. L.J.* 1215, 1228–31 (2003); see also Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 *N.Y.U. L. Rev.* 687, 704–09 (1997).

¹⁰² See Arlen & Kraakman, *supra* note 101, at 690–91; Chris William Sanchirico, *Detection Avoidance*, 81 *N.Y.U. L. Rev.* 1331, 1337 (2006).

¹⁰³ See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 *Ind. L.J.* 473, 526 (2006); Coffee, *supra* note 20, at 407–10; Annie Geraghty, *Corporate Criminal Liability*, 39 *Am. Crim. L. Rev.* 327, 338 & n.73 (2002); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 *Harv. L. Rev.* 1477, 1479–81 (1996); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 *Vand. L. Rev.* 1343, 1350 (1999).

¹⁰⁴ See *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 *Harv. L. Rev.* 1227, 1230 (1979); Vikramaditya S. Khanna, *Corporate Defendants and the Protections of Criminal Procedure: An Economic Analysis* 7–11 (Michigan Law & Econ. Research Paper, Paper No. 04-015, 2004), available at <http://ssrn.com/abstract=657441>.

¹⁰⁵ See *N.Y. Cent. R.R. v. United States*, 212 U.S. 481, 494–95 (1909). Further, after-the-fact approval of the agent's conduct, or ratification, can satisfy the scope and intent requirements. See *Restatement (Second) of Agency* § 82 (1958); see also *United States v. Cincotta*, 689 F.2d 238, 241–42 (1st Cir. 1982) (stating that the agent's "acts must be motivated—at least in part—by an intent to benefit the corporation"); *Thompson Memo*, *supra* note 16, at 1–2 (approving of the conviction of a corporation "despite its claim that the employee was acting for his own benefit, namely his 'ambitious nature and his desire to ascend the corporate ladder'" (citing *United States v. Automated Med. Lab.*, 770 F.2d 399, 407 (4th Cir. 1985))). This twentieth-century de-

tended to deter and to avoid issues of assigning responsibility within complex firms, permits enormous exposure to acts of agents¹⁰⁶ and was drawn from tort principles of enterprise liability.¹⁰⁷ Critics have asked the DOJ to impose its own more restrictive respondeat superior standard. For example, the Committee on Capital Markets Regulation recommends that the DOJ largely adhere to its approach, but limit prosecutions only to “exceptional circumstances of pervasive culpability throughout all offices and ranks.”¹⁰⁸

Second, the criminal prohibitions for which organizations may be held liable under those broad respondeat superior standards remain notoriously vague. Congress enacted substantive criminal law rules with open-textured prohibitions and reduced culpability resembling civil standards for liability.¹⁰⁹ For example, broad federal criminal fraud statutes leave much to the interpretation of

velopment altered the common law rule that “[a] corporation cannot commit treason, or felony, or other crime, in [its] corporate capacity: though [its] members may, in their distinct individual capacities.” William Blackstone, 1 Commentaries *464.

¹⁰⁶ See Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 *Law & Contemp. Probs.* 23, 24 (1997) (“[T]here is often no distinction between what the prosecutor would have to prove to establish a crime and what the relevant administrative agency or a private plaintiff would have to prove to show civil liability.”); see also John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 *B.U. L. Rev.* 193, 246 (1991).

¹⁰⁷ By 1918, Judge Learned Hand observed “there is no distinction in essence between the civil and the criminal liability of corporations, based upon the element of intent or wrongful purpose.” *United States v. Nearing*, 252 F. 223, 231 (S.D.N.Y. 1918). On tort origins for enterprise liability, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 *J. Legal Stud.* 461, 465 (1985).

¹⁰⁸ *Comm. on Capital Mkts. Regulation*, *supra* note 8, at 13. Of course, that standard is entirely consonant with the DOJ’s current Guidelines. See Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Dep’t Components, U.S. Attorneys 4 (Dec. 12, 2006), http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf. [hereinafter McNulty Memo].

¹⁰⁹ See, e.g., John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the “Evolution” of a White Collar Crime*, 21 *Am. Crim. L. Rev.* 1, 9–10 (1983); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 *Yale L.J.* 1875, 1875 (1992); Lynch, *supra* note 106, at 36–37; see also Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757, 760–70 (1999).

courts and prosecutors, and many incorporate compliance with regulations.¹¹⁰

Thus, the DOJ can readily obtain convictions given broad respondeat superior liability and substantive criminal law. The DOJ nevertheless rejected a deterrence approach in which it would have sought convictions or punitive fines because of a different agency problem: an indictment has such great collateral consequences on the entire entity and also blameless employees, shareholders, consumers, and creditors.¹¹¹ Those collateral consequences include severe regulatory prohibitions such as debarment or revocation of licensing.¹¹² Even for firms without extensive reliance on government contracts or licensing, the reputational effects of an indictment,

¹¹⁰ See, e.g., 18 U.S.C. §§ 1341, 1343 (2000) (mail fraud and wire fraud); see discussion in Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469, 475–76 (1996).

¹¹¹ See Thompson Memo, *supra* note 16, at 12 (“[P]rosecutors may take into account the possibly substantial consequences to a corporation’s officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it.”); see also Bruce Coleman, *Is Corporate Criminal Liability Really Necessary?*, 29 Sw. L.J. 908, 919–20 (1975).

¹¹² See Thompson Memo, *supra* note 16, at 12 (“Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care.”); 48 C.F.R. § 9.406-2(a) (1998) (providing for debarment and suspension from government contracts or subcontracts during criminal prosecution). However, interestingly adopting a parallel structural reform approach, the debarment provisions permit excusing debarment if “the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.” 48 C.F.R. § 9.406-1(a)(1). Other factors relevant to the excusal of debarment include whether “the contractor cooperated fully with Government agencies,” and whether it adopted any Government-recommended remedial measures. 48 C.F.R. §§ 9.406-1(a)(4), (7). Examples of laws governing regulated industries that disqualify criminally prosecuted firms include the following: Securities Act of 1933, 15 U.S.C. § 77t(b) (2000); Securities Exchange Act of 1934, 15 U.S.C. §§ 78o(b)(4)–(6), 78u(d)–(e) (2000); Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(e) (2000); Commodity Exchange Act, 7 U.S.C. § 12a (2000); Federal Deposit Insurance Act, 12 U.S.C. § 1818(a)(2) (2000); Medicare and Medicaid Patients and Program Protection Act, 42 U.S.C. § 1320a-7 (2000). See generally White Collar Crime Comm., Am. Bar Ass’n, *Final Report: Collateral Consequences of Convictions of Organizations* (1991); Andrew T. Schutz, *Too Little Too Late: An Analysis of the General Service Administration’s Proposed Debarment of WorldCom*, 56 Admin. L. Rev. 1263 (2004).

much less a conviction, may be severe.¹¹³ As a result, prosecutors face great incentives to avoid an indictment that can destroy a corporation and as a result harm employees, shareholders, and customers.

The overdeterrent effect of an indictment provided great impetus for the DOJ to resolve prosecutions pre-indictment at the charging stage. A turning point for the DOJ was the Arthur Andersen LLP case. Andersen decided to go to trial rather than agree to a deferred prosecution agreement because the terms gave so much “power and discretion to the Justice Department.”¹¹⁴ Andersen later sought bankruptcy in part because its conviction, though later reversed, resulted in automatic debarment by the SEC and inability to provide services to public corporations.¹¹⁵ The DOJ suffered great criticism following Andersen’s collapse and has since moderated its approach to explicitly take into account collateral consequences in organizational cases.¹¹⁶ That said, the DOJ still sometimes pursues indictments; the class action law firm Milberg Weiss Bershad & Schulman was indicted after balking at a deferral agreement.¹¹⁷

Organizational prosecutions also impose special burdens on the DOJ, further explaining the “cooperation dynamic.”¹¹⁸ Organiza-

¹¹³ See Buell, *supra* note 103 (providing analysis of the functioning and the role of reputational sanction in organizational prosecutions); Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 Wash. U. L.Q. 329, 352 (1993) (“In some instances adverse publicity alone can cause corporate devastation.”).

¹¹⁴ See Richard B. Schmitt et al., *Behind Andersen’s Tug of War with U.S. Prosecutors*, Wall St. J., Apr. 19, 2002, at C1.

¹¹⁵ See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005); Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 Am. Crim. L. Rev. 107, 110 (2006). See generally 17 C.F.R. § 201.102(e)(2) (2005).

¹¹⁶ See Thompson Memo, *supra* note 16, at 12–13.

¹¹⁷ See Julie Creswell, *U.S. Indictment for Big Law Firm in Class Actions*, N.Y. Times, May 19, 2006, at A1 (quoting the U.S. Attorney as saying, “We really had a situation where the firm was not accepting responsibility, was not making any substantial changes to the firm itself. We really were in a situation where we had no choice but to indict.”). Milberg Weiss responded that the agreement would have required improper waiver of attorney-client privilege. See Milberg Weiss, *Statement Regarding Indictment* (May 18, 2006), <http://www.milbergweissjustice.com/ourstatements.php>.

¹¹⁸ See Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 Ohio St. J. Crim. L. 521, 526–29 (2004).

tional prosecutions require a substantial investment due to their complexity, the organizations' greater ability to conceal information, attorney-client privilege issues, access to very highly paid defense counsel, and the factual complexity of such cases. Perhaps for those reasons, for decades federal prosecutors chose to prosecute very few organizations.¹¹⁹ It was not until 1999 that the DOJ issued any document making transparent its approach to exercising discretion regarding organizations. That document, known as the Holder Memo, was updated in 2001 in a memo by then-Deputy Attorney General Larry Thompson known as the Thompson Memo, and then slightly revised in the 2006 McNulty Memo.¹²⁰ Prosecutors are instructed to consider whether prosecution is necessary at all or whether civil or regulatory fines sufficiently punish and deter.¹²¹ The need for more formalized procedures may also be explained by the acceleration in organizational prosecutions post-Enron, discussed next.

The DOJ has now firmly rejected an optimal deterrence approach to organizational punishment, and, as developed below, the DOJ does not chiefly seek punitive fines in its settlements and emphasizes instead restitution to compensate victims. Nor could the DOJ easily adopt optimal deterrence as its goal because the Sentencing Commission has already adopted Guidelines that reject optimal punishment and instead mitigate fines if a firm has "effective compliance" programs.¹²² Due to the Guidelines, even if the DOJ aggressively pursued convictions, the resulting sentences might

¹¹⁹ See Khanna, *supra* note 104, at 25–26.

¹²⁰ See Thompson Memo, *supra* note 16, at 13; McNulty Memo, *supra* note 108, at 17. Also, until the Organizational Sentencing Guidelines were promulgated in 1991, fines remained low and civil awards might have had the greater effect. See Cindy R. Alexander, Jennifer Arlen & Mark A. Cohen, *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 *J. Law & Econ.* 393, 395, 409 (1999) (stating that before 1984, "the average fine was about \$46,000," while "[t]he mean criminal fine imposed on a publicly held firm increased from \$1.9 million pre-Guidelines to \$19.1 million under the Guidelines").

¹²¹ See Thompson Memo, *supra* note 16, at 13; see also Lynch, *supra* note 106, at 32.

¹²² See Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 *Wash. U. L.Q.* 205, 217–22 (1993) (describing the Commission's conscious departure from the orthodox model of optimum deterrence, finding it impossible to estimate with any accuracy or possibility of empirical support the probability of detection of any particular crimes).

look similar to the reforms already obtained in settlements—except for the terrible adverse collateral consequences of an indictment and conviction.

2. Prosecuting Individuals Not Organizations

The DOJ could alternatively exercise the opposite option to not prosecute organizations at all. Scholars have called for that result, criticizing organizational criminal law as lacking a sound deterrence foundation.¹²³ They suggest outright decriminalization of organizational crime and greater reliance on individual criminal prosecutions and regulatory enforcement.¹²⁴ For reasons just discussed, organizations may not be able to efficiently prevent criminal acts by their agents. Prosecuting only individual wrongdoers would continue to deter individual wrongdoing and do so without subjecting the corporation and third parties to the enormous potential collateral costs of indictment. Prosecutors' expertise may lie in prosecuting individual wrongdoers and not in reform of organizations or long-term implementation of structural remedies.¹²⁵

A move to prosecute only individuals would also address concerns regarding the unfairness of organizational prosecutions to individual defendants by avoiding the situation where individual employees have the power of both the DOJ and the organization arrayed against them. Although there is nothing unusual or impermissible about prosecutors seeking the cooperation of one defendant as against another in criminal cases, an organization is

¹²³ See Epstein, *supra* note 11; *supra* note 20.

¹²⁴ See Arlen, *supra* note 20; John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 *Mich. L. Rev.* 1466 (1982); Kraakman, *supra* note 20.

¹²⁵ Mary Jo White, former U.S. Attorney for the Southern District of New York, commented that “[f]or a prosecutor to get into the business of changing corporate culture is skating on fairly thin ice.” Interview with Mary Jo White, Partner, Debevoise & Plimpton LLP, New York, New York, *Corp. Crime Rep.* (Corporate Crime Reporter, Wash., D.C.) Dec. 12, 2005, at 48, available at <http://www.corporatecrimereporter.com/maryjowhiteinterview010806.htm>. Professor Coffee has similarly commented: “I don’t think prosecutors are particularly skilled in corporate governance.” Janet Novack, *Club Fed, Deferred*, *Forbes.com*, Aug. 29, 2005, http://www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz_jn_0824beltway.html. Similar criticisms are directed at civil structural reform efforts. See Zaring, *supra* note 72, at 1040 n.122 (observing a path dependency in remedial design and stating that “the Civil Rights Division regularly enters into cookie-cutter consent decrees across jurisdictions”).

unlike the typical cooperator or informant in many respects. The organization's cooperation provides the DOJ with employee records and documents, and, where privilege is waived, with attorney-client communications and work product. The KPMG case raises the manner in which an organization can exert other pressures. Employees can face a difficult choice whether to cooperate or lose their jobs and employer payment of legal bills. Future scholarship should explore in depth the effects of DOJ agreements on individual defendants.

Individual prosecutions, however, would not be nearly as easy to mount absent cooperation of the entity itself. Given limited government resources and an organization's "often formidable resources," the DOJ significantly depends on the organization's cooperation to mount individual prosecutions, particularly where documents and witnesses are in the organization's control.¹²⁶

Further, abandoning organizational prosecutions may have been politically unrealistic for the DOJ, though this may change. As noted earlier, in the past federal prosecutors only pursued organizational cases against very small organizations, but, as will be developed further in the next Part, the landscape changed after a wave of large-scale corporate fraud. With the passage of Sarbanes-Oxley, Congress gave strong direction to the Sentencing Commission, which in turn enhanced organizational sentences.¹²⁷ For the DOJ to have simply ignored those directions and refused to prosecute a wide range of organizational crimes would have been a political nonstarter. Instead, the DOJ crafted an intermediate approach to prosecute only some organizations and to accommodate interests of shareholders, third parties, agencies, and the public.

3. Deferring to Private Litigation and Regulators

As a third alternative approach, the DOJ could not prosecute at all, instead deferring entirely to private civil litigation or regulatory action. Doing so would greatly reduce the deterrent threat entities may face, where, unlike in civil law, the "primary goals of criminal law are deterrence, punishment, and rehabilitation," and further, where the costs of an indictment, much less a conviction, may be

¹²⁶ Wray & Hur, *supra* note 17, at 1170–71; accord Brown, *supra* note 118, at 528–29.

¹²⁷ See *infra* notes 143, 224–25.

severe.¹²⁸ The DOJ already defers to private litigation and explicitly requires prosecutors to consider whether private civil suits would suffice.¹²⁹ Arguments can be made that this deference should be enhanced. If shareholders are the primary victims of failures by management to adequately supervise agents, then the shareholders can file a derivative suit; other victims can file civil tort or consumer fraud actions.¹³⁰ The DOJ might enter into a settlement that does not serve shareholder interests.¹³¹ Adding to fear of collusion, agreements before indictment raise similar concerns as early settlements in class actions.¹³² On the other hand, prosecutors offer advantages over private litigation. Unlike private attorneys, DOJ prosecutors lack a financial stake in the outcome and do not incur the transaction costs of attorney's fees.¹³³ In addition, the DOJ often seeks civil restitution that provides victims with a similar rem-

¹²⁸ Thompson Memo, *supra* note 16, at 13.

¹²⁹ See *id.* (“Although non-criminal alternatives to prosecution often exist, prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct.”).

¹³⁰ Regarding the deterrent threat of securities class actions, see Comm. on Capital Mkts. Regulation, *supra* note 8, at 71 (describing how securities class action settlements increased sharply in value since the 1990s; in 2004, the DOJ secured \$16.8 million in sanctions, or 2% of total securities enforcement, compared to over \$3.1 billion in SEC enforcement, or 30%, and \$5.4 billion in private class actions, or 52.5% of enforcement); see also Michael P. Dooley, Two Models of Corporate Governance, 47 *Bus. Law.* 461, 510 n.185 (1992); Roberta Romano, The Shareholder Suit: Litigation Without Foundation?, 7 *J.L. Econ. & Org.* 55, 60 (1991).

¹³¹ Not only may shareholders ultimately bear the cost that a prosecution incurs, but, raising a moral hazard problem, management may agree to incur suboptimal costs to settle with the DOJ to avoid their own individual liability. See Coffee, *supra* note 20, at 387 (calling this the “overspill” problem of corporate penalties); see also Polinsky & Shavell, *supra* note 97, at 948–49. DOJ actions do not involve multibillion dollar settlements as in some blockbuster securities class actions. See Stanford Securities Class Action Clearinghouse, Top Ten List, http://securities.stanford.edu/top_ten_list.html (last visited Apr. 7, 2007) (displaying ten securities class action settlements over \$500 million).

¹³² See Class Action Fairness Act of 2005, 28 U.S.C.A. §§ 1712–1715 (West 2006) (requiring judicial scrutiny and approval of certain types of class action settlements); see also S. Rep. No. 109-14, at 35 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 7 (describing congressional concern with attorney collusion at the expense of the plaintiff class).

¹³³ See Comm. on Capital Mkts. Regulation, *supra* note 8, at 79 (criticizing efficacy of securities class actions in compensating victims).

edy. Deferral agreements contain detailed admissions of wrongdoing that can empower civil plaintiffs.¹³⁴

Second, the DOJ currently defers to administrative agency enforcement, and arguments can be made that they could do so to a greater degree. Agencies can pursue a wide range of civil remedies, from forfeiture to fines, restitution, and injunctive remedies.¹³⁵ Agencies not only often detect the underlying crimes in the DOJ's cases, based on their own public reporting regimes, but they have specialized expertise. Agencies may also better protect third parties and the public; in contrast to a largely secret exercise of prosecutorial discretion, several federal agencies must permit notice and comment from the public before they enter into consent decrees regarding certain federal statutes.¹³⁶ Further, in civil actions filed by agencies, third parties potentially affected by a consent decree may often participate in a fairness hearing conducted before the decree is approved.¹³⁷

These advantages of agency action explain why in all but a few cases the relevant agency already handles the litigation. Agencies only refer serious cases to the DOJ, and the DOJ explicitly considers whether a prosecution is a necessary supplement to pending agency action before asserting jurisdiction.¹³⁸ Indeed, regulatory

¹³⁴ An issue for future exploration is whether DOJ actions could undermine civil suits. A proposed amendment to the Federal Rules of Evidence would make clear that a corporation may selectively waive privilege only for cooperation with the DOJ, preventing civil plaintiffs from making use of material uncovered. Report of the Advisory Comm. on Evidence Rules 5 (2006), available at http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf (proposing addition of Fed. R. Evid. 502(c)).

¹³⁵ See Lynch, *supra* note 106, at 27–31.

¹³⁶ See, e.g., Tunney Act, 15 U.S.C. § 16(b) (2000); 16 C.F.R. § 2.34(c) (2006) (FTC consent orders); Clean Water Act, 33 U.S.C. § 1319(g)(4) (2000); Safe Drinking Water Act, 42 U.S.C. § 300h-2(c)(3)(B) (2000); 40 C.F.R. § 22.45 (2006) (Environmental Protection Agency (“EPA”) public notice requirements); CERCLA, 42 U.S.C. § 9622(d)(2) (2000).

¹³⁷ See *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986) (describing third party right to participate in fairness hearing).

¹³⁸ See Thompson Memo, *supra* note 16, at 3 (including an entity’s efforts to “cooperate with the relevant government agencies” in the list of factors prosecutors should consider in determining whether to charge a corporation); *id.* at 7 (“[T]he Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the SEC and the EPA, as well as the Department’s Environmental and Natural Resources Division, have formal voluntary disclosure programs in

agencies including the SEC have adopted parallel approaches also emphasizing self-reporting, disclosure, and compliance.¹³⁹ Further, the DOJ continues to coordinate and collaborate with regulatory agencies during the implementation of its deferral agreements.¹⁴⁰ The DOJ's added value may be that in unusually serious cases, it can secure cooperation using the deterrent threat of indictment.

As this Section has explained, the DOJ chooses to pursue structural reform settlements rather than indicting and convicting (which would impose grave collateral consequences), or prosecuting only individuals (which would pose practical difficulties absent the entity's cooperation and would ignore the DOJ mandate to enforce organizational criminal law), or deferring more to private litigation and regulators (which the DOJ does, except in serious cases where agencies refer cases to the DOJ for the added deterrent of a criminal prosecution). The next Part develops in greater detail the decisions that shaped the DOJ's structural reform approach and provides a richer empirical description of that approach.

II. THE DOJ'S NEW MODEL FOR STRUCTURAL REFORM PROSECUTION

Like the explosion of public interest law firms in the late 1960s and early 1970s pursuing structural reform, the DOJ has now consciously adopted a structural reform litigation strategy in the wake of Enron and dozens of other high-profile corporate malfeasance

which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions.”).

¹³⁹ The SEC's Seaboard Report closely resembles the DOJ's McNulty and Thompson Memos in its approach. See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, 76 SEC Docket 296 (Oct. 23, 2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm> [hereinafter Seaboard Report] (asking, among the factors informing SEC discretion, “[d]id the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct?”); Information Memorandum from Susan L. Merrill, Executive Vice President, Div. of Enforcement, N.Y. Stock Exch., to All Members, Member Orgs. & Chief Operating Officers 2 (Oct. 7, 2005), [http://apps.nyse.com/commdata/PubInfoMemos.nsf/0/85256FCB005E19E8852570920068314A/\\$FILE/Microsoft%20Word%20-%20Document%20in%2005-77.pdf](http://apps.nyse.com/commdata/PubInfoMemos.nsf/0/85256FCB005E19E8852570920068314A/$FILE/Microsoft%20Word%20-%20Document%20in%2005-77.pdf); see also *infra* note 163.

¹⁴⁰ See *infra* Section II.B.

scandals.¹⁴¹ A structural reform paradigm is different from the traditional role of prosecutors, which focuses on seeking convictions. Further, although prosecutors have previously pursued institutional reforms in several contexts, the DOJ has recently fixed upon one model for its recent structural reform litigation: the deferred or nonprosecution agreement, secured at the charging stage, far earlier than in typical negotiations that occur during plea bargaining after an indictment.

The DOJ's new structural reform prosecutions have been brought in a range of areas, from securities fraud, to environmental cases, to foreign corrupt practice cases. These disparate efforts have not been viewed as sharing a common project, whereas on the civil side, institutional reform interventions in schools, police departments, and prisons have been considered as part of a common reform agenda.¹⁴² In this Part, I describe in greater detail the DOJ's adoption of a strategy at the charging stage resulting in a recent wave of high-profile settlements. I then provide empirical analysis of the terms of these agreements to develop a richer picture of what the DOJ seeks to accomplish. Second, after describing the charging stage approach that the DOJ decided to adopt in pursuing structural reform, I frame the different ways prosecutors could obtain structural reform at other stages in a criminal case. The prevention, charging, plea bargaining, and sentencing stages each involve progressively greater court supervision, and, as a fifth alternative, prosecutors could seek civil consent decrees. Though the DOJ can pursue structural reform using any one or a combination of these approaches, this discussion will shed light on why the DOJ chose instead to seek structural reform early in a criminal case, at the charging stage, where prosecutors have particularly broad discretion.

A. The Making of the DOJ's Structural Approach

The Department of Justice now operates at the center of a program chiefly seeking reform of private corporations (though also targeting a few public entities) engaging in such crimes as criminal white collar fraud, money laundering, securities fraud, tax viola-

¹⁴¹ See Blum, *supra* note 22.

¹⁴² See *supra* Section I.B.

tions, foreign corrupt practices, health care fraud, and environmental crimes. In the past several years, corporate culture has been scrutinized in the wake of the recent “epidemic” of accounting and financial malfeasance. Congress responded to the crisis with the Sarbanes-Oxley Act, which relies on both enhanced criminal penalties and regulatory reform of governance to create “internal controls” to prevent malfeasance.¹⁴³ At the same time, the DOJ responded with a series of large-scale organizational prosecutions. Only a negligible number have been convicted, however.¹⁴⁴

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

¹⁴³The Act, among its provisions, creates new offenses for destruction or falsification of records with intent to obstruct federal investigations, requires accountants to maintain audit documents, creates independent audit committees within corporations, requires companies to report on their “internal controls,” and, finally, establishes an independent Public Accounting Oversight Board. 15 U.S.C.A. 78j-1(m) (West 1997 & Supp. 2006); 15 U.S.C. §§ 7211, 7241(a), 7245(1), 7262 (Supp. IV 2004); see Coffee, *supra* note 7, at 336, 353–64; Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 *Yale L.J.* 1521, 1529 (2005).

¹⁴⁴In the past few years, only two large firms per year have been sentenced. See U.S. Sentencing Comm’n, 2003 Sourcebook of Federal Sentencing Statistics 108 tbl.54 (2003), available at <http://www.ussc.gov/ANNRPT/2003/SBtoc03.htm> [hereinafter 2003 Sourcebook of Federal Sentencing Statistics] (only two of ninety organizations sentenced in fiscal year 2003 had more than five thousand employees; eighty-six had fewer than two hundred employees, with approximately half in firms of fewer than ten employees); U.S. Sentencing Comm’n, 2004 Sourcebook of Federal Sentencing Statistics 124 tbl.54, 330 tbl.54 (2004), available at <http://www.ussc.gov/ANNRPT/2004/SBtoc04.htm> [hereinafter 2004 Sourcebook of Federal Sentencing Statistics] (only two of sixty-nine organizations sentenced in 2004 had more than five thousand employees; sixty-two had fewer than two hundred employees, with approximately half in firms of fewer than ten employees). The Milberg Weiss indictment is one of the few reported indictments of a large firm since Andersen. See *supra* note 117.

¹⁴⁵See Exec. Order No. 13,271, 3 C.F.R. 245 (2002).

ment.¹⁴⁶ The numbers are accelerating. While no more than two such agreements a year were reported before 2003, there were four such agreements in 2003, eight in 2004, ten in 2005, and thirteen in 2006.

This change can be attributed to a new approach announced in January 2003 by the then-head of the Task Force, Deputy Attorney General Larry Thompson, in a document known as the Thompson Memo.¹⁴⁷ The Memo recommended “granting a corporation immunity or amnesty or pretrial diversion . . . in exchange for cooperation” when that cooperation “appears to be necessary to the public interest.”¹⁴⁸ Not only was “pre-trial diversion” for corporations a fairly new concept, but the Memo did not suggest when the “public interest” might be served by not prosecuting a corporation in exchange for an agreement. The Memo did, however, set out factors to provide guidance as to when the DOJ should prosecute. They include: (1) the nature, scope, and pervasiveness of wrongdoing, (2) the history of misconduct, (3) timely and voluntary disclosures and cooperation with the investigation (versus “circling the wagons”), (4) remedial actions taken, including disciplining wrongdoers, (5) whether the company has an adequate compliance program, (6) collateral consequences to shareholders, pensionholders, and employees, and (7) the adequacy of individual prosecutions or civil and regulatory remedies.¹⁴⁹

The heart of the Thompson Memo approach is the fifth factor, emphasizing compliance in the DOJ’s exercise of discretion and in the design of remedies. The approach creates, in effect, a “due diligence” defense for corporations.¹⁵⁰ Corporations that adopt an

¹⁴⁶ See Corporate Crime Reporter, *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements* (2005), <http://www.corporatecrimereporter.com/deferredreport.htm> (“[P]rosecutors have entered into twice as many non-prosecution and deferred prosecution agreements with major American corporations in the last four years . . .”).

¹⁴⁷ See Thompson Memo, *supra* note 16. Generally, the DOJ suggests prosecutors enter into deferred prosecution agreements when “the person’s timely cooperation appears to be necessary to the public interest.” U.S. Dep’t of Justice, *United States Attorneys’ Manual* § 9-27.600 (2d ed. 2000).

¹⁴⁸ Thompson Memo, *supra* note 16, at 6.

¹⁴⁹ *Id.* at 3–4.

¹⁵⁰ See *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, *supra* note 104, at 1258 (1979) (advocating a due diligence defense in federal criminal law to modify respondeat superior).

“adequate compliance program” may avoid prosecution. Of course, a central concern of the DOJ is to screen out “cosmetic compliance” programs.¹⁵¹ Organizations, including large organizations, have been adopting compliance programs for some time.¹⁵² As the DOJ well knew, Enron had a compliance program entitled “Respect, Integrity, Communication and Excellence,” which despite the lofty title existed only on paper.¹⁵³ The Thompson Memo guidelines counsel that prosecutors investigate whether compliance efforts are implemented effectively.¹⁵⁴ Further, the U.S. Sentencing Commission adopted guidelines mitigating punishment but only where organizations develop “effective” compliance programs.¹⁵⁵

The DOJ now seeks to use prosecution in egregious cases to leverage compliance on a “massive scale” and provide “a force for positive change of corporate culture.”¹⁵⁶ In keeping with its new mission, the DOJ has obtained deferred or nonprosecution agreements with thirty-five companies, many of which are leading Fortune 500 companies. These agreements resulted in \$4.9 billion in fines and restitution as well as sweeping compliance reforms.¹⁵⁷ The

¹⁵¹ See Krawiec, *supra* note 100.

¹⁵² See, e.g., Weaver et al., *Corporate Ethics Practices in the Mid-1990's: An Empirical Study of the Fortune 1000*, 18 *J. Bus. Ethics* 283, 285–86 (1999).

¹⁵³ See Enron Corp., Code of Ethics 4 (2000), <http://www.thesmokinggun.com/enron/enronethics1.html>; Public Hearing Held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines 60 (Nov. 14, 2002), available at http://www.uscc.gov/corp/ph11_02/plenary1.pdf.

¹⁵⁴ The Thompson Memo states: “[i]n evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct.” Thompson Memo, *supra* note 16, at 10; see also Memorandum from the Deputy Attorney Gen. to All Component Heads and U.S. Attorneys para. VII(A) (June 16, 1999), <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html> (noting that the mere “existence of a compliance program is not sufficient”).

¹⁵⁵ See U.S. Sentencing Guidelines Manual § 8B2.1 (2005), discussed *infra* Section III.B.

¹⁵⁶ Thompson Memo, *supra* note 16, at 1 (“[C]orporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale.”).

¹⁵⁷ See *infra* Appendix A; *infra* Section II.B.

DOJ has also declined prosecution of organizations in part because they maintain “effective” compliance programs.¹⁵⁸

The DOJ’s approach in organizational crime cases has several important progenitors in addition to civil structural reform efforts; structural reform is not an entirely new goal for prosecutors. Prosecutors beginning in the 1980s pursued long-term structural reform remedies in civil RICO cases that I describe in Section C below. The DOJ Antitrust Division adopted compliance-oriented approaches to criminal prosecutions decades ago, as have several other DOJ divisions.¹⁵⁹ Thus, federal prosecutors already had practical experience implementing institutional reforms. The DOJ’s current approach also has origins dating back to compliance approaches adopted in the 1970s by a series of federal regulatory agencies.¹⁶⁰ States have more recently adopted parallel strategies to

¹⁵⁸ See U.S. Sentencing Comm’n, Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines 27 n.107 (2003) [hereinafter Ad Hoc Committee Report] (citing examples).

¹⁵⁹ While the Thompson Memo generally governs all criminal prosecutions, divisions within the DOJ adopted earlier compliance-based strategies in division-specific areas ranging from antitrust to environmental enforcement to civil rights. The DOJ’s Antitrust Division adopted a “Corporate Leniency Policy” in 1978. The policy was revised in 1993 to focus on compliance. See Antitrust Division, U.S. Dep’t of Justice, Corporate Leniency Policy (Aug. 10, 1993), available at <http://www.usdoj.gov/atr/public/guidelines/0091.pdf>. Similarly, the DOJ’s Environment & Natural Resources Division adopted an approach rewarding compliance and voluntary disclosure. See Env’t & Natural Res. Div., U.S. Dep’t of Justice, Factors in Decisions on Criminal Prosecution for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (July 1, 1991), http://www.usdoj.gov/enrd/Electronic_Reading_Room/factors.htm. In the area of police misconduct, in which the DOJ may file civil suits for injunctive relief against local governments, the Civil Rights Division at the DOJ has in recent years settled cases pursuant to Memoranda of Agreements rather than consent decrees. See 42 U.S.C. § 14141 (2000); Matthew J. Silveira, Comment, An Unexpected Application of 42 U.S.C. § 14141: Using Investigative Findings for § 1983 Litigation, 52 UCLA L. Rev. 601, 617 & n.73 (2004). The DOJ also emphasizes voluntary settlement of ADA violations and mistreatment of institutionalized persons in correctional facilities under the Civil Rights of Institutionalized Person Act. See News Release, U.S. Dep’t of Justice, Fact Sheet: Civil Rights Accomplishments (July 23, 2003), http://www.usdoj.gov/opa/pr/2003/July/03_crt_414.htm.

¹⁶⁰ Such agencies include the Department of Defense, the Department of the Treasury, the Department of Health and Human Services (“HHS”), the EPA, the Federal Financial Institutions Regulatory Agency, the Federal Aviation Administration, the State Department, and the SEC. See, e.g., U.S. Dep’t of Defense, Voluntary Disclosure Program Guidelines (2000); Office of Thrift Supervision, U.S. Dep’t of the Treasury, Regulatory Bull. No. 32-28, Thrift Activities Regulatory Handbook Update § 370, at 370.1–.2 (2003), available at <http://www.ots.treas.gov/docs/7/74085.pdf>; Publi-

create “incentives . . . to implement compliance programs,”¹⁶¹ with then-New York Attorney General Eliot Spitzer having led the way.¹⁶² The convergence in regulatory approaches amongst state and federal actors continues. Since the DOJ issued its Thompson Memo, still more regulatory agencies have enacted new policies even more closely resembling the DOJ’s approach.¹⁶³

cation of the [HHS] OIG’s Provider Self-Disclosure Protocol, 63 Fed. Reg. 58,399 (Oct. 30, 1998); Memorandum from Earl E. Devaney, Dir., Office of Criminal Enforcement, U.S. EPA, to All EPA Employees Working in or in Support of the Criminal Enforcement Program (Jan. 12, 1994), available at <http://www.epa.gov/Compliance/resources/policies/criminal/exercise.pdf> (known as the Devaney Memo); Steve Herman, From the Assistant Administrator, Audit Policy Update (U.S. EPA, Wash., D.C.), Jan. 1997, at 1, <http://www.epa.gov/compliance/resources/newsletters/incentives/auditupdate/spr1997.pdf>; Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 45 Fed. Reg. 59,423 (Sept. 9, 1980); see also Wray & Hur, *supra* note 17, at 1108–33 (describing the compliance approaches of each of these federal agencies in turn); *supra* note 112.

¹⁶¹ Ad Hoc Committee Report, *supra* note 158, at 35 (quoting Jeffrey M. Kaplan, The Sentencing Organizational Guidelines: The First Ten Years, *Ethikos & Corp. Conduct Q.*, Nov./Dec. 2001, at 1, 2–3, available at <http://www.singerpubs.com/ethikos/html/guidelines10years.html>).

¹⁶² See Michael Bobelian, Companies Under Fire Often Decide to Settle to End Problems Quickly, *N.Y. L.J.*, Nov. 29, 2004, at 1; Junda Woo, Self-Policing Can Pay Off for Companies, *Wall St. J.*, Sept. 8, 1993, at B5. Perhaps most remarkable was a global settlement of a dozen of the leading Wall Street investment banking firms with the New York Attorney General, the SEC, the New York Stock Exchange, and other regulators, “mandating sweeping structural reforms.” See Joint Press Release, SEC, NASD, NYSE, NYSAG & NASAA, Ten of Nation’s Top Investment Firms Settle Enforcement Actions (Apr. 28, 2003), <http://www.sec.gov/news/press/2003-54.htm>.

¹⁶³ These agencies include the Commodity Futures Trading Commission, Department of Commerce, Department of Labor, Department of the Treasury, EPA, the Federal Energy Regulatory Commission, the Occupational Safety and Health Administration, and the SEC. See, e.g., Enforcement Advisory, Div. of Enforcement, U.S. Commodity Futures Trading Comm’n, Cooperation Factors in Enforcement Division Sanction Recommendations (Aug. 11, 2004), available at <http://www.cftc.gov/files/enf/enfcooperation-advisory.pdf>; Office of Foreign Assets Control, Dep’t of the Treasury, 31 C.F.R. § 501.601–606 (2006); U.S. EPA, Incentives for Self-Policing: Discovery, Disclosure, and Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000); Seaboard Report, *supra* note 139; Press Release, U.S. SEC, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), available at <http://www.sec.gov/news/press/2006-4.htm> (noting that for the SEC, the use of “very large corporate penalties” is comparatively recent); see also Ad Hoc Committee Report, *supra* note 158, at 48 nn.189–94, 119 n.391; Wray & Hur, *supra* note 17, at 1109–13, 1125–34 (describing SEC experience under the Sea-

Finally, the DOJ has, in response to criticism from industry and Congress, moderated its approach in two respects. The McNulty Memo that superseded the Thompson Memo includes two brief but important additions. It discourages prosecutors, except in unusual cases, from conditioning agreement on nonpayment of employee legal fees, and, second, discourages prosecutors from obtaining privilege waivers, requiring central DOJ approval of such waivers.¹⁶⁴

B. Empirical Analysis of the DOJ's Agreements

Judge Gerard E. Lynch and others have argued that as the best solution for the problem of vast prosecutorial discretion, prosecutors should develop standards to constrain their discretion and to provide clear notice to organizations.¹⁶⁵ In some respects that is what the DOJ did when it issued its Thompson and McNulty Memo guidelines. Nevertheless, no DOJ guidelines define what remedies prosecutors should seek when they negotiate structural reform agreements. Courts have statutory authority to approve deferral of a prosecution, but no court has rejected an agreement.¹⁶⁶ All have been approved without judicial modification. The DOJ's remedial discretion could create substantial uncertainty among potential targets of prosecution. The agreements, for example the KPMG agreement, show the vast power of the DOJ to achieve structural oversight with a wide range of intrusive terms. Nevertheless, looking at the KPMG agreement alongside the others casts them all in a different light.

board Report and describing post-Thompson Memo approaches by regulatory agencies).

¹⁶⁴ See McNulty Memo, *supra* note 108, at 10–12.

¹⁶⁵ See Lynch, *supra* note 106, at 64–65; *infra* note 320.

¹⁶⁶ See 18 U.S.C. § 3161(h)(2) (2000) (stating that the time to file an indictment is tolled during “[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct”); Deferred Prosecution Agreement at 14, *United States v. Computer Assocs. Int’l, Inc.*, No. 1:04-cr-00837-ILG (E.D.N.Y. Sept. 22, 2004), available at <http://www.usdoj.gov/dag/cftf/chargingdocs/compassocagreement.pdf> (“[T]he Agreement to defer prosecution of CA must be approved by the Court, in accordance with 18 U.S.C. § 3161(h)(2). Should the Court decline to approve the Agreement to defer prosecution for any reason, both the Office and CA are released from any obligation imposed upon them by this Agreement, and this Agreement shall be null and void.”).

To determine whether or how the DOJ adopts any consistent approach that would provide somewhat clearer notice to organizations, I compiled terms from deferred and nonprosecution agreements entered in federal organizational prosecutions. I separated the agreements into two groups, before and after January 20, 2003, the date of the Thompson Memo; as noted, the numbers of such agreements began to sharply accelerate in 2003. I have included at Appendices A and B charts of the main features of these deferred prosecution agreements (DP's) and nonprosecution agreements (NP's). I am confident that the thirty-five agreements identified include all of the agreements entered in the first four years since the Thompson Memo was announced (and covering the entire period until the McNulty Memo was adopted), and for that reason I focus the analysis on that time frame.¹⁶⁷ I provide this comprehensive study of the DOJ approach both to better understand its features and also to provide guidance to prosecutors, courts, and practitioners in future negotiations and litigation. The table below summarizes several central findings regarding post-Thompson memo agreements.

Table 1: Post-Thompson Memo DOJ Agreements (Jan. 2003–Jan. 2007)

	<i>Independent Monitor</i>	<i>Compliance Program</i>	<i>Agency Cooperation</i>	<i>Privilege Waiver Required</i>	<i>DOJ Can Unilaterally Terminate</i>
Number of agreements	21	24	23	20	29
Percentage of the 35 agreements	60	69	66	57	83

Overall, the compliance focus of the DOJ is clear. Of the thirty-five agreements entered in the four years after January 2003, twenty-one included Independent Monitors (sixty percent).

¹⁶⁷ See *infra* note 326 on methodology. It is striking that thirty-five agreements have been entered since 2003, while I have been able to locate only thirteen such deferred organizational agreements in the years prior.

Twenty-four of the agreements ordered compliance programs (sixty-nine percent). However, far more of the agreements involved compliance programs than even this data illustrates. In ten of the remaining eleven, the corporation had already implemented a compliance program: in seven, the prosecutors recognized the organization had already taken sufficient steps to implement compliance measures;¹⁶⁸ in two, simultaneous compliance agreements were reached with regulators;¹⁶⁹ and in one case, the company voluntarily imposed a compliance program.¹⁷⁰ Of course, we cannot know from any of these agreements what other prior compliance or acts the DOJ may have taken into account.

¹⁶⁸ Those companies are AEP, AIG, AmSouth Bancorp, Micrus Corporation, PNC Financial, WesternGeco LLC, and Williams Power Co. See *infra* Appendix A; see, e.g., Press Release, Fed. Energy Regulatory Comm'n, Commission Accepts \$21 Million Civil Penalty to Settle Investigation of AEP's Natural Gas Activities (Jan. 26, 2005), <http://www.ferc.gov/press-room/press-releases/2005/2005-1/01-26-05-aep.asp> ("Commission staff understands that the companies' new owners are not repeating the improper practices."). In addition, the Healthsource agreement incorporated actions taken in response to an SEC settlement, and the MCI agreement recognized cooperation with the Oklahoma Attorney General. See *infra* Appendix A.

¹⁶⁹ The Adelphia and FirstEnergy Nuclear cases involved agreements with regulators. See Press Release, SEC, SEC and U.S. Attorney Settle Massive Financial Fraud Case Against Adelphia and Rigas Family for \$715 Million (Apr. 25, 2005), <http://www.sec.gov/news/press/2005-63.htm>; FirstEnergy Nuclear Hit With Record Fine for Reactor Damage, Env't News Service (Apr. 22, 2005), <http://www.ens-newswire.com/ens/apr2005/2005-04-22-04.asp> ("Davis-Besse's performance has been closely monitored by a dedicated NRC oversight panel and the inspection staff." (quoting Luis Reyes, the Nuclear Regulatory Commission's Executive Director for Operations)); see also *infra* Appendix A.

¹⁷⁰ The BankAtlantic agreement does not include or recognize compliance programs or monitors, but the company issued a public statement that it had implemented substantial compliance efforts. See Press Release, BankAtlantic, BankAtlantic Enters into Agreements with the Department of Justice, Office of Thrift Supervision, and FinCEN Relating to Bank Secrecy Act and Anti-Money Laundering Compliance Matters, <http://phx.corporate-ir.net/phoenix.zhtml?c=106823&p=irol-newsArticle&ID=847985&highlight> (Apr. 26, 2006) (quoting BankAtlantic CEO Alan B. Levan as saying, "we have worked tirelessly to ensure we are in full compliance with the Bank Secrecy Act and other anti-money laundering laws and regulations, and have made significant investments in personnel and compliance systems").

The only firm left, the exception, is BAWAG, a foreign bank that was in the process of being sold. Press Release, U.S. Attorney's Office, S. Dist. of N.Y., Austrian Bank "BAWAG" to Pay \$337.5 Million for Restitution to Victims of Refco Fraud (June 5, 2006), <http://www.usdoj.gov/usao/nys/pressreleases/June06/bagwagnon-prosecutionagreementpr.pdf>.

Thus, the DOJ appears to follow the Thompson and McNulty Memo guidelines in emphasizing compliance, at least in the written terms of the agreements. Some consistency would not be surprising given that the Corporate Fraud Task Force coordinates the prosecution of these cases (and importantly ensures that the various U.S. Attorneys' Offices do not issue competing or preemptive indictments in the same matter), but some inconsistency could also be expected, given that the Task Force does not currently oversee prosecutions, each U.S. Attorney's Office negotiates the agreements independently, and there is no requirement of central office approval of their terms.¹⁷¹

The DOJ did not invent this approach from whole cloth. As noted, it pursues compliance-based remedies similar to those of regulatory agencies such as the SEC, Environmental Protection Agency ("EPA"), Treasury Department, Defense Department, Department of Labor, Department of Health and Human Services ("HHS"), State Department, and the voluntary disclosure and cooperation regimes that DOJ Divisions and U.S. Attorneys' Offices had earlier adopted, also mirroring the substantial innovations of former New York Attorney General Eliot Spitzer's compliance-oriented approach.¹⁷²

It should come as no surprise that my data shows sixty-six percent of these agreements were reached in conjunction with regulatory agencies, sometimes more than one in a given agreement. By far the leading agency was the SEC, cooperating in fifteen agreements, followed by the U.S. Postal Inspection Services (eight), the IRS (five), the Commodity Futures Trading Commission (two), and several other agencies that only cooperated in one agreement (Treasury Department Inspector General, Nuclear Regulatory

¹⁷¹ See Andrew Hruska, *The President's Corporate Fraud Task Force*, U.S. Att'y Bull., May 2003, at 1, 1, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5103.pdf (stating that the Task Force members "consult regularly with the prosecutors and investigators . . . to coordinate the overall scope and direction of the Department's effort to combat corporate fraud"); Wray & Hur, *supra* note 17, at 1187-88 & n.407. Prosecutors in different districts use each others' work as a template. The U.S. Attorney's Office for the District of New Jersey "utilized the work of other districts as a starting point and crafted the final document to fit the facts of the case and the negotiations with Bristol-Myers." Christie & Hanna, *supra* note 17, at 1049.

¹⁷² See Wray & Hur, *supra* note 17, at 1107-08; *supra* notes 160-61.

Commission, U.S. Air Force, NASA, and Diplomatic Security Services).

Prosecutors also drew inspiration from the framework of the Organizational Sentencing Guidelines, rewarding corporations with “effective” compliance programs.¹⁷³ Nevertheless, many of the agreements fall short of the Guidelines’ rigorous criteria for what constitutes effective compliance; only five formally incorporate the Guidelines requirements.

Twelve agreements were nonprosecution agreements, while twenty-three were deferred prosecution agreements. Deferred prosecutions must be approved by a court, as discussed further below. However, the terms of deferred prosecution agreements did not vary significantly from those found in nonprosecution agreements. I discuss each category of provision in turn.

First and most prominent is the role of independent monitors. Twenty-one of the thirty-five prosecution agreements entered since the Thompson Memo required independent monitors. These monitors had sweeping powers to gather information, promulgate policies, and oversee compliance. As the U.S. Attorney for New Jersey explains, “[a] strong, independent monitor is in a far better position to ride herd over a mammoth corporation than any U.S. Attorney’s Office or Probation Office. Independent monitors are visible, on-site reminders that compliance with the terms of a deferred prosecution agreement is mandatory, not optional.”¹⁷⁴ The monitors do not report to a court, but report to the DOJ and perhaps also a federal agency. Further, none of the agreements provide that the reports of these monitors are to be made public (nor does the DOJ take a position on whether the reports are privileged). The work of these monitors resembles the sort of internal investigations by independent auditors that the DOJ increasingly demands for cooperating entities.¹⁷⁵

¹⁷³ The Thompson Memo cites the Organizational Guidelines in several places. See Thompson Memo, *supra* note 16, at 5, 7 n.2, 10 n.6. The Sentencing Commission then returned the favor, citing the Thompson Memo as part of the reason why it strengthened its compliance requirements. See Ad Hoc Committee Report, *supra* note 158, at 119–20, nn.392–93.

¹⁷⁴ See Christie & Hanna, *supra* note 17, at 1055.

¹⁷⁵ See, e.g., Lawrence D. Finder, Internal Investigations: Consequences of the Federal Deputation of Corporate America, 45 S. Tex. L. Rev. 111 (2003).

The length of monitoring is often longer than the typical eighteen months for deferral agreements and can be as long as three years. The average amount of time that these agreements last is two years. A few specify that they can be extended if needed to secure compliance.¹⁷⁶

The monitors may become involved in uncovering and remedying new criminality totally unrelated to the agreement. Demonstrating the power of these monitors, in the Bristol-Myers Squibb case the monitor recommended that the Board dismiss the CEO based not on failures related to the agreement deferring prosecution of securities fraud charges, but on a new criminal investigation relating to a patent dispute.¹⁷⁷ However, as will be developed below, outside monitors may face difficulties gaining access to information and cooperation, particularly where they work with a limited staff and are charged with assessing a very large organization.

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

As noted, only five agreements incorporate the Sentencing Guidelines requirements for effective compliance programs.¹⁷⁸ The other agreements often do not satisfy the Guidelines' seven criteria. For example, they do not specify that the compliance program itself be audited to improve its effectiveness and do not specify involvement of high-level officials. Some also go farther than the Guidelines in some respects, for example by requiring top-level governance changes apart from the creation of a compliance pro-

¹⁷⁶ See U.S. Dep't of Justice, United States Attorneys' Manual § 9-22.010 (2d ed. 2000) ("The period of supervision is not to exceed 18 months."). The few deferral agreements, such as the KPMG agreement, that specify that they can be extended if compliance is not complete do not specify how that is to be judged.

¹⁷⁷ See Stephanie Saul, *Drug Chief May Lose His Job: Firing Is Urged at Bristol-Myers*, N.Y. Times, Sept. 12, 2006, at C1.

¹⁷⁸ The KPMG, Hilfiger, German Bank HVB, Mellon Bank, and Roger Williams Medical Center agreements require creation of "effective compliance" programs as per the U.S. Sentencing Guidelines. See *infra* Appendix A.

gram, including adding members to the Board of Directors of the corporation and, in one case, DOJ approval of an independent director.¹⁷⁹

Third, ten of the agreements include data-gathering efforts in the compliance programs to enable monitors to better oversee compliance.¹⁸⁰ They do not, however, specify what measures the monitor should use to quantify compliance.

Fourth, the agreements include provisions that require cooperation with the DOJ during investigations of individual employees or former employees.¹⁸¹ These provisions do not have time limits; they state in very general terms that the organization has an obligation to fully cooperate with the DOJ for as long as the DOJ continues to investigate the underlying crimes. Some obligate the organization to cooperate should the DOJ uncover additional criminality. Not only do the generic cooperation provisions contain sweeping language, but the DOJ specifies certain types of cooperation, including access to documents and employees for interviewing. In effect, the organization serves as “an investigative partner” of the DOJ.¹⁸² Such provisions also controversially include waivers of attorney-client and work-product privileges.

I note, though, that despite the controversy over a “culture of waiver,”¹⁸³ and though the DOJ may also request waiver during investigations, in its agreements at least, the DOJ exercised some

¹⁷⁹ See Christie & Hanna, *supra* note 17, at 1052–53 (describing the Bristol-Myers agreement requirement that two directors be appointed to the Board, one with the approval of the U.S. Attorney’s Office, and stating that the “aim was to bring fresh blood and a new perspective to the board of directors; our preference for someone with a law enforcement background was made clear”).

¹⁸⁰ See *infra* Appendix A (showing that the Boeing, Bristol-Myers Squibb, Canadian Imperial Bank, Computer Associates, and Operations Management International agreements require data gathering, and that the KPMG, Hilfiger, German Bank HVB, Mellon Bank, and Roger Williams Medical Center agreements require creation of “effective compliance” programs under the Guidelines and therefore must comply with the Guidelines’ requirement that data be gathered to evaluate the effectiveness of the compliance program itself).

¹⁸¹ There is one exception—the Hilfiger agreement does not require full cooperation with the DOJ—but only because Hilfiger had already provided it.

¹⁸² See Michael R. Sklaire & Joshua G. Berman, *Deferred Prosecution Agreements: What Is the Cost of Staying in Business?*, Wash. Legal Found. Legal Opinion Letter, June 3, 2005, at 1, 2, available at <http://www.wlf.org/upload/060305LOLSklair.pdf>.

¹⁸³ See Am. Chemistry Council et al., *The Decline of the Attorney-Client Privilege in the Corporate Context* 2–3 n.7 (2006), <http://www.acca.com/Surveys/attyclient2.pdf>.

underappreciated sensitivity. As my chart shows, the DOJ did not seek privilege waiver in many of its agreements, though it did seek privilege waiver in the majority, or twenty agreements (fifty-seven percent). After the McNulty Memo, and in response to critics, the DOJ may seek such waivers less frequently.

Fifth, the agreements often retained a key nonstructural element typical of criminal law judgments—damages, with amounts ranging from the thousands to the hundreds of millions. The total fines, restitution, and compensation paid as a result of the thirty-five agreements was \$4.95 billion, with an average amount of \$141 million per agreement. This figure is only approximate because it includes some payments secured not by the DOJ, but credited as separately (or jointly) secured by regulatory agencies that cooperated in the investigation. These ballpark figures do confirm that the DOJ has, on average, pursued substantial cases involving relatively large costs.

Nevertheless, many of the agreements chiefly require payments of civil restitution only, rather than a punitive fine (including to shareholder compensation funds), compensation to settle civil lawsuits, disgorgement, or payment of back taxes.¹⁸⁴ The added punitive fine was often negligible.¹⁸⁵ A generous calculation of punitive fines imposed provides a total of \$670 million, or \$19 million on average per agreement, and only 14% of the total.¹⁸⁶ Thus, the DOJ does not seem to rely on fines for deterrence, but rather on civil remedies such as restitution, disgorgement, and civil compensation, with a small proportion of payment as fines. In so doing, the agreements comport with the Guidelines' emphasis on providing restitution to victims.¹⁸⁷

¹⁸⁴ The Sentencing Guidelines prioritize payment of restitution. See U.S. Sentencing Guidelines Manual § 8B1.1 (2005); cf. 18 U.S.C. § 3572(b) (2000) (“[T]he court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.”); Christie & Hanna, *supra* note 17, at 1059 (describing why the Bristol-Myers agreement did not include a punitive fine).

¹⁸⁵ As in civil structural reform cases, a structural reform remedy may cost far less than a damages award (or, in a criminal case, a punitive fine). See Jeffries, *supra* note 72, at 107–10.

¹⁸⁶ This figure is certainly overstated; I counted as a fine the entire sum in several cases (worth \$63.5 million total) where, though naming a large damages payment, the DOJ did not specify what part of the award was a fine and what part was restitution.

¹⁸⁷ See U.S. Sentencing Guidelines Manual § 8B1.1.

The overall approach requires comprehensive compliance programs, including independent monitors whose terms last for years, detailed injunctive changes of policy and practice, training programs, auditing, data collection, cooperation with the DOJ, and payment of restitution to victims. This is a real change from the general features of the few known organizational agreements prior to the Thompson Memo because previous agreements tended to last for a short time and typically did not require compliance.¹⁸⁸

Given each of the reasons why prosecutors possess near overwhelming power to prosecute organizations, the adoption of a more lenient approach, an “entente cordiale,” is perhaps surprising.¹⁸⁹ Explanations already given include that prosecutors hope to avoid the catastrophic collateral consequences of an indictment, and also that settlement conserves DOJ resources, where organizational prosecutions are complex and firms can afford expensive and experienced defense counsel. Prosecutors also claim that they could not obtain such sweeping injunctive relief through courts.¹⁹⁰

An additional explanation suggested by these agreements is that prosecutors often confront situations in which the organization is less blameworthy than individual employees. Prosecutors may confront two general types of organizations. If rogue employees can be blamed for the criminality, then the interests of prosecutors and the current leadership of the organization may be aligned. Both may wish not only to reform the organization and punish those involved in criminality, but also take special care to avoid undue collateral consequences to blameless employees, shareholders, pension plans, and the public.¹⁹¹ Thus, it is often defense lawyers representing the employees being individually prosecuted that protest about the prejudicial effects of these agreements.¹⁹² In cases

¹⁸⁸ As illustrated in Appendix B below, about one-third of those agreements had independent monitors, most lasted for a short time or listed no duration at all, and approximately one-third required compliance programs.

¹⁸⁹ See Joseph A. Grundfest, *Over Before it Started*, N.Y. Times, June 14, 2005, at A23.

¹⁹⁰ See supra note 22 and accompanying text.

¹⁹¹ See Blum, supra note 22, at 1 (“Deferred prosecutions give a company the chance to reform itself without creating a situation where a lot of people are going to lose their jobs and a lot of investors are going to lose more money.” (quoting Timothy Coleman, Senior Counsel to Deputy Attorney General James Comey, Jr.)).

¹⁹² In the Computer Associates case, an attorney for the company called the agreements “an excellent way for prosecutors to satisfy their objectives without imposing

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

Finally, the DOJ's own deterrence goals may be better served by a system of narrow standards that provide enhanced notice.¹⁹³ I discuss the DOJ's exercise of prosecutorial discretion next.

C. Alternative Stages to Pursue Structural Reform Prosecutions

Prosecutorial discretion remains fundamental to the nature of organizational prosecutions, and prosecutors, in the exercise of their broad discretion, chose the structural reform alternative to avoid the collateral consequences of indictment and conviction.¹⁹⁴ Having chosen to seek structural reform, however, they have not just one but a range of alternative means to that end. I divide the exercise of a prosecutor's discretion into four stages chronologically: prevention, charging, plea bargaining, and sentencing. As a fifth option, prosecutors may seek parallel civil remedies. Further, the prosecutor's choice of which stage to exercise discretion has great significance. At each successive stage of the criminal process, the nature of the discretion changes and courts further constrain it. In addition, the DOJ could choose to pursue more than one of these alternatives in a given case, such as by seeking a conviction and parallel civil remedies. In this Section, I explore these alterna-

serious collateral consequences." *Id.* In contrast, an attorney representing a former Computer Associates executive facing criminal charges objected to the decrees as "undermin[ing] the adversarial system of justice." *Id.*

¹⁹³Few organizational prosecutions were brought before the Thompson Memo provided notice of the new approach. See *supra* notes 119–20, 146–49, and accompanying text. The DOJ's current structural reform approach resembles the "benign big gun" approach towards regulatory compliance and the "enforced self-regulation" developed in Professors Ian Ayres and John Braithwaite's book. See Ian Ayres & John Braithwaite, *Responsive Regulation* 19 (1992).

¹⁹⁴Regarding the problem of prosecutorial discretion, particularly in organizational cases, see, for example, Lynch, *supra* note 106; Richman, *supra* note 109; William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 *Harv. L. Rev.* 780, 790–91 (2006).

tive approaches to structural reform to shed light on what the DOJ decided by selecting a charging stage approach.

1. The Prevention Stage

First, prosecutors may seek to achieve structural reform goals without prosecuting at all. While prosecutions typically litigate in response to specific reports of criminal activity, as a complement to their traditional role, prosecutors sometimes also focus on prevention to influence primary behavior. For example, in individual cases they may participate in early intervention programs to prevent youth violence, truancy, or drug use,¹⁹⁵ or task forces that raise public awareness, encourage voluntary reporting, hinder criminals, and assist victims.¹⁹⁶ In organizational cases, the DOJ operates joint task forces with other agencies in a range of areas in part to focus on prevention. The Corporate Fraud Task Force, for example, allocates resources among federal and state agencies to develop capability to audit organizations and compliance procedures, encourage voluntary disclosures, and detect criminality.¹⁹⁷ The Katrina Fraud Task Force aimed to develop institutional ability to prevent fraud directed at the \$85 billion in Gulf region relief spending.¹⁹⁸ Prosecutors may also impact industry significantly by announcing their enforcement priorities, such as through memoranda like the Thompson Memo or in speeches to the white collar bar.

¹⁹⁵ See Anthony V. Alfieri, *Community Prosecutors*, 90 Cal. L. Rev. 1465, 1473–80 (2002) (describing community outreach and violence-prevention efforts by prosecutors); James C. Backstrom, *The Role of The Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community*, 50 S.C. L. Rev. 699, 712 (1999) (listing examples nationwide of prosecutors' involvement in juvenile crime prevention programs).

¹⁹⁶ For example, as part of the Trafficking Victims Protection Act, a task force was tasked in part with developing economic opportunities for potential victims of trafficking. 22 U.S.C. §§ 7103(d)(4), 7105(a)(1) (2000).

¹⁹⁷ See Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002); Corporate Fraud Task Force, *First Year Report to the President* (2003), available at http://www.usdoj.gov/dag/cftf/first_year_report.pdf. On the early roots of a problem solving approach among prosecutors leading, for example, to the creation of the DOJ's Organized Crime Section, see Ronald Goldstock, *The Prosecutor as Problem Solver* (1991) (unpublished manuscript, on file with the Virginia Law Review Association).

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

Further, though federal prosecutors remain focused in their day-to-day work on investigations and prosecutions, they operate against a regulatory background in which auditing and reporting aim to prevent crime. Regulators have long promulgated policies encouraging prevention-oriented reporting and auditing, and they may prefer those approaches to prosecutions that can discourage cooperation.¹⁹⁹ A range of agencies have also adopted rewards for voluntary disclosure, including the Department of Defense, EPA, Federal Aviation Administration, HHS, SEC, State Department, and Department of Labor.²⁰⁰ The emphasis on voluntary disclosure increased in response to corporate governance scandals. With the passage of Sarbanes-Oxley, with its elaborate reporting and compliance requirements, and then with the addition of SEC requirements, corporations face more onerous rules governing auditing and compliance.²⁰¹ Prosecutors rely on these pre-existing disclosure regimes to prevent crime. They coordinate training on those regulatory reporting requirements and then bolster those rules by investigating, along with agencies, noncompliance as an early signal of possible criminality.²⁰² The net result may allow prosecutors to rely on criminal sanctions only in egregious cases, but otherwise to rely on self-reporting and prevention.

2. *The Charging Stage*

Second, having been made aware of alleged criminality, prosecutors decide whether or not to pursue charges and then what charges to pursue. The DOJ now chooses to pursue structural reform in organizational cases at the charging stage. Particularly sig-

¹⁹⁹ See *supra* notes 139, 159, 163, and accompanying text.

²⁰⁰ See *id.*; see also Wray & Hur, *supra* note 17, at 1108–33.

²⁰¹ See 18 U.S.C. § 1519 (2006) (Sarbanes-Oxley Act anti-shredding provision); Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, 17 C.F.R. §§ 228, 229, 249 (2003); NYSE, Inc., Listed Company Manual § 303A.10 (2004); Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 *Admin L. Rev.* 757 (2005); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 *Harv. L. Rev.* 1197, 1209–20 (1999); *supra* note 143.

²⁰² See Larry D. Thompson, *Introduction to Corporate Fraud Task Force*, *supra* note 197, at iii, available at http://www.usdoj.gov/dag/cftf/first_year_report.pdf (describing contributions of task force members, joint training efforts, policy initiatives, and enforcement); see also *infra* Appendix A, which shows that most agreements were negotiated in collaboration with regulators.

nificant is that the charging stage occurs before indictment, and thus the DOJ avoids the severe collateral consequences of an indictment to the organization. Also significant at the charging stage is that prosecutors have considerable discretion. The Supreme Court has held that the executive branch “has exclusive authority and absolute discretion to decide whether to prosecute a case.”²⁰³ Prosecutorial exercise of discretion is generally unreviewable if the prosecutor had probable cause, unless prosecutors rely on invidious characteristics like race or religion.²⁰⁴ This “broad discretion” stems from separation of powers and the President’s power to “take Care that the Laws be faithfully executed.”²⁰⁵ Prosecutors may also publicly define charging guidelines or standards that, though legally unenforceable, internally limit exercise of their discretion.²⁰⁶ Further, at the charging stage, prosecutors may seek permission from the court to “defer” prosecution in individual cases pending an opportunity to complete a rehabilitative program.²⁰⁷ Typically only nonviolent or first time offenders are eligi-

²⁰³ United States v. Nixon, 418 U.S. 683, 693 (1974).

²⁰⁴ See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.” (quoting *United States v. Goodwin*, 457 U.S. 598, 380 n.11 (1982))), *cited with approval in* *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

²⁰⁵ See U.S. Const. art. II, § 3; 28 U.S.C. §§ 516, 547 (2000) (reserving conduct of litigation to officers of the Department of Justice); *Armstrong*, 517 U.S. at 464 (noting that prosecutors retain their broad discretion “because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed’”); *United States v. Hicks*, 693 F.2d 32, 34 n.1 (5th Cir. 1982).

²⁰⁶ See U.S. Dep’t of Justice, *United States Attorneys’ Manual* § 9-27.230 (2d ed. 2000) (defining charging standards using very broad factors such as “[f]ederal law enforcement priorities,” “[t]he person’s culpability,” and “[t]he nature and seriousness of the offense”); see also Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117, 2143 (1998) (calling for prosecutors to “declare the standards by which” they decide “what cases to bring and not bring”). See generally *Thompson Memo*, *supra* note 16; *McNulty Memo*, *supra* note 108.

²⁰⁷ Generally, federal prosecutors enter into deferral agreements when “the person’s timely cooperation appears to be necessary to the public interest.” U.S. Dep’t of Justice, *United States Attorneys’ Manual* § 9-27.600; see also *United States v. Richardson*, 856 F.2d 644, 647 (4th Cir. 1988) (“A defendant has no right to be placed in pre-trial diversion. The decision . . . is one entrusted to the United States Attorney.”);

ble for deferral (or “diversion”), and if they agree to participate, courts typically supervise such efforts in drug courts or other alternative courts.²⁰⁸ The DOJ’s more recent innovation was to extend the practice of pre-trial diversion to organizations.²⁰⁹ As developed in the next Part, the discretion prosecutors receive at the charging stage limits the ability of courts to review structural reform prosecutions.

3. *The Plea Bargaining Stage*

Third, prosecutors may choose to negotiate a plea bargain. Almost all individual criminal prosecutions result in guilty pleas.²¹⁰ Plea bargaining retains the same prominence in organizational prosecutions; the overwhelming majority of organizations charged plead guilty.²¹¹

Federal courts are more involved in reviewing plea bargains than charging decisions, but judges still remain highly deferential.²¹² Judges examine voluntariness, factual basis, fairness, abuse of discretion, or infringement on the judge’s sentencing power.²¹³ Judges

Hicks, 693 F.2d at 34 n.1 (“Since pretrial diversion is a program administered by the Justice Department, considerations of separation of powers and prosecutorial discretion might mandate an even more limited standard of review.”); Thomas E. Ulrich, *Pretrial Diversion In The Federal Court System*, Fed. Probation, Dec. 2002, at 30, 31–33, 35.

²⁰⁸ See Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 Wash. U. L.Q. 1205, 1208–09 (1998) (describing the use of courts to supervise drug treatment programs for nonviolent offenders).

²⁰⁹ See *supra* Section II.A; *infra* Appendix A.

²¹⁰ See *Mitchell v. United States*, 526 U.S. 314, 324–25 (1999) (“Over 90% of federal criminal defendants whose cases are not dismissed enter pleas of guilty or nolo contendere.”); Bureau of Justice Statistics, U.S. Dep’t of Justice, *Sourcebook of Criminal Justice Statistics tbl.5.22* (2005), available at <http://www.albany.edu/sourcebook/pdf/t5222005.pdf> (finding that in 2004 95.1% of individual defendants disposed of in federal district courts pleaded guilty or nolo contendere); see also Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 Colum. L. Rev. 1276, 1282–83 (2005).

²¹¹ See 2003 *Sourcebook of Federal Sentencing Statistics*, *supra* note 144, at 107 tbl.53 (in fiscal year 2003, 182 of 200 organizations prosecuted plead guilty, with 18 proceeding to trial).

²¹² Nolo contendere agreements without an admission of guilt must be approved by the court. See Fed. R. Crim. P. 11(a)(3) (requiring that the court evaluate nolo contendere pleas by considering “the parties’ views and the public interest in the effective administration of justice”).

²¹³ See *Santobello v. New York*, 404 U.S. 257, 262 (1971) (“A court may reject a plea in exercise of sound judicial discretion.”); Fed. R. Crim. P. 11(e) advisory committee’s

may reject plea agreements “when the district court believes that bargain is too lenient, or otherwise not in the public interest.”²¹⁴ However, plea agreements cannot be modified but can only be accepted or rejected.²¹⁵ Once entered, both prosecutors and defendants are bound by plea agreements as contracts and may seek relief for any material breach.²¹⁶

The DOJ has sometimes pursued guilty pleas combined with compliance settlements. Before the Thompson Memo, the DOJ occasionally sought structural reforms from corporations charged with crimes and did so chiefly by securing plea agreements including injunctive reforms. The E.F. Hutton and the Drexel Burnham Lambert cases in the 1980s were leading examples.²¹⁷ More recently, for reasons discussed, the DOJ sought to avoid indictments of large firms, preferring deferral or nonprosecution agreements.²¹⁸

note (“The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge.”); Lowell B. Miller, *Judicial Discretion to Reject Negotiated Pleas*, 63 *Geo. L.J.* 241, 246–47 (1974).

²¹⁴ *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985) (quoting *United States v. Miller*, 722 F.2d 562, 563 (9th Cir. 1983)); see also *United States v. Freedberg*, 724 F. Supp. 851, 854–55 (D. Utah 1989) (holding that a plea agreement dismissing charges against owner but not corporation was contrary to the public interest); cf. *United States v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1973) (“[A]uthority has been granted to the judge to assure protection of the public interest.”); *United States v. Nederlandsche Combinatie Voor Chemische Industrie*, 75 F.R.D. 473, 474–75 (S.D.N.Y. 1977) (finding that the dismissal of a corporate conspiracy case involving life-saving drugs would be contrary to the manifest public interest).

²¹⁵ See, e.g., *United States v. Reyes*, 313 F.3d 1152, 1156–57 (9th Cir. 2002); *United States v. Martin*, 287 F.3d 609, 622 (7th Cir. 2002); *United States v. Cunavelis*, 969 F.2d 1419, 1422 (2d Cir. 1992).

²¹⁶ See *Ricketts v. Adamson*, 483 U.S. 1, 9–12 (1987); *Santobello*, 404 U.S. at 262 (1971); see also Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *Yale L.J.* 1909, 1914–15 (1992).

²¹⁷ The E.F. Hutton case was the most high-profile early instance. See *Notice of Plea Agreement and Plea Agreement*, *United States v. E.F. Hutton & Co.*, No. 85-00083 (M.D. Pa. Apr. 30, 1985), *reprinted in* Staff of Subcomm. on Crime of the H. Comm. on the Judiciary, 99th Cong., *E.F. Hutton Mail and Wire Fraud 329* (Comm. Print 1986).

²¹⁸ In a few cases brought under the Foreign Corrupt Practices Act, however, the DOJ used a different approach. In conjunction with obtaining guilty pleas by subsidiaries resulting in criminal fines, the DOJ entered into separate agreements with regulators and the parent corporation to adopt compliance reforms. The ABB corporation agreed to compliance-based reforms with the SEC in conjunction with guilty pleas by its subsidiaries, ABB Vetco Gray and ABB Vetco Gray UK. See SEC Sues ABB, Ltd. in Foreign Bribery Case, *Litigation Release No. 18,775*, 83 SEC Docket 1014,

4. *The Probation Stage*

Fourth, a prosecutor may pursue a conviction. The threat not just of indictment but also of conviction shapes the current structural reform approach. In some individual cases, a court may decide to order supervised probation in which all or part of the sentence is deferred pending successful compliance.²¹⁹ Similarly, in organizational cases, upon a guilty plea or a conviction, the court may impose supervised probation. At the probation stage, a court may supervise structural reform.

Unlike in individual prosecutions, where sentences are largely “charge-offense based” and plea bargaining occurs in the shadow of a prosecutor’s own charging decisions,²²⁰ organizational sentences reflect a range of flexible factors. The organizational sentencing guidelines consider the type and severity of an offense to establish a base fine, and then look to organizational culpability, which depends on a range of factors including whether top management or middle management “participated in” the criminality and whether the organization reported the offense or cooperated.²²¹ Based on those factors, the court assesses a punitive fine together with any civil restitution or remediation, including community service and notice to victims.²²² In addition, organizations may receive mitigation for compliance. When Congress passed Sarbanes-Oxley, it directed the U.S. Sentencing Commission to consider revising its organizational guidelines. New guidelines, which took effect in November 2004,²²³ explicitly permit reducing the fine if an entity

1014–15 (July 6, 2004). That approach secures compliance but also avoids harsh consequences on the parent corporation.

²¹⁹ The Guidelines were intended to reduce use of probation through determinate sentencing. See U.S. Sentencing Comm’n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 68–69 tbls.2 & 3 (1987); U.S. Sentencing Guidelines Manual § 1A1.4(d) (1987) (amended 1990, 1995, 2000, 2004); Sharon M. Bunzel, Note, The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows, 104 *Yale L.J.* 933, 951–57 (1995).

²²⁰ For individuals, the Guidelines provide a grid that “scores” on one axis the defendant’s prior record and on the other axis the seriousness of the crime. See U.S. Sentencing Guidelines Manual ch. 5, pt. A (2005).

²²¹ See id. §§ 8C2.3–5.

²²² See id. § 8A1.2(a)–(b).

²²³ The recent amendments to the Sentencing Guidelines were adopted in response to the Sarbanes-Oxley Act’s direction to promulgate new Guidelines that could better deter corporate wrongdoing. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204,

adopts an “effective” compliance program meeting detailed criteria.²²⁴ The Commission adopted “structural reform” reasoning; approved compliance programs were intended to create structural safeguards against criminality.²²⁵

In addition to organizational sentencing, a court may impose probation on an organization after a conviction. This model more closely resembles classic civil, court-centered structural reform litigation, except here it is the Guidelines that provide the authority under which a federal court may impose reforms. The vast majority of organizations that are convicted or that plead guilty are sentenced by federal courts to probation.²²⁶ Most require that an entity not engage in criminality during a probationary period. The Guidelines also permit a court to impose affirmative structural conditions, including ordering the creation of an “effective ethics and compliance program.”²²⁷ One criterion for probation is “if such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct.”²²⁸

§ 805(a)(2)(5), 2002 U.S.C.C.A.N. (116 Stat.) 745, 802 (stating that the Sentencing Commission should promulgate rules “sufficient to deter and punish organizational criminal misconduct”); see also U.S. Sentencing Guidelines Manual § 8B2.1 cmt. background (noting that Congress “directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter ‘are sufficient to deter and punish organizational misconduct’”).

²²⁴ U.S. Sentencing Guidelines Manual § 8B2.1. Under the 1991 Guidelines, such programs had been defined previously only in the advisory notes. See *id.* § 8A1.2 cmt. n.3(k) (2003) (amended 2004); cf. *id.* § 8C2.5(f)–(g) (2005) (explicitly setting out the criteria an effective compliance program must conform to); Ad Hoc Committee Report, *supra* note 158, at 50.

²²⁵ See U.S. Sentencing Guidelines Manual ch. 8, introductory cmt. (2005).

²²⁶ See 2003 Sourcebook of Federal Sentencing Statistics, *supra* note 144, at 107 tbl.53 (in fiscal year 2003, 148 of 200 organizations received probation, with 24 court-ordered compliance programs); 2004 Sourcebook of Federal Sentencing Statistics, *supra* note 144, at 123 tbl.53, 329 tbl.53 (in fiscal year 2004, 94 of 130 organizations received probation with 21 court-ordered compliance programs).

²²⁷ U.S. Sentencing Guidelines Manual § 8D1.4(c)(1).

²²⁸ U.S. Sentencing Guidelines Manual § 8D1.1(a)(6). Probation is also to be ordered if necessary “to secure payment of restitution . . . enforce a remedial order . . . or ensure completion of community service.” *Id.* § 8D1.1(a)(1). Furthermore, probation is required “if the organization within five years prior to sentencing engaged in similar misconduct,” and if an “individual within high-level personnel of the organization . . . participated in the misconduct underlying the instant offense.” *Id.* § 8D1.1(a)(4)–(5). See also Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 *Am. J.*

The court then orders, as a condition of probation, that the entity maintain “an effective compliance and ethics program consistent with §8B2.1.”²²⁹ An “effective” program must be quite comprehensive, including auditing, data collection, policy changes, training, and involvement of high-level management. Courts now order a significant number of organizations to install such compliance programs during probation.²³⁰ The court may also impose other sanctions including restitution, community service, and requiring an entity to publicize its noncompliance to victims.²³¹

Courts supervise implementation of these compliance programs in much the same fashion as in a civil structural reform case. Once courts order an organization to develop a compliance program as a condition of probation, courts monitor the organization to decide whether it has successfully done so. Courts largely rely on organizational self-reporting, but in a form specified by the court.²³² The Sentencing Commission also recommends that a regulatory body review those reports and that appropriate experts be employed to assess compliance.²³³ The court, relying on reporting and evaluations, remains closely involved until it determines that the firm has complied and should be released from probation.

5. Civil Actions

Fifth, prosecutors may file civil actions, typically obtaining a settlement imposing injunctive reforms designed to prevent future

Crim. L. 1, 4 (1988); Christopher A. Wray, Note, Corporate Probation Under the New Organizational Sentencing Guidelines, 101 Yale L.J. 2017, 2027–29 (1992) (describing the breadth of the probation option).

²²⁹ U.S. Sentencing Guidelines Manual § 8D1.4(c)(1).

²³⁰ See 2003 Sourcebook of Federal Sentencing Statistics, *supra* note 144, at 107 tbl.53 (seventy-four percent of organizations had probation ordered and twelve percent had court-ordered compliance programs). Most notable was the Consolidated Edison case, in which ConEd pleaded guilty mid-trial and accepted a probation agreement as well as the appointment of a special master. See Arthur F. Mathews, Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations, 18 Nw. J. Int'l L. & Bus. 303, 430–31 (1998).

²³¹ U.S. Sentencing Guidelines Manual §§ 8D1.3, 8D1.4(a).

²³² See *id.* §§ 8D1.1(a), 8D1.4(b)–(c).

²³³ See *id.* § 8D1.4 cmt. n.1. (“To assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program.”).

criminality. The DOJ has used this approach in the health care context, occasionally bringing parallel criminal fraud charges and civil False Claims Act proceedings.²³⁴ The dismissal of criminal charges against the organization or a guilty plea by a subsidiary may then be accompanied by a parallel civil settlement requiring adoption of compliance measures.²³⁵ If the DOJ is concerned about the collateral effects of an indictment, it could pursue such a strategy rather than enter into deferral agreements.

The DOJ has also in the past adopted an approach seeking civil consent decrees, in which a court supervises the implementation of any agreement and adjudicates any breach and the agreement's ultimate termination. Beginning in the 1980s, the DOJ used a civil consent decree approach to combat organized crime in RICO prosecutions of labor unions.²³⁶ The RICO statute provides both for criminal punishment and civil injunctions,²³⁷ permitting a court to issue "such restraining orders or prohibitions, or take such other actions . . . as it shall deem proper."²³⁸ The DOJ filed twenty such lawsuits,²³⁹ negotiating consent decrees in which trusteeships took over control of affected unions or locals.²⁴⁰ These decrees were closely monitored by courts, often involving judges in years of protracted efforts to obtain compliance. Such a supervising role closely

²³⁴ An example is the recent Medco settlement. See Press Release, U.S. Attorney, E. Dist. of Pa., U.S. Dep't of Justice, U.S. Announces Settlement of \$155 Million Medco False Claims Case (Oct. 23, 2006), <http://www.usdoj.gov/usao/pae/News/Pr/2006/oct/MedcoPressReleaseUpdated10.20.06.pdf>.

²³⁵ See, e.g., Wray & Hur, *supra* note 17, at 1165–69 & n.334 (listing examples of civil False Claims Act settlements together with dismissals of criminal charges or a subsidiary guilty plea regarding Abbott Laboratories, Gambro Healthcare, Schering-Plough, McKesson, Serono, S.A., Novartis, and Tenet Healthcare).

²³⁶ On the influence of organized crime efforts on recent corporate fraud prosecutions, see Kurt Eichenwald & Alexei Barrionuevo, Tough Justice for Executives in Enron Era, *N.Y. Times*, May 27, 2006, at A1 ("The tactics and strategies used in the successful prosecution of the former Enron chief executives, Jeffrey K. Skilling and Kenneth L. Lay, highlight the transformation that has occurred in recent years in the investigation and prosecution of white-collar crime, a change that has brought many of the techniques applied to drug cases and mob prosecutions into the once-genteel legal world of corporate wrongdoers.").

²³⁷ 18 U.S.C. §§ 1963–1964 (2000).

²³⁸ *Id.* § 1964(b). See generally Gerard E. Lynch, RICO: The Crime of Being a Criminal, Parts I & II, 87 *Colum. L. Rev.* 661 (1987).

²³⁹ See James B. Jacobs et al., The RICO Trusteeships After Twenty Years: A Progress Report, 19 *Lab. Law.* 419, 419 (2004).

²⁴⁰ In only two cases was the trusteeship imposed post-trial. *Id.* at 420 n.5.

resembles the traditional “public law” judging model. Where these cases involved efforts to eradicate organized crime, many cases involved long and difficult remedial phases, with resistance by union leadership.²⁴¹ For example, in the Teamsters litigation, each of three special masters faced prolonged challenges to their authority, with “incessant attacks against the Court Officers, Government and [the] Court objecting to the implementation of the Consent Decree,”²⁴² as well as with litigation by nonparties.²⁴³ DOJ trustees have had mixed results, with successes in eradicating racketeering but “very little success in establishing union democracy.”²⁴⁴ The experience illustrates the difficulty of structural reform in the face of institutional resistance; RICO consent decrees remained supervised by courts for years, even decades. The civil consent decree approach used courts to bolster the DOJ’s authority and delegated to courts the long-term project of overseeing compliance. Whether the recent wave of DOJ deferred prosecution regimes will face the same roadblocks during their intended shorter life-spans and absent court supervision remains to be seen. Obviously there are significant differences in a context where the entity may be essentially law-abiding and seeks to remedy employee malfeasance.²⁴⁵

To conclude this Section, the DOJ not only made a choice among several options when deciding to pursue structural reform as a strategy, but the DOJ also chose a unique approach towards structural reform by seeking to enter settlements at the charging stage. At that early stage, prosecutorial discretion remains extremely broad, unlike after a conviction or under a civil consent decree, where a court supervises the remedy. Opportunities for overreaching may be greater at the charging stage, and, at the same time, the scope of judicial review is quite limited. Thus, the deci-

²⁴¹ See George Kannar, *Making the Teamsters Safe for Democracy*, 102 *Yale L.J.* 1645 (1993).

²⁴² *United States v. Int’l Bhd. of Teamsters*, 742 F. Supp. 94, 102 (S.D.N.Y. 1990).

²⁴³ See *Yellow Freight System, Inc. v. United States*, 506 U.S. 802 (1992); *United States v. Int’l Bhd. of Teamsters*, 905 F.2d 610, 613–14, 617–20 (2d Cir. 1990); *United States v. Int’l Bhd. of Teamsters*, 803 F. Supp. 806, 810–13 (S.D.N.Y. 1992).

²⁴⁴ Jacobs, *supra* note 18, at 160.

²⁴⁵ Indeed, federal prosecutors had greater success in their structural efforts to use civil RICO and regulatory actions to eradicate the influence of organized crime from private industry, such as the New York garment, waste-hauling, and construction industries. See James B. Jacobs, *Gotham Unbound* 223–30 (1999).

2007]

Structural Reform Prosecution

913

sion to pursue structural reform at the charging stage has important consequences for the future of organizational crime enforcement, which I take up in the last Part.

III. PROSECUTORS, COURTS, AND REMEDIAL DISCRETION

Locating structural reform with prosecutors creates both benefits and problems that are unique to the role of prosecutors in our federal criminal system. Recall the range of difficult questions raised in civil structural reform cases that led to judicially imposed limits on their scope and a focus on identifying the most effective set of best practices. Prosecutors face none of those limitations. Federal criminal law delegates to them vast discretion while, at the same time, considerations of separation of powers constrain courts. Further, though several structural reform alternatives were available, the DOJ chose to pursue structural reform at the charging stage, where prosecutorial discretion remains particularly broad. This Part first examines the question of whether prosecutors may abuse their discretion in these agreements, and frames what calling an act an abuse means in an area where prosecutors retain such broad discretion. Second, it discusses how courts may not effectively limit prosecutorial discretion in these cases because judicial review remains very deferential and limited. Finally, this Part concludes by raising a series of questions for further scholarship, including whether the DOJ itself, perhaps in conjunction with other actors, can provide greater clarity regarding the remedies pursued.

A. Defining Abuse of Power in Organizational Prosecutions

Despite their many benefits for the organizations involved, critics in the press have called certain terms in DOJ agreements prosecutorial “abuses of power.”²⁴⁶ Rhetoric aside, abuse of prosecutorial power is a quite limited legal concept, given the scope of a prosecutor’s authority and discretion. First, many perceived abuses lack a legal remedy and are permissible exercises of prosecutorial discretion. Second, other perceived abuses may lack a legal remedy but nevertheless implicate a prosecutor’s ethical responsibilities.

²⁴⁶ See Epstein, *supra* note 11. See generally also Coffee, *supra* note 7.

Third, only in rare cases do prosecutors so exceed their discretion that a court may provide a remedy.

First, critics in the press have attacked features of these agreements as involving abuses of power when in fact prosecutors did not violate any rights for which there is any legal redress. For example, as described, prosecutors retain substantial discretion over whether to charge defendants at all and over what charges to pursue. While I have described a striking family resemblance among the agreements to date, critics have observed some case-by-case inconsistencies that cannot be easily explained by the type of organization involved, nor by misconduct or prior compliance.²⁴⁷ Some nonprosecution agreements have more onerous terms, for example, than deferred prosecution agreements, which may indicate “sweetheart deals.”²⁴⁸ However, prosecutors may not cite to prior compliance in the text of the agreement; we do not have all of the information that they relied upon. Even assuming outright special treatment of defendants occurred, that is consistent with the broad discretion vested in prosecutors. Only disparate treatment of protected classes or extreme cases of special treatment may be reviewed by a court. Thus, to the extent that preferential treatment in organizational cases raises a problem, it raises a serious question of prosecutorial ethics, but those affected lack a legal remedy.

Second, a range of prosecutorial actions in organizational cases implicate their ethical responsibilities. Though ethical rules typi-

²⁴⁷ See Finder & McConnell, *supra* note 17, at 2 (attributing inconsistency to a “devolution” of DOJ authority); F. Joseph Warin & Peter E. Jaffe, *The Deferred-Prosecution Jigsaw Puzzle: A Modest Proposal for Reform*, *White Collar Crime Litig. Rep.*, Sept. 2005, at 1, 1, available at <http://media.gibsondunn.com/fstore/documents/pubs/WarinJaffeWCCDeferredPros0905.pdf> (“[I]n Shell and Monsanto we have two blue-chip, highly regarded public companies[, and] . . . each cooperated fully with the investigations of both the DOJ and the SEC. . . . Yet one corporation walked away with the disconcerting prospect of conducting 36 months of business under the shadow of a deferred criminal information and a corporate monitor, while the other was let off with a good talking to. . . . Shell, the one admonished to ‘go forth and sin no more,’ admitted to a misreporting scheme that allegedly cost investors billions of dollars, while Monsanto, the one with the hammer-shaped cloud hanging over its head, admitted to a failed five-figure bribery attempt that, in the end, cost no one but itself.”).

²⁴⁸ Warin & Jaffe, *supra* note 247, at 3 (comparing the American Electric Power Inc. deferred prosecution agreement with the Symbol Technologies Inc. nonprosecution agreement and noting “the curious result that some non-prosecution agreements are quite possibly more oppressive than some deferred-prosecution agreements”).

cally do not provide enforceable rules, criticism of perceived ethical breaches may gain public traction and result in prosecutors adopting new internal controls such as model guidelines. Model disciplinary rules typically forbid only prosecuting without probable cause and concealing exculpatory evidence.²⁴⁹ None have suggested that prosecutors violated any such rules regarding organizational agreements. Model ethical rules chiefly provide abstract aspirational goals to “seek justice.”²⁵⁰

In some contexts, however, organizations, together with other critics, have effectively protested perceived breaches of prosecutorial ethics. Using strong rhetoric, many organizations, lawyers, academics, and politicians have called securing organizational privilege waivers an abuse of power.²⁵¹ Prosecutors took the “important policy considerations” raised by critics seriously, and voluntarily restricted their pursuit of privilege waivers to limited cases raising a “legitimate” need.²⁵²

The agreements may, as described, severely impact the rights of individuals being prosecuted.²⁵³ Prosecutors face few restrictions on the use of cooperating defendants, except that they may not deceive or coerce (which Judge Kaplan held the government did by applying pressure to KPMG to threaten to cut off employee legal fees²⁵⁴). Outside that situation, criminal law typically does not provide remedies to third parties collaterally affected by prosecutions. In response to outside criticism and political pressure, the DOJ revised its policies to generally prohibit rewarding refusal to pay employees’ attorney’s fees.²⁵⁵ Nevertheless, while prosecutors may promulgate memoranda with guidelines, and while such internal

²⁴⁹ See Model Code of Prof’l Responsibility DR 7-103(A) (1983).

²⁵⁰ Model Rules of Prof’l Conduct R. 3.8 cmt. 1 (2001); see also Carolyn B. Ramsey, The Discretionary Power of “Public” Prosecutors in Historical Perspective, 39 Am. Crim. L. Rev. 1309, 1310–12 (2002); Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 Vand. L. Rev. 45, 60–65 (1991).

²⁵¹ See supra text accompanying notes 9–12.

²⁵² See McNulty Memo, supra note 108, at 8–9.

²⁵³ See supra Subsection I.C.2.

²⁵⁴ United States v. Stein, 435 F. Supp. 2d. 330, 365 (S.D.N.Y. 2006), appeal docketed, No. 06-4358 (2d Cir. Sept. 19, 2006).

²⁵⁵ See McNulty Memo, supra note 108, at 8–9.

guidelines provide added notice and clarity regarding their discretion, they are legally unenforceable.²⁵⁶

In other areas, the organizations themselves may not perceive any breach of ethics even when they are the only entity adversely affected. Critics have attacked four agreements that include “community service” requirements, such as funding the chair in ethics at Seton Hall Law School in the Bristol-Myers case, donating to the Coast Guard Alumni Association and funding a chair in environmental studies in the Operations Management International case, and funding environmental community service projects in the FirstEnergy Nuclear Operating Co. case.²⁵⁷ The Roger Williams Medical Center agreement contained terms particularly far afield; in that case the government feared that indicting a nonprofit hospital for public corruption would jeopardize health care to the poor in Providence, Rhode Island. The deferral agreement required that the hospital provide \$4 million in additional free uninsured health care to low-income residents.²⁵⁸ The DOJ has articulated no principle to limit the reach of such terms. Nor is there anything unusual about those four cases making community service more appropriate than in other post-Thompson Memo agreements.

A court would be unlikely to provide any relief should a firm try to challenge such community service requirements. The Guidelines permit community service agreements, but caution against requirements not “directly related to the offense,” and they prohibit “requiring a defendant to endow a chair at a university or to con-

²⁵⁶ See Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *Fordham L. Rev.* 1511, 1512 n.6 (2000).

²⁵⁷ See *Prosecutor to Corporation: Endow a Chair at My Law School, or Else*, *Corp. Crime Rep.* (Corporate Crime Reporter, Wash., D.C.), Aug. 3, 2005, at 32, available at <http://www.corporatecrimereporter.com/coffee080305.htm> (quoting Professor John Coffee as saying that the Bristol-Myers Squibb agreement implicated “prosecutorial accountability” and as asking, “[s]hould a U.S. attorney exploit his leverage over a corporate defendant to compel it to do good deeds, such as creating a chair at the U.S. attorney’s law school?”).

²⁵⁸ See *Deferred Prosecution Agreement at ¶ 12–13, United States v. Roger Williams Med. Ctr.*, No. 06-02T (D.R.I. Jan. 27, 2006), available at http://www.usdoj.gov/usao/ri/press_release/jan2006/rwmcdef.PDF; Press Release, Office of Governor Donald L. Carcieri, State of R.I., Health Department to Renew Hospital License with Increased Oversight (Apr. 7, 2006), <http://www.ri.gov/GOVERNOR/view.php?id=1697>.

tribute to a local charity” in order to avoid potential abuses.²⁵⁹ Yet at the charging stage, a court’s hands are tied. As described in the next Section, a court cannot subtract terms from an agreement, but can only reject an entire agreement if it is grossly contrary to the goals of the Guidelines. Further, it can be difficult to conclude whether there was any overreaching. Perhaps the entity itself proposed to perform community service.²⁶⁰ After all, community service creates positive publicity and imposes minimal costs on firms, and by settling, organizations avoid far more punitive terms (such as large fines).²⁶¹ No organization has challenged these terms, which could explain why courts have never rejected such agreements, even if prosecutors arguably strayed from the core Guidelines mission.

Third, some terms suggest that prosecutors may have actually exceeded the legal bounds of their broad discretion. Some terms may be unrelated to either rehabilitative or punitive ends. In the prosecution of the New York Racing Association (“NYRA”), a state-franchised operation,²⁶² federal prosecutors required, as part of the conditional dismissal of the criminal charges, that the NYRA install slot machines (“video lottery terminals”) at its race tracks. This requirement was imposed in deference to state officials who feared that the loss of slot machine revenue at race tracks would impair their ability to comply with a ruling requiring additional school financing.²⁶³ The settlement between state prosecutors and MCI included “a first-of-its-kind economic development agree-

²⁵⁹ U.S. Sentencing Guidelines Manual § 8 B1.3 (2005).

²⁶⁰ The U.S. Attorney for New Jersey has stated that the Seton Hall ethics chair was requested by Bristol-Myers, for example. See Lisa Brennan, *Deferred White-Collar Prosecutions: New Terrain, Few Signposts*, N.J. L.J., Apr. 11, 2006, available at <http://www.law.com/jsp/article.jsp?id=1144330167949>.

²⁶¹ See U.S. Sentencing Guidelines Manual § 8B1.3; Brent Fisse, *Community Service as a Sanction Against Corporations*, 1981 Wis. L. Rev. 970.

²⁶² See Press Release, U.S. Attorney’s Office, E. Dist. of N.Y., U.S. Dep’t of Justice, *Two Former Directors of the New York Racing Association’s Pari-mutuel Department Plead Guilty to Scheme to Defraud the United States* (May 6, 2004), <http://www.usdoj.gov/tax/usaopress/2004/txdv042004may06.htm>.

²⁶³ See James M. Odato, *NYRA Deal in the Works*, Albany Times Union, Dec. 6, 2003, at A1 (reporting that “Gov. George Pataki and legislative leaders are counting on the gambling hall to help balance the state budget” and projecting that the slots would generate \$500 million for state coffers); see also Greenblum, *supra* note 17, at 1878.

ment” that MCI would add 1600 jobs over ten years in Oklahoma.²⁶⁴ Critics call such unrelated obligations imposed on corporations by prosecutors “Tammany Hall politicking”; indeed, prosecutors in both cases acted solely to benefit state government by imposing conditions bearing no relationship to the alleged crimes.²⁶⁵ Such terms resemble similar provisions in civil structural reform agreements under which resources are exacted from state governments for the benefit of local governments. For example, by entering into a consent decree, a local school system could obtain vast state funds to create new magnet schools.²⁶⁶ Here, however, the paradigm is altered. Federal prosecutors cooperate with state or local governments to obtain financial benefits from private parties.

Such side agreements raise the question of whether prosecutors always pursue criminal law goals. Nevertheless, firms may have little interest in challenging such terms. They avoid far more punitive fines and the costs of an indictment by entering into an agreement. In cases of egregious abuses, however, I suggest in the next Section that a court might reject an agreement as incompatible with the Guidelines.

So far I have discussed possible abuses in the terms of agreements, but one could also imagine potential abuses during their implementation. We have little information about implementation. It has remained nonpublic, with the exception of two examples in which independent monitors, as noted, exerted substantial influence and detected additional malfeasance by the subject organization. Critics have cited those as examples of abuses.²⁶⁷ In principle, these agreements are no different than any cooperation or probationary agreement with prosecutors in the criminal law context. Moreover, where organizations have contracted to confer broad supervisory power to independent monitors, calling such acts abuses seems difficult. Nevertheless, prosecutors have ethical responsibilities to do justice when supervising organizational compliance.

²⁶⁴ Corporate Crime Reporter, *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements* (2005), <http://www.corporatecrimereporter.com/deferredreport.htm>.

²⁶⁵ See Warin & Jaffe, *supra* note 247, at 4.

²⁶⁶ See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 91–92 (1995).

²⁶⁷ See Epstein, *supra* note 11.

Finally, an organization would be severely impacted if the DOJ improvidently declared a breach and pursued an indictment. The vast majority of agreements (eighty-three percent) permit the DOJ, in its sole discretion, to find that an agreement has been breached and then pursue a prosecution. Interestingly, only two firms negotiated alternative provisions (the other four agreements without such provisions were silent). Boeing negotiated a unique provision where a Special Master, a retired federal judge, will adjudicate any alleged breach—any breach by an employee “at a level below Executive Management” is not to “be deemed to constitute conduct by Boeing.”²⁶⁸ BDO Seidman negotiated a provision that any declared breach must be adjudicated in proceedings the DOJ initiates before a federal district judge. One would expect more firms to have bargained for such protections against the harm of an improper indictment. Instead, most permit a unilateral DOJ finding of breach, risking the indictment and severe collateral consequences that provided the impetus for these agreements. This risk may be mitigated only somewhat by judicial review, as discussed next.

Problems of perceived, actual, and potential prosecutorial abuses all flow from the sweeping discretion of prosecutors and their ability to obtain far-reaching relief in these structural reform cases. Next, I address a series of additional questions regarding whether constraints exist on that discretion.

B. Judicial Review

In the classic structural reform model, “public law” litigation fundamentally reallocates government power and places judges as impartial power brokers in an ongoing bargaining process between citizens and government.²⁶⁹ During remedial efforts, courts serve as gatekeepers, approving remedies, supervising implementation of remedies, deciding when the entity has substantially complied with constitutional mandates, and then terminating remedial decrees.

²⁶⁸ Deferred Prosecution Agreement Between the United States Attorney’s Offices for the Central District of California and the Eastern District of Virginia and The Boeing Company ¶¶ 10–12 (June 29, 2006), available at <http://www.corporatecrimereporter.com/documents/boeing2.pdf>.

²⁶⁹ See Diver, *supra* note 66, at 64.

In structural reform prosecutions, prosecutors, not courts, assume the public law mantle. In the criminal system, courts typically remain on the sidelines except in the few cases that proceed to trial. While courts supervise structural reform when they sentence firms to probation following a conviction, before an indictment the role of courts remains circumscribed. In Judge Gerard E. Lynch's terms, the criminal system in practice operates as "an administrative system" in which almost all cases are resolved in plea bargaining based on the prosecutor's internal procedures and standards, "in absolute distinction from a model of adversarial determination of fact and law before a neutral judicial decision maker."²⁷⁰

In many respects, structural reform by prosecutors in the criminal law setting should be far less troubling than civil structural reform before a judicial decisionmaker. The chief criticism raised in civil structural reform was that unaccountable private parties sought to reform institutions under the aegis of unaccountable courts.²⁷¹ Indeed, critics argued that separation of powers principles demand that courts abstain from exercising "traditionally executive functions," and that structural reform instead come from the political branches.²⁷² Structural reform prosecutions answer those criticisms. Except in a few cases, the subjects of structural reform prosecutions are private firms, not government entities. Prosecutors are executive actors and politically accountable. For that reason, they receive substantial separation of powers deference. This is not to say deference is always justified; in practice, federal prosecutors are not wholly accountable to the central DOJ but maintain real independence, including in the organizational crime context.²⁷³

Though both the litigants and the institutional targets are very different from those in civil cases, structural reform prosecutions raise similar challenges in that they rely on the same broad remedial tools. Institutional remedies raise a raft of difficult practical and policy questions regarding their scope, cost, duration, detail,

²⁷⁰ Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 *Stan. L. Rev.* 1399, 1404 (2003).

²⁷¹ See Mishkin, *supra* note 85, at 971; Yoo, *supra* note 85, at 1124.

²⁷² Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 *Stan. L. Rev.* 661, 662 (1978); see also Fletcher, *supra* note 71, at 636-37 (arguing that political intervention by courts should only occur where an entity is "seriously and chronically in default").

²⁷³ See *supra* text accompanying note 171.

implementation, role for experts, reporting, effects on third parties, degree of participation by third parties, and alterations when conditions change.²⁷⁴ Critics of civil interventions typically called, not for an end to reform, but for stricter and principled limits to judicial discretion.²⁷⁵ In turn, civil courts fashioned such remedial limits.²⁷⁶ In the school desegregation context, for example, the Supreme Court developed a three-part test requiring a court to (1) consider the nature and scope of the constitutional violation, (2) impose the least restrictive injunctions to restore victims to the position they would have been in absent unconstitutional acts, and (3) take account of administrative prerogatives of state and local authorities.²⁷⁷ Some argue the Court went too far in hampering remedies for constitutional violations, while others argue the Court did not go far enough.²⁷⁸

In the criminal context, though problems of federalism or legitimacy of judicial discretion are not implicated, the complications just discussed arise precisely because prosecutors have almost unlimited discretion. Courts do review actions of prosecutors, despite substantial separation of powers deference, in order to protect rights of criminal defendants from prosecutorial zeal, but judicial review remains highly limited except in unusual cases. The uncertain existence of meaningful limits on structural reform prosecutions raises substantial questions for future scholarship. Here, I look more closely at what stages actors might consider or reject such limits by looking at the roles of courts, prosecutors, legislators, and organizations regarding (1) the approval, (2) the implementation, and (3) the termination of structural reform agreements. Where judicial review can play only a very limited role given separation of powers deference, absent legislative intervention and so long as the DOJ pursues remedies at the charging stage, I conclude the DOJ will chiefly define the development of structural reform prosecutions.

²⁷⁴ See *supra* Section I.B.

²⁷⁵ See, e.g., Yoo, *supra* note 85, at 1171–73.

²⁷⁶ See *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977); see also Fed. R. Civ. P. 60(b) (permitting a court to relieve a party of a judgment if “it is no longer equitable that the judgment should have prospective application”).

²⁷⁷ See *Milliken*, 433 U.S. at 280–81.

²⁷⁸ See *supra* notes 71–72, 84–85 and accompanying text.

1. Approval

Courts have not intervened at the approval stage during which the parties negotiate and agree on the terms of a structural reform prosecution agreement. Perhaps, even at the charging stage of a criminal case, a federal judge need not accept a “fait accompli” deferral agreement.²⁷⁹ None have suggested how judges can review such charging decisions. However, the U.S. Code provides that courts must review deferred prosecution agreements and approve any deferral.²⁸⁰ There is no case law interpreting that provision. There is no commentary on it. Every judge approving a deferred prosecution agreement has done so without any published rulings or modifications to the agreement.

Perhaps that has been due to institutional limits on a court’s capacity to evaluate deferred prosecution agreements dealing with complex governance matters. A court is in the position of reviewing a complex agreement already reached. A court can only reject the entire agreement; the U.S. Code does not (clearly, at least) provide any power to modify a proposed diversion. At the charging stage, as noted, prosecutorial decisions receive a “presumption of regularity.”²⁸¹ Similarly, in the plea agreement context, federal courts scrutinize agreements not only for several reasons noted, including voluntariness, factual basis, and fairness, but also to see whether they comply with the “public interest” or conflict with the purposes of the Guidelines.²⁸² However, such criteria are “difficult to enforce,” and courts rarely reject an agreement unless defendants were denied minimally adequate procedural protections or there was a gross departure from prosecutorial discretion.²⁸³

²⁷⁹ See Greenblum, *supra* note 17, at 1864.

²⁸⁰ See 18 U.S.C. § 3161(h)(2) (2000) (stating that the time to file an indictment is tolled during “[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct”).

²⁸¹ *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

²⁸² See *supra* Subsection I.C.1.

²⁸³ See Abraham S. Goldstein, *The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea* 9 (1981). Just as in civil cases, where appellate courts face great difficulties reviewing discretionary decrees in institutional cases, courts here may only intervene given clear violations of legal rules. See Fletcher, *supra* note 71, at 661–63.

Organizational defendants, while highly unlikely to sign an agreement involuntarily, may enter into an agreement that grossly departs from the purposes of the Guidelines. The Guidelines, as noted, are far more demanding than many organizational agreements. They include seven detailed criteria for what constitutes an “effective” compliance program²⁸⁴ that make clear an organization must develop ways to cure systemic shortcomings.²⁸⁵ Still more demanding, the Guidelines require that a company remain vigilant in its problem solving and “evaluate periodically the effectiveness of the organization’s compliance and ethics program.”²⁸⁶ An organization must “promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”²⁸⁷ Courts consider best practices in an industry and take into account the size of an organization.²⁸⁸ While courts now apply these demanding Guidelines at the sentencing stage²⁸⁹ and when ordering compliance programs during probation,²⁹⁰ in such cases the organi-

²⁸⁴ See U.S. Sentencing Guidelines Manual § 8B2.1 (2005) (requiring that an organization (1) “establish standards and procedures to prevent and detect criminal conduct,” (2) ensure its governing authority and high-level personnel oversee an effective compliance program, delegating specific individuals to implement it and report on its progress, (3) exclude from positions of authority persons involved in illegality, (4) conduct effective training on the compliance and ethics program, (5) use monitoring and auditing to detect criminal conduct and to evaluate the effectiveness of the compliance program and create avenues for confidential reporting of malfeasance, (6) discipline failures to comply, and (7) after criminality is detected, take reasonable steps to respond and modify the compliance program).

²⁸⁵ See U.S. Sentencing Guidelines Manual § 8B2.1 cmt. nn.2–5.

²⁸⁶ *Id.* § 8B2.1(b)(5)(B).

²⁸⁷ *Id.* § 8B2.1(a)(2).

²⁸⁸ See *id.* § 8B2.1 cmt. n.2(A).

²⁸⁹ Few courts have thus far given credit to organizations for having effective compliance programs (only 0.4% of 812 organizations sentenced from 1993 to 2001). See Ad Hoc Committee Report, *supra* note 158, at 26. Part of the reason may be that most companies sentenced had fifty or fewer employees and thus were small enough that a high-level person engaged in or approved of the criminal offense (66.4% had 50 or fewer, 27.5 % had 10 or fewer, and only 7.4% had 1000 or more). *Id.* However, a fair number of cases (40%) did involve mitigation for cooperation with the government. See 2003 Sourcebook of Federal Sentencing Statistics, *supra* note 144, at 108 tbl.54.

²⁹⁰ See *Dellastatious v. Williams*, 242 F.3d 191, 196 (4th Cir. 2001) (stating directors may avoid derivative liability if they demonstrate “an adequate corporate information-gathering and reporting system”); *McCall v. Scott*, 239 F.3d 808, 819–20 (6th Cir. 2001) (stating that “inaction” and failure to implement compliance programs in the face of “red flags” supports liability); *In re Caremark Int’l Derivative Litig.*, 698 A.2d

zation was convicted and is legitimately subject to punitive sentencing conditions.

Absent a conviction, the Guidelines do not squarely apply and judicial intervention will be highly deferential. Courts would likely presume the agreement is proper or conduct a “reasonableness” inquiry, as they do when reviewing whether plea agreements comport with the broad goals of the Guidelines.²⁹¹ Applying such deferential review, a court would likely reject only a highly atypical, egregiously nonconforming agreement and would routinely approve the rest without hesitation. Most agreements will generally serve the compliance goals of the Guidelines, even if some of their specific terms do not. Imposing substantial, unrelated obligations on an organization might deserve judicial intervention.²⁹² Yet if the organization itself does not protest, a court would be unlikely to act. Further, the U.S. Code does not provide for review of non-prosecution agreements. Should courts start to more rigorously review deferral agreements, the DOJ could merely secure nonprosecution agreements rather than deferred prosecution agreements.

Deferential judicial review would also likely prove of little use in protecting nondefendant third parties, such as current and former employees, who face individual prosecutions and are negatively impacted by the firm’s cooperation with the DOJ.²⁹³ In the KPMG case, the District Court offered individual employees only the rem-

959, 969 (Del. Ch. 1996) (noting that because the Guidelines offer “powerful incentives for corporations today to have in place compliance programs to detect violations of law,” failure to implement compliance systems supports derivative liability).

²⁹¹ One court has evaluated the reasonableness of a plea agreement with a corporate defendant that included substantial compliance and remedial measures, approving it with reference to the Organizational Sentencing Guidelines. See *United States v. C.R. Bard, Inc.*, 848 F. Supp. 287 (D. Mass. 1994).

²⁹² Perhaps if an agreement almost exclusively contained overreaching community service terms a court could intervene, given that the Guidelines caution against imposing community service not “directly related” to the offense. Now that the Guidelines commentary no longer suggests that privilege waiver supports a reduction, courts may also consider whether terms requiring privilege waivers support the purposes of the Guidelines. See News Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Firearms, and Steroids (Apr. 11, 2006), <http://www.ussc.gov/PRESS/rel0406.htm>.

²⁹³ See Mark Hamblett, Judge: Evidence Shows Government Influenced KPMG’s Defense Fees Policy, N.Y. L.J., May 12, 2006, available at <http://www.law.com/jsp/article.jsp?id=1147338329237>.

edy of a civil suit for legal fees.²⁹⁴ The court did not consider the rights of those employees when it approved the KPMG deferred prosecution agreement in the first place. Nor would doing so necessarily be practicable; it might require consolidated hearings including individual and organizational defendants.²⁹⁵ Such hearings could turn into prolonged multipolar disputes, and courts do not typically permit third parties to intervene in criminal matters. When former employees challenged the KPMG agreement (only after it was terminated), the court permitted them to file motions as *amicus curiae*, but ruled they lacked standing to object; regardless, the court ruled that prosecutors retain exceedingly broad discretion to terminate a prosecution.²⁹⁶

If Congress is concerned about prosecutorial discretion in shaping structural reform remedies, legislation could provide for enhanced judicial review. Alternatively, legislation could focus on the DOJ's relationship with industry and the public, requiring an opportunity for public notice and comment as some agencies must currently provide before entering into consent decrees.²⁹⁷ No such proposals have been made.

2. *Implementation*

Courts are also unlikely to play any role during the implementation of structural reform agreements. The DOJ chose not to pursue alternative approaches such as civil consent decrees or corporate probation, which heavily involve courts in policing the implementation process and settling disputes. Where the parties agree to a structural reform remedy that leaves courts out of the project, the only mechanism for judicial oversight would be for judges to insist

²⁹⁴ *United States v. Stein*, 435 F. Supp. 2d 330, 382 (S.D.N.Y. 2006), appeal docketed, No. 06-4358 (2d Cir. Sept. 19, 2006).

²⁹⁵ A court could perhaps, pursuant to its inherent authority to consolidate cases, enter joint rulings on narrow legal issues raised by the limited group of parties also being criminally prosecuted for the same underlying conduct. See Section II.A. In contrast, I find it highly unrealistic, as one author suggests, that courts broadly serve as a "fiduciary for constituencies otherwise unrepresented in the corporate deferral process and potentially vulnerable to negative externalities." See Greenblum, *supra* note 17, at 1901.

²⁹⁶ See *United States v. KPMG LLP*, No. 1:05-CR-00903-LAP, 2007 WL 541956 (S.D.N.Y. Feb. 14, 2007).

²⁹⁷ See *supra* note 136 and accompanying text.

that a deferral not be approved in the first instance absent periodic reports to the court regarding the progress of compliance. Such an occurrence seems highly unlikely given that judges would have to reach out to assume a supervisory role not sought by the parties and in areas regarding organizational governance.

The U.S. Code provision requiring that the court approve a deferral, though intended to “strengthen[] the supervision over persons released pending trial,”²⁹⁸ does not clearly provide the sort of supervisory power that courts have under the Guidelines at the probation stage after a conviction. If Congress intended to provide for supervision over pre-trial diversion, it could pass a statute to that effect.

Absent such interventions, prosecutors will supervise implementation of these agreements, a difficult task for which they may lack institutional competence. For that reason prosecutors understandably appear to rely heavily on independent monitors, just as a court would, to structure compliance programs and audit performance. The criminal law context raises special challenges for independent monitors, however, that are worth further exploration, just as scholars have explored challenges facing civil monitors.²⁹⁹ The DOJ has selected former regulators and former corporate crime prosecutors to serve as independent monitors.³⁰⁰ Those credentials nevertheless may not always prepare a monitor for the work of reconstituting a compliance program, even if they have such experience. While internal groups might welcome a monitor to eradicate criminality, an outside monitor could have difficulty obtaining cooperation or even information. Internal groups can mislead a monitor and disguise criminality.³⁰¹ Gatekeepers such as auditors

²⁹⁸ See H.R. Rep. No. 93-1508, at 1 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7401, 7401.

²⁹⁹ See Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. Ill. L. Rev. 725, 732–35 (1986) (describing roles of independent monitors in civil structural remedies); Note, “Mastering” Intervention in Prisons, 88 Yale L.J. 1062, 1063–68 (1979) (exploring use of “masters” in prison reform litigation).

³⁰⁰ A similar development has occurred with the rise in the retention of independent private sector inspectors general, often former prosecutors, by government to prevent fraud in contracting and by private firms conducting internal investigations. See James B. Jacobs & Ron Goldstock, *Monitors & IPSIGS: Emergence of a New Criminal Justice Role*, *Crim. L. Bull.*, Mar.–Apr. 2007.

³⁰¹ See *id.*

and lawyers may already have failed to detect employee malfeasance or contributed to failures to properly supervise compliance.³⁰² If they face resistance, monitors may need more time to achieve deep changes than many short-lived agreements provide.³⁰³ One monitor has uncovered substantial new criminality in an organization, which could result in additional individual prosecutions but perhaps also complicates the compliance process.³⁰⁴ Another, at Bristol-Myers Squibb, recently recommended that the CEO be dismissed. The board did so, but a new investigation is now ongoing regarding new criminality uncovered.³⁰⁵ Given difficulties in quickly achieving reform, prosecutors may require more sustained interventions. Indeed, prosecutors might themselves seek out judicial involvement and supervision of the type that provided an important buttress in civil RICO prosecutions. While courts may not have any more expertise, they would have authority to modify the terms of supervision and perhaps better adapt reform to changed circumstances.

3. Termination

A final occasion where courts may become involved is at the back end, if disputes arise where the DOJ unilaterally terminates an agreement. Federal courts already conduct analogous review in individual cases where the defendant made promises in exchange for a plea agreement, asking whether the government acted in “good faith” and “lived up to its end of the bargain.”³⁰⁶ Almost all

³⁰² See John C. Coffee, Jr., What Caused Enron? A Capsule Social and Economic History of the 1990s, 89 Cornell L. Rev. 269, 287–97 (2004).

³⁰³ See Jill Nawrocki, Home Improvement, Corp. Governance, Apr. 2006, at 90, 95, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1146560723743> (describing the sustained efforts of the Computer Associates’ General Counsel to “weave the [DP] agreement’s principles into the fabric of the company”).

³⁰⁴ See Troy Graham & Jennifer Moroz, UMDNJ Monitor Says Fraud, Failures Now Up to \$243 Million, Phila. Inquirer, July 21, 2006, at B01 (describing how the monitor’s investigation of the University of Medicine and Dentistry of New Jersey led to the resignation of the Dean and the firing of an Associate Dean, and uncovered \$243 million in mismanagement and \$35 million in potential Medicare fraud).

³⁰⁵ See Saul, *supra* note 177.

³⁰⁶ *United States v. Leonard*, 50 F.3d 1152, 1157 (2d Cir. 1995) (quoting *United States v. Knights*, 968 F.2d 1483, 1486–87 (2d Cir. 1992)). This issue arises where the government promises to move for a downward departure for “substantial assistance” under § 5K1.1 of the Sentencing Guidelines, but later decides it did not receive such

of the deferred and nonprosecution agreements contain provisions in which the DOJ can unilaterally assert a breach, terminate the agreement, and then pursue a criminal prosecution of the organization. The DOJ can then typically take full advantage of all of the admissions of criminal wrongdoing contained in the agreement, making indictment and conviction all but certain. Despite those stringent terms, federal courts hold that due process prevents the government from “unilaterally determining” that a defendant breached an agreement not to prosecute and that prosecutors “must obtain a judicial determination of the defendant’s breach.”³⁰⁷ Nevertheless, as I will describe, organizations may still face severe harm.

Federal courts developed standards grounded in contract law to interpret immunity, cooperation, and plea agreements, mostly in cases involving individual defendants. Under contract law principles, the government is not entitled to rescission if the defendant had substantially performed.³⁰⁸ If “nonperformance . . . is innocent, does not thwart the purpose of the bargain, and is wholly dwarfed by that party’s performance,” then the government “is not entitled to rescission.”³⁰⁹ Conversely, defendants are entitled to the benefit

assistance and does not make the § 5K1.1 motion. Other courts of appeals either adopt a more deferential review, see, e.g., *United States v. Garcia-Bonilla*, 11 F.3d 45, 47 (5th Cir. 1993) (government refusal to file § 5K1.1 motion not reviewable absent unconstitutional motive), or an intermediate rationality review approach, see, e.g., *United States v. Pipes*, 125 F.3d 638 (8th Cir. 1997); *United States v. Copeland*, No. 96-6043, 1997 WL 563141 (4th Cir. Sept. 11, 1997).

³⁰⁷ *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) (“In the context of non-prosecution agreements the government is prevented by due process considerations from unilaterally determining that a defendant is in breach and nullifying the agreement.”); *United States v. Castaneda*, 162 F.3d 832, 835–36 (5th Cir. 1998); *United States v. Ataya*, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988) (“A pre-indictment hearing would help prevent overreaching by prosecutors . . . in the drafting of ambiguous plea agreements . . .”); *United States v. Verrusio*, 803 F.2d 885, 888 (7th Cir. 1986).

³⁰⁸ See, e.g., *Ricketts v. Adamson*, 483 U.S. 1, 9 (1987); *United States v. Crawford*, 20 F.3d 933, 935 (8th Cir. 1994); *United States v. Tilley*, 964 F.2d 66, 71 (1st Cir. 1991); *United States v. Packwood*, 848 F.2d 1009, 1011 (9th Cir. 1988); *Verrusio*, 803 F.2d at 888.

³⁰⁹ *Castaneda*, 162 F.3d at 838 (quoting *White Hawk Ranch v. Hopkins*, No. CIVA.91-CV29-DD, 1998 WL 94830, at *3 (N.D. Miss. Feb 12, 1998)); accord, e.g., *United States v. Riggs*, 287 F.3d 221 (1st Cir. 2002); *Crawford*, 20 F.3d at 933; *Rodriguez v. New Mexico*, 12 F.3d 175 (10th Cir. 1993); *United States v. Fitch*, 964 F.2d 571 (6th Cir. 1992).

of the bargain and may try to demonstrate that the government did not substantially perform.³¹⁰

This inquiry is similar to that in civil consent decrees, where the Supreme Court ruled that courts should craft injunctions within “appropriate limits” to be dissolved after local compliance “for a reasonable period of time,”³¹¹ and that consent decrees may be terminated in stages.³¹² A federal court has the equitable discretion to modify a prospective judgment or a consent decree to take account of changed circumstances.³¹³ A consent decree is treated as a contract in that its terms are interpreted using contract principles, based on its text and, if ambiguous, based on extrinsic sources such as the intent of the parties when they entered the bargain.³¹⁴

Those standards apply in the criminal context but not in the same manner, due to separation of powers in the form of deference to prosecutors. In one example, a federal court recently intervened

³¹⁰ See, e.g., *Santobello v. New York*, 404 U.S. 257, 262 (1971) (holding defendant entitled to enforcement of bargained-for plea agreement); *United States v. Hodge*, 412 F.3d 479, 485 (3d Cir. 2005); *United States v. Nolan-Cooper*, 155 F.3d 221, 236 (3d Cir. 1998); *United States v. Price*, 95 F.3d 364, 367 (5th Cir. 1996); *United States v. Badaracco*, 954 F.2d 928, 939 (3d Cir. 1992) (asking “whether the government’s conduct is inconsistent with what was reasonably understood by the defendant when entering the plea of guilty” (quoting *United States v. Nelson*, 837 F.2d 1519, 1522 (11th Cir. 1988))).

³¹¹ *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247–48 (1991); accord *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Milliken v. Bradley*, 433 U.S. 267 (1977); see also Fed. R. Civ. P. 60(b) (permitting a court to relieve a party of a judgment if “it is no longer equitable that the judgment should have prospective application”).

³¹² See *Freeman v. Pitts*, 503 U.S. 467, 490–91 (1992); cf. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (“[A] federal consent decree must . . . further the objectives of the law upon which the complaint was based.”); *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (holding that a consent decree may provide “broader relief than the court could have awarded after a trial”).

³¹³ See *Local No. 93*, 478 U.S. at 526–27; see also Fed. R. Civ. P. 60(b). The Court also noted in *Frew* that Rule 60(b)(5) “encompasses the traditional power of a court of equity to modify its decree in light of changed circumstances.” 540 U.S. at 441–42. Similarly, in *Rufo v. Inmates of Suffolk County Jail*, the Court held that district courts should apply a flexible standard to the modification of institutional reform consent decrees. 502 U.S. 367, 392 n.14 (1992).

³¹⁴ See *Local No. 93*, 478 U.S. at 522; *United States v. I.T.T. Continental Baking Co.*, 420 U.S. 223, 238 (1975) (“Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree.”); see also Anderson, *supra* note 299, at 726.

to enjoin prosecution of the Stolt-Nielsen company, a supplier of parcel tanker shipping services, after the DOJ unilaterally found a breach in the corporation's cooperation under the DOJ Antitrust Division's Corporate Leniency Program. The court explained:

When it entered into the agreement, DOJ never intended to prosecute SNTG [Stolt-Nielsen Transportation Group]. Its goals were to pursue SNTG's co-conspirators and to break up the conspiracy. It got what it had bargained for in the agreement. SNTG's partners in the conspiracy were prosecuted and convicted, and the conspiracy has been terminated.

The court then enjoined any future prosecution.³¹⁵ The United States Court of Appeals for the Third Circuit, however, reversed, ruling that the court could not enjoin a prosecution but that the company could raise the defense post-indictment.³¹⁶ Only the Seventh Circuit counsels pre-indictment relief.³¹⁷ Thus, an organization that substantially complied with an agreement might nevertheless face the very threat of indictment that caused it to settle in the first place.

Absent pre-indictment judicial remedies, the DOJ decides whether an organization has substantially complied, yet it has never defined how its prosecutors measure compliance. The DOJ

³¹⁵ *Stolt-Nielsen, S.A. v. United States*, 352 F. Supp. 2d 553, 562–63 (E.D. Pa. 2005).

³¹⁶ See *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 187 (3d Cir. 2006). The Supreme Court denied certiorari. *Stolt-Nielsen, S.A. v. United States*, 127 S. Ct. 494 (2006). The U.S. Chamber of Commerce and others as amici urged the Court to rule that an agreement could be specifically enforced and the prosecution enjoined. Perhaps the corporation could have sought a declaratory judgment stating that it did not breach. See *Stolt-Nielsen*, 442 F.3d at 184–85 (collecting authority).

³¹⁷ The Seventh Circuit recommends pre-indictment hearings, see *United States v. Meyer*, 157 F.3d 1067, 1076–77 (7th Cir. 1998), while the Third Circuit, along with others, holds that pre-trial determinations are not required. See *Stolt-Nielsen*, 442 F.3d at 184; *United States v. Bailey*, 34 F.3d 683, 690–91 (8th Cir. 1994); *United States v. Bird*, 709 F.2d 388, 392 (5th Cir. 1983). But see *United States v. Ataya*, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988); *United States v. Verrusio*, 803 F.2d 885, 888 (7th Cir. 1986) (holding that the preferred procedure, “absent exigent circumstances,” is for the government to seek a hearing pre-indictment to seek relief from an agreement). The Seventh Circuit's approach seems appropriate given due process requirements and the great harm of improper indictments. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (stating that the pre-deprivation hearing is the “root requirement” of due process (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971))).

could have adopted the Guidelines definitions providing a detailed seven-part test to evaluate whether compliance is “effective.”³¹⁸ Lacking such a standard, it is not clear whether or how anyone determines whether there has been full, partial, or no compliance. The agreements specify that while obligations to cooperate continue indefinitely, formal DOJ supervision terminates after eighteen months to three years, without any evaluation of success, and with only the extreme provision that the DOJ may unilaterally find a breach and terminate the agreement. Further, the process remains nonpublic, so outsiders cannot assess compliance nor whether these DOJ efforts are effective.

Where organizations may only be able to raise a defense of “substantial compliance” after an indictment, the threat of improper termination remains severe and ill defined. Only the DOJ can provide clearer notice of its compliance goals, unless organizations negotiate for additional specificity in the terms of agreements, courts provide pre-indictment remedies, or Congress intervenes.

C. Rethinking Remedies for Organizational Crime

Understanding the current organizational prosecution regime as a structural reform regime and making that new approach explicit, as I have done in this Article, raises a series of problems for future work that extends far beyond the traditional critiques of organizational criminal law. In the past, scholars focused on the need to narrow the open-textured, underlying federal substantive law for which organizations may be prosecuted, together with the sweeping respondeat superior standard.³¹⁹ Scholars have advocated two solutions for the problem of broad prosecutorial discretion in organizational cases: that prosecutors voluntarily constrain their own discretion, or that judges narrow federal organizational criminal law. Structural reform prosecutors then add an additional layer of problems relating to the choice of what remedies are negotiated

³¹⁸ See U.S. Sentencing Guidelines Manual § 8B2.1 (2005). Courts also already rely on compliance experts to define what reforms are reasonably effective to “reduce the likelihood of future criminal conduct.” *Id.* § 8D1.1(a)(6).

³¹⁹ See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 *Am. U. L. Rev.* 703, 717 (2005); William Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505, 519–20, 531 (2001); see also *supra* notes 106, 109.

between organizations and prosecutors, which, as discussed, courts currently will review only at the margins. Below I outline a series of additional issues that arise once we understand that prosecutors have adopted a structural reform approach. I discuss here both issues for exploration in future scholarship, and also the problems these remedies raise for prosecutors, courts, legislators, industry, and compliance experts.

Judge Gerard E. Lynch, Professor Daniel Richman, and others argue that prosecutorial self-regulation of discretion offers the most practical means for allocating enforcement resources and is the approach that best fits our constitutional and political system.³²⁰ While under the typical account prosecutors push for high-profile convictions and expansive interpretations of federal criminal law in order to advance their institutional interests,³²¹ these commentators instead argue that prosecutors will often narrow their focus and create standards to provide notice and better deter wrongdoers. However, structural reform prosecutions raise complex questions where though the DOJ has limited its prosecutors' discretion, it has done so in a different and novel way that raises a new kind of uncertainty. Rather than choosing to provide notice of what criminal provisions deserve certain punishments, the DOJ has begun to elaborate a set of explicit charging guidelines, now limited in response to political pressure and advocacy from organizations. I have described how the DOJ has also implicitly adopted a range of remedial principles to govern the content of agreements entered into and the compliance process under those agreements. The scope of the DOJ's remedial discretion raises a series of additional unexplored issues.

First, structural interventions remain highly contextual. While the agreements themselves provide some clarity once their terms are compared, a set of DOJ guidelines describing the terms to be

³²⁰ See Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (1969); Lynch, *supra* note 206; Lynch, *supra* note 106; Richman, *supra* note 194; see also Buell, *supra* note 103, at 535–36 (arguing prosecutors should restrict charging to corporations for whom reputational sanctions would appropriately deter); Laufer, *supra* note 99, at 1350 (calling for “significant constraint of prosecutorial discretion”).

³²¹ Individual U.S. Attorneys may do so not just for internal rewards, but also for political gain and publicity. See Kahan, *supra* note 110, at 487 n.105 (citing Daniel R. Fischel, *Payback 98–127* (1995)); see also James Eisenstein, *Counsel for the United States: U.S. Attorneys in the Political and Legal Systems 230–31* (1978).

pursued in agreements would be an improvement. Even this, however, may not provide sufficient notice of how the agreements will be implemented by a local U.S. Attorney's Office in the context of a particular organization over a period of many years. Much of the work in their implementation remains nonpublic and may be particularly geared towards the unique problems an institution faces. Nor has the DOJ asserted any central review over the content of organizational agreements. The DOJ has not publicly reviewed the efficacy of its agreements, nor has it promulgated internal guidelines to guide the content of these agreements; the approach has emerged through ad hoc efforts and replication of other U.S. Attorneys' and agencies' efforts. Future research could ask whether prosecutors provide sufficient guidance and notice regarding their remedial approach and whether prosecutors, over time, continue to proceed ad hoc or produce a more clearly defined set of best practices.

A related problem is the exercise of prosecutorial discretion regarding individual employees of target organizations. An organizational employer is no ordinary cooperator, and the criminal procedure rights of employees when the forces of the government and an organization are arrayed against them will continue to deserve careful study. A separate question will be whether ongoing individual prosecutions hamper or distract from efforts to implement structural reform.

Second, structural reform prosecutions also complicate the relationship between substantive law and organizational punishment. Scholars have observed that courts rarely ensure that underlying substantive criminal statutes are interpreted narrowly or that vagueness is eliminated, in part due to separation of powers deference.³²² Congress continues to pass an increasing number of broad, ill-defined statutes.³²³ Where courts do not narrow the meaning of such statutes, prosecutors fix their meaning in practice, so that in effect the legislature has delegated common law crime-making au-

³²² See, e.g., Jeffries, *supra* note 20, at 244–45 (describing the demise of strict construction of criminal statutes); Kahan, *supra* note 20, at 353.

³²³ See Lynch, *supra* note 206, at 2137–38; Richman, *supra* note 194, at 763–65; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *Yale L.J.* 1, 66–76 (1997); cf. Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 *Mich. L. Rev.* 1269 (1998).

thority to prosecutors.³²⁴ Structural reform prosecutions raise a set of still more complex problems because their remedies are not closely tied to the already often broad and vague underlying substantive law. As arm's-length deferral agreements, they need only accomplish the general purposes of that underlying substantive law and the Sentencing Guidelines. The possibilities for effectual judicial review of structural reform agreements remain highly limited; courts may only exclude flagrant abuses to define the broad outer reaches of permissible agreements. An issue for future exploration is whether courts can help define what constitutes substantial compliance and clarify a set of best compliance practices. An important issue for the courts and Congress will be whether pre-indictment relief should be provided if prosecutors do violate due process and unilaterally declare a breach of an agreement. Also worth further exploration is the extent to which Congress could enact a range of reforms, including (1) narrowing the underlying substantive law applicable to organizations, (2) altering the respondeat superior standards that create such broad exposure, and (3) mitigating the collateral consequences of an indictment or conviction.

Third, the possibility for the emergence of best practices should also be explored. In civil structural reform cases, one benefit that scholars observed is that despite ad hoc efforts at first, over time remedial law developed a clarity not found in the underlying constitutional law, providing a set of best practices and notice to all sides. This often occurred over decades, due to a converging recognition that certain remedies were effective. Whether evolution of a clear body of remedies in the area of organizational crime can occur may remain an open question for some time. A related and very difficult question for future scholarship will be the efficacy of these compliance remedies. Given uncertainty regarding the effectiveness of these various compliance programs, it is far from clear whether structural reform prosecutions have produced or will produce the sought-after compliance. The DOJ makes no public effort to test whether structural reform remedies succeed in obtaining compliance or whether other remedies should be used instead. No public effort is being made to measure the effectiveness of these reform efforts.

³²⁴ See Kahan, *supra* note 110, at 484–85.

Fourth, the role of industry and political pressure on prosecutors should be explored further. Organizations themselves may produce greater clarity by insisting on more detailed agreements, based on the experience of others in industry. Organizations may evaluate the effectiveness of these remedies and develop industry practices. We can be confident that industry will continue to exercise significant political clout to affect the formal and informal rules governing these prosecutions. Already organizations and business groups have successfully lobbied for changes in DOJ practices. Over time, if prosecutors exercise essentially unconstrained choices of what remedies to impose, organizations might demand or receive remedial clarity, concessions in individual cases, regulatory change, or legislation. Indeed, Congress is considering legislation regarding privilege waivers and could legislate regarding other terms in these agreements.

Fifth, the role of independent monitors and compliance experts is worth evaluating. These monitors may come to have substantial influence based on their experience shaping the implementation of these agreements. Perhaps informal exchange of information amongst independent monitors, prosecutors, regulators, and industry experts will, over time, create a narrowed set of accepted best remedial practices.

Finally, I underscore again that prosecutors retain fundamentally broad discretion. Even if constrained by judicial or legislative or internal limits on structural reform settlements, prosecutors can always choose not to settle but rather to pursue a conviction. Unless prosecutors cease to prosecute organizations entirely, all future scholarly, judicial, regulatory, or legislative efforts to rethink or clarify structural settlements must be understood in the context of organizations bargaining under the long shadow of the threat of indictment. Prosecutors have limited resources and remain politically accountable, whereas the large organizations affected often have substantial resources and political influence. Nevertheless, prosecutors retain a giant stick—the ability to indict—and unless the nature of that deterrent changes, prosecutors will remain the key to the success or failure of structural reform prosecutions.

CONCLUSION

In its sheer novelty, the rise of structural reform prosecution calls into question the traditional civil rights-centric view of structural reform. While Owen Fiss wrote that “[t]he structural injunction received its most authoritative formulation in civil rights cases,”³²⁵ now it receives a reformulation in criminal law. This illuminates not only the continuing vitality of the structural reform model, but also how the challenges faced during decades of civil structural reform efforts acquire new relevance today in the area of organizational criminality. Structural reform litigation engendered an important literature regarding legitimacy and efficacy of such interventions by federal courts. Now that prosecutors have harnessed powerful civil institutional reform tools, similar questions should be asked again in the criminal context.

The move towards a structural reform approach is, in my view, the most important development in decades in the law of organizational crime. Federal prosecutors have stepped far outside of their traditional role of obtaining convictions, and, in doing so, seek to reshape the governance of leading corporations, public entities, and ultimately entire industries. This development has gone largely unexamined. To show the range of alternative approaches for structural reform prosecutions, I framed structural reform remedies at four stages of the criminal process, each with mounting judicial involvement, together with parallel civil remedies. The DOJ adopted a strategy to accomplish ambitious structural reform at the charging stage alone, and for an important reason: to avoid the collateral consequences of an indictment. My empirical study of the DOJ agreements’ terms illuminates a consistent compliance-based approach. These results provide clearer notice to organizations and counsel.

Nevertheless, the DOJ exercises substantial discretion in its charging decisions that remains essentially unreviewed by courts, except at the margins during the approval and termination stages. The DOJ has also declined to provide guidelines on what remedies prosecutors should seek and what constitutes compliance with their agreements. Perhaps predictably, one result of this wide discretion has been some perceived overreaching, which, though mostly un-

³²⁵ Owen M. Fiss, *The Allure of Individualism*, 78 *Iowa L. Rev.* 965, 965 (1993).

2007]

Structural Reform Prosecution

937

reviewable by a court, has already in two discrete respects (relating to privilege waiver and employer-funded attorney's fees) been addressed through the political process.

Structural reform prosecutions place the focus not on prosecutorial discretion to charge, indict, or convict, but rather on supervision of practical efforts to reform institutions. In the civil structural reform context, consensus often developed over time regarding a set of accepted and effective remedial practices. The advent of structural reform prosecutions raises a host of new problems of remedial design regarding the use of criminal prosecutions to rehabilitate organizations. My empirical study describing the DOJ's approach can serve as a foundation for future work investigating those important questions. The DOJ chose to pursue structural reform at the charging stage for several reasons, including the underlying substantive law, the scope of their prosecutorial discretion, the nature of judicial review, and the unique dynamics of prosecuting large organizations. That strategy then defined the resulting body of ambitious structural reform undertakings on a scale never before attempted. Now that this structural reform approach has taken hold, however, prosecutors, scholars, and other actors should make sustained efforts to assess its efficacy and delimit its scope. At minimum, such efforts could clarify the relationships between courts, Congress, prosecutors, administrative agencies, and organizations. Federal organizational criminal law would then itself benefit from a much-needed structural reform.

Appendix A: Chart of Post-Thompson Memo Deferred and Non-prosecution Agreements (Jan. 20, 2003–Jan. 2007)³²⁶

Organization (U.S. Atty's Office) (date of agreement)	NP or DP ³²⁷	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
Adelphia Communications (S.D.N.Y.) (May 2005)	NP	Sec. fraud	No	No	None cited
AEP Energy Services (S.D. Ohio) (Jan. 2005)	DP	Fraud (commodities reports)	No	No	None cited
American Int'l Group (W.D. Pa., DOJ Fraud Section) (Nov. 30, 2004)	DP	Sec. fraud	Yes, chosen by DOJ, SEC, and AIG as part of separate SEC agreement	No	None cited
AOL (E.D. Va., DOJ Criminal Div.) (Dec. 2004)	DP	Sec. fraud	Yes: 1 yr, agreed upon by DOJ, SEC, and AOL	Yes: new policies, including future reporting to the DOJ of any substantial, credible evidence of new federal crimes	None cited

³²⁶ A note on methodology: the charts in Appendices A and B were compiled from the DOJ website and U.S. Attorneys' Offices ("USAO") websites, where the full texts of deferred and nonprosecution agreements since 2003 have been publicly posted. See Office of the Deputy Attorney Gen., Significant Criminal Cases and Charging Documents, <http://www.usdoj.gov/dag/cftf/cases.htm> (last visited May 11, 2007). I have used news searches and have not found reports of agreements entered into that have not had their terms made public. However, I am not confident that I have included all of the pre-Thompson Memo prosecution agreements because not all agreements from the 1990s have been made public or are posted on DOJ websites. I have, whenever possible, reconstructed their terms using available news sources. Details regarding parallel SEC, IRS, and other federal agency agreements were confirmed in press releases on those agencies' websites.

For ease of reading, the table has been split across two pages. Half of the columns relating to each agreement appear on the facing page. For a printable version of the charts, see <http://virginialawreview.org/inbrief/2007/06/18/appendices.pdf>.

³²⁷ Nonprosecution (NP) or deferred prosecution (DP).

2007]

Structural Reform Prosecution

939

Organization	Un-related Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Adelphia Communications	No	No	SEC, USPS	\$715M restitution	2 years	Yes
AEP Energy Services	No	Yes	None	\$30M fine	15 months	Yes
American Int'l Group	No	Yes	SEC	\$80M, SEC disgorgement and interest of \$46.3M	2 years (1 year if compliant)	Yes
AOL	No	Yes	SEC	\$150M to compensation/settlement fund; \$60M fine	2 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
AmSouth Bancorp (S.D. Miss.) (Oct. 2004)	DP	Bank Secrecy Act	No	No	Revised policies with respect to responding to grand jury subpoenas
BankAtlantic (S.D. Fla.) (Mar. 2006)	DP	Bank Secrecy Act, failure to maintain eff. anti-money laundering program	No	No	Investments in personnel and compliance systems
Bank of New York (S.D.N.Y., E.D.N.Y.) (Nov. 2005)	NP	Money laundering, unlicensed money transfers; no anti-money laundering program	Yes	Yes: new policies, training; new management structure; reporting system	Retained law firm to conduct investigation; shared results
BAWAG P.S.K. (Bank owned by Austrian Trade Unions Association) (S.D.N.Y.) (Oct. 2006)	NP	Banking and sec. fraud	No	No	Yes: new management took over

2007]

Structural Reform Prosecution

941

Organization	Un-related Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
AmSouth Bancorp	No	No	None	\$40M settlement with gov't	1 year	Yes
BankAtlantic	No	No	None	\$10M settlement with gov't	1 year	Yes
Bank of New York	No	Yes	None	\$12M restitution; \$26M in civil settlements	3 years (can be terminated earlier)	Yes
BAWAG P.S.K.	No	No	USPIS, SEC, CFTC	\$337.5M to U.S. bankruptcy estate in <i>Refco</i> case and victims; further payments depending on sale price of bank	None	N/A

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
Boeing Co. (C.D. Cal., E.D. Va.) (June 30, 2006)	NP	Federal procurement fraud, conflict of interest, use of competitor's information	Yes: Special Compliance Officer appointed already under Interim Agreement with Air Force	Yes: training; discipline; prohibiting retaliation; hot line created; auditing of compliance program created; Interim Agreement with the Air Force providing for compliance, an independent monitor, and auditing of compliance	Yes: changes to ethics and compliance program; interim agreement with Air Force in 2005; appointing "Special Compliance Officer" as a monitor
Bristol-Myers Squibb (D. N.J.) (June 15, 2005)	DP	Sec. fraud	Yes	Yes: policy changes; data collection; info on website	Entering SEC consent decree, retained independent advisor; personnel changes; created two positions on Board of Directors; reporting
Canadian Imperial Bank of Commerce (DOJ Enron Task Force) (Dec. 22, 2003)	DP	Aided and abetted accounting fraud (by Enron)	Yes	Yes: auditing; policy changes; data collection; confidential reporting	Agreement with OSFI and Federal Reserve of NY (new policies)

2007]

Structural Reform Prosecution

943

Organization	Un-related Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Boeing Co.	No	No	NASA, NASA-OIG, USAF, DOD-OIG	\$50M penalty, \$565M civil settlement	2 years	No: but "conduct by a Boeing employee classified at a level below Executive Management . . . shall not be deemed to constitute conduct by Boeing" and "USAO's shall provide Boeing with written notice" of belief a breach occurred. Special Master will adjudicate any breach.
Bristol-Myers Squibb	Yes: endow chair in ethics at Seton Hall Law School	Yes	None	\$300M compensation fund	2 years	Yes
Canadian Imperial Bank of Commerce	No	Yes	SEC	\$80M to SEC	3 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Re-quired	Pre-Agreement Compliance
Computer Associates (E.D.N.Y.) (Sept. 22, 2004)	DP	Sec. fraud; obstruction	Yes	Yes: auditing; policy changes; data collection; confidential and public reporting	Terminate employees; add two independent directors to board; new CEO; reorganize Finance and Internal Audit Departments
Edward D. Jones (E.D. Mo.) (Dec. 2004)	DP	Sec. fraud	No	Yes: new policies, training, compliance program; new executive committee	None cited
FirstEnergy Nuclear Operating Co. (N.D. Ohio) (Jan. 20, 2006)	DP	Environmental crimes, false statements by employees	No	No	Extensive corrective actions with ongoing supervision of NRC
German Bank HVB (S.D.N.Y.) (Feb. 14, 2006)	DP	Conspiracy to defraud IRS	No	Yes: compliance program as per U.S. Sentencing Guidelines; policy changes; permanent restrictions on banking practices	None cited
HealthSouth Corp. (N.D. AL) (May 2006)	NP	Accounting fraud and sec. fraud	Yes: Governance Consultant as required by SEC consent decree	Yes: actions taken or agreed to pursuant to SEC settlement incorporated in agreement	Adoption of new compliance policies; payments in SEC consent decree; new management, new CEO, CFO, new Chief Compliance Officer, new General Counsel; terminated employees; confidential hotline; retained consultant

2007]

Structural Reform Prosecution

945

Organization	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Computer Associates	No	Yes	SEC	\$225M restitution; \$163M civil compensation	18 months	Yes
Edward D. Jones	No	Yes	SEC, USPS	\$75M and \$200,000 in costs to U.S. Postal Service	2 years	No
FirstEnergy Nuclear Operating Co.	Fund community serv. projects	NA	NRC	\$23M fines; \$4.3M community service	12 months	Yes
German Bank HVB	No	N/A	IRS	\$29.6M in fines, restitution	18 months	
HealthSouth Corp.	No	No	SEC, IRS, USPS	(\$100M in SEC settlement; \$445M class settlement); \$3M to U.S. Postal Service	30 months	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
Hilfiger (S.D.N.Y.) (Aug. 10, 2005)	NP	Tax fraud	No	Yes: compliance program as per U.S. Sentencing Guidelines	Full cooperation; file amended tax returns; internal investigation
InVision (DOJ Fraud Section) (Dec. 3, 2004)	DP	Foreign Corrupt Practices Act ("FCPA")	Yes	Yes: policy changes	Voluntary disclosure; prompt disciplinary action; no prior history
KPMG (S.D.N.Y.) (Aug. 26, 2005)	DP	Tax fraud, conspiracy to defraud IRS; tax evasion	Yes	Yes: policy changes; confidential reporting; compliance program as per U.S. Sentencing Guidelines	None cited
MCI (S.D.N.Y.) (Sept. 1, 2005)	NP	Sec. fraud	No	Yes: compliance program as part of 2004 settlement with Okla. prosecutors and civil settlements	None cited
Mellon Bank, N.A. (W.D. Pa.) (Aug. 15, 2006)	NP	Theft of gov't property, theft of mail matter, conspiracy	Yes	Yes: compliance and ethics program that satisfies U.S. Sentencing Guidelines; new training; auditing	None cited
Merrill Lynch (DOJ Enron Task Force) (Sept. 17, 2003)	NP	False statements, aided/abetted Enron	Yes	Yes: policy changes; confidential reporting; creation of a special structure products committee to review transactions	None cited

2007]

Structural Reform Prosecution

947

Organization	Un-related Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Hilfiger	No	No	IRS	Pay back taxes, interest; fine (est. \$15.4M; \$2.7M interest)	3 years (can request to be terminated after 2 years)	No
InVision	No	Yes	SEC	\$800,000 fine	2 years	Yes
KPMG	No	Yes	IRS	\$456M total, of which \$228M consists of fines	14 months (can be extended at one year intervals; max. 5 yrs); monitorship lasts three years	Yes
MCI	No	No	SEC	\$750M restitution (SEC agreement)	2 years	Yes
Mellon Bank, N.A.	No	Yes	USPIS, Dep't Treasury Inspector Gen. for Tax Admin.	\$30,000 in costs, \$18.1M in restitution to taxpayers, U.S.	3 years	
Merrill Lynch	No	No	SEC	\$80M (SEC agreement)	21 months	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
Micrus Corp. (DOJ Fraud Section) (Feb. 28, 2005)	NP	FCPA	Yes	No	Voluntary disclosure; disciplinary action of employees, no prior criminal history
Monsanto (DOJ Fraud Section) (Jan. 2005)	DP	FCPA	Yes	Yes: auditing; policy changes; confidential reporting; press release	Internal investigation; voluntary reporting; new policies
MRA Holdings, LLC (N.D. Fla.) (Sept. 2006)	DP	Failing to label sexually explicit material	Yes	Yes: supervised by independent monitor	None
New York Racing Ass'n (E.D.N.Y.) (Dec. 10, 2003)	DP	Conspiracy to defraud; tax fraud	Yes	Yes: auditing; new management; policy changes	Formation of oversight committee; retain outside firm to review; new policies; confidential reporting
Operations Management International (D. Conn.) (2006)	DP	Reporting requirements under Clean Water Act	No	Yes: auditing; data collection	New policies and compliance structure; confidential reporting; compliance program; new management

2007]

Structural Reform Prosecution

949

Organization	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Micrus Corp.	No	Yes	SEC	\$450,000 fine	3 years	Yes (for 24 months)
Monsanto	No	Yes	None	\$1M fine	3 years	Yes
MRA Holdings, LLC	No	No	None	\$2.1M fine	3 years	Yes (provides for notice and two week opportunity to demonstrate no breach or cure)
New York Racing Ass'n	Video lottery terminals installed at racetracks	Yes	None	\$3M fine	18 months	Yes
Operations Management International	Gift to Alumni Ass'n for Coast Guard Academy to endow chair for envtl. study	Yes	None	\$2M to Coast Guard Academy; \$1M to Greater New Haven Water Pollution Control Authority	2 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
PNC Financial (W.D. Pa., DOJ Fraud Section) (June 2, 2003)	DP	Sec. fraud	No	No	"[E]xceptional remedial measures" and separate agreements with the SEC, the Federal Reserve Bank of Cleveland and Federal Reserve Board, and the Office of the Comptroller of the Currency
Roger Williams Medical Center (D.R.I.) (Jan. 27, 2006)	DP	Public corruption	Yes	Yes: revise ethical standards, in accord with U.S. Sentencing Guidelines; hire Executive Ethics Officer; ethics training; written reports	Yes: previously adopted compliance program and prior Corporate Integrity Agreement with HHS
Statoil, ASA (S.D.N.Y., DOJ Fraud Section) (Oct. 2006)	DP	FCPA	Yes	Yes	Simultaneous compliance agreement with SEC
Symbol Technologies (E.D.N.Y.) (June 3, 2004)	NP	Accounting fraud	Yes	Yes: new policies (training and educational program); new auditing firm; appointed independent examiner	Retained firm to conduct internal investigation; shared results; waived privilege; termination of new employees; new management appointed; restructured Board of Directors, new policies; confidential reporting

2007]

Structural Reform Prosecution

951

Organization	Un-related Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
PNC Financial	No	Yes	None	\$90M restitution fund; \$25M fine	1 year	Yes, upon written notice with two week opportunity to demonstrate no breach
Roger Williams Medical Center	Yes: \$4M in free health care to the public	Yes	None	None	2 years; may be extended up to a total of 5 years if there are violations	Yes
Statoil, ASA	No		SEC	\$10.5M (separate \$10.5M disgorgement to SEC)	3 years	Yes
Symbol Technologies	No	Previously waived	SEC, USPS	\$139M to compensation fund; \$3M to U.S. Postal Service	3 years	Yes

Organization (U.S. Atty's Of- fice) (date of agreement)	NP or DP	Crime	Indep. Moni- tor Req.	Compliance Program Required	Pre-Agreement Compliance
University of Medicine and Dentistry of New Jersey (D.N.J.) (Dec. 2005)	DP	Health care fraud	Yes	Yes: new policies; confidential report- ing; training pro- grams; create posi- tion of Chief Compliance Officer, new General Coun- sel.	Yes: cites "reme- dial actions to date" without de- tailing them
WesternGeco LLC (subsidiary of Schlumberger Seismic, Inc.) (S.D. Tex.) (June 16, 2006)	DP	Immigra- tion (visa) fraud	No	No	Yes: cites "reme- dial actions" taken including "a com- prehensive com- pliance program"
Whitehall Jew- elers, Inc. (E.D.N.Y.) (Sept. 28, 2004)	NP	Bank fraud	Yes	Yes: hiring of Inter- nal Audit Director; reporting hotline; compliance program; compliance commit- tee; training pro- gram; whistleblower protection; compli- ance reports to USAO E.D.N.Y.	Yes: terminated employment of those involved; committed to hir- ing new President, General Counsel, Internal Audit Director; insti- tuted comprehen- sive compliance program
Williams Power Co. (N.D. Cal.) (Feb. 22, 2006)	DP	Fraudu- lent com- modities reports	No	No	Yes: "remedial actions to date" cited

2007]

Structural Reform Prosecution

953

Organization	Un-related Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
University of Medicine and Dentistry of New Jersey	No	Yes	None	Full restitution in amount determined by Monitor, \$4.9M to Medicaid	2 years (can be extended 1 year)	Yes
WesternGeco LLC (subsidiary of Schlumberger Seismic, Inc.)	No	Yes	USPIS, Dep't Labor, OIG, IRS, Dep't State Diplomatic Sec. Serv.	\$18M fine, \$1.6M in costs	1 year	Yes
Whitehall Jewelers, Inc.	No	No	USPIS	\$350,000 fine, \$13.3M restitution	3 years	Yes
Williams Power Co.	No	Yes	CFTC	\$50M fine	15 months	Yes

Appendix B: Pre-Thompson Memo Deferred and Nonprosecution Agreements (before Jan. 20, 2003)

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Re-quired	Pre-Agreement Compliance
Aetna (D. Mass.) (Aug. 1993)	NP	N/A	No	No	\$9.5M restitution; structural/policy changes; internal investigation
Arthur Andersen (D. Conn.) (April 1996)	DP	Accounting fraud	No	No	None listed
Aurora Foods (S.D.N.Y.) (Jan. 2001)	NP	Accounting fraud	Yes: outside consultant	Yes: new policies; confidential reporting by employees	Immediate disclosure; voluntary cooperation; termination of employees; compliance program
Banco Popular De Puerto Rico (D.P.R.) (Jan. 2003)	DP	Failure to file SARS	No	No	None listed
BDO Seidman (S.D. Ill.) (Apr. 12, 2002)	DP	Accounting fraud	No	Yes: auditing; data collection	None cited
Coopers & Lybrand (Sept. 1996)	NP	Obtaining confidential bid info during K selection; lying to grand jury	Yes		

2007]

Structural Reform Prosecution

955

Organiza- tion	Unrelated terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Aetna	No	No	None	\$3.7M restitu- tion; civil assessment \$1M	None listed	Yes
Arthur Andersen	No	Yes	IRS	\$10.3M reimburse- ment fund; \$200,000 costs	Gov't con- clude in- vestigation in 90 days	Yes
Aurora Foods	No	Yes	SEC	None listed	None listed	Yes
Banco Popular De Puerto Rico	No	No	Fin- CEN	\$21.6M set- tlement; \$20M fine	12 months	Yes
BDO Seid- man	No	Yes	None	\$16M resti- tution	18 months	No, DOJ must initiate proceedings in the district court to de- termine whether a breach oc- curred
Coopers & Lybrand	3000 hrs commu- nity ser- vice; teach ethics classes			\$2.75M set- tlement with gov't; \$725,000 to Ariz.		

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
John Hancock Mutual Life (D. Mass.) (Mar. 1994)	NP	Mail fraud	No	No	Internal investigation; voluntary disclosure; waived privilege; new policies
Lazard Freres (D. Mass.) (Oct. 1995)	NP	Individual employee's misconduct	No	No	New compliance policies; internal investigation voluntary notification; waived privilege
Merrill Lynch (D. Mass.) (Oct. 1995)	NP	N/A	No	Those already enacted by company; injunctive policy changes	Administrative payment to U.S.; new compliance policies
Prudential Securities (S.D.N.Y.) (Oct. 1994)	DP	Fraud in sale of limited partnership interests	Yes	Yes (previous SEC agreement); new outside director; confidential reporting	None listed
Salomon Brothers (May 1992)	NP				
Sears (S.D. Ill.) (April 2001)	DP	Mail fraud	No	Injunctive policy changes; data collection; auditing	None listed
Sequa (June 1993)	NP			N/A	

2007]

Structural Reform Prosecution

957

Organization	Un-related terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
John Hancock Mutual Life	No	Yes	None	\$900,000 civil assessment; \$110,000 to Mass. State Ethics Commission	None listed	Yes
Lazard Freres	No	Already waived	None	\$4.28M restitution; \$4.43M administrative payment; \$300,000 reimbursement; \$3M civil penalty	None listed	Yes
Merrill Lynch	No	Already waived	None	\$3.8M restitution; \$4.91M administrative payment; \$3M civil penalty; \$300,000 reimbursement	None listed	No
Prudential Securities	No	Yes (limited)	SEC, USPIS	\$330M settlement with SEC	3 years	Yes
Salomon Brothers						
Sears	No	Yes	None	\$62.6M fine	18 months	Yes
Sequa						