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Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States

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NOTE

HUMANIZING THE CORPORATION WHILE DEHUMANIZING THE INDIVIDUAL: THE MISUSE OF DEFERRED-PROSECUTION AGREEMENTS IN THE UNITED STATES

Andrea Amulic*

American prosecutors routinely offer deferred-prosecution and nonprosecution agreements to corporate defendants, but not to noncorporate defendants. The drafters of the Speedy Trial Act expressly contemplated such agreements, as originally developed for use in cases involving low-level, nonviolent, noncorporate defendants. This Note posits that the almost exclusive use of deferrals in corporate cases is inconsistent with the goal that these agreements initially sought to serve. The Note further argues that this exclusivity can be attributed to prosecutors' tendency to only consider collateral consequences in corporate cases and not in noncorporate cases. Ultimately, this Note recommends that prosecutors evaluate collateral fallout when deciding whether to prosecute noncorporate, as well as corporate, defendants and that the Department of Justice adopt departmental guidelines to ensure compliance with this goal.

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INTRODUCTION

Criminal convictions have devastating effects on the lives of convicted defendants long after incarceration. The United States has the highest rate of incarceration in the world, with 1 in 100 adults currently in jail or prison.¹ This rate has increased dramatically in the past forty years—the federal prison population has more than quadrupled in the past thirty-five years.² In addition to punishment by incarceration, convicted defendants in the United States also suffer a wide variety of collateral consequences that take effect upon conviction or release, such as disenfranchisement and restrictions on employment.³ Unlike direct consequences, collateral consequences are not imposed at sentencing but instead by regulations, laws, or policies that a conviction triggers.⁴ Communities with high rates of incarceration are harmed by the removal of individuals from these communities, as well as the limitations on reintegration that collateral consequences impose upon their release.⁵

The increased use of deferred-prosecution agreements (“DPAs”) and nonprosecution agreements (“NPAs”) may mitigate the harmful effects of criminal convictions. A DPA is an agreement through which a prosecutor agrees to defer a defendant’s prosecution for a period of time on the condition that the defendant fulfill a set of requirements over that period of time.⁶ The prosecutor files criminal charges against the defendant but does not actually investigate or try the case unless the defendant breaches the terms of the agreement.⁷ If the defendant successfully completes the requirements, the charges are dropped.⁸ An NPA, on the other hand, does not involve filing

1. See, e.g., Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 428 (2013).

2. See Mark Osler & Mark W. Bennett, *A “Holocaust in Slow Motion?” America’s Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUST. 117, 127 (2014) (citing *Statistics*, FED. BUREAU PRISONS, http://www.bop.gov/about/statistics/population_statistics.jsp [<https://perma.cc/9RKB-KDH2>]).

3. See generally *National Inventory of Collateral Consequences of Conviction (“NICCC”)*, COUNCIL ST. GOV’TS, <https://niccc.csgjusticecenter.org/map/> [<https://perma.cc/HC9U-GQNW>] [hereinafter *NICCC*].

4. See Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators”*, 93 MINN. L. REV. 670, 678 (2008).

5. See Robert J. Sampson & Charles Loeffler, *Punishment’s Place: The Local Concentration of Mass Incarceration*, 139 DAEDALUS 20, 29 (2010).

6. See 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, 1299–300 (2014).

7. See *id.*

8. *Id.*

formal charges against a defendant at the outset. Instead, the prosecutor agrees not to file charges at all, as long as the defendant complies with the agreement's terms.⁹ This Note will focus on deferred-prosecution agreements, but similar concerns apply to both types of agreements.

Deferral programs initially arose from a desire to protect vulnerable members of society from the stigma of criminal prosecutions.¹⁰ In the mid- and late 1900s, prosecutors deferred prosecutions of nonviolent, low-level offenders in order to mitigate the harmful collateral effects of convictions.¹¹ The theory behind deferrals is both utilitarian and rehabilitative.¹² Individuals who have criminal convictions may, for example, have a hard time finding employment upon release and might consequently be more likely to recidivate—a deferral, on the other hand, gives a defendant a second chance.¹³ Recently, however, leniency for low-level offenders has not been the norm.¹⁴ Since the early 2000s, the Department of Justice (“DOJ”) has entered into several hundred DPAs and NPAs with corporate defendants,¹⁵ but virtually none with noncorporate individuals.¹⁶ Senator Elizabeth Warren has noted the irony in offering such agreements to corporate defendants almost exclusively, stating:

If you're caught with an ounce of cocaine, the chances are good you're gonna go to jail. If it happens repeatedly, you may go to jail for the rest of your life But evidently if you launder nearly a billion dollars for drug cartels and violate our international sanctions, your company pays a fine and you go home and sleep in your bed at night.¹⁷

9. See Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1799–800 (2015).

10. E.g., Peter R. Reilly, *Justice Deferred Is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, 2015 B.Y.U. L. REV. 307, 314.

11. *Id.*

12. David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1305–06 (2013).

13. *Id.* at 1305.

14. See Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, 101 VA. L. REV. ONLINE 60, 62–63 (2015), http://www.virginialawreview.org/sites/virginialawreview.org/files/Garrett_final_publish.pdf [<https://perma.cc/6JKW-WMV7>] (“[F]or years, particularly under Attorney General John Ashcroft, the DOJ policy was the opposite of lenient, encouraging prosecutors to pursue the ‘most serious, readily provable’ charges against individuals.” (quoting Memorandum from John Ashcroft, Attorney Gen., U.S. Dep’t of Justice, to All Fed. Prosecutors (Sept. 22, 2003), https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm [<https://perma.cc/P9U6-NA8B>])).

15. Garrett, *supra* note 9, at 1791.

16. See, e.g., MICHAEL L. SIEGEL, *WHITE COLLAR CRIME: LAW, PROCEDURE, THEORY, PRACTICE* 443 (2011) (“As a general rule, there is no method of dealing with street criminals other than prosecution. They either face criminal charges or go free.”).

17. Golumbic & Lichy, *supra* note 6, at 1321–22 (quoting Mark Gongloff, *Elizabeth Warren: Banks Get Wrist Slaps While Drug Dealers Get Jail*, HUFFINGTON POST (Mar. 7, 2013, 5:19 PM), http://www.huffingtonpost.com/2013/03/07/elizabeth-warren-hsbc-money-laundering_n_2830166.html [<https://perma.cc/FP4E-2Q9E>])).

By offering deferrals to only corporate offenders, the DOJ is expressing a great deal of inconsistency regarding how it views corporate and noncorporate defendants in our criminal justice system.

A federal judge recently drew attention to this inconsistent treatment in an opinion that advocated for a reform of the practice of granting deferrals exclusively to corporations. On October 21, 2015, Judge Emmett Sullivan approved the use of deferred-prosecution agreements in a corporate case.¹⁸ He did not exclusively consider collateral consequences but noted that this consideration was one useful factor in evaluating the agreements.¹⁹ Judges have routinely approved deferred-prosecution and nonprosecution agreements for corporate defendants in recent years, so Judge Sullivan's decision to do so in this case was not remarkable. But his inclusion of an additional part to the opinion arguing, in dicta, that "the current use of deferred-prosecution agreements for corporations rather than individual defendants strays from Congress's intent when it created an exclusion from the speedy trial calculation for the use of such agreements"²⁰ drew some attention.²¹ In this part, Judge Sullivan repeatedly expressed disappointment that DPAs and similar tools are not being used to avoid subjecting noncorporate defendants to the "devastating collateral consequences of . . . criminal conviction[s]."²² Although a great deal has been written recently about the use of DPAs and NPAs in the corporate criminal context, and it is virtually uncontested that these agreements were developed for use in noncorporate prosecutions,²³ the literature exploring the derailment of this goal is sparse.

In order to adhere to the promise of justice, actors within the system should treat all defendants with humanity. Treating defendants with humanity requires considering the impact that convictions will have on their lives beyond incarceration, particularly through collateral consequences.²⁴ Currently, prosecutors treat corporate defendants as human and explicitly consider the human fallout attendant with corporate convictions when deciding whether to defer corporate prosecutions.²⁵ Meanwhile, however, they treat

18. *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11 (D.D.C. 2015).

19. *Id.* at 31.

20. *Id.* at 37.

21. See, e.g., Matt Apuzzo, *Judge Laments Imbalance in Criminal Justice System*, N.Y. TIMES, Oct. 24, 2015, at A15 ("While it is not uncommon for judges to criticize outcomes that they see as unjust, it is highly unusual for them to so explicitly advocate—and at such great length—a change in approach.").

22. *Saena Tech*, 140 F. Supp. 3d at 42.

23. See, e.g., Reilly, *supra* note 10, at 314; Gordon Bourjaily, Note, *DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions*, 52 HARV. J. ON LEGIS. 543, 544 (2015).

24. See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 522 (2010) (arguing that collateral consequences "seriously infringe upon the dignity interests of those with criminal records" in the United States).

25. See, e.g., U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.1100 (2015) [hereinafter USAM], <https://www.justice.gov/usam/united-states-attorneys-manual> [<https://perma.cc/M5ZE-ZS8T>] ("Prosecutors may consider the collateral consequences of a

noncorporate defendants as instruments of crime and fail to consider the human fallout of convictions on noncorporate defendants.²⁶ This inconsistent treatment should end. Although the potential collateral consequences of corporate convictions are certainly destructive, so are the collateral consequences of noncorporate convictions. These consequences must be considered in choosing whether to prosecute noncorporate, as well as corporate, defendants.

This Note argues that prosecutors should treat noncorporate defendants²⁷ with humanity and consider collateral consequences in offering DPAs and NPAs in the same way they do with corporate defendants. Part I contends that, while DPAs and NPAs arose to address prosecutions for low-level, nonviolent offenses, they have been used much more frequently in the corporate context, particularly in recent years. Part II argues that, since collateral consequences are explicitly considered in corporate prosecutions, prosecutorial failure to consider collateral consequences in noncorporate criminal prosecutions is inappropriate because it results in prosecutors humanizing corporations but dehumanizing individuals. Part III recommends that prosecutors regularly consider offering DPAs and NPAs to noncorporate offenders and explicitly evaluate collateral consequences when making such decisions.²⁸

I. DPAs AND NPAs WERE DESIGNED FOR USE IN NONCORPORATE CASES

In the early 1900s, prosecutors used deferred-prosecution agreements in dealing with low-level, nonviolent individuals, especially juveniles and first-time offenders.²⁹ This application of DPAs and NPAs has declined, however, and the use of DPAs and NPAs in the corporate context has skyrocketed over the past two decades.³⁰ This Part details the shift from the initial uses of such agreements in the noncorporate context to the corporate context. Section I.A reviews the mechanics of DPAs and NPAs and analyzes the Speedy Trial Act in the context of the original use of deferrals. Section I.B explains that, in recent years, prosecutors have offered DPAs and NPAs almost exclusively to corporate offenders.

corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases.”).

26. *See id.* §§ 9-22.000 to .200.

27. Although DPAs and NPAs are available for misdemeanor cases, *see, e.g., id.* § 9-22.010, this Note considers the use of DPAs and NPAs in felony prosecutions only.

28. This Note does not contend that the use of DPAs and NPAs in corporate criminal cases is inappropriate or improper, but rather that the use of these agreements should not be exclusive to the corporate context.

29. *E.g.,* Reilly, *supra* note 10, at 314–15; Bourjaily, *supra* note 23, at 544.

30. *See* Golumbic & Lichy, *supra* note 6, at 1309–10 (“From 1994 to 2001, the DOJ resolved only seven corporate criminal cases via DPAs. Since then, the DOJ has entered into over 250 DPAs, with 100 executed between 2010 and 2012 alone.” (footnote omitted)).

A. *DPA, NPA, and the Speedy Trial Act*

Deferrals were initially offered exclusively to noncorporate individuals, as Congress expressly contemplated when drafting the Speedy Trial Act. The Speedy Trial Act requires that a defendant pleading not guilty be brought to trial within seventy days.³¹ The Act provides an exception from the seventy-day timeline for “[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.”³² This provision in the Speedy Trial Act reflects the original purpose for which deferrals were initially developed.³³

In the early and mid-twentieth century, prosecutors offered deferred-prosecution agreements to low-level offenders, rather than charging them for minor offenses.³⁴ Prosecutors were thus able to avoid “placing young, non-violent offenders on the track of traditional criminal adjudication—and thus inflicting on them the stigma of a criminal conviction”³⁵ Deferred-prosecution agreements instead allowed defendants to demonstrate that they had reformed and were therefore no longer deserving of traditional criminal punishment.³⁶ Deferrals were usually targeted at low-level, nonviolent offenders, with the hope of allowing those offenders to avoid “the potentially lifelong collateral consequences of a felony conviction.”³⁷ These agreements created the additional benefit of increasing judicial efficiency by reducing the total number of cases actually tried.³⁸ Ultimately, proponents of deferrals and diversion programs expected that these arrangements would greatly benefit society at large.

Evidence suggests that deferrals and diversion programs do benefit society. Diversion programs, such as the Manhattan Court Employment Project in New York City (“MCEP”) and Project Crossroads in Washington, D.C.,

31. 18 U.S.C. § 3161(c)(1) (2012).

32. *Id.* § 3161(h)(2).

33. *See, e.g.*, Reilly, *supra* note 10, at 314–15; Bourjaily, *supra* note 23, at 544.

34. *See* Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1866 (2005).

35. Bourjaily, *supra* note 23, at 544.

36. Kristie Xian, Note, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 631, 643 (2014) (“In order to be granted a deferral, the offender first makes an admission of guilt and waives the right to a speedy trial. Then, in exchange for being criminally charged, the offender commits to rehabilitation and when necessary, pays restitution to the victims. The offender then agrees to abide by terms that the prosecution sets, which always include a deferral period. At the end of the period, if the offender has followed the terms, the prosecutor may dismiss the indictment.”).

37. Greenblum, *supra* note 34, at 1866.

38. *Id.*

were developed as diversion programs for eligible defendants.³⁹ The MCEP limited eligibility to men who were between seventeen and forty-five years old, resided in New York City, were unemployed, had no more than one additional pending charge, had not served more than six months in prison, were not suffering from addiction, and had not been charged with certain crimes.⁴⁰ Project Crossroads required that participants be between sixteen and twenty-six years old; have no prior convictions; be unemployed, underemployed, or enrolled in school; and have been charged with “a crime specifically defined and accepted by both the court and the project.”⁴¹ These programs likely limited eligibility to young, nonviolent, unemployed offenders in order to effectively limit their scope and minimize political backlash against the idea of offering alternative dispositions. This Note does not advocate for indiscriminately offering deferrals to all criminal defendants, but neither does it envision as narrow an application as the MCEP and Project Crossroads utilized.

Both the MCEP and Project Crossroads were successful in achieving their goals of increasing employment rates and decreasing recidivism rates among participants who had been favorably terminated (meaning that they had successfully completed the programs). A staggering majority of MCEP participants were employed at dismissal each year.⁴² Project Crossroads found that “approximately 60% of those favorably terminated were employed for more than four-fifths of the year following termination,” as compared to only 23% of those unfavorably terminated.⁴³ In the first two years of the MCEP’s implementation, the recidivism rate (measured by rearrest)

39. CRIMINAL JUSTICE COORDINATION COUNCIL & VERA INST. OF JUSTICE, *THE MANHATTAN COURT EMPLOYMENT PROJECT 1* (1970) (“[The MCEP] offers [a defendant] counseling and job opportunities and, if he cooperates and appears to show promise of permanent change, recommends that the prosecutor (district attorney) and the judge dismiss the charges against him without ever deciding whether he is guilty.”); ROBERTA ROVNER-PIECZENIK, *NAT’L COMM. FOR CHILDREN & YOUTH, PROJECT CROSSROADS AS PRE-TRIAL INTERVENTION: A PROGRAM EVALUATION 1–2* (1970) (“The court, in supporting this endeavor, agreed to consider a ‘nol pros’ of the charges pending against any project participant who was terminated with a favorable recommendation by the project after the successful completion of the three-month program.”).

40. CRIMINAL JUSTICE COORD. COUNCIL & VERA INST. OF JUSTICE, *supra* note 39, at 3 (explaining that defendants were ineligible if they had been charged with “crimes of extreme gravity, such as homicide, armed robbery, forcible rape, or arson[, or] crimes indicating a lucrative illegal occupation, such as gambling or numbers running[, or] crimes indicating a problem beyond the Project’s capability, such as drug addiction or alcoholism”).

41. ROVNER-PIECZENIK, *supra* note 39, at 1.

42. See VERA INST. OF JUSTICE, *PRE-TRIAL INTERVENTION: THE MANHATTAN COURT EMPLOYMENT PROJECT OF THE VERA INSTITUTE OF JUSTICE FINAL REPORT 7* (1972) (noting that 91.4% of participants were employed at dismissal in the first year, 95.4% were employed at dismissal in the second year, and 79.3% were employed at dismissal in the third year). The drop in employment in the third year may be attributed to an increase in the number of students participating in the program, or a change in the minimum wage law. *Id.* at 8.

43. ROVNER-PIECZENIK, *supra* note 39, at 12.

for successful participants was half that of unsuccessful participants,⁴⁴ and in the third year, it was only 2.9%.⁴⁵ The combined recidivism rate for all Project Crossroads participants, whether favorably or unfavorably terminated, was 14% lower than that of the control group.⁴⁶ The success of these programs in improving outcomes for their participants suggests that deferrals can be effective in nonviolent criminal cases.

Congress specifically considered the successes of these programs in drafting the Speedy Trial Act. Congress expressed a desire “to encourage the current trend among United States attorneys to allow for deferral of prosecution on the condition of good behavior.”⁴⁷ A Senate committee report regarding 18 U.S.C. § 3161(h)(2), the provision that allows for exclusion of time pursuant to a deferral agreement, mentions both the MCEP and Project Crossroads, noting that “[s]uch diversion programs have been quite successful with first offenders.”⁴⁸ These programs illustrated the benefits of alternative dispositions.⁴⁹ The report further notes that the provision allowing for exclusion of time is necessary because without it, “prosecutors would never agree to such diversion programs.”⁵⁰ By drawing upon MCEP and Project Crossroads in support of § 3161(h)(2), Congress expressed support for alternative dispositions and hoped that prosecutors would continue to utilize deferrals and diversion programs in dispensing with cases that involved low-level, nonviolent offenders. Although the consideration of legislative history in interpreting statutory provisions is often controversial,⁵¹ arguments against such consideration usually hinge on the difficulty of ascertaining intent from the *Congressional Record*.⁵² In the case of this provision, however, that argument is inapplicable—the Senate report clearly communicated that a goal of drafting § 3161(h)(2) was to encourage prosecutors to offer deferrals to nonviolent offenders.

44. VERA INST. OF JUSTICE, *supra* note 42, at 12 (noting that the recidivism rate is 15.8% for favorably terminated participants, as compared to 30.8% for unfavorably terminated participants).

45. *Id.* at 10.

46. ROVNER-PIECZENIK, *supra* note 39, at 17 (describing the overall recidivism rates (measured by rearrests) for participants within fifteen months of initial arrest as follows: 20.13% for the favorably terminated group (n=149), 56.65% for the unfavorably terminated group (n=51), and 43.36% for the control group (n=107)).

47. ANTHONY PARTRIDGE, FED. JUDICIAL CTR., LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 117 (1980).

48. *Id.*

49. See ROVNER-PIECZENIK, *supra* note 39, at 12, 17; VERA INST. OF JUSTICE, *supra* note 42, at 7.

50. PARTRIDGE, *supra* note 47, at 117.

51. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 845–46 (1992) (addressing various criticisms of legislative history).

52. *Id.* at 854–55 (describing a helpful consideration of the legislative history of a federal bankruptcy statute in order to ascertain the purpose of an amendment).

The text of the Speedy Trial Act further supports a reading that Congress contemplated deferral agreements with noncorporate individuals in mind. The Act states:

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 . . . 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.⁵³

Congress did not limit the scope of the Act to corporate defendants—rather, it is more likely that this provision was meant to apply to individual actors and not corporations. As a matter of grammar, the use of the singular noun “defendant” and the singular possessive pronoun “his” suggest that Congress meant for this provision to apply to individual defendants not acting on behalf of corporations.⁵⁴ The historic use of deferrals, along with the legislative history and text of the Speedy Trial Act, all indicate that Congress intended for prosecutors to offer deferrals to noncorporate defendants.

B. *Recent Use of DPAs and NPAs in Corporate Cases*

Scholars agree that the collapse of the accounting firm Arthur Andersen in the early 2000s sparked the routine use of DPAs and NPAs with respect to corporate crimes.⁵⁵ Andersen was convicted for obstructing an SEC investigation related to the Enron scandal.⁵⁶ The company ceased its operations after losing its audit license as a collateral consequence of the conviction, leaving 28,000 employees without jobs.⁵⁷ The loss of the audit license can be considered a direct collateral consequence, because the SEC affirmatively imposes this penalty on convicted felons.⁵⁸ The subsequent collapse of the company, on the other hand, was an indirect consequence, as it resulted

53. 18 U.S.C. § 3161(h)(2) (2012).

54. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1763 (2010) (explaining that textualist interpretations of statutes depend on definitions, textual context, and “default presumptions based on common rules of grammar and word usage”).

55. E.g., Golumbic & Lichy, *supra* note 6, at 1306; Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreement*, 82 *N.Y.U. L. REV.* 1434, 1436 (2007).

56. *United States v. Arthur Andersen, LLP*, 374 F.3d 281 (5th Cir. 2004), *rev'd*, 544 U.S. 696 (2005). Ironically, the Supreme Court reversed the conviction a year later. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

57. Golumbic & Lichy, *supra* note 6, at 1307.

58. Investment Advisers Act of 1940, § 203(e)(2)–(3), 15 U.S.C. § 80b-3(e)(2) to (3) (2012).

from the imposition of the audit restriction.⁵⁹ Both sets of consequences were devastating to the company,⁶⁰ and the increased use of DPAs and NPAs since the company's demise is widely seen as an attempt to avoid a repeat of the "Andersen effect."⁶¹

Although deferrals were used in noncorporate cases against individuals in the early and mid-twentieth century, prosecutors began to consider offering similar agreements to corporate defendants in the later part of the century. The E.F. Hutton and Drexel Burnham Lambert cases in the late 1980s indicated that alternatives to prosecution could benefit corporations as well as individuals. Hutton had been charged with mail and wire fraud; after pleading guilty, the company "was drastically weakened and forced to merge with a competitor."⁶² Drexel pleaded guilty to securities fraud charges, after which the company filed for Chapter 11 bankruptcy.⁶³ These instances of corporate collapse following conviction inspired prosecutors to consider alternatives to charging corporations criminally.⁶⁴ Several years later, the DOJ investigated Salomon Brothers for violations of the False Claims Act.⁶⁵ Instead of prosecuting the company, however, prosecutors offered Salomon an NPA in exchange for several conditions, including the payment of fines, forfeiture, and victim compensation; cooperation with investigators; and implementation of compliance procedures.⁶⁶ Notably, the then U.S. attorney for the Southern District of New York specifically referenced a desire to avoid collateral consequences—among other factors—in justifying the office's decision not to prosecute Salomon.⁶⁷

Prosecutors did not begin offering deferred-prosecution and nonprosecution agreements to corporate defendants immediately after the Salomon case. In fact, the DOJ only entered into seven DPAs between 1994 and 2001.⁶⁸ After the Andersen conviction, however, the use of DPAs increased—"[s]ince [2001], the DOJ has entered into over 250 DPAs, with 100 executed between 2010 and 2012 alone."⁶⁹ In 2009, the Government Accountability

59. See Golumbic & Lichy, *supra* note 6, at 1307 ("After the grand jury issued the indictment, the firm could no longer audit public companies. Andersen folded, and with it 28,000 employees lost their jobs.").

60. *See id.*

61. *Id.* at 1296.

62. *Id.* at 1301–02.

63. *Id.* at 1302.

64. *Id.* ("These cases contributed to the general perception that a criminal conviction was not the preferred means of rehabilitating a corporation and achieving maximum deterrence.").

65. Press Release, U.S. Dep't of Justice, Department of Justice and SEC Enter \$290 Million Settlement with Salomon Brothers in Treasury Securities Case (May 20, 1992), https://www.justice.gov/archive/atr/public/press_releases/1992/211182.htm [<https://perma.cc/AH27-2WPQ>].

66. Golumbic & Lichy, *supra* note 6, at 1302.

67. *Id.* at 1302–03.

68. *Id.* at 1309–10.

69. *Id.* at 1310 (footnote omitted).

Office (“GAO”) conducted a study of the use of DPAs and NPAs in corporate prosecutions and found that, between 2004 and 2009, U.S. Attorneys’ Offices (“USAOs”) entered into ninety-four DPAs and NPAs with corporate defendants and pursued 1,659 corporate prosecutions.⁷⁰ The GAO also found that the Criminal Division of the DOJ had entered into forty-four corporate DPAs and NPAs, as compared to thirty-eight prosecutions.⁷¹ While these numbers do not account for the past seven years, they do indicate a growth in the use of alternative dispositions in corporate cases since the late twentieth century. The GAO report makes much of the fact that USAOs pursued seventeen times as many corporate prosecutions as deferrals from 2004 to 2009,⁷² but this statistic does not sufficiently address the fact that USAOs disproportionately offer deferrals to corporate, as compared to noncorporate, defendants.

The legislative history of the Speedy Trial Act confirms that Congress intended to make DPAs and NPAs available to noncorporate actors. As noted above, the relevant Senate committee report states that the goal of § 3161(h)(2) was to encourage deferrals conditioned on good behavior and references diversion programs targeted at individual offenders.⁷³ Nothing in the legislative record indicates that Congress contemplated that these agreements would be offered to corporations at all, let alone exclusively. Instead, the shift away from using DPAs and NPAs in noncorporate prosecutions has tracked the historical shift toward being tough on crime that characterized the late 1900s, with the enactment of mandatory minimums, three-strikes laws, and harsh sentencing guidelines.⁷⁴ Although the use of DPAs and NPAs in corporate cases has likely been helpful in avoiding large-scale economic fallout of the Andersen magnitude in recent years, there is no reason to limit the use of these agreements to corporate defendants. Instead, prosecutors should give similar considerations to the collateral consequences attendant

70. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-110, *Corporate Crime: DOJ Has Taken Steps to Better Track its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness* 16 tbl.1 (2009), <http://www.gao.gov/assets/300/299781.pdf> [https://perma.cc/V6RP-4P56].

71. *Id.*

72. *Id.* at 14, 16 tbl.1 (“The number of DPAs and NPAs entered into by the USAOs is small compared to the number of corporate prosecutions they pursued.”).

73. PARTRIDGE, *supra* note 47, at 117 (“A number of Federal and State courts have been experimenting with pretrial diversion or intervention programs in which prosecution of a certain category of defendants is held in abeyance on the condition that the defendant participate in a social rehabilitation program. If the defendant succeeds in the program, charges are dropped. Such diversion programs have been quite successful with first offenders in Washington, D.C. (Project Crossroads) and in New York City (Manhattan Court Employment Project). Some success has also been noted in programs where the defendant’s alleged criminality is related to a specific social problem such as prostitution or heroin addiction.”).

74. See Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753, 770–71 (2011) (asserting that, in the late 1900s, “[d]eferred adjudication laws enacted in the 1970s, whose purpose was to enable certain defendants to avoid a conviction record, were overridden”).

with convicting noncorporate defendants, and consideration of such consequences should thus inform decisions to prosecute or defer these cases as well.

II. PROSECUTORS HUMANIZE CORPORATIONS BUT DEHUMANIZE INDIVIDUALS

Prosecutorial treatment of collateral consequences exemplifies the failure of the criminal justice system to recognize the humanity of defendants. While collateral consequences accompany convictions in both corporate and noncorporate criminal cases, prosecutors only consider the effects of these consequences in the corporate context. This Part explores the ways in which prosecutors consider collateral consequences. Section II.A presents the disparate ways prosecutors evaluate collateral consequences in corporate and noncorporate cases. Section II.B contends that imposing collateral consequences requires that prosecutors treat offenders with some level of humanity, and that prosecutors do not consider the collateral consequences of convicting noncorporate defendants in order to avoid humanizing them. In contrast, the fiction of corporate personhood encourages a legal understanding of corporations as quasi-human. The explicit consideration of collateral consequences with respect to corporate DPAs and NPAs, but not for noncorporate defendants, reflects this difference.

A. *Prosecutors Consider Collateral Consequences for Corporate Defendants Exclusively*

Prosecutors are uncharacteristically transparent with respect to the factors that they consider in evaluating corporate crimes. The public therefore has a great deal of information regarding why prosecutors decide to prosecute or not prosecute corporations: “In few areas of criminal law do prosecutors announce in advance, and in detail, under what circumstances they will prosecute versus offer outright leniency.”⁷⁵ The U.S. Attorneys’ Manual explicitly recommends that prosecutors consider collateral consequences when deciding whether to prosecute corporate defendants.⁷⁶ Within the manual, the “Principles of Federal Prosecution of Business Organizations” suggest that prosecutors consider ten factors when deciding whether to charge corporations.⁷⁷ “These factors broadly focus[] on the seriousness of the past conduct at the firm, the firm’s present cooperation, reporting and

75. Garrett, *supra* note 14, at 62.

76. USAM, *supra* note 25, § 9-28.1100 (“Prosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases.”).

77. *Id.* § 9-28.300 (listing, as a factor, “collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution”).

compliance at the firm, and future consequences, including collateral consequences, for the firm and others should the company be prosecuted.⁷⁸

Although the manual explicitly contemplates collateral consequences in corporate cases, it fails to consider these consequences in noncorporate cases. The section regarding noncorporate deferrals does not even mention collateral consequences.⁷⁹ Instead, it frames eligibility for deferral programs in terms of types of crimes committed and offenders' prior convictions.⁸⁰ The consideration of collateral consequences plays a significant role in prosecutorial decisions to offer DPAs and NPAs to corporations but not to noncorporate actors.

1. Collateral Consequences of Corporate Convictions

The collateral consequences associated with convicting corporate actors are often referred to in the literature as a "corporate death penalty."⁸¹ Such consequences include direct regulatory restrictions, such as debarment,⁸² loss of good standing, and loss of professional (e.g., banking, audit) licenses.⁸³ The U.S. Attorneys' Manual instructs prosecutors to account for these consequences.⁸⁴ These direct sanctions may in turn lead to indirect third-party effects, including loss of jobs, shareholders' losses, forced mergers, and even bankruptcy.⁸⁵ Both direct and indirect collateral consequences of corporate convictions can be extremely serious.

Corporations might also face administrative debarment upon conviction.⁸⁶ Administrative debarments are collateral to convictions because they are imposed by agencies, not judges. The Federal Acquisition Regulations ("FAR") govern business transactions between federal agencies and businesses⁸⁷ and seek to ensure that the government only conduct business with

78. Garrett, *supra* note 14, at 64.

79. See USAM, *supra* note 25, §§ 9-22.000 to .200.

80. *Id.* § 9-22.100.

81. E.g., Reilly, *supra* note 10, at 321–22; Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 426 (2007).

82. Reilly, *supra* note 10, at 320.

83. See, e.g., Golumbic & Lichy, *supra* note 6, at 1320 (quoting then-Assistant Attorney General Lanny Breuer in asserting that, "had prosecutors pursued criminal sanctions against HSBC, it 'would almost certainly have lost its banking license in the U.S.'").

84. USAM, *supra* note 25, § 9-28.1100 ("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 federally funded programs such as health care programs.").

85. E.g., Reilly, *supra* note 10, at 323 ("[U]nfortunately, it is not only the irresponsible business partners that are impacted when a company is debarred. Numerous other parties face collateral consequences, including employees, stockholders, and, of course, customers who rely on the products and services produced or provided by these businesses.").

86. *Id.* at 320–21.

87. See generally 48 C.F.R. §§ 1.000–.707 (2016).

responsible companies⁸⁸ in order to “maintain[] the public’s trust and fulfill[] public policy objectives.”⁸⁹ Pursuant to the FAR, a federal agency can, at its discretion, debar a convicted corporation if such action is in the public interest.⁹⁰ A debarred or suspended company is excluded from receiving new contracts from federal agencies directly and from dealing with the government as agents or representatives on behalf of other companies.⁹¹ Any existing contracts that these companies have with federal agencies are subject to further regulations and may even be terminated at the discretion of agency heads.⁹² Since many companies depend on contracts with federal agencies for revenue,⁹³ debarments may impose very serious consequences.

Statutory debarments operate in a similar fashion to exclude convicted companies from contracting with federal agencies. Particular statutes, such as the Clean Air Act⁹⁴ and the Clean Water Act,⁹⁵ mandate that corporations convicted under these statutes lose their government contracts.⁹⁶ These sanctions operate to prevent companies “from entering new contracts with the

88. *Id.* § 9.402.

89. *Id.* § 1.102(a).

90. Reilly, *supra* note 10, at 320–21.

91. 48 C.F.R. § 9.405(a).

92. *Id.* § 9.405-1.

93. See Reilly, *supra* note 10, at 321 (noting that, in fiscal year 2013, the U.S. government spent an estimated \$460 billion on goods and services, thus making it the largest purchaser of goods and services in the world). See generally OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2015 BUDGET OF THE U.S. GOVERNMENT (2015) (allocating approximately \$23.7 billion to the Department of Agriculture, \$8.8 billion to the Department of Commerce, \$495.6 billion to the Department of Defense, \$45.6 billion to the National Intelligence Program, \$68.6 billion to the Department of Education, \$27.9 billion to the Department of Energy, \$77.1 billion to the Department of Health and Human Services, \$38.2 billion to the Department of Homeland Security, \$46.7 billion to the Department of Housing and Urban Development, \$12 billion to the Department of the Interior, \$11.8 billion to the Department of Labor, \$91 billion to the Department of Transportation, \$7.9 billion to the Environmental Protection Agency, \$17.5 billion to the National Aeronautics and Space Administration, \$7.3 billion to the National Science Foundation, and \$710 million for the Small Business Administration).

94. 42 U.S.C. § 7606(a) (2012) (“No federal agency may enter into any contract with any person who is convicted of any offense under section 7413(c) of this title for the procurement of goods, materials, and services to perform such contract at any facility at which the violation which gave rise to such conviction occurred if such facility is owned, leased, or supervised by such person. . . . The Administrator may extend this prohibition to other facilities owned or operated by the convicted person.”).

95. See 33 U.S.C. § 1368(a) (2012) (“No Federal agency may enter into any contract with any person, who has been convicted of any offense under section 1319(c) of this title, for the procurement of goods, materials, and services if such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person. The prohibition in the preceding sentence shall continue until the Administrator certifies that the condition giving rise to such conviction has been corrected.”).

96. Reilly, *supra* note 10, at 321.

government until they address the conditions that gave rise to their conviction[s],” which typically requires entry into compliance programs.⁹⁷ Again, such consequences could have drastic effects on convicted corporations: “[I]f a company relies on government contracts as a source of projects and profits, such statutory debarment could dramatically impact its bottom line, if not put it out of business altogether.”⁹⁸

Companies may also be unable to participate in certain federal programs if they have been convicted of crimes. Medicare and other health care programs mandate exclusion for certain offenses, such as “(1) [c]onviction of program-related crimes . . . (2) [c]onviction relating to patient abuse . . . (3) [f]elony conviction relating to health care fraud . . . [and] (4) [f]elony conviction relating to controlled substance.”⁹⁹ These programs also allow for discretionary exclusion for numerous less serious offenses, including misdemeanor fraud or controlled substance convictions, failure to furnish medically necessary services, failure to disclose certain required information, obstructing investigations, and making false statements or material misrepresentations.¹⁰⁰ Businesses like hospitals, pharmacies, and other health care providers depend on maintaining good business relationships with health care programs in order to be able to serve their customers. Accordingly, exclusion from these programs can be particularly harmful to those companies.

Numerous indirect effects may emanate from corporate convictions due to the imposition of regulatory or statutory collateral consequences. As previously noted, the United States is the largest purchaser of goods and services in the world,¹⁰¹ and much of the national budget is divided among various federal departments and agencies.¹⁰² If a company were to lose its federal contracts, then, countless people could lose their jobs. In fact, in order to justify offering DPAs and NPAs to corporations, prosecutors have previously expressed fears that convictions may lead to widespread economic trouble, as well as substantial harm to employees and shareholders. The notion that corporations are “too big to jail” has been subject to a great deal of backlash.¹⁰³ For example, then–Assistant Attorney General Lanny Breuer offered a DPA to HSBC despite “overwhelming evidence[] . . . and

97. David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1258 (2016).

98. Reilly, *supra* note 10, at 321.

99. 42 U.S.C. § 1320a-7(a) (“The Secretary shall exclude the following individuals and entities from participation in any Federal health care program . . .”).

100. *Id.* at § 1320a-7(b) (“The Secretary may exclude the following individuals and entities from participation in any Federal health care program . . .”).

101. Reilly, *supra* note 10, at 321.

102. See OFFICE OF MGMT. & BUDGET, *supra* note 93.

103. See, e.g., BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* (2014) (arguing that DPAs are often unsuccessful in reforming companies and advocating for improvements to the current practice of offering such agreements); Jed S. Rakoff, *Justice Deferred Is Justice Denied*, N.Y. REV. BOOKS (Feb. 19, 2015), <http://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied> [<https://perma.cc>

HSBC's own admission" that the company enabled drug cartels to launder more than \$800 million through a subsidiary and facilitated over \$600 million in transactions with countries that were subject to economic sanctions.¹⁰⁴ Breuer said that "[o]ur goal here is not to bring HSBC down, it's not to cause a systemic effect on the economy, it's not for people to lose thousands of jobs."¹⁰⁵ This statement "caused a firestorm of criticism" from scholars and journalists.¹⁰⁶ One report also noted that then-Attorney General Eric Holder claimed that "some financial institutions have become 'so large' that it makes it 'difficult for us to prosecute them.'"¹⁰⁷ The DOJ has since denied that it considers corporations beyond prosecution.¹⁰⁸ But concern about the human fallout of a corporate conviction has likely been at the root of many decisions to defer corporate prosecutions.¹⁰⁹

As discussed, the fear that a corporate conviction will lead to a major economic collapse has been cited as the driving factor in the increased use of DPAs and NPAs in the early 2000s. This fear, however, has lately been criticized and, to some extent, debunked. Preet Bharara, the former U.S. attorney for the Southern District of New York, has characterized concern about the Andersen effect¹¹⁰ as overblown,¹¹¹ and at least one study has shown no such effect following the convictions of corporations between 2001 and 2010.¹¹² Scholars have not yet studied this theory extensively. If the results of

84VN-8WBW] (providing a favorable review of Garrett's book by a federal judge in the Southern District of New York).

104. Golumbic & Lichy, *supra* note 6, at 1295.

105. James O'Toole, *HSBC: Too Big to Jail?*, CNN: MONEY (Dec. 12, 2012, 1:08 PM), <http://money.cnn.com/2012/12/12/news/companies/hsbc-money-laundrying> [<https://perma.cc/9JBP-6Q2L>].

106. See Editorial, *Too Big to Indict*, N.Y. TIMES, Dec. 12, 2012, at A38; Peter J. Henning, *HSBC Case Tests Transparency of Deferred Prosecution Agreements*, N.Y. TIMES: DEALBOOK (Feb. 8, 2016), <https://www.nytimes.com/2016/02/09/business/dealbook/hsbc-case-tests-transparency-of-deferred-prosecution-agreements.html> [<https://perma.cc/K64J-43UE>].

107. Danielle Douglas, *Holder Concerned Megabanks Too Big to Jail*, WASH. POST (Mar. 6, 2013), https://www.washingtonpost.com/business/economy/holder-concerned-megabanks-too-big-to-jail/2013/03/06/6fa2b07a-869e-11e2-999e-5f8e0410cb9d_story.html [<https://perma.cc/X6DU-8YVB>].

108. Aruna Viswanatha, *DOJ: "There Is No Such Thing as Too Big to Jail"*, HUFFINGTON POST (May 5, 2014, 10:57 AM), http://www.huffingtonpost.com/2014/05/05/doj-too-big-to-jail_n_5267238.html [<https://perma.cc/D8PQ-BZ2X>].

109. See, e.g., O'Toole, *supra* note 105.

110. The "Andersen effect" refers to the collapse of a corporation following an indictment. See *supra* notes 56–57 and accompanying text.

111. *Id.* at 1337–38.

112. Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 827 (2013) (finding that, in the years 2001 to 2010, no publicly traded company failed due to a conviction, and reporting "[n]o [e]vidence of an Andersen [e]ffect"). No evidence of effect, however, is neither logically nor scientifically equivalent to evidence of no effect. See William Oditá Tarnow-Mordi & Michael JR Healy, Annotation, *Distinguishing Between "No Evidence of Effect" and "Evidence of No Effect" in Randomised Controlled Trials and Other Comparisons*, 80 ARCHIVES DISEASE CHILDHOOD 210, 210–11 (1999).

this study hold up, and if other actors in the system echo Mr. Bharara's sentiments, it is possible that federal prosecutors and the DOJ will begin to offer fewer DPAs and NPAs to corporations in the future. Although this Note does not advocate for fewer corporate deferrals, prosecutors should offer DPAs and NPAs to more noncorporate defendants.

2. Collateral Consequences of Noncorporate Convictions

Noncorporate defendants may face a litany of collateral consequences, in addition to incarceration, upon conviction. These consequences are collateral because they are not included within the defendant's judicially imposed sentence; instead, they are imposed by various laws and regulations.¹¹³ Some collateral consequences impact defendants' economic livelihood, others affect their families and personal lives, and others affect constitutionally protected rights.¹¹⁴ Ultimately, the imposition of collateral consequences on a convicted defendant involves an intrusion into almost all aspects of his life and therefore requires that he be treated with humanity—that is, with an eye toward his existence in the world as a person.¹¹⁵

Upon release, former felons encounter economic hardship because it is difficult for them to find employment.¹¹⁶ Not only are employers less likely to hire applicants with criminal records,¹¹⁷ but former felons may be categorically restricted from certain types of occupations.¹¹⁸ Furthermore, they may lose their business or trade licenses as a result of their convictions.¹¹⁹ Given the numerous and onerous restrictions on employment opportunities for individuals with criminal convictions, it is hardly surprising that many

113. See generally *NICCC*, *supra* note 3. This database lists approximately 1,200 federal collateral consequences, as compared to 46,000 state collateral consequences. *Id.* For ease of comparison with corporate cases, this Note will focus on federal collateral consequences. State-imposed collateral consequences greatly outnumber those imposed by federal statutes and regulations, and should also be considered in evaluating the effects of convictions on defendants' lives.

114. See *infra* notes 116–137 and accompanying text.

115. See *Humanity*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/humanity> [<https://perma.cc/E56V-VPVN>].

116. E.g., Noah Remnick, *Getting Fit, Prison-Style*, N.Y. TIMES (Apr. 9, 2016), <http://mobile.nytimes.com/2016/04/10/nyregion/at-a-gym-in-manhattan-fitness-tips-from-ex-convicts.html> [<https://perma.cc/NXU6-FQ2T>] (“Forced to disclose his criminal history on applications, Mr. Marte floundered in the job market. ‘The stigma was so strong it was like serving double time.’”).

117. See, e.g., *Soto v. Bd. of Fire & Police Comm'rs*, 989 N.E.2d 1109, 1116 (Ill. App. Ct. 2013) (explaining that the employer could be liable for negligent hiring if it were charged with sexual harassment for hiring an employee who had previously been disciplined for sexual harassment, even though he did not have convictions on his record that technically disbarred him).

118. E.g., 28 C.F.R. § 115.17 (2016) (prohibiting agencies from hiring individuals who have been convicted of certain sex crimes for jobs involve direct contact with inmates).

119. E.g., 14 C.F.R. § 63.12 (2016) (noting that a conviction for a controlled substance offense is grounds for the denial, suspension, or revocation of certification for non-crew airmen).

of them return to lives of crime upon release¹²⁰ in order to pay their bills and feed their families. Ironically, a criminal conviction will often render an individual ineligible for welfare, food stamps, Social Security, or other public benefits.¹²¹ It may also preclude an individual's eligibility for certain student loans and grants.¹²² Financially, former criminal defendants have few options to rehabilitate their lives after conviction.

Convicted defendants may also face drastic consequences in their personal lives. They may be excluded or evicted from public housing on the basis of certain convictions.¹²³ Under the Anti-Drug Abuse Act, public housing authorities can evict entire families from public housing on the basis of a single household member or guest engaging in drug-related activity.¹²⁴ Convicted parents may also lose custody of their children,¹²⁵ and individuals with certain convictions are ineligible to foster or adopt children.¹²⁶ Noncitizens face deportation upon conviction of an "aggravated felony"—but this category is not limited to federal felonies and may even include state misdemeanors, such as drug crimes.¹²⁷ Deportation is automatic, and defendants often have little notice of the possibility that they may lose resident status if they are found guilty of, or plead guilty to, many crimes.¹²⁸ A criminal conviction can therefore severely and negatively impact almost every aspect of a defendant's life.

Furthermore, criminal defendants may be subjected to the deprivation of certain constitutional rights after conviction, such as the rights to vote or bear arms. The Supreme Court has clarified, for instance, that the Second Amendment right to bear arms for individual citizens does not extend to felons.¹²⁹ In fact, federal law makes it illegal for any felon to possess a firearm.¹³⁰ In addition, individuals with felony convictions are prohibited from

120. See MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, NCJ 244205, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 1 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> [<https://perma.cc/UTH4-U535>] (finding that half of released prisoners were imprisoned again within five years).

121. *E.g.*, 21 U.S.C. § 862a (2012) (excluding individuals with felony convictions from receiving Social Security Act assistance or supplemental nutrition assistance).

122. *E.g.*, I.R.C. § 25A (2012) (denying eligibility for a Hope Scholarship Credit to individuals who have been convicted of felony drug offenses).

123. *E.g.*, 24 C.F.R. § 966.4 (2016) (stating that a criminal conviction is grounds for termination of tenancy).

124. 42 U.S.C. § 1437d (2012).

125. *E.g.*, *id.* § 5106a (limiting the custodial rights of parents who have been convicted of certain crimes).

126. *E.g.*, *id.* § 671(a)(20).

127. See 8 U.S.C. § 1101(a)(43) (2012).

128. See *Padilla v. Kentucky*, 559 U.S. 356, 373–74 (2010) (finding counsel's failure to inform a client that he would be deported upon entering a guilty plea to constitute ineffective assistance).

129. U.S. CONST. amend. II; *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

130. 18 U.S.C. § 922(g)(1) (2012). While a thorough analysis of felon-in-possession recidivism is beyond the scope of this Note, it is notable that this law constitutes a possession offense, which is easy to prove and difficult to challenge. See MARKUS DIRK DUBBER, VICTIMS

exercising the right to vote in many jurisdictions.¹³¹ Although the Constitution does not expressly grant citizens the right to vote, several amendments clarify the scope of this right, which courts have interpreted as fundamental.¹³² Under Section 2 of the Fourteenth Amendment, however, states may impose limits on this right for individuals with felony convictions.¹³³ These collateral consequences redefine the roles of convicted defendants in society by making it impossible for them to regain their status as full citizens upon release.

Scholars have challenged the definition of these consequences as collateral, civil, and regulatory. They contend that, although these sanctions are imposed on defendants outside of the sentencing scheme, they are inherently punitive and should be considered as such.¹³⁴ They have emphasized that judges and legislatures might scrutinize collateral consequences more closely if they were classified as punitive.¹³⁵ A punitive classification would render most of them—as they currently stand—unconstitutional violations of the Ex Post Facto¹³⁶ and Double Jeopardy¹³⁷ Clauses. While this Note does not advocate for such a definition, it agrees that collateral consequences must be scrutinized more carefully—namely, by the prosecutors who ultimately decide whether to subject defendants to the criminal process and, eventually, to these collateral consequences.

B. *The Consideration of Collateral Consequences Is Humanizing*

Prosecutors should consider collateral consequences in deciding whether to prosecute both corporate and noncorporate actors in order to regard these defendants holistically with an understanding of their human

IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 81 (2002) (describing a possession offense as a “scheme, a means of surreptitiously expanding the reach of existing criminal prohibitions, of transforming them into instruments of incapacitation”).

131. Despite this Note's focus on federal collateral consequences, the discussion of disenfranchisement must be conducted at the state level, since even federal elections are administered differently by each state. *Elections and Voting*, WHITE HOUSE, <https://www.whitehouse.gov/1600/elections-and-voting> [<https://perma.cc/G4ED-EEGG>]. For a breakdown of felon disenfranchisement laws in all fifty states, see *State Felon Voting Laws*, PROCON.ORG, <http://felonvoting.procon.org/view.resource.php?resourceID=286> [<https://perma.cc/CP5R-BAVH>].

132. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665–67 (1966).

133. U.S. CONST. amend XIV, § 2; *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (“[T]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment . . .”).

134. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 16–17 (Marc Mauer & Meda Chesney-Lind eds., 2002).

135. *Id.*

136. U.S. CONST. art. I, § 9, cl. 3 (prohibiting the imposition of a law with retroactive effects).

137. U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .”).

experiences and effects. The word “humanity” is defined simply as “the quality or state of being human.”¹³⁸ The United States is a nation founded upon ideas of personhood and individuality,¹³⁹ and its criminal justice system should reflect these historical values. “Humanity is something that needs to be articulated and, most important, to be recognized.”¹⁴⁰ To recognize an individual’s humanity is to understand the quality of his human state—to comprehend his place in the world as a human. The consideration of collateral consequences allows prosecutors to view defendants as humans, not merely as instruments of crime, because these consequences intimately impact all aspects of defendants’ lives beyond the imposition of fines or the deprivation of liberty.¹⁴¹

When prosecutors have considered the human fallout that may result from corporate convictions, they have declined to prosecute, opting instead to enter into DPAs and NPAs with corporate defendants. The U.S. Attorneys’ Manual explicitly recommends that “where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a nonprosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism.”¹⁴² An oft-cited statistic regarding the Andersen conviction is that it resulted in 28,000 employees losing their jobs.¹⁴³ Notably, however, “only five percent of Arthur Andersen’s employees were responsible for the Enron misconduct.”¹⁴⁴ As stated above, Lanny Breuer, likely motivated by concern about a repeat of the Andersen effect, justified entering into a DPA with HSBC by suggesting that it was necessary to avoid the loss of thousands of jobs.¹⁴⁵ Evidently, when prosecutors view corporations with an eye toward the human consequences of convictions, they are willing to offer alternative dispositions.

The legal fiction of corporate personhood further encourages prosecutors to humanize corporations. Corporations are legally treated as human in

138. See *Humanity*, *supra* note 115.

139. U.S. CONST. pmbl. (“We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).

140. COURTNEY R. BAKER, *HUMANE INSIGHT: LOOKING AT IMAGES OF AFRICAN AMERICAN SUFFERING AND DEATH* 13 (2015).

141. Pinard, *supra* note 24, at 461 (discussing the “collective weight” of collateral consequences and their “pernicious impact” on several aspects of the lives of individuals with criminal records).

142. USAM, *supra* note 25, § 9-28.1100.

143. *E.g.*, Golumbic & Lichy, *supra* note 6, at 1296.

144. Bourjaily, *supra* note 23, at 546.

145. See O’Toole, *supra* note 105.

various respects.¹⁴⁶ The legal fiction that a corporation is a person was necessary to the development of criminal corporate liability.¹⁴⁷ The idea of corporate personhood may seem incompatible with the imposition of criminal liability, particularly since a corporation cannot be incarcerated.¹⁴⁸ The fiction of corporate personhood, however, remains influential in the way corporations are prosecuted, or not prosecuted. In fact, in his memorandum regarding charging corporations, Eric Holder noted that, while prosecutors should generally consider the same factors when dealing with corporate and noncorporate defendants, “due to the nature of the corporate ‘person,’ some additional factors are present” in corporate cases.¹⁴⁹

The U.S. Attorneys’ Manual does not similarly recommend that prosecutors consider the collateral consequences of convicting noncorporate defendants. The section that addresses pretrial diversion programs does not mention collateral consequences whatsoever. In fact, it states the goals of pretrial diversion in remarkably impersonal terms: “To prevent future criminal activity among certain offenders To save prosecutive and judicial resources To provide, where appropriate, a vehicle for restitution to communities and victims of crime.”¹⁵⁰ This language differs markedly from the vivid language in the corporate section, which mentions “impact on innocent third parties” and expressly contemplates the effect of a criminal conviction on humans, namely “employees, investors, pensioners, and customers.”¹⁵¹ Furthermore, the section of the Criminal Resource Manual that discusses the Speedy Trial Act does not mention pretrial diversion programs, or § 3161(h)(2), at all.¹⁵² Unlike corporate defendants, noncorporate defendants are instrumentalized, not humanized, by federal prosecutors.

The likely justification for viewing noncorporate defendants as mere conduits of criminal activity is that the act of subjecting a person to the criminal process is made significantly easier when that person is not seen as a person. If a defendant is found guilty of or pleads guilty to a felony, he will likely be incarcerated. In the land of the free, taking away a person’s freedom is seen as an extremely serious consequence, and the Constitution guards

146. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”); see also *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (holding that corporate speech is constitutionally protected and indicating that corporations are “citizens”).

147. Weissmann with Newman, *supra* note 81, at 418.

148. *Id.* at 428.

149. Memorandum from Eric Holder, Jr., Deputy Attorney Gen., U.S. Dep’t of Justice, to All Component Heads and U.S. Attorneys (June 16, 1999) [hereinafter Holder Memo], <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> [<https://perma.cc/LY7K-BSZT>].

150. USAM, *supra* note 25, § 9-22.010.

151. *Id.* § 9-28.1100.

152. U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 628 [hereinafter CRIMINAL RESOURCE MANUAL], <https://www.justice.gov/usam/criminal-resource-manual> [<https://perma.cc/FU59-UZ6W>].

heavily against improper liberty deprivation.¹⁵³ The Due Process Clause guarantees that the state may not deprive a *person* of life or liberty without due process of law.¹⁵⁴ Any attempt to see a defendant as an instrument of crime, rather than a person that may potentially be subject to the deprivation of liberty, is likely a reconciliation mechanism.¹⁵⁵ Because a corporation cannot be incarcerated, however, it is unnecessary to apply this kind of framing to corporate defendants. While it is easy to forget that the consequences of convicting an individual do not end with incarceration, the collateral effects of convictions may be just as devastating.¹⁵⁶ Prosecutors should be encouraged to consider collateral consequences, and the effects that they may have on convicted defendants' entire lives, when deciding whether to prosecute or divert them.

Some scholars are concerned that, in the corporate context, the individuals who suffer most from the collateral consequences of criminal convictions are usually the ones who have neither benefited from nor contributed to the wrongdoing. They note that employees, shareholders, and customers face negative consequences when companies are debarred.¹⁵⁷ Alternatively, the imposition of collateral consequences on noncorporate defendants is seen as less troubling because they have actually been convicted of crimes.¹⁵⁸ But the negative effects of convicting both corporate and noncorporate defendants are felt widely, and they are not limited to the actors responsible for the criminal activity.

153. U.S. CONST. amends. V, XIV.

154. *Id.*

155. Although this Note does not focus on criminal punishment and does not define collateral consequences as punitive, it is helpful to note various philosophical theories of punishment in the context of instrumentalization. See, for example, Professor Noam Wiener's discussion:

Deontological retributivists critique consequentialist justifications for punishment by pointing out that consequentialists instrumentalize the perpetrators of crimes by using them as a means to achieve societal goals. Thus, a perpetrator sentenced severely to deter others is not punished purely because of the wrongness of his actions, but is also made into an instrument by the state for the deterrence of others who may commit crimes in the future. Expressivists consider the punishment, and consequently the person being punished, as a tool for expressing societal norms. Deontologists consider the humanity of the perpetrator, and his free will, to be the very reason why he may be punished, and therefore consider rationales that subject the free will to the good of others to be anathema to criminal punishment.

Noam Wiener, *Excuses, Justifications, and Duress at the International Criminal Tribunals*, 26 PACE INT'L L. REV. 88, 93 (2014) (footnotes omitted).

156. See *supra* Section II.A.2.

157. Reilly, *supra* note 10, at 323 (“[U]nfortunately, it is not only the irresponsible business partners that are impacted when a company is debarred. Numerous other parties face collateral consequences, including employees, stockholders, and, of course, customers who rely on the products and services produced or provided by these companies.”).

158. See, e.g., Love, *supra* note 74, at 770–71 (noting that, following the Sentencing Reform Act of 1984, the imposition of collateral consequences increased because “the official position of the federal government was that criminals were to be labeled and segregated for the protection of society, not reclaimed and forgiven”).

These critics forget that collateral consequences do not only affect convicted individuals—they impact families and communities to a devastating degree and contribute to the continued oppression of racial and economic minorities. Child custody and public housing restrictions break up families, harming individuals—often children—who have done nothing wrong.¹⁵⁹ Furthermore, several states deny welfare benefits to individuals with felony drug convictions,¹⁶⁰ and individuals with convictions are ineligible for certain categories of employment.¹⁶¹ These conditions may drive individuals to reoffend to make a living—high rates of conviction and incarceration paradoxically harm communities rather than making them safer.¹⁶² This effect is often racial.¹⁶³ Given that black and Hispanic men are incarcerated at significantly higher rates than white men in the United States, collateral consequences of convictions disproportionately affect these populations¹⁶⁴ and contribute to an ongoing societal repression of racial minorities.¹⁶⁵ Prosecutors should therefore consider the far-reaching effects of criminal convictions for noncorporate, as well as corporate, defendants.

III. PROSECUTORS SHOULD CONSIDER COLLATERAL CONSEQUENCES FOR NONCORPORATE DEFENDANTS

Given the failures of the current prosecutorial framework, prosecutors should change their approaches to offering deferrals to noncorporate defendants. Ultimately, the decision to initiate, divert, or decline a prosecution lies solely in the hands of the prosecutor.¹⁶⁶ Although prosecutorial discretion is subject to extrajudicial checks, a prosecutor's decision to prosecute or not prosecute a suspected offender is not reviewable.¹⁶⁷ Prosecutors are therefore uniquely positioned to effectuate a major reform in the way corporate and noncorporate prosecutions are disparately handled. This Part advocates for a reform of the way prosecutors deal with noncorporate offenders. Section III.A recommends that the DOJ adopt guidelines analogous to those

159. See, e.g., 42 U.S.C. § 1437d (2012); 24 C.F.R. § 966.4 (2016).

160. Pinar, *supra* note 24, at 494.

161. *Id.* at 492.

162. See Traum, *supra* note 1, at 434 (“Paradoxically, more incarceration does not make neighborhoods safer, and it may lead to higher crime and higher incarceration.”).

163. See John Edgar Wideman, *Doing Time, Marking Race*, *NATION*, Oct. 30, 1995, at 503, 505 (“[T]o be a man of color of a certain economic class and milieu is equivalent in the public eye to being a criminal.”).

164. See Osler & Bennett, *supra* note 2, at 126–28.

165. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 198 (2012) (“In the era of mass incarceration, what it means to be a criminal in our collective consciousness has become conflated with what it means to be black . . .”).

166. See Garrett, *supra* note 14, at 61 (“[P]rosecutors simply have discretion to charge corporations—or not . . .”).

167. See, e.g., Traum, *supra* note 1, at 445.

employed in corporate cases, requiring prosecutors to evaluate potential collateral consequences when deciding whether to offer DPAs or NPAs to noncorporate individuals. Section III.B considers alternative solutions that may mitigate the devastating, far-reaching effects of collateral consequences on noncorporate offenders in the event that prosecutors continue to limit the use of DPAs and NPAs to corporate defendants.

A. Proposed DOJ Guidelines

Prosecutors should again adopt a practice of offering deferred-prosecution and nonprosecution agreements to individual, noncorporate offenders. This policy is most consistent with historical practice, congressional intent, and rehabilitative criminal justice goals. As discussed above, diversion programs implemented in New York City and Washington, D.C., in the mid-twentieth century were successful in increasing employment rates and decreasing recidivism rates among young, nonviolent offenders.¹⁶⁸ Furthermore, the Speedy Trial Act expressly contemplates pretrial diversion by providing for the exclusion of time pursuant to diversion agreements, and the Act does not limit its terms to corporate defendants only.¹⁶⁹ In drafting this section, Congress specifically considered the successes of the MCEP and Project Crossroads and likely intended that prosecutors would utilize the exclusion provision to continue deferring prosecution of low-level offenders.¹⁷⁰ While the recent use of DPAs and NPAs in corporate criminal cases has likely been successful in avoiding another Andersen effect,¹⁷¹ the fact that prosecutors have been offering these agreements to corporate defendants exclusively deviates from the original purpose that they were designed to serve.¹⁷²

The DOJ should take active steps to remedy this deviation by updating the U.S. Attorneys' Manual to explicitly instruct prosecutors to consider collateral consequences for noncorporate defendants. The manual most recently underwent a significant revision in 1997, but that version of the manual offered no guidance regarding corporate deferrals.¹⁷³ Instead, the only mention of pretrial diversions concerned noncorporate defendants.¹⁷⁴ The sections dealing with corporate DPAs and NPAs were added in August

168. See *supra* notes 39–46 and accompanying text.

169. 18 U.S.C. § 3161(h)(2) (2012).

170. See PARTRIDGE, *supra* note 47, at 117.

171. See, e.g., Golumbic & Lichy, *supra* note 6, at 1307.

172. *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 37 (D.D.C. 2015) (“[T]he Court observes that the current use of deferred-prosecution agreements for corporations rather than individual defendants strays from Congress’s intent when it created an exclusion from the speedy trial calculation for the use of such agreements.”).

173. See generally USAM, *supra* note 25.

174. *Id.* § 9-22.100; CRIMINAL RESOURCE MANUAL, *supra* note 152, § 712.

2008.¹⁷⁵ The DOJ should incorporate some of the language regarding corporate deferrals from these sections into section 9-22.010, the section governing noncorporate deferrals.¹⁷⁶ This section should be amended to include, among the listed objectives of pretrial diversion, the goals of (1) facilitating the rehabilitation of criminal defendants by minimizing the collateral effects of criminal convictions and (2) reducing the collateral impact of criminal convictions on third parties, including the families and communities of defendants. Furthermore, the DOJ should add an additional section titled “Collateral Consequences,” which should explain the attendant harms that might follow from noncorporate criminal convictions. Given that there are over a thousand federal collateral consequences,¹⁷⁷ this section should not attempt to detail each one, but it should instead depict, in broad strokes, categories of collateral consequences, similarly to the analogous subpart in the corporate section.¹⁷⁸ Most importantly, the section should explicitly declare at the beginning, as section 9-28.1100 does, that “[p]rosecutors may consider the collateral consequences of a . . . criminal conviction or indictment in determining whether to charge the [defendant] with a criminal offense and how to resolve . . . criminal cases.”¹⁷⁹ Although the manual, as currently written, does not *prohibit* prosecutors from considering these consequences,¹⁸⁰ an explicit directive to do so would likely promote compliance.

Alternatively, the DOJ could issue a memorandum to recommend that prosecutors offer DPAs and NPAs to noncorporate defendants. Although the manual contemplates diversion programs, prosecutors are not explicitly instructed to offer DPAs and NPAs to noncorporate defendants in order to divert them.¹⁸¹ The DOJ has issued a series of memoranda in the past two decades instructing prosecutors on charging corporate defendants. The first of these memos was issued in 1999 by then–Deputy Attorney General Eric Holder.¹⁸² The Holder Memo failed to explicitly acknowledge DPAs and NPAs as alternatives to prosecutors, and it did not provide parameters or clear standards regarding diversion in corporate cases.¹⁸³ It was not until a later memo from then–Deputy Attorney General Larry Thompson¹⁸⁴ that

175. Press Release, U.S. Dep’t of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), <https://www.justice.gov/archive/opa/pr/2008/August/08-odag-757.html> [<https://perma.cc/T79V-FNFD>].

176. USAM, *supra* note 25, § 9-22.010.

177. See generally NICCC, *supra* note 3.

178. See USAM, *supra* note 25, § 9-28.1100.

179. *Id.*

180. *Id.* § 9-22.010.

181. *Id.* § 9-22.100.

182. Holder Memo, *supra* note 149.

183. Golumbic & Lichy, *supra* note 6, at 1305.

184. Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep’t of Justice, to All Component Heads and U.S. Attorneys (Jan. 20, 2003) http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf [<https://perma.cc/VWC2-X2H8>].

the DOJ “explicitly recognized pre-trial diversion as a viable option to reward a corporation’s authentic cooperation” that the use of DPAs began to increase.¹⁸⁵ If the DOJ issued a memorandum explicitly recommending the use of pretrial diversion in noncorporate cases in addition to amending the manual, prosecutors would likely heed the suggestion.

One potential problem with issuing these guidelines has to do with scope—it would be both impractical and impossible for prosecutors to meaningfully consider offering DPAs and NPAs to every defendant that they encounter. The manual currently limits eligibility for pretrial diversion programs to any individual who is not:

- (1) Accused of an offense which, under existing D[OJ] guidelines, should be diverted to the State for prosecution;
- (2) A person with two or more prior felony convictions;
- (3) A public official or former public official accused of an offense arising out of an alleged violation of a public trust; or
- (4) Accused of an offense related to national security or foreign affairs.¹⁸⁶

The first criterion is logical from a federalism perspective, and the third and fourth are consistent with protecting government interests and ensuring national security, respectively. The second limitation, however, precludes a large group of defendants from eligibility for diversion.¹⁸⁷ Since certain status offenses, such as felon-in-possession laws, are felonies,¹⁸⁸ it can be easy for individuals to accumulate several felony convictions in rapid succession. Furthermore, limiting eligibility for diversion to individuals with only one felony conviction echoes the sentiments behind three-strikes laws.¹⁸⁹ Therefore, the DOJ should expand the second criterion to include individuals who have multiple felony convictions.

The use of deferred-prosecution agreements for individual, noncorporate defendants would serve a rehabilitative function because these agreements would give defendants second chances.¹⁹⁰ Although scholars most frequently reference retributivism and deterrence as the underlying philosophical rationales supporting the imposition of criminal liability,¹⁹¹

185. Golumbic & Lichy, *supra* note 6, at 1309.

186. USAM, *supra* note 25, § 9-22.100.

187. See, e.g., THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001 (2003) (estimating that over 5.6 million adults had served time in prison between 1974 and 2001); *Criminal Cases*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=23> [<https://perma.cc/PV7E-VTW7>] (“More than three-fourths of felony defendants had a prior arrest history, with 69% having multiple prior arrests.”). To the extent that this figure serves as a reliable proxy for the prevalence of felony convictions among adults in the United States, it supports the assertion that a significant number of individuals would be ineligible for diversion on the basis of having been previously convicted of a felony.

188. E.g., 18 U.S.C. §§ 922(g)(1), 924(a)(2) (2012).

189. E.g., TEX. PENAL CODE § 12.42(d) (2016) (requiring a twenty-five- to ninety-nine-year sentence for a third felony conviction).

190. See Uhlmann, *supra* note 12, at 1306.

191. See, e.g., Thomas E. Robins, *Retribution, the Evolving Standard of Decency, and Methods of Execution: The Inevitable Collision in Eighth Amendment Jurisprudence*, 119 PA. ST. L.

rehabilitation is still an important purpose. Under a retributivist rationale, punishment is justified because the offender has, by committing a crime, breached his social contract and must repay a debt to society.¹⁹² Deterrence theory, on the other hand, justifies punishment on more utilitarian grounds—punishment is justified because it will either prevent the offender from committing crimes in the future (specific deterrence),¹⁹³ prevent other potential offenders from committing crimes (general deterrence),¹⁹⁴ or both. But given that imprisonment in the United States has increased dramatically in recent decades, perhaps an alternative approach to criminality should be considered—that of rehabilitation.

Under a rehabilitative model, the criminal justice system does not seek to punish or make examples of offenders. Rather, the function of the system is to rehabilitate and reform these individuals so that they do not reoffend, not out of a fear of punishment, but out of an improvement in their circumstances.¹⁹⁵ The rehabilitative model recognizes the humanity of criminal defendants in a way that traditional justifications of criminal law do not.¹⁹⁶ Pretrial diversion programs, such as MCEP and Project Crossroads, sought to rehabilitate their participants by providing them with vocational training, counseling, and other services.¹⁹⁷ It is no small wonder that these programs were remarkably successful in helping participants improve their stations in life.¹⁹⁸ The imposition of severe, broad, and numerous collateral consequences on defendants currently makes it extremely challenging for them to live normal lives after conviction.¹⁹⁹ Prosecutors should therefore give meaningful consideration to these collateral consequences, and they should consequently consider offering more DPAs and NPAs to noncorporate offenders in order to give them opportunities to reform after offending. Such a practice would be most successful in achieving the rehabilitative goals of criminal justice.

REV. 885, 892 (2015) (“Retribution demands culpability before punishment and proportionality in punishment. Retributivist justice relies solely on the moral justification that the guilty require punishment, either for the benefit of the criminal and victim, or for society as a whole.”).

192. *See id.*

193. *See* David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. REV.* 1623, 1626 (1992).

194. *Id.*

195. *Id.* at 1642 (“Rehabilitative theories view punishment as a means of reforming criminals or therapeutically ‘curing’ them of the pathology that is believed to motivate their offenses.”).

196. *But see* C.S. Lewis, *The Humanitarian Theory of Punishment*, in *CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS* 194, 194–95 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972) (arguing that the rehabilitative model actually fails to recognize the humanity of defendants because it does not consider what he deserves but rather considers what will cure him, thereby making him “a mere object, a patient, a ‘case.’”).

197. *See generally* CRIMINAL JUSTICE COORDINATION COUNCIL & VERA INST. OF JUSTICE, *supra* note 39; ROVNER-PIECZENIK, *supra* note 39.

198. *See* sources cited *supra* note 39.

199. *See supra* Section II.A.2 for a discussion of collateral consequences and hardship.

An obvious limitation to these proposals is the fact that prosecutorial discretion is largely unreviewable.²⁰⁰ Therefore, although this language may be included in the U.S. Attorneys' Manual and DOJ memos, and even replicated at state and local levels, it may not necessarily be followed. Ultimately, however, including such recommendations is better than not addressing their viability at all. As an initial matter, a statement recognizing the importance of considering collateral consequences serves at least an expressive function and shows that actors in the criminal justice system are committed to treating defendants humanely. Furthermore, it can hardly be argued that including this language would likely result in *less* frequent consideration of collateral consequences for noncorporate defendants. Finally, the exercise of discretion is necessarily bidirectional; it is possible that this modification will inspire prosecutors to wield their power to offer DPAs and NPAs to noncorporate defendants more frequently than they currently do.²⁰¹ Broad, DOJ-wide reform may be unavailable in the current political climate. Prosecutors should therefore exercise their discretion to offer DPAs and NPAs to noncorporate individuals, even in the absence of an explicit departmental policy, in the interest of justice.

B. *Alternative Mitigation Methods*

In the event that prosecutors continue to limit the use of DPAs and NPAs to corporate cases, they should consider implementing alternative reforms to help minimize the long-lasting and far-reaching impact that criminal convictions may have on noncorporate defendants. As with DPAs and NPAs, these alternative solutions would require actors in the criminal justice system to think about defendants as humans and not merely as instruments of criminality. These solutions also focus on rehabilitation, rather than retribution or deterrence, and seek to help offenders reform, rather than repay.

Robust expungement procedures could significantly allay the devastating effects of criminal convictions for individual defendants. Expungement is defined as “[t]he removal of a conviction (esp[ecially] for a first offense) from a person’s criminal record.”²⁰² The practice is authorized by statutes, varies from state to state, and is not often available.²⁰³ It provides defendants with numerous benefits, however, by allowing them to erase the mistakes of the past and start over. A defendant who has successfully expunged his criminal conviction would not be limited in his abilities to apply for jobs, hold professional licenses, qualify for federal assistance, and live in public housing. Indiana, for example, recently amended its expungement laws to allow individuals with misdemeanor convictions to petition for expungement five

200. See, e.g., Traum, *supra* note 1, at 437–38.

201. Wayne R. LaFave, *The Prosecutor’s Discretion in the United States*, 18 AM. J. COMP. L. 532, 535–36 (1970) (“The discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient . . .”).

202. *Expungement of Record*, BLACK’S LAW DICTIONARY (10th ed. 2014).

203. See Pinard, *supra* note 24, at 505.

years after conviction,²⁰⁴ individuals with nonviolent felony convictions to petition for expungement either eight years after conviction or three years after release,²⁰⁵ and individuals with serious felonies to petition for expungement either ten years after conviction or five years after release.²⁰⁶ These provisions may serve as models for other states or the federal government to adopt similar procedures. Indiana's statute is particularly notable in that it prohibits discrimination on the basis of expunged records and provides that defendants may not waive their expungement rights in plea bargains.²⁰⁷ These limitations offer additional protections to defendants and ensure that they will fully benefit from expungement.

Reentry programs may also help released inmates overcome some of the barriers they will likely face upon returning to their communities. Although the federal criminal justice system abolished parole in the 1980s,²⁰⁸ it is possible for defendants to receive combined sentences of incarceration followed by supervised release.²⁰⁹ Federal inmates may also be eligible for supervised release on the basis of good time credit, which typically results in a 15% reduction of the time they spend in prison.²¹⁰ Some states have adopted reentry programs that provide services and supervision to inmates upon release; these states have seen some success in the form of diminished recidivism and crime rates.²¹¹ The federal system could develop similar back-end diversion programs that would provide inmates with resources to assist them upon release. Given that these individuals have been separated from society for long periods of time and will be subject to numerous debilitating regulations upon reentry, it seems illogical not to provide them with such assistance. Programs that offer vocational support would be particularly helpful, as would programs that offer treatment for drug and alcohol abuse. While these programs would not completely avoid subjecting defendants to collateral consequences, they could at least offer them the tools necessary to overcome the obstacles such consequences impose.

204. IND. CODE § 35-38-9-2 (2016).

205. *Id.* § 35-38-9-4.

206. *Id.* § 35-38-9-5. Indiana does not allow for expungement of the records of individuals who have been convicted of official misconduct, kidnapping, human trafficking, homicide, or sex crimes. *Id.* § 35-38-9-5(b).

207. Joseph C. Dugan, *I Did My Time: The Transformation of Indiana's Expungement Law*, 90 IND. L.J. 1321, 1343 (2015).

208. Osler & Bennett, *supra* note 2, at 129. States differ in their provisions of parole and supervised release; this Note will focus on the federal system, for consistency.

209. U.S. SENTENCING GUIDELINES MANUAL § 1A1.4d (U.S. SENTENCING COMM'N 2015).

210. *See* 18 U.S.C. § 3624(b) (2012).

211. *See, e.g.*, MICH. PRISONER REENTRY INITIATIVE, 2010 PROGRESS REPORT 15 (2010), http://www.michigan.gov/documents/corrections/MPRI_2010_Progress_Report_343664_7.pdf [<https://perma.cc/62NP-XBCB>] (noting that the number of parolees returning to prison within three years fell from one in two to one in three since the advent of the MPRI, that the prison populations in Michigan is (safely) at its lowest level since 1999, and that the number of serious crimes decreased by about 50,000 between 2006 and 2009).

Recent years have also seen the advent of problem-solving courts, such as drug courts and therapeutic courts. “Problem-solving courts abandon the traditional model of adjudicating guilt or innocence. Instead, the courts assume guilt and focus on rehabilitation, seeking to address and resolve the underlying cause of the criminal activity”²¹² Drug courts, for example, are characterized by diversion, treatment, a nonadversarial approach, and ongoing judicial supervision.²¹³ Upon successful completion of treatment, defendants graduate, after which their records may even be sealed.²¹⁴ Another alternative proposal to help mitigate the effects of convictions is to allow *all* graduates from drug and therapeutic courts to have their records sealed, not only those who have not committed felony offenses. Ultimately, even if participants do not qualify to have their records sealed, they are arguably rehabilitated, at least with respect to their addictions. These participants are therefore less likely to commit drug-related offenses again.

While these alternative solutions may help mitigate the problems that criminal defendants face after conviction, the most effective solution would be one that works to reduce conviction rates in the first place. Prosecutors possess a great deal of power in our criminal justice system, and they should use this power to help defendants reform, not just to make them pay for their transgressions. Ideally, prosecutors will turn to DPAs and NPAs in the noncorporate context to help them achieve there what they have managed to achieve with corporations: decreased collateral devastation.

CONCLUSION

The criminal justice system in the United States is cyclical. By imposing harsh collateral consequences on convicted defendants, the system essentially ensures that these individuals will have little to no chance of ever leading normal lives after conviction. It should come as no surprise, then, that approximately two-thirds of released individuals are rearrested within three years.²¹⁵ Although prosecutors readily defer the prosecution of corporate defendants, they do not offer the same option to noncorporate defendants at nearly the same rate. This notable disparity in treatment serves to increase the racial and socioeconomic stratification that is rampant in the system by ensuring that wealthy, usually white, corporate defendants are not subjected to criminal convictions or any of their attendant consequences, while continuing to subject minority defendants with little bargaining power to the criminal process. In order to correct this inequality, prosecutors should seek to understand all of the defendants they encounter in terms of their humanity. While prosecutors already consider corporate personhood in deciding to

212. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, AMERICA’S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 15 (2009), <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20217&libID=20187> [https://perma.cc/256L-AGSD].

213. *See id.* at 16.

214. *See id.* at 17–18.

215. DUROSE, *supra* note 120, at 1.

defer prosecutions of corporate defendants, they should give similar consideration to the personhood of noncorporate defendants. With an eye toward avoiding the devastating fallout that collateral consequences of criminal convictions often impose on noncorporate defendants, prosecutors should offer more deferred-prosecution and nonprosecution agreements to these individuals.