NOTE

DPA DOA: HOW AND WHY CONGRESS SHOULD BAR THE USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS IN CORPORATE CRIMINAL PROSECUTIONS

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I. INTRODUCTION

The default mode of American federal corporate criminal law enforcement today is the deferred prosecution agreement ("DPA").[1] These guilty-plea-esque settlements allow organizations to settle criminal charges with the federal government without trial, conviction, or (sometimes) even indictment. In theory, the situation benefits the government, the defendants, and the public at large: prosecutors can secure criminal penalties and sweeping internal reforms from corporate wrongdoers with less time and expense, corporations can avoid the potentially disastrous collateral consequences of going through the criminal justice system, and the public interest in preventing corporate crime is vindicated without unnecessary harm to the innocent shareholders, employees, customers, and creditors of the firms in question.

However, creating a secondary criminal justice system has its costs: DPAs allow prosecutors to circumvent the safeguards of the criminal process, and they undermine public faith in the rule of law. Because DPAs resolve corporate criminal matters before the indictment stage, they take place outside of all but the most minimal judicial and public oversight. As a result, there is little recourse for corporate defendants when prosecutors exploit their leverage to exact concessions—even unconstitutional ones.

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[1] This paper will address not only DPAs but non-prosecution agreements, or NPAs. Unless otherwise specified, the phrase "DPA" in this Note should be understood to refer to either a DPA or an NPA involving a business organization. An NPA does not involve any filing of charges at all. "[I]nstead of a deferral period, the agreement has an expiration date beyond which criminal prosecution is no longer possible." Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1872 n.60 (2005). In practice, the two are interchangeable (although the differences between the two, as explained below, require careful drafting of legislative solutions); indeed, the Justice Department does not consistently distinguish between the two in actual practice. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-636T, CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ'S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS (2009).

The sub rosa nature of DPAs also contributes to the other criticism of the agreements—that they undermine the rule of law. The general public perceives corporate DPAs as sweetheart deals given to companies that are "Too Big to Jail"; the result is that the law ceases to communicate social values, and respect for the law—and voluntary obedience—declines.

At the same time, the supposed benefits of DPAs are largely non-existent. There is no empirical evidence that the collateral consequences of corporate criminal indictment are as catastrophic as claimed; nor is there evidence that DPAs succeed in "rehabilitating" corporations.

For these reasons, Congress must act to end the failed DPA experiment. Although the decision whether to prosecute is a classic area of prosecutorial—and therefore, executive—power, the Speedy Trial Act, which regulates the timing of stages in federal criminal prosecutions, provides a foothold for congressional regulation of DPAs. By amending the provision of the Speedy Trial Act that authorizes deviations from this timeline for deferred prosecutions, Congress can eliminate corporate DPAs. Congress has the ability to quickly, easily, and cheaply abolish corporate DPAs—and it should do so.

This Note will begin by giving a brief history of how DPAs came to take center stage in federal corporate law enforcement, and how the use and terms of these agreements have evolved over the last fifteen years. It will then address the two criticisms of DPAs outlined above—first, that they facilitate abuses of prosecutorial authority, and second, that they undermine public trust in the justice system. Next, it will provide evidence that the justifications offered for DPAs—avoiding disastrous collateral consequences of corporate indictments and reforming corporate culture—are not supported by empirical evidence. Then, it will demonstrate why neither the executive nor judicial branches are able to effectively curtail DPAs, and why congressional prohibition of DPAs is necessary. Finally, the article will conclude by suggesting a possible form that anti-DPA legislation can take.

II. Historical Overview of DPAs

Deferred prosecutions came into use decades ago in the context of low-level individual offenders—particularly juveniles.[2] Instead of placing young, non-violent offenders on the track of traditional criminal adjudication—and thus inflicting on them the stigma of a criminal conviction—prosecutors would file charges with a court, but then agree to suspend the prosecution. Essentially, the defendant would be placed on a term of probation. If the offender successfully completed this term, then the prosecutor would dismiss the charges.[3] Individual deferred prosecutions began to catch on at the

[2] Greenblum, *supra* note 1, at 1866.
[3] *Id.* at 1864.

federal level with the advent of the War on Drugs, which created an increase in the sorts of non-violent offenders traditionally eligible for diversion.[4]

Federal diversion agreements for organizations, however, did not begin until the early 1990s.[5] The ancestor of the DPAs and NPAs that define today's corporate criminal landscape was probably the 1992 agreement between the Department of Justice ("DOJ"), the Securities and Exchange Commission ("SEC"), and investment bank Salomon Brothers. In what amounted to an early NPA, the DOJ agreed not to file criminal charges against the bank in relation to alleged violations involving U.S. Treasury securities; in return, the bank agreed to pay significant fines, fully cooperate with the government (including waiving privilege with regards to the investigation), and implement or maintain internal compliance reforms.[6] Still, such agreements remained rare until the turn of the century—DPA expert Brandon Garrett is only aware of fourteen before 2001.[7]

What changed? First, then-Deputy Attorney General Eric Holder issued guidelines in 1999 for prosecuting business organizations. The Holder Memo, as it is known, also explained the benefits of corporate criminal law enforcement as being "a force for positive change of corporate culture."[8] The landscape of corporate crime changed as well. The early 2000s saw a wave of high-profile corporate accounting scandals, chief among them the cases involving Enron, Tyco, WorldCom, and Adelphi.[9] In the wake of public outrage at this malfeasance, President Bush created the President's Task Force on Corporate Crime.[10] Perhaps a more important result of these scandals, though, was the fall of Arthur Andersen. The accounting firm—Enron's auditors—had been signing off on the energy giant's financials, despite red flags.[11] When Enron began unraveling, Andersen responded by shredding boxes of documents related to its Enron dealings, which ultimately drew the attention—and ire—of Congress, law enforcement, and the public. With its credibility—perhaps the most valuable resource for an accounting firm—in question, partners and clients alike began to flee Andersen.[12]

Things got worse as the government began pursuing criminal sanctions against Andersen. Prosecutors offered the firm a DPA, but Andersen balked at the amount of "power and discretion" the DOJ would have under the

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[4] *Id.* at 1866.

[5] *Id.* at 1872.

[6] *Id.*

[7] Memorandum of Law of *Amicus Curiae* Law Professor at 5–6, United States v. Saena Tech Corp., Criminal No. 14-66 (EGS) (D.D.C. 2014).

[8] Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, to Component Heads and U.S. Att'ys, Federal Prosecution of Corporations (June 16, 1999), at Part I.A.

[9] Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 50 (2006).

[10] CORPORATE FRAUD TASK FORCE, REPORT TO THE PRESIDENT 2008, iii (2008).

[11] BARBARA LEY TOFFLER, FINAL ACCOUNTING: AMBITION, GREED AND THE FALL OF ARTHUR ANDERSEN 210–14 (2003).

[12] *Id.* at 217–20.

DPA's terms and chose to try its luck at trial.[13] The firm was convicted, and Andersen's fate was sealed, as it was now legally barred from providing services to public companies (many of which had already fired the firm).[14] In a cruel twist of fate, the United States Supreme Court ultimately overturned the firm's conviction.[15] Too little, too late. One of the largest accounting firms in the world collapsed, taking with it thousands of jobs—even though only five percent of Arthur Andersen's employees were responsible for the Enron misconduct.[16]

The Andersen debacle left an impression on both the business community and the federal government. To corporations, Arthur Andersen was a cautionary tale, suggesting that a company which opted for indictment over even the most onerous settlement risked paying for its audacity with its life. In particular, Andersen illustrated the perils of criminal adjudication for companies that, if convicted, could be barred from certain lines of business.[17] These consequences—some of which can issue on indictment alone—pose (or seem to pose) an existential threat.

To the government, which came under attack for Andersen's collapse, the incident showed what could happen if the government did not adequately consider the collateral consequences of conviction.[18] The government began backing away from criminal prosecutions of business organizations, and in 2003, the DOJ issued new guidance concerning prosecutions of business organizations.[19] The guidance, known as the Thompson Memo (after issuer Deputy Attorney General Larry Thompson), provided guidelines that not only stressed the importance of corporate cooperation in government investigations but suggested that federal prosecutors consider using "pretrial diversion" agreements (i.e., DPAs and NPAs) to address corporate misconduct.[20] Since then, the use of DPAs has skyrocketed. In 2004, the government entered into eight DPAs; in the first half of 2014 alone, it has entered into eleven.[21] As of January 6, 2015, federal prosecutors have entered into a total

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[13] Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 880 (2007) (quoting Richard B. Schmitt et al., *Behind Andersen's Tug of War With U.S. Prosecutors*, WALL ST. J., Apr. 19, 2002, at C1).

[14] *Id.*

[15] Arthur Andersen LLP v. United States, 544 U.S. 696, 708 (2005).

[16] Kristie Xian, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 631, 647 (2014).

[17] *See* Garrett, *supra* note 13, at 879.

[18] *See id.* at 880.

[19] Memorandum from Larry Thompson, Deputy Att'y Gen.'s Office, Principles of Fed. Prosecution of Bus. Org., 3 (Jan. 20, 2003). *But see* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1311 (2013) (arguing that the Thompson Memo was not a response to Andersen).

[20] Christopher A. Wray and Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1103 (2006).

[21] GIBSON, DUNN & CRUTCHER LLP, 2014 MID-YEAR UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS (DPAS) 1 (2014), *available at* http://www.gibsondunn.com/publications/pages/2014-Mid-Year-Update-Corpo-

of 308 DPAs with companies since 2000; the SEC has entered into an additional seven since 2010.[22] Even more strikingly, over half of these 290 agreements were entered into since the beginning of 2010.[23]

III. The Dangers of DPAs

These trends are worrisome because corporate DPAs carry inherent flaws. This Note offers two reasons that DPAs are dangerous to society, each of which risks undermining the separation of powers, the rule of law, and the integrity of the criminal justice system.

A. A Shadow System of Adjudication

DPAs undermine the rule of law by facilitating a shadow system of adjudications away from any oversight. By their nature, DPA and NPA negotiations precede the filing of charges—indeed, the point is often to avoid any indictment at all. There is simply no way for a court to exercise jurisdiction over these negotiations. Judicial regulation of pre-indictment bargaining would be an invasion of prosecutorial discretion, and the federal courts will not interfere with the government's decision to prosecute or to decline to prosecute.[24] Pre-indictment negotiations are thus limited to the government and the corporate defendants, and the power imbalance is stark. Because the government can choose to decline or prosecute for almost any reason, prosecutors have the leeway to accept or decline any agreement they want. On the other hand, the corporation is negotiating in the shadow of death. In the wake of Arthur Andersen's collapse, conventional wisdom among companies is that an indictment, much less a full-dress criminal trial, will destroy the organization altogether.[25] Therefore, companies negotiating DPAs see themselves as having no realistic alternative to the government's offer.[26]

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rate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx, *archived at* http://perma.cc/XAQ8-D2W6.

[22] Gibson, Dunn & Crutcher LLP, 2014 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs) 1 (2015), *available at* http://www.gibsondunn.com/publications/pages/2014-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx, *archived at* http://perma.cc/79TQ-48RQ.

[23] *Id.*

[24] Greenblum, *supra* note 1, at 1868.

[25] *See* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15:3 U. Pa. J. Bus. L. 783, 808 n.51 (2013) (collecting sources indicating corporate belief in the "Andersen Effect"). Although Markoff's research casts serious doubt on the existence of the Andersen Effect (see below), what is important is that companies perceive the Andersen Effect as a credible threat, and that it influences their DPA negotiations accordingly.

[26] Greenblum, *supra* note 1, at 1884–89; *see also* Joseph A. Grundfest, *Over Before it Started*, N.Y. Times, June 14, 2005, at A19; Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. Rev. 1434, 1457 (2007).

The government often goes further and ensures that this power differential lasts the entire life of the agreement by including provisions that create extra-judicial mechanisms for determining whether the defendant is in material breach of the agreement.[27] These provisions vary. Some breach mechanisms may at least give the corporate defendant a hearing and opportunity to respond to the government's allegations (although the tribunal at such a hearing is not subject to judicial review); however, they may leave the discretion to determine breach entirely in the hands of prosecutors, or (as in at least one case) provide for a "liquidated damages" provision, where the finding of a breach would not set the trial process in motion, but would result in an automatic fine.[28] If the defendant is determined enough, it may nonetheless fight for judicial intervention; however, in the one case where a company appealed the government's unilateral determination of breach, the court was unwilling to enjoin the government from filing charges.[29]

The KPMG tax shelter case provides an example of how lopsided DPAs are detrimental to corporate and, more importantly, individual, civil rights. In 2004, the accounting firm KPMG came under investigation for alleged tax fraud.[30] The investigation encompassed both the firm and individual partners, and KPMG, as was company policy, made advances to its partners and employees to cover their legal fees.[31] At the same time, the firm began negotiations with federal prosecutors. When the government balked at payments made to individuals who had invoked their Fifth Amendment rights (or otherwise had not engaged the government in proffer sessions) as not showing "sufficient cooperation" with the investigation, KPMG stopped paying legal fees of those non-cooperating individuals, even as the government remained skeptical of the firm's cooperation and DPA eligibility.[32] When KPMG finally entered into a DPA in summer 2005, it was in conjunction with the government's indictment of several current or former KPMG employees, some of whom were still receiving legal fees from KPMG.[33] Shortly after the DPA, however, KPMG ceased payments to the indicted employees, appar-

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[27] Garrett, *supra* note 13, at 857; Greenblum, *supra* note 1, at 1892.

[28] Greenblum, *supra* note 1, at 1892, 1892 nn.199–201 (citing DOJ agreements with AOL, AIG, Computer Associates, the New York Racing Association, PNC, and BP as examples of DPAs with hearing provisions; DPAs with Merrill Lynch and CIBC as examples of DPAs with unilateral breach provisions; and Coopers & Lybrand as the firm with the "liquidated damages" provision). *See also* Garrett, *supra* note 14, at 894 (noting that eighty-three percent of DPAs from January 2003 to January 2007 contained unilateral breach provisions).

[29] *See* Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 178–79 (3d Cir. 2006); *see also* F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View From the Trenches and a Proposal for Reform*, 93 VA. L. REV. 121, 133 nn.39–40 (2007).

[30] Garrett, *supra* note 13, at 862.

[31] United States v. Stein, 435 F. Supp. 2d 330, 340–44 (S.D.N.Y. 2006), *aff'd in part* 541 F.3d 130 (2d Cir. 2008); *see also* Lynnley Browning, *Prosecutor Denies Pressure on KPMG to Cut Off Legal Fees*, N.Y. TIMES, May 9, 2006, http://www.nytimes.com/2006/05/09/business/09shelter.html?adxnnl=1&adxnnlx=1426374078-ROoaISC8ENZ0ZrlVFR/Tag, *archived at* http://perma.cc/WUZ3-3UL8.

[32] *See* United States v. Stein, 541 F.3d 130, 137–39, 143 (2d Cir. 2008).

[33] *Id.* at 139–40.

ently to remain in "full cooperation" with the government.[34] After all, KPMG's DPA contained an ongoing cooperation agreement, which bound the firm to continue cooperating (such cooperation being defined by the government) upon pain of material breach and subsequent prosecution of the deferred indictment to verdict.[35] Some of the employees sued, alleging, among other things, a violation of their Sixth Amendment rights. The Southern District of New York found the government's actions amounted to an unconstitutional interference with Sixth Amendment rights.[36] Upholding the verdict, the Second Circuit noted that, despite prosecutors' representations to the contrary, KPMG was placed in a "supine position" under the DPA, and could not have felt free to do anything but what the government considered "cooperative."[37]

The potential for abuses such as in the KPMG case is only part of why DPAs threaten the rule of law. One of the fundamental axioms of the Anglo-American legal tradition is that no man shall be a judge in his own case; however, the ability of the federal prosecutor to dictate the terms of an agreement and decide whether and how to enforce them amounts to a dangerous concentration of power. One commentator on corporate criminal liability has noted that "power corrupts, and federal prosecutors have something approaching absolute power."[38] The current state of DPAs opens the door to prosecutorial abuse for personal or political gain, and it undermines the legitimacy of the corporate criminal justice system.

B. "Too Big to Jail"

DPAs also undermine the legitimacy of the criminal justice system in a second way—by creating the perception that certain business organizations are "Too Big to Jail." These are companies which have committed wrongdoing, but whose exposure to collateral consequences might be particularly harmful to society. In such cases, the utility of DPAs seems to shine through—by exacting major sanctions without criminal indictment, DPAs allow prosecutors to punish and reform major corporations without dragging society down in a display of "let justice be done, though the heavens fall."

However, DPAs carry a cost to the perceived legitimacy of the justice system. By sidestepping criminal indictment, prosecutors insulate corporate wrongdoers from the full consequences of their criminal conduct. In the eyes of the public, the double standard for such companies flies in the face of bedrock principles of fairness and the rule of law and makes prohibitions on criminal behavior seem suspect. To other businesses, meanwhile, the govern-

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[34] *Id.*
[35] *Id.* at 140, 148.
[36] *See Stein*, 435 F. Supp. 2d at 367–69.
[37] *Stein*, 541 F.3d at 145.
[38] John C. Coffee, Jr., *Deferred Prosecution: Has it gone too far?,* NAT'L L.J., July 25, 2005, at 13.

ment's unwillingness to hold corporate bad actors accountable makes compliance seem like a sucker's bet. Ultimately, the "Too Big to Jail" effect will likely increase—or at least encourage—criminality in society generally. In addition, allowing some companies to avoid the collateral consequences of indictment or conviction performs an end-run around the civil and criminal framework created by Congress.

In January 2013, PBS aired the Frontline documentary, *The Untouchables*, which investigated the apparent failure of the DOJ to punish fraudulent conduct underlying the crisis. Although the program focused on the lack of individual prosecutions, one of its most publicized moments involved Lanny Breuer, then-head of the Criminal Division at the DOJ, and his remarks defending the decision not to indict a bank in 2012:

> I think I and prosecutors around the country, being responsible, should speak to regulators, should speak to experts, because if I bring a case against institution A, and as a result of bringing that case, there's some huge economic effect—if it creates a ripple effect so that suddenly, counterparties and other financial institutions or other companies that had nothing to do with this are affected badly—it's a factor we need to know and understand.[39]

Breuer was not saying anything new—this had been DOJ policy for over a decade—but the backlash was swift, and many doubt Breuer's resignation the day after the program aired was a coincidence.[40] Shortly thereafter, some 330,000 people signed a petition demanding Attorney General Eric Holder and the DOJ begin taking criminal action against institutions and individuals deemed responsible for the 2008 economic crisis.[41] Later that spring, both House and Senate subcommittees grilled DOJ officials—including the Attorney General—over the Department's alleged "Too Big to Jail" practices.[42] At the Senate hearing, Attorney General Holder seemed to admit the existence of a "Too Big to Jail" policy:

> I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if we do prosecute—if we do bring a criminal charge—it will have a negative impact on the national economy, perhaps even the world economy. I think that is

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[39] *Frontline: The Untouchables* (PBS television broadcast Jan. 22, 2013) (transcript on file with the Harvard Journal on Legislation).

[40] *Cf.* Ryan Chittum, Frontline *Hits Hard On The Lack of Crisis Prosecutions*, Columbia Journalism Review (Jan. 31, 2013, 6:50 AM), http://www.cjr.org/the_audit/frontline_hits_hard_on_the_lac.php?page=all, *archived at* http://perma.cc/JT33-9CDZ.

[41] Jennifer Bjorhus, *Petitions Demand Obama Action On Banks*, Star Tribune, Apr. 2, 2013, http://www.startribune.com/business/201165911.html, *archived at* http://perma.cc/QB7N-F4SK.

[42] Court E. Golumbic & Albert D. Lichy, *The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 Hastings L.J. 1293, 1323–24 (2014).

> a function of the fact that some of these institutions have become too large. Again, I'm not talking about HSBC, this is more of a general comment. I think it has an inhibiting influence, impact on our ability to bring resolutions that I think would be more appropriate.[43]

Meanwhile, Representative Emanuel Cleaver, II, (D-MO) summed up public opinion at the House hearing: "But it just creates a problem—no criminal charges. That is what people see. And then hundreds of million dollars are involved, and somebody takes a carton of milk out of one of the convenience stores and they are going to go to jail."[44]

Not all of this outrage can be traced to the use of DPAs, or even to DOJ policy vis-à-vis organization prosecutions generally—a lot of public anger is related to the perceived failure to prosecute individuals for their roles in the crisis.[45] However, DPAs play a significant part in undermining confidence in the criminal justice system, as demonstrated in the recent HSBC deferred prosecution.

In December 2012, the DOJ announced a deferred prosecution agreement with the banking giant HSBC to settle charges of anti-money laundering violations.[46] The allegations had two prongs: the first involved HSBC's Mexican branch, which turned a blind eye to the use of the bank's accounts by some of the largest, most notorious drug cartels in Central and South America, and abetted narcotics traffickers in exchanging their ill-gotten dollars for pesos.[47] The other prong involved systemic violations of Treasury Department sanctions, as HSBC circumvented Office of Foreign Assets Control ("OFAC") sanctions for a rogue's gallery of blacklisted people and organizations, including organized crime figures, suspected terrorists, and entities linked to Iran, Syria, Cuba, and North Korea.[48] The allegations were

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[43] *Hearing Before the Sen. Judiciary Comm.*, 113th Cong. (2013) (statement of Eric Holder, Att'y Gen. of the United States).

[44] *Who is Too Big to Fail: Are Large Financial Institutions Immune From Federal Prosecution? Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs.*, 113th Cong. 23 (2013) (statement of Emanuel Cleaver, Missouri Congressman); *see also* Golumbic & Lichy, *supra* note 42, at 1324 (describing similar remarks by Cleaver as "summarizing concerns" about "Too Big to Jail").

[45] Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, 85 U. COLO. L. REV. 1, 4 (2014). *See also, e.g.*, Mark Hamblett & Christine Simmons, *Holder Leaves His Imprint on Major Cases in New York*, N.Y.L.J. (Sept. 26, 2014), http://www.newyorklawjournal.com/id=1202671413319/Holder-Leaves-His-Imprint-on-Major-Cases-in-New-York, *archived at* http://perma.cc/2PDA-H7HC.

[46] Press Release, Department of Justice, *HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement*, Dec. 11, 2012, http://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations, *archived at* http://perma.cc/NNX2-PCLJ.

[47] Gilchrist, *supra* note 45, at 6; Matt Taibbi, *Gangster Bankers: Too Big to Jail*, ROLLING STONE (Feb. 14, 2013), http://www.rollingstone.com/politics/news/gangster-bankers-too-big-to-jail-20130214, *archived at* http://perma.cc/7DL2-KBST.

[48] Taibbi, *supra* note 47.

stunning, not only in the amounts at stake—HSBC admitted to processing $881 million of drug money through HSBC Mexico and $660 million in transactions that violated OFAC rules—but in how the conduct permeated the bank.[49] For example, the Head of Compliance himself allowed HSBC's European and Middle Eastern branches to continue the sanction-evading activities, citing the "significant business opportunities" doing so provided.[50]

In the face of such egregious conduct, announcement of the DPA set off a firestorm of criticism. The New York Times proclaimed the agreement was "a dark day for the rule of law."[51] Senator Chuck Grassley (R-IA) denounced the DOJ's actions as "inexcusable," and suggested the failure to prosecute HSBC put American lives at risk.[52] *Rolling Stone*'s Matt Taibbi went further, writing that the DPA "succeeded, finally, in making crime mainstream."[53] Even United States District Judge John Gleeson, in approving the agreement, acknowledged the widespread criticism of the HSBC deferral, and noted that he himself had received letters urging him to reject the DPA. "These criticisms boil down to the argument that the government should seek to hold HSBC criminally liable, rather than to divert HSBC from the criminal process," he wrote.[54]

However, Judge Gleeson felt that the DPA was not inadequate, but "significant, and in some sense, extraordinary."[55] HSBC would pay a fine of $1.9 billion, admit to criminal wrongdoing, and receive a corporate monitor to oversee its continuing compliance with a plan of reform. The reforms themselves (some of which HSBC had already completed and others of which were underway) included an overhaul of the executive leadership at HSBC Holdings (the HSBC parent company) and HSBC North America; internal reorganizations to boost the authority and resources of the firm's compliance and anti-money laundering departments; and realigning executive bonus performance requirements to include compliance metrics.[56] Judge Gleeson concluded that, "taking into account the fact that a company cannot be imprisoned, it appears to me that much of what might have been accomplished by a criminal conviction has been agreed to in the DPA."[57]

But one thing was missing—criminal indictment and conviction—and this absence matters. David Uhlmann writes that "criminal law has an expressive function that cannot be achieved by non-criminal disposition."[58]

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[49] Gilchrist, *supra* note 45, at 6.

[50] *Id.* at 14.

[51] *HSBC, Too Big to Indict?* N.Y. Times, Dec. 11, 2012, at A38.

[52] Sen. Charles E. Grassley, *Letter to Attorney General Eric Holder* (Dec. 13, 2012), http://www.grassley.senate.gov/news/news-releases/grassley-justice-department%E2%80%99s-failure-prosecute-criminal-behavior-hsbc-scandal, *archived at* http://perma.cc/R5GL-ASRW.

[53] Taibbi, *supra* note 47.

[54] United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *13–14 (E.D.N.Y. July 1, 2013).

[55] *Id.* at 20.

[56] *Id.* at 18–21.

[57] *Id.* at 20.

[58] Uhlmann, *supra* note 19, at 1336.

This expressive effect is a stigmatizing one—by labeling certain actions as criminal, society identifies and reaffirms its understanding of right and wrong. This is where DPAs get it wrong: traditionally, deferred prosecutions of individuals in the drug and juvenile offense contexts also insulate their beneficiaries from the stigmatizing effects of criminal prosecution. However, that is the point—because society sees minor offenses by relatively non-culpable defendants as not truly deserving of full-blown criminal labeling, DPAs are an appropriate expression. When the DOJ grants deferred prosecutions to corporations who have engaged in egregious conduct, they fail to give voice to social norms.[59] The resulting gap between public perceptions of justice and the realities of corporate criminal law enforcement undermines the public's trust in the rule of law.

Where the law deviates too far from strongly held norms, it risks generating expressions at odds with those norms. This creates a dissonance between personal morality and legal commands. Where the dissonance is too great, one of two things must happen: the law will be perceived as less legitimate, or violation of the law will cease to be perceived as a basis for condemnation, eroding the distinctive expression associated with criminal liability. Either resolution undermines the legitimacy of the law, the persistence of the internal view, and eventually, the stability of the legal system.[60]

The "Too Big to Jail" problem compounds the problem of legitimacy, leading to an increase in criminal behavior throughout society. Larger corporations are more likely to receive DPAs than smaller ones.[61] Given the perverse logic of "Too Big to Jail," this trend makes sense: the larger the company, the more likely its "destruction" upon indictment or conviction would have unacceptable collateral consequences. At the same time, high-profile cases involving elite actors are particularly likely to attract public attention. When the public sees that large companies can escape the ordinary criminal process, the result is the same as when wealthy and powerful individuals appear to "get off" disproportionately—people begin to think, as Taibbi does, of two justice systems: one for the elite, and one for the rest of us.[62] Over time, "the system of justice upon which our ideals are founded is chipped away with every deferred prosecution."[63] This leads to a phenomenon that Mary Ramirez calls "criminal affirmance": when those at the top of the heap are seen to avoid criminal sanctions—or to receive less than full criminal condemnation for their crimes—the general public begins to lose

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[59] *Id.* at 1336, 1342. *But see* Golumbic & Lichy, *supra* note 42, at 1314–15 (arguing that the filing of charges in a DPA has an expressive effect).

[60] Gregory M. Gilchrist, *Condemnation Without Basis: An Expressive Failure of Corporate Prosecutions*, 64 HASTINGS L.J. 1121, 1168 (2013).

[61] Uhlmann, *supra* note 19, at 1326–27.

[62] Taibbi, *supra* note 47.

[63] Xian, *supra* note 16, at 664.

faith in the rule of law.[64] Ultimately, the internal norms that encourage automatic obedience to the law break down, replaced with other standards: "Observers that perceive a lack of fair play will assess for themselves whether the costs outweigh the benefits of adhering to the rule of law."[65] The result will be a general increase in criminality.[66]

Not only does the expressive effect of corporate DPAs discourage lawful behavior by individuals, but by businesses as well—ironic, given that the DOJ's corporate prosecution policies are ostensibly aimed at encouraging law-abiding, compliance-minded company cultures. Because DPAs are given out to larger, more powerful institutions, the same sense of a two-tiered corporate criminal justice regime may take root within businesses. The harm here is two-fold: first, as mentioned above, DPAs gnaw away at the legitimacy of the rule of law, meaning that any tendency to value the law for its own sake on the organizational level will tend to be replaced by more mercenary calculations. Second, DPAs may skew the cost-benefit analysis in favor of law-breaking. Kristie Xian cites enforcement of the Iranian sanctions regime as an example: the DOJ has consistently used DPAs to shield banks from the most severe consequences of "trading with the enemy."[67] In the case of Standard Chartered, which, like HSBC, altered wire transactions to conceal the identity of Iranian clients, the bank paid only a fraction of the fees it made on the illegal transactions.[68] On the other hand, had the bank's punishment been addressed through the traditional criminal system, it would have run the risk of being cut off from the American federal deposit insurance program, which could have doomed its business.[69] Whether or not Standard Chartered should have had its charter revoked is irrelevant—the point is that by refusing to expose Standard to the full range of possible consequences, the government essentially "subsidized" the bank's illegal behavior, removing the "price" of a possible loss of American business from its calculations when determining whether and how to obey American sanctions.[70] By rendering illegal activities profitable, DPAs encourage firms to follow in their criminal brethren's footsteps, as "those who follow the law and forgo corrupt profits may actually be at a competitive disadvantage relative to those who obey the law."[71] If the incentives are skewed enough, then market forces may ultimately push out "good" corporate actors altogether, creating a climate where law-breaking may not only be acceptable, but com-

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[64] Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining to Prosecute Elite Crime*, 45 CONN. L. REV. 865, 870–72 (2013).

[65] *Id.* at 922.

[66] *See id.*

[67] Xian, *supra* note 16, at 634–36.

[68] *Id.* at 632, 655–56.

[69] *Id.* at 655.

[70] *Id.* at 635–36, 659–60.

[71] Ramirez, *supra* note 64, at 922.

pulsory.[72] All this will come at the expense of the social, economic, and national security aims promoted by laws such as the Iranian sanction regime.[73]

IV. The Supposed Benefits of DPAs Do Not Justify the Harms

Proponents of DPAs cite two benefits as justifying their continued existence.[74] The first is, essentially, a defense of "Too Big to Jail"—there are, at least, some instances where DPAs may simply be necessary to prevent the Andersen Effect—namely the systemic shocks from the collateral consequences of indicting or convicting certain institutions.[75] The second argues that DPAs allow prosecutors to bring about corporate reform, not merely corporate punishment, through use of customized agreements containing internal reform provisions. However, these purported benefits are not sufficient to counterbalance the harms outlined above: the lack of empirical evidence supporting the Andersen Effect, combined with the DOJ's recent willingness to pursue criminal prosecutions of high-profile corporate offenders, undermines claims that DPAs are needed to protect companies from the horrors of indictment. Meanwhile, DPAs have a dubious track record of inducing corporate reform and do not offer any options that corporate guilty plea agreements cannot also attain. Therefore, neither of these defenses emerges as an adequate justification of DPAs.

A. The Andersen Effect Lacks an Evidentiary Basis

Although the Andersen Effect has become received wisdom in white-collar matters, there is no evidence that it exists anywhere but in the imaginations of lawyers and business-people. In the only empirical study of corporate criminal indictments' effects on business failure, Gabriel Markoff found that "[n]o company publicly traded on a major stock exchange failed because of a conviction that occurred in the years 2001-2010."[76] Of course, as Markoff acknowledges, the lack of prosecution-induced failures could demonstrate that the DOJ's approach to corporate crime has worked, and that DPAs have successfully been used in those cases where the defendant firms would otherwise have collapsed on indictment or conviction.[77] Indeed, Markoff's data set contained no convictions of publicly traded financial companies, which are the firms at the center of the "Too Big to Jail" contro-

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[72] *Id.* at 922–23.

[73] *See, e.g.*, Xian, *supra* note 16, at 664; *see also* Grassley, *supra* note 52.

[74] Markoff, *supra* note 25, at 801–802.

[75] The "Andersen Effect" refers to the demise of Arthur Andersen, which, as mentioned above, left the impression that the collateral consequences of indicting a business will destroy it.

[76] *Id.* at 830.

[77] *Id.* at 828–30 (considering, but rejecting, this argument); *see also* Golumbic & Lichy, *supra* note 42, at 1341 n.305.

versy.[78] Considering that banks may be particularly sensitive to the effects of criminal prosecution, the absence of banks and other financial companies bolsters this counter-interpretation of Markoff's data, and suggests that, for all their flaws, financial-sector DPAs may be doing more good than harm.[79]

However, developments since Markoff's study suggest otherwise—the last two years have seen several large financial companies survive indictments and convictions, both through plea agreements and at trial. None of these firms has suffered anything close to the harms predicted by the Andersen Effect. These new data points, then, support Markoff's original hypothesis: the Andersen Effect does not exist. In 2012, the DOJ entered into DPAs or NPAs with several banks involved in the London Inter-Bank Offered Rate ("LIBOR") manipulation scandal; however, it then secured guilty pleas from Japanese subsidiaries of two of those banks (RBS and UBS).[80] These were the first criminal charges filed against parts of a major financial institution since the Drexel Burnham Lambert case, and have been followed by several others.[81] In July 2013, the DOJ charged hedge fund giant SAC Capital Advisors for its role in a massive, high-profile insider trading scheme; the fund pled guilty that November.[82] 2014 then saw some of the largest corporate plea bargains yet. In May, Credit Suisse pled guilty to its role in a tax evasion scheme.[83] That same summer, BNP Paribas pled guilty to OFAC violations and received a whopping $8.9 billion fine.[84] The Credit Suisse and BNP Paribas pleas are significant in another respect: before then, prosecutors had pulled some of their punches in the plea deals—the LIBOR pleas involved foreign subsidiaries with few ties to the United States (and thus, at little risk of severe collateral consequences).[85] Credit Suisse pled guilty only after prosecutors arranged with regulators to ensure the bank kept its licenses in the United States.[86] BNP Paribas and Credit Suisse though, remain ex-

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[78] Markoff, *supra* note 25, at 819.

[79] Golumbic & Lichy, *supra* note 42, at 1341 n.305. For arguments that banks are especially vulnerable to prosecution, see Gilchrist, *supra* note 45, at 25–38.

[80] Golumbic & Lichy, *supra* note 42, at 1331–34.

[81] *Id.* at 1333–34. Drexel Burnham Lambert was an investment bank that played a large role in the heyday of 1980s corporate takeovers. *See* Kurt Eichenwald, *The Collapse of Drexel Burnham Lambert*, N.Y. Times, Feb. 14, 1990, http://www.nytimes.com/1990/02/14/business/collapse-drexel-burnham-lambert-drexel-symbol-wall-st-era-dismantling-bankruptcy.html?pagewanted=1&pagewanted=all, *archived at* http://perma.cc/TL65-B3YW. In 1986, the firm was involved in a major insider trading scandal and ultimately pled guilty to related felony charges in 1989. *See id.* By the beginning of 1990, Drexel's parent company filed for bankruptcy. *Id.*

[82] Golumbic & Lichy, *supra* note 42, at 1334–36. *But see id.* at 1337 (speculating as to whether the prosecution represented a departure from DOJ policy).

[83] *See id.* at 1338–39.

[84] Tiffany Kary, Del Quentin Wilber & Patricia Hurtado, *BNP to Pay Almost $9 Billion Over U.S. Sanctions Case*, Bloomberg (Jun. 30, 2014, 7:27 PM), http://www.bloomberg.com/news/2014-06-30/bnp-paribas-charged-in-sanctions-violation-probe-in-new-york.html, *archived at* http://perma.cc/7YLW-2LCZ.

[85] Golumbic & Lichy, *supra* note 42, at 1333–34.

[86] James Kwak, *Why Is Credit Suisse Still Allowed to Do Business in the United States?*, The Atlantic (May 20, 2014, 3:02 PM), http://www.theatlantic.com/business/archive/2014/

posed to the threat of serious collateral consequences—they have had to petition the Department of Labor for a waiver to continue to manage U.S. pension plan assets following sentencing.[87] Despite this vulnerability, these firms have not experienced anything close to the kinds of harms predicted by the Andersen Effect. In short, "Too Big to Jail" is largely an illusion—and even the DOJ is finally recognizing this.

B. DPAs are Neither Sufficient nor Necessary for Corporate Reform

The second justification for DPAs is that they allow prosecutors to fashion novel, firm-specific rehabilitation methods—a so-called "scalpel" to the "sledgehammer" of criminal indictment.[88] For example, former United States Attorney for the District of New Jersey Chris Christie and former Assistant United States Attorney Robert Hanna described DPAs as achieving "remedies beyond the scope of what a court could achieve after a criminal conviction."[89] By entering into a DPA with Bristol-Myers Squibb in 2005, Christie and Hanna set out to give the firm a "push down the road of good corporate citizenship" by implementing a series of internal reforms.[90] These reforms included replacement of top executives, implementation of internal controls, and the appointment of two independent directors—one of whom was to be approved by the United States Attorney's Office.[91]

Bristol-Myers also agreed to the appointment of an independent corporate monitor.[92] Independent monitors, a common feature of DPAs, are thirdparties retained at the defendant firm's expense which serve as a sort of corporate probation officer, monitoring the company's compliance and giv-

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05/why-is-credit-suisse-still-allowed-to-do-business-in-the-united-states/371238/, *archived at* http://perma.cc/R6DS-6NTK.

[87] *See* Patricia Hurtado, *BNP Wins Sentencing Delay While U.S. Considers a Waiver*, BLOOMBERG (Sept. 24, 2014, 5:34 PM), http://www.bloomberg.com/news/2014-09-24/bnp-seeks-sanctions-sentencing-delay-while-u-s-mulls-waiver.html, *archived at* http://perma.cc/6SXB-HRMW (discussing BNP Paribas's attempts to secure a Department of Labor waiver); Bartlett Naylor, *Credit Suisse: Crime Without Punishment*, THE HUFFINGTON POST (Oct. 14, 2014, 10:38 AM), http://www.huffingtonpost.com/bartlett-naylor/credit-suisse-crime-witho_b_5982890.html?utm_hp_ref=business&ir=Business, *archived at* http://perma.cc/658W-98TT (discussing the possibility of Credit Suisse not receiving an exemption from the Department of Labor).

[88] The metaphor comes from Steven J. Tave and Jeremy Joseph, *With a Scalpel, Not a Sledgehammer: Resolving FDCA Investigations Through Deferred Prosecution and Non-Prosecution Agreements*, UPDATE, Nov.–Dec. 2012, at 10, *available at* http://www.gibsondunn.com/publications/Documents/TaveJoseph-WithaScalpelNotaSledgehammer.pdf, *archived at* http://perma.cc/5PRR-N23A.

[89] Christopher Christie & Richard 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, 1043 (2006).

[90] *Id.* at 1043–44.

[91] Bristol-Myers Squibb Deferred Prosecution Agreement, at 2–3, 5 (2005), *available at* http://lib.law.virginia.edu/Garrett/prosecution_agreements/sites/default/files/pdf/bristol-meyers.pdf, *archived at* http://perma.cc/H8HP-UD9E.

[92] *Id.* at 3.

ing reports and recommendations to the government.[93] Monitors can wield substantial power. In the case of Bristol-Myers, for example, the monitor recommended that the board fire the chief executive officer for misconduct completely unrelated to the conduct underlying the DPA.[94] The day after the monitor recommended the dismissal, the CEO was fired.[95]

While it may be true that DPAs have given prosecutors powerful tools in their battle against corporate crime, this fact does not in itself justify their continued use. To start, it is not clear that DPAs succeed at their task. Ironically, Arthur Andersen was the recipient of a DPA in 1996 for its role in certifying the financials of a fraudulent real estate firm—yet the lesson clearly did not stick.[96] A more serious example concerns American International Group ("AIG"), which entered into a DPA in 2004 to resolve allegations that one of its units, AIG Financial Products ("AIGFP"), had aided and abetted securities fraud by engaging in transactions that violated financial accounting standards.[97] The government heralded the provisions of the DPA, including a provision establishing a transaction review committee under the supervision of an independent consultant, as "important reforms" that would provide for close government supervision of the firm.[98] Four years later, the same division of AIG—headed by the same employee who came under suspicion the first time—drew the government's attention in a much more dramatic way. That employee was Joseph Cassano, the "Patient Zero" of the global financial crisis, who had been in charge of AIGFP's exposure to the residential housing market through its credit-default swap positions, and whose alleged misconduct led to criminal and civil inquiries in the wake of the financial collapse.[99] The DPA failed to reform AIGFP—that failure al-

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[93] Patricia M. Sulzbach, *Independent Corporate Monitors: A Company's Friend Or Foe?*, 2013 A.B.A. WHITE COLLAR CRIME COMM. NEWSLETTER 1, http://www.americanbar.org/content/dam/aba/publications/criminaljustice/sulzbach.authcheckdam.pdf, *archived at* http://perma.cc/8G5E-C7AC.

[94] Garrett, *supra* note 13, at 898.

[95] Stephanie Saul, *Bristol-Myers Chief Fired Over Patent Dispute*, N.Y. TIMES, Sept. 12, 2006, http://www.nytimes.com/2006/09/12/business/13bristolcnd.html?pagewanted=print, *archived at* http://perma.cc/LM56-QKK9.

[96] *See* Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 WASH. U. L.Q. 917, 926 (2004); Markoff, *supra* note 25, at 805; Ramirez, *supra* note 64, at 905 n.174 (suggesting that by the time of the Enron debacle, Arthur Andersen had already demonstrated "a broader firm culture of misconduct").

[97] Rachel Delaney, Comment, *Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements*, 93 MARQ. L. REV. 875, 883 (2009).

[98] *American International Group, Inc. Enters into Agreements with the United States*, U.S. DEP'T OF JUSTICE (Nov. 30, 2004), *available at* http://www.justice.gov/archive/opa/pr/2004/November/04_crm_764.htm, *archived at* http://perma.cc/SR77-87QN.

[99] Delaney, *supra* note 97, at 883; Zachary Roth, *Did Cassano And AIG Commit Fraud?*, TALKING POINTS MEMO (Mar. 18, 2009, 9:57 PM), http://talkingpointsmemo.com/muckraker/did-cassano-and-aig-commit-fraud, *archived at* http://perma.cc/68E6-ND66; Matt Taibbi, *The Big Takeover: How Wall Street Is Using the Bailout to Stage a Revolution*, ROLLING STONE (Apr. 2, 2009), *available at* http://www.rollingstone.com/politics/news/how-wall-street-is-using-the-bailout-to-stage-a-revolution-20090402, *archived at* http://perma.cc/9KWZ-NY7M.

lowed the firm to "continue to operate with questionable practices and cause more serious damage."[100]

Even if we assume that DPAs can, and sometimes do, succeed in reforming some corporations, it is a myth that the criminal justice process cannot produce the same result. While it may be true that a court cannot include the sorts of reform provisions that a DPA can, over ninety percent of corporate indictments are resolved by plea bargains.[101] These plea bargains often do include reform provisions; indeed, federal prosecutors used to prefer plea agreements to DPAs as a vehicle for corporate change.[102] This practice continues today—the DOJ's Environmental and Antitrust Divisions frequently embed reform provisions within the plea bargains they secure, as does the Criminal Division.[103] In Gabriel Markoff's survey of corporate criminal plea agreements between 2001 and 2010, nearly one-quarter (thirteen of the fifty-four agreements in the sample) contained "compliance programs, most of which were extremely detailed in the same fashion as are compliance plans put in place through DPAs"; four of the agreements contained corporate monitor provisions.[104]

The 2012 BP plea agreement, which resolved criminal charges arising from the Deepwater Horizon oil spill, illustrates how a plea bargain can replicate the reform provisions of a DPA.[105] BP's plea requires it to: retain two monitors—a "process safety" monitor and an ethics monitor—for four year periods; perform safety audits on its equipment; strengthen operational oversight; publicly disseminate safety and compliance reports; collaborate with the Bureau of Safety and Environmental Enforcement on pilot projects for safety technology; and install safety equipment on rigs.[106] In addition, BP must "maintain a safety organization that has the authority to intervene or stop any operation that it deems unsafe."[107] To invert the words of Judge Gleeson, it seems that "much of what might have been accomplished by a DPA has been agreed to in the plea agreement."

In addition, guilty pleas, by clearly labeling the defendant's conduct as criminal, are able to perform better the expressive function of criminal law than DPAs.[108] Because corporate pleas capture all the possible reform advan-

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[100] Delaney, *supra* note 97, at 884.
[101] Markoff, *supra* note 25, at 811.
[102] Garrett, *supra* note 13, at 907.
[103] Uhlmann, *supra* note 19, at 1324.
[104] Markoff, *supra* note 25, at 826–27.
[105] *See* Uhlmann, *supra* note 19, at 1324.
[106] Guilty Plea Agreement, Exhibit B at 1–14, United States v. BP Exploration & Prod., Inc., No. 2:12-CR-00292 (E.D. La. 2012), *available at* http://www.justice.gov/iso/opa/resources/433201211151436139900 27.pdf, *archived at* http://perma.cc/LNK4-H737.
[107] *Id.* at 14.
[108] Ramirez, *supra* note 64, at 899; *see also* James B. Stewart, *SAC: A Textbook Case of Corporate Prosecution*, N.Y. Times Dealbook (Nov. 4, 2013, 8:47 PM), http://dealbook.nytimes.com/2013/11/04/sac-a-textbook-case-of-corporate-prosecution/?_php=true&_type=blogs&_r=0, *archived at* http://perma.cc/46GS-64DL (citing Professor Lawrence Friedman as endorsing the SAC Capital plea as making "an important statement"). It is true that plea bar-

tages of DPAs, with the added expressive benefits, the corporate reform justification for DPAs evaporates.

V. Congress Should Ban DPAs

Because DPAs do not carry the benefits they promise—and because they threaten grave harm to the rule of law—they should be abolished. Much as a hospital may remove an older, more dangerous drug from its pharmacopeia in favor of one that works at least as well, and has fewer side effects, the federal government must stop using DPAs and return to criminal prosecutions. Every DPA that is inked concentrates a little more unchecked power in the hands of prosecutors, and erodes public trust in the rule of law.

A. Despite Recent Changes, DPAs Remain Problematic

The DOJ is unlikely to abandon its use of DPAs in the foreseeable future—they are simply too appealing from the perspective of resource management.[109] Granted, the DOJ has broken with decades of practice to return to the indictment of major financial institutions as a law enforcement method. Furthermore, this shift in practice has been accompanied by a shift in rhetoric, as prominent federal prosecutors have backed away from the "Too Big to Jail" proclamations which brought Breuer and Holder under such scrutiny. In spring of 2014, Preet Bharara, United States Attorney for the Southern District of New York, gave a speech in which he seemed to repudiate "Too Big to Jail" while evincing skepticism at claims of collateral consequences, mocking the arguments that taking criminal action against a corporation means "the skies will darken; the oceans will rise; nuclear winter will be upon us; and the world as we know it will end."[110] Bharara went on to question the overall trend of federal criminal prosecutions: "In my view, after Arthur Andersen, the pendulum has swung too far and needs to swing back a bit. And so you can expect that before too long a significant financial institution will be charged with a felony or be made to plead guilty to a felony, where the conduct warrants it."[111]

However, while these present trends are salutary, they do not amount to the necessary wholesale cessation of DPAs. First, although much of the current public backlash against DPAs concerns financial institutions and "Too

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gains themselves can be criticized for failing to adequately vindicate criminal law's expressive qualities; Ramirez claims that "criminal prosecution" is superior to pleas and deferrals. Ramirez, *supra* note 64, at 899–900. However, the point is that pleas still solve the expressive problem better than the status quo.

[109] Gibson, Dunn & Crutcher, *supra* note 21, at 16.

[110] United States Attorney for the Southern District of New York Preet Bharara, Prepared Remarks at Securities Industry and Financial Markets Association's Compliance and Legal Society Annual Seminar (Mar. 31, 2014); *accord* Golumbic & Lichy, *supra* note 42, at 1337–38.

[111] Bharara, *supra* note 110.

Big to Jail," every DPA, not just these few high-profile ones, carries the inherent qualities that undermine the rule of law and public confidence. Gilchrist writes that, even if a handful of people are aware of any given DPA (and have their faith in the system shaken), the cumulative result from each failure to prosecute a corporation undermines the rule of law.[112]

Second, events in 2014 belie the idea that the government is moving away from DPAs. As of mid-year 2014, the government had entered into approximately the same number of DPAs as it had by mid-year 2013 (eleven in 2014, versus twelve in 2013); as it is, the government is on track to meet or exceed the number of DPAs it entered into in 2013.[113] Moreover, the aggregate dollar penalties from the eleven DPAs as of mid-2014 are approximately $3.6 billion, larger than the aggregate of the dollar penalties from all of 2013 ($2.9 billion).[114]

2014 also saw the introduction of what may be a new resolution vehicle—the "renunciation and remediation agreement," or "R&R." On July 2, 2014, the DOJ entered into an R&R with SunTrust Mortgage Inc. to resolve criminal charges involving misconduct in administering mortgage remodification programs.[115] The agreement contained a non-prosecution provision among its terms, and the overall R&R was, for all intents and purposes, an NPA—indeed, the Office of Special Inspector General for the Troubled Assets Relief Program ("SIGTARP"), which was involved because the case concerned TARP funds, issued a press release referring to the agreement as an NPA.[116] However, the DOJ's press release declined to identify the R&R as such—and neither did most of the mainstream media coverage of the agreement.[117] While no official reason for the characterization of the NPA as an R&R has been provided, it seems quite possible that image issues related to the "Too Big to Jail" controversy played a role. For a case involving a high-profile fraud related to the financial crisis—and in particular, involving wrongful foreclosures, a subject prime for public outrage—to settle through an NPA at a time when the DOJ is making a public shift away from settling might have been, to put it bluntly, bad for public relations. If so, this would suggest that the DOJ may want to have its cake and eat it too, sometimes using prosecutions (while trumpeting the death of "Too Big to Jail"), and other times quietly engaging in the same old DPAs. Similarly, the vigor with which the DOJ is contesting federal court oversight in a DPA involving

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[112] Gilchrist, *supra* note 60, at 1159–62.

[113] Gibson, Dunn & Crutcher, *supra* note 21, at 2.

[114] *Id.*

[115] *SunTrust Gets Non Prosecution Agreement*, Corporate Crime Reporter (July 7, 2014, 5:50 PM), http://www.corporatecrimereporter.com/news/200/suntrust-gets-non-prosecution-agreement/, *archived at* http://perma.cc/GH2N-3QXB.

[116] *Id.*

[117] *Id.*

Saena Tech Corporation suggests the government is not willing to cede control over DPAs anytime soon.[118]

Finally, matters of resource management counsel against the idea that the DOJ would want to scrap DPAs. The Department itself has acknowledged that resource constraints make alternatives to criminal prosecution appealing, particularly in an environment of constrained government spending.[119] It seems unlikely that the DOJ would willingly expose itself to greater costs merely to assuage public opinion. For these reasons, it seems safe to assume that DPAs still have "staying power," and will remain the resolution vehicles of choice for corporate misconduct.[120]

B. The Judiciary is Unable to Ban DPAs

Action is needed, then—and Congress is the only actor capable of abolishing the corporate DPA. Because the DOJ seems, as explained above, unlikely to end the practice, the only other actors that could plausibly reform DPAs are Congress and the judiciary. However, while courts would play a useful role enforcing a prohibition against DPAs, courts will be very ill-suited to the task on their own. The courts are not a unitary body with the ability to consistently enforce this policy. It is not controversial that federal courts may reject a DPA if the defendant has not entered into it freely, knowingly, and willingly. However, the question of what standard a court may use in deciding whether to approve a deferred prosecution remains contested. The hook upon which judicial oversight ostensibly attaches is contained in the Speedy Trial Act ("STA"), 18 U.S.C. § 3161, which establishes time limits for stages of a federal criminal prosecution.[121] 18 U.S.C. § 3161(c) and (d) require trial in a criminal case to commence seventy days from the later of the filing date of an indictment or criminal information against the defendant, or the defendant's appearance before the court. Section (h)(2) of the STA provides an exception, though, in the case of deferred prosecutions:

> The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence . . . [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

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[118] *See* Alison Frankel, *Justice Department to Federal Judges: Get Off My Lawn*, REUTERS (Aug. 29, 2014), http://blogs.reuters.com/alison-frankel/2014/08/29/justice-department-to-federal-judges-get-off-my-lawn/, *archived at* http://perma.cc/BA5E-PGU6.

[119] *See, e.g.*, *Who is Too Big to Fail: Are Large Financial Institutions Immune From Federal Prosecution?: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs.,* 113th Cong. 12 (2013) (Testimony of Mythili Raman, Acting Assistant Attorney General, Criminal Division).

[120] Gibson, Dunn & Crutcher, *supra* note 21, at 16.

[121] Speedy Trial Act of 1974, 18 U.S.C. § 3161 (2012).

> court, for the purpose of allowing the defendant to demonstrate his good conduct.[122]

Case law is "barren" on the subject of (h)(2) standards,[123] and opinions vary regarding how the provision should be interpreted. Some judges and scholars maintain that the courts have broad authority indeed under (h)(2). In an *amicus* brief in the *Saena* deferred prosecution case, Branden Garrett argues that approval of a DPA is entirely left to the court's discretion, because the statutory language does not provide standards to govern discretion in (h)(2) as it does elsewhere.[124] Garrett then notes the legislative history of the STA evinces an intention to "assure[ ] the court will be involved"[125] in the decision to defer, and that the overall thrust of the STA is that of a statute intending to "strengthen[ ] the supervision over persons pending trial."[126] As a result, Garrett concludes that "such provisions should be read in favor of judicial discretion."[127]

However, another reading of the statute forecloses Garrett's reading by focusing on the fact that the legislative intent of (h)(2) seems limited to ensuring that a deferred prosecution is not an end-run around the STA's timeframe. Even Judge Gleeson, who cited the STA as authority for reviewing the HSBC DPA, understood (h)(2) as being intended to prevent the parties from colluding to avoid the speedy trial clock.[128]

This reading, which requires less of a stretch from the statutory text, suggests the court's inquiry is limited to the bona fides of the DPA, and does not allow it to assess the agreement's substantive provisions. If the courts are indeed limited to establishing whether a DPA is a legitimate deferral, and not a stalling tactic, then they cannot reject DPAs wholesale. This does not necessarily mean that the limited view of the STA is correct, but simply that the uncertainty of the textual grounding of judicial regulation of DPAs makes the STA a less-than-perfect vehicle for reform, raising the possibility of a circuit split, in which some courts continue to uphold DPAs while others reject them.

It is telling that the judge who has most thoroughly endorsed the expansive vision of the judiciary's powers under the STA—Judge John Gleeson, in the HSBC case—did not invoke any standard of review from the STA in asserting the right to approve or disapprove of the DPA, but instead relied upon the court's "supervisory authority."[129] This supervisory authority,

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[122] *Id.*

[123] United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *3 (E.D.N.Y. July 1, 2013).

[124] Memorandum of Law of *Amicus Curiae* Law Professor, *supra* note 7, at 4.

[125] Memorandum of Law of *Amicus Curiae* Law Professor, *supra* note 7, at 4 (quoting S. REP. NO. 93-1021, at 37 (1974)).

[126] *Id.* (quoting H.R. REP. NO. 93-1508, at 1 (1974)) (alteration in original).

[127] *Id.*

[128] *HSBC Bank USA, N.A.*, 2013 WL 3306161 at *3.

[129] *Id.* at *4.

though, is an even weaker hook upon which to hang a scheme for systemic judicial regulation of DPAs. Although the federal judiciary asserts a broad power to regulate the conduct of the attorneys who come before it, this authority probably does not extend to DPAs. "The federal courts are not charged with the responsibility of policing the prosecutorial arm of the government,"[130] and supervisory authority cannot extend to give the court "a chancellor's foot veto over law enforcement practices of which [the court] does not approve."[131] The Supreme Court has held that because the courts do not preside over the grand jury, the scope of the supervisory authority over grand jury matters is limited.[132] Yet the grand jury is an aspect of federal law enforcement which may be fairly called at least quasi-judicial: "[i]t has an institutional relationship with the court, which both empanels it and presides over disputes occurring within it, and it thus has been characterized as an arm of the court."[133] If the supervisory authority is limited even in the context of the grand jury, where the argument for judicial supervision is strongest, it follows that the supervisory authority must be even more limited as we move further into core prosecutorial discretion—and the decision to prosecute is at the heart of that discretion. Invoking supervisory authority for wholesale rejection of DPAs would constitute precisely the sort of "chancellor's foot veto" that contravenes the separation of powers.

Finally, even if courts had some supervisory authority over DPAs, courts are powerless to prevent NPAs from taking effect. As Judge Gleeson concedes, NPAs are "not the business of the courts."[134] Because they do not involve any filing of criminal charges, they take place entirely outside the court's purview. It is easy to imagine that, if the courts began a concerted effort to bar the use of DPAs, the government would simply switch to NPAs instead; indeed, the government often uses the two interchangeably.[135] As a result, judicial enforcement of a prohibition on DPAs would be a paper tiger. Only Congress is capable of robust action to curtail DPAs.

VI. Proposal for Legislation

What form should congressional action take? Although commentators have suggested abolishing DPAs,[136] none of them have specifically indicated how Congress would do that. Below are some of the mechanisms that a putative bill to abolish DPAs and NPAs would need to include.

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[130] United States v. Myers, 510 F. Supp. 319, 322 (E.D.N.Y. 1980).

[131] *Id.* at 322 (quoting United States v. Russell, 411 U.S. 423, 435 (1973)).

[132] United States v. Williams, 504 U.S. 36, 46–47 (1992).

[133] The Honorable John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges,* 5 J.L. & Soc'l Pol'y 423, 463 (1997).

[134] United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *5 (E.D.N.Y. July 1, 2013).

[135] U.S. Gov't Accountability Office, *supra* note 1.

[136] *See, e.g.*, Xian, *supra* note 16, at 663.

A. Outlawing DPAs

Amending the STA would easily eliminate DPAs. Specifically, 18 U.S.C. 3161(h)(2) can be amended to redefine DPAs in the following way:

> Any 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. The foregoing shall not apply to a defendant which is not an individual.

By requiring judges to turn down any corporate DPA which comes before them, this amendment would render DPAs dead on arrival, effectively making it pointless for prosecutors to enter into them in the first place.

B. Outlawing NPAs

The existence of NPAs is one of the thorniest problems facing a would-be deferred prosecution reformer. Because they take place entirely outside the courts' purview, judicial regulation cannot touch them. As a result, we could predict the DOJ would move to using NPAs, and/or NPA-like agreements (such as the R&Rs detailed above). If the DOJ preserved its ability to resolve corporate wrongdoing with alternatives to prosecution, the harms outlined above could actually be exacerbated. That is, even the small amount of judicial oversight available under the STA would be extinguished; meanwhile, the idea of a "non-prosecution" of corporate crime might look even more like a sweetheart deal to the public than deferred prosecutions do.

One solution is suggested by the Accountability in Deferred Prosecutions Act of 2014 ("ADPA"), which attempted to bring DPAs under judicial control.[137] The ADPA purported to solve the problem of parity in DPA and NPA regulation by declaring NPAs subject to the same provisions as DPAs.[138] Presumably, this parity of treatment would have encompassed Section 7(a), which would have required the government to file DPAs with the applicable district court.[139] This mechanism makes sense in the context of legislation that countenances DPAs as continuing to exist. The legislation proposed by this article, though, would eliminate DPAs entirely.

In the current context, then, legislation like the ADPA would create needless complexity while failing to solve the NPA problem. A court's "rejection" of an NPA would have no effect on the agreement's efficacy. Although the Speedy Trial Act can require the parties in a criminal case to proceed with the criminal adjudication process, it cannot require the government to press criminal charges; the prosecution would thus be free to imple-

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[137] H.R. 4540, 113th Cong. (2014).
[138] *See id.* at §§ 2–3.
[139] *See* Gibson, Dunn & Crutcher, *supra* note 21, at 8 n.32.

ment the NPA and leave the court powerless.[140] Similarly, the courts could not prevent the government from initially filing criminal charges while negotiating an NPA behind the scenes and then dropping the charges once the government secured its desired agreement.

To solve this problem, the DPA/NPA prohibition legislation would have to directly forbid the government from entering into such agreements, while not intruding upon the power of prosecutors to negotiate plea bargains, consent decrees, and other non-DPA/NPA agreements. Such language might look like this:

> Section 1: It shall be unlawful for the government to enter into a written agreement with a business organization in which the government agrees to decline prosecution in exchange for consideration. Nothing in this statement shall be construed as preventing the issuance of advisory opinions or no-action letters, entering into civil consent decrees, or negotiating and/or agreeing to plea bargaining agreements.
>
> Section 2: Any such unlawful agreement referenced in Section 1 shall be void and unenforceable as a matter of public policy.

Because of the similarities between various types of settlements—and the need to allow such settlements while not allowing overly broad language to vitiate the proposed legislation's DPA prohibition—the actual wording might well be more precise.

Another advantage of this language is that it avoids concerns regarding separation of powers. Neither Congress nor the courts would be purporting to tell the DOJ which factors it must use in choosing to indict or decline prosecutions; it would instead be declaring a type of contract illegal. After passage of this legislation, the DOJ would retain its core prosecutorial discretion to initiate, terminate, or decline any prosecution it chose.

C. Phase-In Clause

Both federal prosecutors and businesses will have been making decisions against the background assumption that DPAs will continue to be available. On the government side, the DOJ and SEC have likely allocated resources and set enforcement priorities with the assumption that they will be enjoying the leverage and cost-savings of corporate deferrals. While the harms of DPAs outweigh these considerations in the long-term, it would be counterproductive to blindside federal law enforcement in the short-term. On the business side, companies may have likely self-reported, made incriminating disclosures, and taken certain negotiating positions in similar reliance

[140] United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *7 (E.D.N.Y. July 1, 2013).

upon the status quo. Penalizing companies that came forward to air their dirty laundry runs contrary to the current federal policy. The same considerations, as well as the general interest in making settlements final, militate against any legislative action that purported to nullify currently valid DPAs. Denying both sides the benefit of their bargain would undercut the credibility of the DOJ and its settlements as sufficiently final, and also wastefully reallocate resources to re-resolving closed matters.

To solve these problems, the legislation would have a phase-in period, during which any company currently (i.e., as of the date of passage) in talks with federal authorities regarding possible criminal misconduct would be allowed to receive a DPA to resolve charges arising from said misconduct if prosecutors so chose. Although this might actually trigger a brief increase in DPAs in the short-term, as companies and prosecutors scrambled to take advantage of the last chance to use the agreements, the long-term elimination of DPAs and "Too Big to Jail" would outweigh any short-term harm.

VII. Conclusion

What would a post-DPA world look like? Absent an alternative to the traditional criminal process, the DOJ would have to move to guilty pleas that, in many ways, would resemble DPAs. However, there would be crucial differences. First, as explained above, guilty pleas would better vindicate the expressive effects of criminal law than DPAs. Not only does a guilty plea involve the criminal justice system, but judicial approval of a guilty plea carries more expressive power than approval of a DPA. While the latter is more contractual, and involves less scrutiny, by "accepting a plea bargain and moving thereafter to sentence the defendant, the court places the imprimatur of legitimacy, as an independent branch of government, on the parties' bargain."[141]

Second, guilty pleas allow for robust judicial oversight. Courts must not only agree to the plea, but they can make sentencing decisions (or, in the case of some pleas, agree to the sentencing recommendations of the parties). For example, in 2013, Judge William G. Young of the District of Massachusetts rejected two corporate guilty pleas. In a sentencing memo, which laid out an expansive view of the judicial role in plea agreement approval, Judge Young outlined his objections to ordered departures from the sentences suggested by the parties. First, Judge Young turned to the plea involving medical device manufacturer Orthofix. Judge Young felt that the absence of a probationary period, during which Orthofix would have to abide by the terms of a civil settlement entered into with regulatory agencies, as well as the absence of a non-disparagement provision (forbidding the company from later disparaging the factual basis of its plea), rendered the agreement lack-

[141] United States v. Orthofix, Inc., 956 F.Supp.2d 316, 325 (D. Mass. 2013).

ing.[142] In so doing, Judge Young claimed to uphold the public interest, both by encouraging reform of Orthofix and by ensuring that the plea was more than just a cost of doing business, but entailed the reputational costs of a criminal conviction.[143]

Judge Young then rejected the suggested fine in a plea agreement concerning APTx Vehicle Systems Limited, a British contractor. APTx was pleading guilty to fraud claims, and the government had agreed to a fine amount far below both the statutory maximum fine for the offense and the amount suggested by the United States Sentencing Guidelines.[144] Judge Young explicitly pointed to the expressive effects of criminal law, writing that for the government to "invoke the specter of criminal law in all its majesty and awe" by securing APTx's criminal plea, and to then impose a "slap on the wrist" fine would "turn the normative edifice of criminal justice into a Bergsonian theater of the absurd."[145] Judicial review of plea agreements can thus serve two purposes—on the one hand, it provides a neutral arbiter to guard against the risk of an omnipotent prosecutor. On the other, it protects the public interest from collusive agreements between prosecutors and companies which would otherwise undermine public faith in the rule of law.

In addition to the uptick in guilty pleas, there would also probably be fewer prosecutions brought; however, that decline might be beneficial. The current lack of judicial oversight may be fueling situations where companies are pressured to enter DPAs on the basis of conduct that may not actually be criminal. The Foreign Corrupt Practices Act ("FCPA") is a prime example of how DPAs may facilitate prosecutorial overreach. Although the FCPA, which was designed to fight corporate bribery abroad, has existed for decades, the DOJ has only recently begun rigorously enforcing it. The hallmark of this enforcement wave has been the notion that "the FCPA means simply what the DOJ and SEC say it means."[146] With DPAs in hand, prosecutors can get corporations to settle conduct that, while criminal under an expansive theory of the law's reach, might not stand up under the scrutiny of a judge. However, businesses have no incentive to run the risks of indictment and/or conviction—and are afraid of looking uncooperative by challenging the government's theories—and so accede to government pressure even before the claims can be proven beyond a reasonable doubt.[147] Although a similar dynamic exists with respect to plea bargains—since the Sentencing Guidelines reward corporate cooperation and acceptance of responsibility, contesting the factual or legal bases for the charges may lead to

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[142] *Id.* at 332–33.
[143] *Id.* at 333–34.
[144] *Id.* at 334–35.
[145] *Id.* at 335, 337. "Bergsonian" is a reference to the French philosopher Henri Bergson.
[146] Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 909–10 (2010).
[147] *Id.* at 925–27, 929.

harsher treatment—DPAs have been crucial in allowing FCPA expansion. In 2010 Mark Mendelsohn— the former head of the DOJ's FCPA unit—admitted that "it is tempting" for the DOJ to use DPAs to resolve cases that "don't actually constitute violations of the law," and that if the government did not have DPAs, it would "certainly bring fewer cases."[148]

It is easy to see why this is the case: first, prosecutors will actually have to file charges against companies, meaning that they will be subject to judicial scrutiny. Second, corporations will not be operating in the same circumstances as in the DPA context. With the ability to hide from the criminal process removed, the incentives for companies will shift. Whereas DPAs allowed businesses to avoid indictment at all costs, companies facing charges may find challenging the prosecution's theory or offering a defense preferable to avoiding indictment. In turn, this may cause prosecutors to shy away from these more marginal cases for fear of incurring the costs of trial, resulting in a more efficient allocation of law enforcement resources.

DPAs were an attempt to thread the needle, punishing and reforming organizational lawbreakers without wreaking havoc in the form of collateral consequences. However, almost a decade and a half after its birth, the modern DPA has proven to have serious collateral consequences of its own. Because of these consequences, and because other tools exist to fight corporate crime, Congress should move to abolish DPAs in the corporate context.

[148] *See* Mike Koehler, Prepared Statement of Professor Mike Koehler Before the Subcomm. on Crime and Drugs of the S. Comm. on Jud. (Nov. 30, 2010) (quoting *Mark Mendelsohn on the Rise of FCPA Enforcement*, 24 CORPORATE CRIME REPORTER 35 (Sept. 13, 2010)), http://www.judiciary.senate.gov/imo/media/doc/10-11-30%20Koehler%20Testimony.pdf, *archived at* http://perma.cc/3QT3-TPTW.