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# Funding Favored Sons and Daughters: Nonprosecution Agreements and "Extraordinary Restitution" in Environmental Criminal Cases

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## **FUNDING FAVORED SONS AND DAUGHTERS: NONPROSECUTION AGREEMENTS AND “EXTRAORDINARY RESTITUTION” IN ENVIRONMENTAL CRIMINAL CASES**

*Paul J. Larkin, Jr.\**

*Over the past eight years, the federal government has entered into more than two hundred nonprosecution agreements with corporations in white-collar crime cases. In such agreements the government promises to cease its investigation and forego any potential charges so long as the corporation agrees to certain terms. And there’s the rub: given the economic realities of just being charged with a white-collar crime these days, corporations are more than willing to accept nonprosecution agreements. Prosecutors are cognizant of this willingness, as well as of the fact that these agreements are practically insulated from judicial review. This results in the prosecution possessing a seemingly unfettered discretion in choosing the terms of a nonprosecution agreement. The breadth of this discretion is nowhere more apparent than in environmental criminal cases. Nonprosecution agreements in such cases have begun to require corporations to donate monetarily to a nonprofit of the government’s choosing. Indeed, in 2012 British Petroleum agreed to pay more than \$2.394 billion to nonprofit agencies. This Article critiques this practice by highlighting the inconsistencies between nonprosecution agreements and plea bargaining—the latter are subject to judicial review while the former are not—and unearthing the differences between these payments and any common-law understanding of restitutionary principles. The Article then suggests that the practical result of these nonprosecution agreements is that prosecutors are diverting money that ought to be paid to the Treasury to government-chosen nonprofit agencies, a power constitutionally granted to legislative actors. Finally, the Article concludes by suggesting a modest reform: judicial review by a United*

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*States magistrate judge, so as not to run into any Article III concerns, to ensure that prosecutors do not take advantage of the nonprosecution-agreement process.*

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## I. INTRODUCTION: THE RISE OF NONPROSECUTION AGREEMENTS IN CORPORATE CRIMINAL INVESTIGATIONS

Over the last two decades, the federal government has often used “nonprosecution” or “deferred prosecution agreements” to resolve corporate investigations in lieu of a civil (or administrative) settlement and short of a criminal trial.<sup>1</sup> The agreements include a mixture of pretrial diversion, plea bargains, and consent decrees.<sup>2</sup> In these undertakings, the government agrees to close an investigation and dismiss any outstanding charges in return for the target’s acceptance of certain conditions demanded by the government.<sup>3</sup> This

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1. These agreements have existed since at least 1993, but they have become numerous only in the past decade. For a list of agreements from 1993 to 2007, refer to Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 938–57 (2007). The difference between the two agreements, which can be quite important, is that no charges are filed in connection with nonprosecution agreements, whereas when charges already have been filed, if the defendant satisfactorily complies with the agreement, the charges are dismissed in the case of deferred prosecution agreements. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-636T, CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ’S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS 4, 10–11 (2009) [hereinafter GAO PRELIMINARY OBSERVATIONS], available at <http://www.gao.gov/assets/130/122853.pdf>. The number of nonprosecution and deferred prosecution agreements is approximately the same. See *infra* note 7. For simplicity’s sake, I will use the term “nonprosecution agreements” to refer to both types of settlements.

2. Because nonprosecution agreements may avoid the need for an indictment and conviction to alter a corporation’s behavior, they resemble the type of pretrial diversion practices that once were used to avoid scarring juveniles with a criminal record. See Benjamin S. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1864, 1866 (2005). Given the quid pro quo exchange between the government and a corporation, the agreements resemble plea bargains, with the (important) exception that nonprosecution agreements do not (and cannot) contemplate incarceration. Insofar as they require a firm to change its business practices and agree to allow an independent third party to monitor the company’s compliance with the settlement, these agreements have an affinity for consent decrees. For a discussion of consent decrees in private and public law contexts, refer to RICHARD A. EPSTEIN, *ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE* (2007); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

3. There have been informal methods of disposing of criminal cases for as long as there have been criminal cases. A common example may be the practice of making a shoplifter caught in the act pay for whatever he tried to steal and agree not to return to the store for some specified period. See, e.g., Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 64 n.78 (1982). The type of nonprosecution agreements discussed in this Article are more formal than that type of settlement, and approach, if not match, the formality associated with plea agreements. For a discussion of alternative dispositions of criminal cases, refer to *Developments in the Law—Alternatives to Incarceration*, 111 HARV. L. REV. 1863 (1998).

quid pro quo may impose a host of requirements on the target: paying a fine and restitution, cooperating with the government in the investigation of particular individuals (e.g., senior management) or other companies (e.g., coconspirators), adopting or beefing up a corporate compliance program, revising the corporation's internal financial procedures, dismissing corporate officers or directors, and agreeing to the appointment of an independent monitor acceptable to the government to oversee the company's compliance efforts.<sup>4</sup> The ostensible purpose of these agreements is to dispose of a particular criminal case, but the Justice Department has also used them to establish a new paradigm of corporate governance.<sup>5</sup> The difference is that the government uses litigation, rather than legislation or regulation, to achieve its goals.<sup>6</sup>

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4. James R. Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, in CIVIL JUSTICE REPORT 2012 1, 14 (Ctr. For Legal Policy at the Manhattan Inst., 2012); Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 52–57 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) [hereinafter PROSECUTORS IN THE BOARDROOM]; GAO PRELIMINARY OBSERVATIONS, *supra* note 1, at 4–5; Assistant Attorney General Lanny Breuer, Remarks as Prepared for Delivery at IBC Legal's World Bribery & Corruption Compliance Forum (Oct. 23, 2012), *transcript available at* <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-121023.html>.

5. See Garrett, *supra* note 1, at 858 (“[S]tructural reform is a new goal for federal criminal law.”); Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. POCKET PART 312, 315 (2007), <http://yalelawjournal.org/images/pdfs/528.pdf> (“The purpose of corporate prosecutions is not to punish but instead to change corporate cultures through agreements that deal directly with internal governance. While it is questionable whether the government has the expertise to tell corporations how best to govern themselves, the focus on how businesses will operate in the future is now a central feature of corporate criminal investigations.”). Commentators have argued that the Justice Department has come to use these agreements more frequently because it learned that the traditional approach to corporate criminal responsibility largely has been unsuccessful. See, e.g., Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, in PROSECUTORS IN THE BOARDROOM, *supra* note 4, at 68–76; Henning, *supra*, at 313; Peter Spivack & Sujit Raman, *Regulating the “New Regulators”*: *Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 180 (2008). The theory is that the government cannot stop “crime in the suites” simply by pursuing individual cases because it can never catch enough white-collar crooks to make a difference. Only reforming the way that companies manage their business and funds will achieve that result. See, e.g., Spivack & Raman, *supra*, at 161 (footnotes omitted).

6. Pursuing a legislative remedy to alter corporate conduct would encounter stiff opposition from the business community and its allies in the legislature. The argument that “regulation costs jobs” has a particular salience today, when we still are suffering from the effects of the 2008 economic recession. Criminal prosecution avoids those problems. There is a sufficient populist distrust of “Corporate America” that actual and potential offenders are not likely to generate sympathy among the electorate. Legislators shy away from being perceived as interfering in a criminal investigation, and they fear winding up on the wrong side of a guilty verdict or plea. Unless the Justice Department makes the mistake of pursuing a weak case on the facts or law against a sympathetic target, no one on Capitol Hill or in the public will express outrage at the

The Justice Department has entered into more than two hundred such agreements over the past eight years, principally in white-collar crime cases.<sup>7</sup> The annual dollar value of these agreements has escalated from \$289 million in 2008 to an excess of \$3 billion since 2009.<sup>8</sup> The increasing number of such agreements, as well as the Department's institutionalization of their use, together make evident that this practice has become a permanent feature of federal criminal prosecutions.<sup>9</sup>

Occasionally, nonprosecution agreements contain a rather novel condition. They may require the target of an investigation to engage in some form of community service or to contribute to a charitable entity. Recently, for example, the federal government required the Gibson Guitar Corporation to pay a \$300,000 fine for an alleged violation of an import law and to make a \$50,000 "community service payment" to the National Fish and Wildlife Foundation (NFWF) for the benefit of the environment.<sup>10</sup> But that contribution is

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resolution of a criminal case agreed to by all parties. That is true even when the agreement contemplates ongoing supervisions by a third party. The public is accustomed to the concept that an offender on probation or parole must report to an officer who monitors the offender's conduct to make sure that he walks the straight and narrow. The idea that a corporation is subject to a similar obligation would trouble few.

7. There were only seventeen such agreements from 1993 to 2003, but there have been 207 since 2004. Copland, *supra* note 4, at 3–4. Roughly 45 percent of the settlements have been nonprosecution agreements, and 55 percent have been deferred prosecution agreements. *Id.* at 5. Most agreements involve some form of white-collar crime, such as a violation of the fraud laws, which criminalize companies to offer bribes, kickbacks, or other financial payments to foreign government officials. *See* 18 U.S.C. §§ 1341, 1343 & 1346 (2006); *see also* Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (2006); Copland, *supra* note 4, at 4. The principal Justice Department components to make use of nonprosecution agreements are the Fraud Section of the Criminal Division, and the U.S. Attorney's Offices for the Southern and Eastern Districts of New York. Copland, *supra* note 4, at 4–5. Beginning in 2010, the Securities and Exchange Commission (SEC) announced that it, too, would use nonprosecution agreements to resolve investigations, and the SEC entered into its first such agreement later that year. *Id.* at 5. Banks, insurance companies, other members of the financial community, and companies involved in the health care industry have been the principal private parties to enter into nonprosecution agreements. *Id.*

8. Copland, *supra* note 4, at 4.

9. *See* Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 45 (2006) (footnote omitted) ("Since 2003 (the year of the conviction and disintegration of Arthur Andersen), every major federal case of corporate misconduct has been resolved without filing an indictment against the corporation. The Justice Department now routinely disposes of charges of corporate misconduct by entering into deferred prosecution or non-prosecution agreements with putative corporate defendants.").

10. Letter Containing a Deferred Prosecution Agreement from Jerry E. Martin, U.S. Att'y, M.D. Tenn., et al., to Donald A. Carr 1 (July 27, 2012) (on file with author). For a discussion of the Gibson Guitar case, *see for example*, RAND PAUL, GOVERNMENT BULLIES: HOW EVERYDAY AMERICANS ARE BEING HARASSED, ABUSED, AND IMPRISONED BY THE FEDS 105–19 (2012);

chicken feed compared to the one found in the Gulf Oil Spill case agreement. As part of a nonprosecution agreement that disposed of the criminal investigation of the massive 2010 Gulf of Mexico oil spill, British Petroleum agreed to pay approximately \$4 billion in penalties over five years, including \$2.394 billion to the NFWF and \$350 million to the National Academy of Sciences.<sup>11</sup> Other nonprosecution agreements have imposed similar obligations on other businesses.<sup>12</sup> This practice is done “off the books” because no

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Juliet Elperin, *Gibson Guitar Ignites Debate Over Environmental Protections*, WASH. POST, Nov. 13, 2011, [http://www.washingtonpost.com/national/health-science/gibson-guitar-ignites-debate-over-environmental-protections/2011/11/11/gIQAACDhN\\_story.html](http://www.washingtonpost.com/national/health-science/gibson-guitar-ignites-debate-over-environmental-protections/2011/11/11/gIQAACDhN_story.html); Kris Maher, *Gibson Guitar to Pay Fine Over Wood Imports*, WALL ST. J., Aug. 7, 2012, [http://professional.wsj.com/article/SB10000872396390443792604577573010767171448.html?mod=rss\\_law&utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+wsj%2Fxml%2Frs%2F3\\_7091+%28WSJ.com%3A+Law%29&mg=reno64-wsj](http://professional.wsj.com/article/SB10000872396390443792604577573010767171448.html?mod=rss_law&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wsj%2Fxml%2Frs%2F3_7091+%28WSJ.com%3A+Law%29&mg=reno64-wsj); James C. McKinley, Jr., *Gibson Guitar Settles Claim Over Imported Ebony*, N.Y. TIMES, Aug. 6, 2012, <http://artsbeat.blogs.nytimes.com/2012/08/06/gibson-guitar-settles-claim-over-imported-ebony/>; Andrew Revkin, *A Closer Look at Gibson Guitar's Legal Troubles*, N.Y. TIMES, Aug. 10, 2012, <http://dotearth.blogs.nytimes.com/2012/08/10/a-closer-look-at-gibson-guitars-legal-troubles/>; Erik Schelzig, *Gibson, Feds Come to Terms on Exotic Woods Case*, WASH. TIMES, Aug. 6, 2012, <http://www.washingtontimes.com/news/2012/aug/6/gibson-feds-come-to-terms-on-exotic-wood-case/>; Elana Schor, *Logging Law Rocked Hard as Tea Party, Enviro Battle over Gibson Guitar*, N.Y. TIMES, Sept. 27, 2011, <http://www.nytimes.com/gwire/2011/09/27/27greenwire-logging-law-rocked-hard-as-tea-party-enviros-b-64213.html?pagewanted=all&gwh=42D7ABDA60ED721A22833F13138813A2>; Harvey Silverglate, *Gibson Guitar Is Off the Feds' Hook. Who's Next?*, WALL ST. J., Aug. 19, 2012, <http://online.wsj.com/article/SB10000872396390443324404577594890622149010.html?KEYWORDS=gibson+guitar>; *Tennessee: Deal with Gibson Guitar Corporation Ends Case on Illegal Importation of Wood*, N.Y. TIMES, Aug. 7, 2012, [http://www.nytimes.com/2012/08/07/us/deal-with-gibson-guitar-corporation-ends-case-on-illegal-import-of-wood.html?\\_r=1](http://www.nytimes.com/2012/08/07/us/deal-with-gibson-guitar-corporation-ends-case-on-illegal-import-of-wood.html?_r=1).

11. See, e.g., Juliet Elperin, *BP Settlement a Boon to Conservation Group*, WASH. POST, Nov. 16, 2012, [http://www.washingtonpost.com/national/health-science/bp-settlement-a-boon-to-conservation-group/2012/11/16/ddcb2790-302b-11e2-a30e-5ca76eeec857\\_story.html](http://www.washingtonpost.com/national/health-science/bp-settlement-a-boon-to-conservation-group/2012/11/16/ddcb2790-302b-11e2-a30e-5ca76eeec857_story.html); Clifford Kraus & John Schwartz, *BP Will Plead Guilty and Pay Over \$4 Billion*, N.Y. TIMES, Nov. 15, 2012, [http://www.nytimes.com/2012/11/16/business/global/16iht-bp16.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/11/16/business/global/16iht-bp16.html?pagewanted=all&_r=0); Campbell Robertson, *Gulf Coast States at Odds on Penalties for Oil Spill*, N.Y. TIMES, Nov. 16, 2012, <http://www.nytimes.com/2012/11/17/business/energy-environment/gulf-coast-states-at-odds-on-penalties-for-oil-spill.html>.

12. In 2006, Operations Management International, Inc., agreed to “donate” \$1 million to the Alumni Association for the United States Coast Guard Academy, and \$1 million to the Greater New Haven Water Pollution Control Authority, as part of a deferred prosecution agreement for an alleged violation of the Clean Water Act. See *Deferred Prosecution Agreement Between the U.S. Attorney’s Office for the Dist. of Conn. and Operations Mgmt. Int’l, Inc.* (Jan. 17 & 24, 2006), available at [http://lib.law.virginia.edu/Garrett/prosecution\\_agreements/sites/default/files/pdf/operationsmanagement.pdf](http://lib.law.virginia.edu/Garrett/prosecution_agreements/sites/default/files/pdf/operationsmanagement.pdf). That year, FirstEnergy agreed to pay \$4.3 million to the Ottawa National Wildlife Refuge and to other community service projects in a deferred prosecution agreement regarding allegedly false statements made to the Nuclear Regulatory Commission. See Tom Henry, *FirstEnergy to Pay \$28 Million Fine for Lying; David Besse’s Punishment Largest in Nuclear Industry*, THE BLADE, Jan. 21, 2006, <http://www.toledoblade.com/local/2006/01/21/FirstEnergy-to-pay-28-million-fine-for-lying-Davis-Besse-s-punishment-largest-in-nuclear->

federal law authorizes the Justice Department to include such a demand in a nonprosecution agreement, or even empowers a district court to impose one on an offender after a conviction.

At least one U.S. Attorney's Office has termed those payments "extraordinary restitution."<sup>13</sup> That term is half right. The payment is *extraordinary* because it has no common law antecedent and no statutory authorization. But it is *not restitution* within the ordinary meaning of that a term—viz., a compensatory payment made to the victim of a crime. Nonprosecution agreements do not rest on a conviction—they substitute for one—and no money must be paid to a victim. Instead, the government compels a party to contribute to an organization of the government's choosing. The catch, however, is that the target of the investigation cannot claim the income tax deduction otherwise available under federal law for voluntary gifts.<sup>14</sup> In fact, because the payment is a condition of avoiding an indictment or trial, which could be tantamount to capital punishment for some businesses, "extraordinary restitution" payments are no more "voluntary" than shotgun weddings.

Congress,<sup>15</sup> the courts,<sup>16</sup> the academy,<sup>17</sup> and the bar<sup>18</sup> are still in the early stages of examining nonprosecution agreements. Those

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industry.html; E. Leslie Hoffman & Stuart Slaven, Jackson Kelly PLLC, *Deferred Prosecution Agreements Offer an Alternative to Trial*, ENERGY & ENV'T MONITOR, May 3, 2008, [http://eem.jacksonkelly.com/2008/05/deferred-prosec.html#\\_ftnref8](http://eem.jacksonkelly.com/2008/05/deferred-prosec.html#_ftnref8); see also Henry J. Shea, *A Worthy New Wrinkle in Restitution*, STARTRIBUNE, Mar. 19, 2005, [http://www.startribune.com/templates/Print\\_This\\_Story?sid=11210891](http://www.startribune.com/templates/Print_This_Story?sid=11210891) (discussing the use of "extraordinary restitution" in Minnesota). See generally Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1160–61 (2006) (discussing the deferred prosecution agreements with both FirstEnergy and Operations Management International, Inc., for Clean Water Act violations).

13. See, e.g., Shea, *supra* note 12; NEWBERGLAWOFFICE.COM, <http://www.newberglawoffice.com/sitebuildercontent/sitebuilderfiles/Extraordinaryrestarticle12-6-05.pdf>, (last visited Aug. 14, 2012) (stating that the U.S. Attorney's Office in Minnesota has used that term).

14. See PETER C. YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 1 n.1 (1991) (stating that the district court reduced the criminal fine that Allied Chemical Corp. paid by the same amount that Allied contributed to charity). The rationale for refusing a tax credit for such a payment would be to deny a target the ability to profit from its crimes. Cf., e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119 (1991) (noting the "fundamental equitable principle" that no one should profit by his own wrongdoing).

15. See H.R. 5086, 110th Cong. (2008) (proposed bill would require the attorney general to issue guidelines regulating use and content of nonprosecution agreements); *Deferred Prosecution: Should Corporate Settlement Agreements be Without Guidelines?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2008), available at <http://judiciary.house.gov/hearings/pdf/Terwiliger080311.pdf> [hereinafter *House Deferred*

discussions have added to an already rich literature about the utility of corporate criminal prosecutions.<sup>19</sup> The practice of forcing a party

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*Prosecution Hearing*]; 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 (Dec. 2009), available at <http://www.gao.gov/assets/300/299781.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-260T, CORPORATE CRIME: PROSECUTORS ADHERED TO GUIDANCE IN SELECTING MONITORS FOR DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS, BUT DOJ COULD BETTER COMMUNICATE ITS ROLE IN RESOLVING CONFLICTS (Nov. 19, 2009), available at <http://www.gao.gov/assets/130/123772.pdf>; GAO PRELIMINARY OBSERVATIONS, *supra* note 1, at 4, 10–11.

16. *See, e.g.*, *Downey v. Clauder*, 30 F.3d 681 (6th Cir. 1994); *United States v. Haile*, 795 F.2d 485 (5th Cir. 1986) (holding that the former Federal Probation Act, 18 U.S.C. § 3651 (repealed), does not authorize a district court to require a charitable contribution as a condition of probation); *United States v. John A. Beck Co.*, 770 F.2d 83 (6th Cir. 1985); *United States v. John Scher Presents, Inc.*, 746 F.2d 959 (3d Cir. 1984) (holding that the former Federal Probation Act, 18 U.S.C. § 3651 (repealed), does not authorize a district court to require a charitable contribution as a condition of probation); *United States v. Danilow Pastry Co.*, 563 F. Supp. 1159 (S.D.N.Y. 1983); *State v. Pieger*, 680 A.2d 1001 (Conn. App. Ct. 1996); *State v. Stellato*, 523 A.2d 1345 (Conn. App. Ct. 1987); *Kopas v. State*, 699 N.E.2d 1193 (Ind. Ct. App. 1998); *Ratliff v. State*, 596 N.E.2d 241 (Ind. Ct. App. 1992); *Campbell v. State*, 551 N.E.2d 1164 (Ind. Ct. App. 1990); *In re Storie*, 574 S.W.2d 369 (Mo. 1978); *In re Davis*, 946 P.2d 1033 (Nev. 1997); *State v. Dominguez*, 853 P.2d 147 (N.M. Ct. App. 1993); *In re Richter*, 409 N.Y.S.2d 1013 (N.Y. Ct. Judiciary 1977); *State v. Bizzle*, 585 N.W.2d 899 (Wis. Ct. App. 1998). *But see, e.g.*, *United States v. Restor*, 679 F.2d 338 (3d Cir. 1982) (stating in dictum that a district court may require community service as a condition of probation despite any specific authorization in the Federal Probation Act); *United States v. Tonry*, 605 F.2d 144 (5th Cir. 1979) (upholding probation condition that the defendant not run for political office or engage in political activity); *United States v. Arthur*, 602 F.2d 660, 664 (4th Cir. 1979) (upholding community service as a condition of probation).

17. *See, e.g.*, PROSECUTORS IN THE BOARDROOM, *supra*, note 4; Copland, *supra* note 4; John C. Coffee, Jr., *Deferred Prosecution: Has It Gone Too Far?*, NAT'L L.J., July 25, 2005, at 13; Christie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679 (2009); Garrett, *supra* note 1; Greenblum, *supra* note 2; Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007); Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89 (2006); Orland, *supra* note 9; Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434 (2007); Sylvia Shaz Shweder, Note, *Donating Debt to Society: Prosecutorial and Judicial Ethics of Plea Agreements and Sentences That Include Charitable Contributions*, 73 FORDHAM L. REV. 377 (2004); Richard A. Epstein, Op-Ed., *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14. *Cf.* Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695 (2001) (retired state judge discussing the novel sentencing practices in some state courts).

18. *See, e.g.*, *House Deferred Prosecution Hearing*, *supra* note 15, at 1–8 (statement of the Hon. George J. Terwilliger III), available at <http://judiciary.house.gov/hearings/pdf/Terwilliger080311.pdf>; Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225 (2006); Spivack & Raman, *supra* note 5; F. Joseph Warin & Jason C. Schwartz, *Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants*, 23 J. CORP. L. 121 (1997); Wray & Hur, *supra* note 12.

19. The literature on corporate criminal liability is enormous. For a sampling of some of the relevant discussion, see, for example, WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS (2006); SALLY S. SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL (2007);

that has not been convicted of any crime to underwrite a charity of the government's own choosing is just one of the public policy issues those agreements raise. The burden of this Article is to analyze that subject.

The first step is to understand where nonprosecution agreements fit within the criminal justice system. Two legal doctrines are relevant. The first is corporate criminal liability; the second is plea bargaining. Part II discusses each. The breadth and depth of those doctrines are relevant to the question whether a nonprosecution agreement is a voluntary undertaking that a target can accept or reject without paying an exorbitant price. If that is true, the benefits from such agreements may justify overlooking any warts that they may have. But if that choice puts companies at the risk of extinction, it can lead them to suffer corporate nonprosecution agreements as the only escape from an intolerable predicament. In other words, in order to determine whether nonprosecution agreements are no different from other types of voluntary agreements that the law allows parties to create, we need to know if corporate criminal liability and plea-bargaining rules create a background that more closely resembles the TV show *Let's Make a Deal* or the street hoodlum's demand "Your money or your life!" Part II also takes on that task.

Part III then analyzes nonprosecution agreements. It starts by explaining the provenance of these agreements and the legal controversies they raise, as well as the extraordinary restitution conditions that may be included in them. Part III ends by identifying the issues that nonprosecution agreements pose and offers an answer to those questions. It explains that the absence of two features critical to the legality of plea bargaining—legislative authorization of

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Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310 (2004); Michael Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395 (1991); John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833 (2000); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996); Gerard Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23 (1997); Note, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979).

permissible sanctions and judicial approval of a specific agreement as a condition to entry of any punishment—allows the government to abuse its charging power by requiring targets to make contributions to charities of the government’s choosing. That part also identifies a remedy—limited judicial review by a federal magistrate—that Congress should endorse to prevent this abuse of authority.

## II. CORPORATIONS AND THE CRIMINAL JUSTICE PROCESS

### A. *The Development of Corporate Criminal Liability*

#### 1. The Rationale for Having Rules of Corporate Criminal Law

Because corporations are artificial entities,<sup>20</sup> they could not commit a crime at common law; only their personnel could.<sup>21</sup> As the nation transitioned from an agrarian to an industrial society, the courts gradually chipped away at that doctrine,<sup>22</sup> and the legislatures took initial steps to overturn it.<sup>23</sup> In 1909 the Supreme Court abandoned it altogether. In *United States v. New York Central & Hudson River Railroad*,<sup>24</sup> the Court ruled that, just as a corporation may be held vicariously liable in tort for the negligent actions of its

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20. See, e.g., *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. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”).

21. See, e.g., *State v. Ohio R.R.*, 23 Ind. 362 (1864); *State v. Great Works Milling & Mfg. Corp.*, 20 Me. 41, 44 (1841) (“It is a doctrine then, in conformity with the demands of justice, and a proper distinction between the innocent and the guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation should be indicted.”); Anonymous Case (No. 935), (1701) 88 Eng. Rep. 1518 (K.B.) 1518 (“A corporation is not indictable, but the particular members of it are.”); 1 WILLIAM BLACKSTONE, COMMENTARIES \*476; Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U.L.Q. 393, 396 (1981); see generally Khanna, *supra* note 19, at 1479–80 & nn.4–12 (discussing early history of organizational liability).

22. See, e.g., *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. (2 Gray) 339 (1854) (corporation can be held criminally liable for failing to ensure navigation); Khanna, *supra* note 19, at 1479–82; LAUFER, *supra* note 19, at 12.

23. See Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 529 (2004). Early federal laws creating corporate crimes were the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.), and the Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)).

24. *United States v. N.Y. Cent. & Hudson River R.R. Co.*, 212 U.S. 509 (1909).

employees,<sup>25</sup> so, too, can a corporation be held vicariously criminally liable for its employee's misconduct.<sup>26</sup> Any other rule, the Court surmised, would immunize corporations for the manifold harms that a modern industrial economy can inflict on the public.<sup>27</sup> Today, federal and state criminal law exposes corporations to liability for a broad range of conduct committed by directors, officers, and employees in the exercise of their authority.<sup>28</sup>

That proposition is a well-settled legal rule, but it remains a controversial one. One camp argues that society long ago wisely abandoned a *laissez-faire* attitude toward the regulation of corporations,<sup>29</sup> that white-collar crimes can inflict the same damage as common law crimes,<sup>30</sup> and that the criminals who commit the former type of offense can be as morally culpable (even as

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25. See, e.g., Fischel & Sykes, *supra* note 19, at 334–35; e.g., *First Nat'l Bank of Carlisle v. Graham*, 100 U.S. 699, 702 (1879) (“Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application.”).

26. *N.Y. Cent.*, 212 U.S. at 514–16; see also, e.g., *United States v. A&P Trucking Co.*, 358 U.S. 121, 123–27 (1958) (establishing that the same rule applies to partnerships); *United States v. Adams Express Co.*, 229 U.S. 381, 389–90 (1913) (establishing that the same rule applies to joint stock association).

27. *N.Y. Cent.*, 212 U.S. at 495–96. The courts did not, initially at least, extend that rule to every offense. They concluded that some crimes could be committed only by individuals, not corporations. See *People v. Rochester Ry. & Light Co.*, 88 N.E. 22 (N.Y. 1909) (dismissing indictment for manslaughter); CHRISTOPHER STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 24–25 (1975).

28. See, e.g., 1 U.S.C. § 1 (2006) (stating that the terms “person” and “whoever” include corporations and other organizations); Arlen, *supra* note 19, at 838; Kathleen Brickey, *Corporate Criminal Liability: A Primer for Corporate Counsel*, 40 BUS. LAW. 129 (1984). An analytically distinct but closely related issue is whether individual corporate officers also should be held liable for the actions of subordinate personnel under the “responsible corporate officer doctrine.” See, e.g., *United States v. Park*, 421 U.S. 658 (1975); *United States v. Dotterweich*, 320 U.S. 277 (1943). The principal arguments in favor of personal liability are that a corporation can act only through individual officers and employees and that compliance can occur only if the law deters *them*. For example, Archer Daniels Midland Co. pleaded guilty to price fixing in violation of the antitrust laws and paid a \$100 million fine without suffering any long-term injury, because the company's stock rebounded the day after the plea agreement became public, closing at a fifty-two-week high. SIMPSON, *supra* note 19, at 110.

29. As one observer has put it: “The danger of unfettered private enterprise is that it degenerates into greed, ruthlessness, and deceit, to the oppression of the interests of those insufficiently cunning, skilled, wealthy, or powerful to protect themselves, and so polarizes the haves from the have-nots.” MICHAEL CLARKE, *BUSINESS CRIME: ITS NATURE AND CONTROL* 31 (1990).

30. For example, a local Indiana prosecutor prosecuted the Ford Motor Company in 1978 for reckless homicide for manufacturing the Pinto with a rear gas tank that it allegedly knew could explode in the case of a rear-end collision. See RICHARD T. CULLEN, ET AL., *CORPORATE CRIME UNDER ATTACK: THE FIGHT TO CRIMINALIZE BUSINESS VIOLENCE* (2d ed. 2006); Richard A. Epstein, *Is Pinto a Criminal?*, REG., Mar.–Apr. 1980, at 15 (discussing the Ford Pinto prosecution).

reprehensible) as those responsible for the latter.<sup>31</sup> Moreover, they contend that only the criminal justice system has the tools (e.g., grand jury subpoenas, immunity for cooperating witnesses) capable of uncovering instances of corporate misconduct.<sup>32</sup> Finally, only the

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31. See, e.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 195–96 (2004); SIMPSON, *supra* note 19, at 13–14, 90–95; Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 *LOY. L.A. L. REV.* 867, 879–80 (1994) [hereinafter Lazarus, *Assimilating Environmental Protection*]. That view has deep roots. See WILLIAM HAZLITT, *TABLE-TALK* 359 (Grant Richards ed., R & R Clark, Ltd. 1901) (1821) (“Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief, and are less amenable to disgrace or punishment. They neither feel shame, remorse, gratitude, nor goodwill.”), *quoted in* CELIA WELLS, *CORPORATIONS AND CRIMINAL RESPONSIBILITY* 1 (2d ed. 2001). For a good discussion of the wrongdoing of the rich and shameless, see SIMPSON, *supra* note 19, at 14–15 & nn.55–57.

32. Detection and investigation of white-collar crimes is an enormously difficult undertaking, one that takes even trained, dedicated, and experienced law enforcement officers and prosecutors a long time to get wind of a problem, to identify and interview witnesses, to sift through a warehouse or computer system full of documents, and to conduct the forensic analysis necessary to get to the bottom of complex financial instruments and transactions. The difficulties are legion. There are a limited number of FBI agents and Justice Department lawyers, and since 9/11 the Justice Department has reassigned to terrorism cases many agents and attorneys who could be tasked to investigate and prosecute white-collar crimes. Many traditional investigative techniques—e.g., interviewing victims, undercover or sting operations, etc.—do not work in a corporate setting. Following a paper trail is more difficult than investigating a package store robbery. Attorneys and agents are trained in the law and investigation, not necessarily in accounting, financial analysis, or statistics. Few such personnel have the training, skills, and experience in the industry being investigated, with the complex business arrangements that Wall Street has devised—e.g., credit default swaps—or in the intricate regulatory mechanisms that federal agencies have adopted in what sometimes must seem to them like a futile effort to keep up with the financial community. Employees fear losing their jobs more than employees desire to help law enforcement. Companies may fear adverse publicity and loss of consumer confidence more than they seek the protection of the criminal law and so may not report illegal conduct to law enforcement authorities. White-collar crimes cross state and national boundaries; new technologies offer ever more mobile ways to transfer information, records, and funds; and there is a monumental amount of information stored on computer systems, laptops, tablets, mobile phones, and in old-fashioned hard-copy files that must be found and digested in order to determine if a crime has occurred. Corporations often use decentralized networks and teams to manage projects, which makes it painfully time-consuming to interview knowledgeable parties and, when all is said and done, extremely difficult to pinpoint responsibility for a particular crime. Different corporate subcultures may have different attitudes toward risk taking or cooperating with the authorities. Corporate officials may have the know-how to exploit weaknesses in a firm’s accounting or electronic security features or, using modern computers and copying machines, to create authentic-looking documents to obscure their actions. Some corporate officers are willing to approach the line of illegality; some shy away from it. Some fear public humiliation, arrest, conviction, and imprisonment; others fear dismissal or loss of a bonus. Some are responsible citizens; others are scallywags. Personnel may come and go from division to division within a company or to other firms, industries, or locales, making it impossible to lay blame at the door of any one person or group. Some corporations see regulations as benign; others, as illegitimate. Corporations have the funds to mount an effective defense, oftentimes more than the government can devote to a particular case, and the political connections to make some investigations “go away.” The persons who can climb the corporate ladder have the skills to deflect blame onto

criminal law expresses the moral outrage and imposes the stigma<sup>33</sup> necessary to identify prohibited conduct as out of bounds—viz., conduct that should not be committed at all, rather than as merely subject to an economic tax.<sup>34</sup>

others. The financial rewards from financial chicanery exceed millions of dollars, which attracts a large number of highly educated and skilled players to Wall Street and elsewhere, and which creates an incentive for corporate insiders quickly to use their money-making opportunities, to obscure their dealings, and to depart before being detected. If a firm's conduct crosses international boundaries, federal investigators are at the mercy of foreign law enforcement agencies for their assistance in evidence gathering. And to top it off, it may be difficult to distinguish unethical or sharp business practices from crimes, with the result being that years of investigation can go for naught if the courts decide that the proven conduct does not violate federal law, however broadly it is read. *See, e.g.*, CLARKE, *supra* note 29, at 18–23, 25–26, 43; NEAL SHOVER & ANDY HOCHSTETLER, CHOOSING WHITE-COLLAR CRIME 93–95, 99 (2006); SIMPSON, *supra* note 19, at 45–49; STONE, *supra* note 27, at 50–69; Brown, *supra* note 23, at 526–29; Griffin, *supra* note 11, at 111–14. Even then, the government may not be able to uncover more than a fraction of business crimes without assistance from a whistle-blower. Deputizing a company to help the government enforce the law, the argument goes, is necessary and efficient. For a quote from DOJ Assistant Attorney General, Criminal Division, Michael Chertoff, see LAUFER, *supra* note 19, at 58 (“Banks are our first line of defense against money launderers, drug dealers, and even terrorists who would attempt to abuse our financial institutions.”). The burdens on law enforcement are so great that we are lucky that it can find and convict any villains in this enterprise.

33. A criminal conviction (sometimes even just a charge) also carries various collateral consequences that cannot be imposed in a civil or administrative proceeding but that, the argument goes, should be part of the overall sanction a corporation should suffer. A conviction can damage a corporation's stock prices, hamper its ability to obtain credit in the financial markets, debar it from competing for government contracts, cause the forfeiture of necessary business licenses, or disqualify the company from participation in federally funded programs, such as Medicare and Medicaid. *See, e.g.*, COPLAND, *supra* note 4, at 3, 15 n.19; JAMES R. COPLAND, *Regulation by Prosecution: The Problems with Treating Corporations as Criminals*, CIV. JUST. REP., Dec. 2010, at 7 n.82; Lazarus, *supra* note 31, at 880. For example, the SEC bars companies convicted of a felony from serving as auditors of publicly held corporations. *See* 17 C.F.R. 201.102(e)(2) (2012); Ainslie, *infra* note 44, at 110 & n.18. The Medicare and Medicaid Patients and Program Protection Act of 1987, Pub. L. No. 100-93, 101 Stat. 680 (1987), requires the Secretary of Health and Human Services (HHS) to exclude—or debar—from participating in any federal health care program individuals or entities convicted of certain crimes related to those programs, abuse, health care fraud, and controlled substances. *See* 42 U.S.C. § 1320a-7 (2006). The act also permits the Secretary to exclude individuals or entities convicted of certain other crimes. *Id.*

34. *See, e.g.*, SIMPSON, *supra* note 19, at 103 (“By far, the most common criticism of firm self-regulation is that it leaves the fox in charge of the henhouse.”); *id.* at 103–06; Michelle Kuruk, Comment, *Putting Polluters in Jail: The Imposition of Criminal Sanctions on Corporate Defendants Under Environmental Statutes*, 20 LAND & WATER L. REV. 93, 95 (1985) (arguing that, historically, regulatory violations were seen as “economic crimes,” with compliance as “merely a matter of economics”); Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2442 (1995) (arguing that only the criminal law expresses condemnation). Criminal liability is necessary in order to ensure that a corporation feels the pinch. Not every firm is subject to market pressure. *See, e.g.*, STONE, *supra* note 27, at 90–91. Some are a monopoly. Others manufacture goods—e.g., cryptographic software—that may be purchased only by the government. Those

By contrast, others argue that corporate criminal liability is ineffective, inefficient, and unfair. It is ineffective because there is no proof that corporate criminal liability deters crime or that it is a better deterrent than civil tort liability, especially when you consider the possible award of punitive damages for egregious wrongdoing.<sup>35</sup> Indeed, some argue that exposing a corporation to criminal liability creates a disincentive for a corporation to uncover employee misdeeds, since a business will be on the hook for every crime that it reports.<sup>36</sup> Corporate criminal liability is inefficient because the tort

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firms do not risk a loss of consumer acceptance for conviction of a crime, and their government business allows them to play one agency (e.g., the Defense Department) off another (e.g., the Justice Department). Criminal liability prevents wrongdoers from obtaining a competitive advantage over compliant firms, keeps law-abiding companies (and their personnel) from feeling like suckers, and gives a firm an incentive to hire capable, responsible managers, rather than scoundrels, to monitor employees' conduct. Holding a corporation vicariously liable for the actions of its personnel, therefore, gives the company a financial incentive to monitor the conduct of its officers and employees, to identify instances of actual or potential criminality, and to bring those cases to the government's attention. *See, e.g.*, RONALD G. BURNS, ET AL., ENVIRONMENTAL LAW, CRIME, AND JUSTICE 103 (2008); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 397–98 (3d ed. 1986); Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 835 (1927); Fischel & Sykes, *supra* note 19, at 321–22; Lazarus, *supra* note 31, at 880; James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 GEO. WASH. L. REV. 916, 916 (1991).

35. *See, e.g.*, SIMPSON, *supra* note 19, at 35. The reason given is that factors other than potential criminal liability—e.g., defeating rivals, staying ahead of new technology, finding new sources of capital—have a greater and more immediate effect on corporate conduct than potential criminal liability. STONE, *supra* note 27, at 40. In fact, the argument goes, corporate liability may have exactly the opposite effect. *See, e.g.*, SIMPSON, *supra* note 19, at 5–6; STONE, *supra* note 27, at 93; John C. Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago School View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 425 (1980); Garrett, *supra* note 1, at 882. Deterrence is not just a factor of the certainty, celerity, and severity of punishment. It also turns on an offender's commitment to crime as a lifestyle choice, the presence and strength of other deterrent or incentive factors such as the effect of crime on an offender's family, the economic alternative available to an offender, and the perceived subjective benefits of pursuing a criminal career (e.g., status in one's peer group). SIMPSON, *supra* note 19, at 28–35. If the public deems a law to be illegitimate or unjust, the response may be defiance, not compliance. *See, e.g.*, SIMPSON, *supra* note 19, at 49, 98; STONE, *supra* note 27, at 41; TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); YEAGER, *supra* note 14, at 9 (“As criminologists have long known, where laws lack legitimacy, violation rates are likely to be relatively high, other factors held constant.”); Peter N. Grabosky, *Counterproductive Regulation*, 23 INT’L J. SOCIOLOGY OF L. 347 (1995).

36. *See, e.g.*, Arlen, *supra* note 5, at 68–76; SIMPSON, *supra* note 19, at 100. Except in cases of large-scale environmental catastrophes or massive corporate fraud, the roadblocks to uncovering corporate crime are sufficiently numerous and steep that the government and the public may never learn about them. Aware of the difficulties of investigating corporate crime, the argument goes, corporate officers have been willing to gamble that their crimes or a subordinate's would never come to the government's attention within the limitations period or that, even if they did, the corporation would take the fall, not them. *See* Arlen, *supra* note 5, at 68–76; Arlen, *supra* note 19, at 835. Corporations therefore adopt lukewarm compliance plans and undertake tepid

system works more quickly than the criminal process, given the lower standard of proof, and imposes fewer constitutional requirements when prosecuting a claim.<sup>37</sup> Finally, corporate criminal liability is unfair to innocent employees, retirees, and stockholders. Though blameless, those individuals suffer a potentially crippling financial loss whenever a corporate criminal investigation is afoot.<sup>38</sup>

## 2. The Role of Nonprosecution Agreements in Corporate Criminal Law

Government officials and corporate officers are well aware of the pros and cons of corporate criminal liability, and they have used nonprosecution agreements to accommodate their conflicting interests.<sup>39</sup> Like a plea bargain, a nonprosecution agreement permits the government to publicly identify a business as responsible for a crime and to resolve a case favorably that might be difficult to prove at trial due to the complexity of the facts or the ambiguity of the law.

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internal investigations because they want to avoid bringing to the government's attention misconduct that would otherwise go undetected. *See* Richard Biersbach & Rachel Forfeiture, *Overenforcement*, 93 GEO. L.J. 1743, 1773–74 (2005). Moreover, the cost of monitoring a corporation's internal operations could exceed the fine that a firm would pay for an offense, making it more efficient to forego the internal controls necessary to identify or deter crimes by employees. *See* Arlen, *supra* note 5, at 68–76.

37. For example, the Fourth Amendment exclusionary rule does not require the suppression of illegally obtained evidence from a civil case. *See, e.g.,* *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding the exclusionary rule inapplicable to civil deportation proceedings); *United States v. Janis*, 428 U.S. 433 (1976) (exclusionary rule is inapplicable in federal civil tax enforcement proceedings).

38. Woodrow Wilson made that point in 1910:

You cannot punish corporations. Fines fall upon the wrong persons; more heavily upon the innocent than upon the guilty; as much upon those who know nothing whatsoever of the transactions for which the fine is imposed as upon those who originated and carried them through—upon the stockholders and the customers rather than upon the men who direct the policy of that business. If you dissolve the offending corporation, you throw great undertakings out of gear. You merely drive what you are seeking to check into other forms or temporarily disorganize some important business altogether, to the infinite loss of thousands of entirely innocent persons, and to the great inconvenience of society as a whole. Law can never accomplish its objects in that way. It can never bring peace or commend respect by such futilities.

Woodrow Wilson, *The Lawyer and the Community*, Address to the 33d Annual ABA Meeting, in 35 REPORTS OF THE ABA 427 (1910), *quoted in* STONE, *supra* note 27, at 58. Public knowledge of the pendency of a criminal investigation, to say nothing of a filed criminal charge, usually leads investors to lose confidence in the financial health of the company and sell their holdings, which can result in a dramatic drop in the corporation's stock price, the dismissal of employees, and even the bankruptcy of the company. *See* LAUFER, *supra* note 19, at ix, 27.

39. *See, e.g.,* Colquitt, *supra* note 17, at 716–18; Epstein, *supra* note 4, at 51–52; Vikramaditya Khanna, *Reforming the Corporate Monitor*, in PROSECUTORS IN THE BOARDROOM, *supra* note 4, at 228.

The government also effectively obtains some punishment for a target's alleged wrongdoing without inflicting the collateral damage that a conviction or charge wrecks on the company's employees. The corporate target also benefits. It avoids those harms and may not have to admit responsibility for misconduct that could provoke a tort or shareholder suit.<sup>40</sup> Finally, nonprosecution agreements serve the interests of third parties such as innocent employees, retirees, investors, and the market, all of which can be damaged by the ruination of a corporation.<sup>41</sup>

The triggering event for the current use of corporate nonprosecution agreements was the collapse of the energy conglomerate Enron Corporation and the ensuing criminal prosecution of its auditor, the accounting firm Arthur Andersen LLP.<sup>42</sup> Enron was one of several large-scale corporate frauds that occurred early in the new century.<sup>43</sup> The government charged Arthur Andersen with obstruction of justice by destroying documents pursuant to the firm's document-retention policy.<sup>44</sup> The Supreme Court ultimately vindicated Arthur Andersen by ruling unanimously that its employees had committed no crime.<sup>45</sup> Arthur Andersen's victory, however, was entirely pyrrhic. The conviction at the trial court forced the nine-billion-dollar, eighty-nine-year-old firm out of

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40. The practice of allowing targets to avoid admitting that they committed a crime is a controversial one. *See, e.g.*, Edward Wyatt, *Settlements Without Admissions Draw Scrutiny*, N.Y. TIMES, Feb. 24, 2012, <http://www.nytimes.com/2012/02/25/business/neither-admit-nor-deny-settlements-draw-judges-scrutiny.html?pagewanted=all&r=0>.

41. Those parties also can make their displeasure with a firm's conduct known to the corporation, particularly if the investor has a large financial stake in the company, such as a pension fund. In the case of privately held corporations, the referent is not the public, but the owners who do not manage the company.

42. *See* Copland, *supra* note 4, at 1–3; Epstein, *supra* note 4, at 46–47; Garrett, *supra* note 1, at 880.

43. The large-scale corporate frauds involving companies like Adelphia and WorldCom that surfaced early in the 2000s brought a sense of urgency to the problem of corporate crime. Congress responded with new legislation, *see* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.), and the president created a task force devoted to corporate fraud, *see* the Corporate Fraud Task Force, Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (2002). Emerging along with those responses was “a new competing paradigm”—the conviction that the government must do more than merely fine a corporation for wrongdoing, but *punish* it as well, in order to make sure that a firm could not slough off a fine as just a cost of doing business. Spivack & Raman, *supra* note 5, at 165.

44. *See* 18 U.S.C. § 1512(b)(2)(A)–(B) (2000); Epstein, *supra* note 4, at 46–47. For a summary of the facts of the Arthur Andersen case, *see* Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 107–08 (2006).

45. *See* *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

business, ruining its hundreds of innocent partners, the twenty-eight thousand innocent employees who lost their jobs, and the firm's innocent retirees, whose retirement income may have rested on Arthur Andersen's survival. Arthur Andersen's demise also hampered competition in the national accounting industry, which in turn injured the innocent public, by reducing the number of firms from five to four.<sup>46</sup> The Arthur Andersen prosecution, in short, was a debacle. Everyone lost: the accounting firm, the Justice Department, the public, and, most importantly, the innocent Arthur Andersen employees.

The Arthur Andersen case proved—as prosecutors themselves readily admit and as courts have recognized—that an indictment can be tantamount to a death sentence for business entities.<sup>47</sup> In the wake of Arthur Andersen's demise, the Justice Department issued several policy memoranda identifying factors that prosecutors should consider when making charging decisions in cases involving business organizations and institutionalizing the use of using nonprosecution agreements.<sup>48</sup> Corporations fear suffering Arthur

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46. See Copland, *supra* note 4, at 3; Epstein, *supra* note 4, at 47. Much of the harm caused to Arthur Andersen was due to the regulation providing that a conviction automatically debars a firm from appearing before the SEC. See *supra* note 33.

47. United States v. Stein, 435 F. Supp. 2d 330, 381–82 (S.D.N.Y.) (noting that “the threat of indictment” can be “a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees”), 440 F. Supp. 2d 315 (S.D.N.Y. 2006), 495 F. Supp. 2d 390 (S.D.N.Y. 2007), *aff'd*, 541 F.3d 130 (2d Cir. 2008); Wray & Hur, *supra* note 12, at 1097 (“[I]ndictment often amounts to a virtual death sentence for business entities.”). The authors are former Justice Department officials. *Id.* at 1094 nn.a1–aa1.

48. See Arlen, *supra* note 5, at 75–76; Copland, *supra* note 4, at 3; Memorandum from Mark Filip, Deputy Att’y Gen., to Heads of Dep’t Components and U.S. Attorneys, on Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008) [hereinafter Filip Memo]; Memorandum from Gary Grindler, Acting Deputy Att’y Gen., to Heads of Dep’t Components and U.S. Attorneys, on Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (May 25, 2010), available at <http://www.justice.gov/dag/dag-memo-guidance-monitors.pdf>; Memorandum from Craig S. Morford, Acting Deputy Att’y Gen., to Heads of Dep’t Components and U.S. Attorneys, on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008), available at <http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf> [hereinafter Morford Letter]; Memorandum from Larry D. Thompson, Deputy Att’y Gen., to Heads of Dep’t Components and U.S. Attorneys, on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at [http://www.justice.gov/dag/cftf/corporate\\_guidelines.htm](http://www.justice.gov/dag/cftf/corporate_guidelines.htm) [hereinafter Thompson Memo]. The Thompson Memorandum replaced the earlier Holder Memorandum on this subject. See Memorandum from Eric Holder, Deputy Att’y Gen., to Heads of Dep’t Components and U.S. Attorneys, on Bringing Criminal Charges Against Corporations (June 16, 1999), available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF>. Deputy Attorney General Larry Thompson issued the first memorandum, known as the “Thompson Memorandum,” that

Anderson's fate, so they jump when given this option and are willing to accept a wide range of onerous conditions that a prosecutor demands in order to avoid being charged with a crime. As one commentator colorfully put it,<sup>49</sup> "Corporations will thus dance to the government's tune—accepting the terms of deferred and non-prosecution agreements with hardly a whimper—to avoid the impact of a criminal prosecution."<sup>50</sup>

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identified various factors that government prosecutors should evaluate when deciding to bring charges against a corporation—such as the nature and seriousness of the offense, the existence of a history of similar wrongdoing at the corporation, and the consequences to innocent third parties from charging a corporation.

49. See Henning, *supra* note 5, at 315.

50. Federal criminal liability is not the only threat a corporation faces. Regulatory agencies may pursue their own investigations. For example, the SEC or the Environmental Protection Agency (EPA) may assist the Justice Department in a criminal investigation, but demand its own settlement with a targeted firm. Corporations may try to use nonprosecution agreements to resolve all potential federal liability in one fell swoop. See Sara Sun Beale, *What Are the Rules if Everybody Wants to Play?*, in PROSECUTORS IN THE BOARDROOM, *supra* note 4, at 216–40. Companies also face criminal and civil liability under state law. Federal criminal law generally does not preempt state law, and states may pursue their own criminal, civil, or administrative actions in state courts. Under the Supremacy Clause, U.S. CONST. art VI, cl. 2, Congress can expressly preempt state law when acting within its Article I power, but no federal law generally preempts state criminal laws or bars the states from pursuing their own nonprosecution agreements. See Beale, *supra*, at 204. Federal law can be deemed implicitly to preempt state law, but only in limited circumstances, such as where federal and state law conflict, federal law comprehensively regulates a particular field, or where implementation of state law would frustrate federal policy. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012). The federal criminal code does not generally displace state (or local) criminal law. See Beale, *supra* note 4, at 204. The Double Jeopardy Clause also does not preclude separate prosecutions by the federal and state governments or by separate states. See, e.g., *Heath v. Alabama*, 474 U.S. 82 (1985); *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959). Federal courts can enjoin proceedings in state courts only in very limited circumstances, such as where the state prosecution is for the alleged violation of a patently unconstitutional state law or where the prosecution is conducted in bad faith. See *Anti-Injunction Act*, 28 U.S.C. § 2283 (2006); *Younger v. Harris*, 401 U.S. 37 (1971); Beale, *supra*, at 204. State courts cannot enjoin prosecutions in other state courts or federal court. See Beale, *supra*, at 219. In a case involving an alleged large-scale fraud, for instance, one or more states may consider pursuing its own criminal or civil case against a corporation. That is particularly likely if the firm pleads guilty to federal charges, thereby estopping it from denying the facts underlying the plea, or if the states can piggyback their own cases on the fruits of the federal investigation. Defending multiple criminal and civil actions in different states can greatly lengthen the period when a corporation is exposed to damaging media stories, increase a corporation's defense costs, and enhance its potential jeopardy. Confronted with an onslaught of federal and state enforcement actions, a corporation may throw up its hands and try to resolve all of its criminal and civil liability in one agreement that everyone joins, regardless of the onerous conditions that it imposes. See *id.* at 216–40.

### B. *The Law Governing Plea Bargaining*

Lenny Bruce once said that, “[i]n the halls of justice, the only justice is in the halls.”<sup>51</sup> How right he was. At one time, the *éminence grise* of the legal profession would have been shocked to learn that, for all practical purposes, plea bargaining had replaced the adversary criminal trial process that we inherited from the common law.<sup>52</sup> Distinguished members of the bench and bar would have expressed (or at least feigned) outrage at the clandestine bartering of justice.<sup>53</sup> But not today.<sup>54</sup> Plea bargaining is rampant, increasingly so in fact.<sup>55</sup>

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51. Michael E. Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet In the Citadel*, 84 HARV. L. REV. 1, 6 (1970).

52. See Bruce P. Smith, *Plea Bargaining and the Eclipse of the Jury*, 1 ANN. REV. SCI. 131, 131 (2005) (“By 1860 . . . most felony cases in New York City . . . were resolved by guilty pleas rather than by jury verdicts.”); *id.* at 132 (“By the late 1920s, guilty pleas accounted for over 80% of felony convictions not only in New York, but in cities such as Chicago, Cleveland, and Los Angeles as well.”). For a concise history of the English and American common law criminal procedure, see for example, LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 20–27, 235–58, 383–418 (1993); JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2005); THEODORE F.T. PLUCKNET, *A CONCISE HISTORY OF THE COMMON LAW* 424–41 (5th ed. 1956).

53. See, e.g., GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH* 6 (2003); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 24–32 (1979) (collecting early twentieth century expressions of condemnation of plea bargaining by Roscoe Pound, John Henry Wigmore, and other then-contemporary luminaries). For the contrasting view that the “blue-collar” members of the bench and bar fully knew about, and commonly participated in, this practice, see MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 12 (1978); Alschuler, *supra*, at 26 n.139; Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC. REV. 247 (1979). Some commentators have said that participants in the criminal justice process went to great lengths to disguise the practice of plea bargaining as a “psychological defense against the inherent deficiencies of assembly-line justice, so characteristic of our major criminal courts.” ABRAHAM BLUMBERG, *CRIMINAL JUSTICE*, at xi (1967).

54. Scholars disagree when plea bargaining first arose. See, e.g., FISHER, *supra* note 53, at 12 (strong but isolated evidence of plea bargaining before the nineteenth century, but systemic evidence in the first half of that century); Alschuler, *supra* note 53, at 2 & n.9 (collecting authorities pointing to a seventeenth century origin); *id.* at 5–26 (arguing for a late nineteenth century origin).

55. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”); *Brady v. United States*, 397 U.S. 742, 752 n.10 (1970) (“It has been estimated that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty; between 70% and 85% of all felony convictions are estimated to be by guilty plea.”); BLUMBERG, *supra* note 53, at 30 tbl.2 (stating that the percentage of cases disposed of by trial from 1950 to 1964 ranged from a low of 2.41 percent to a high of 4.25 percent); Colquitt, *supra* note 17, at 696 (“Every two seconds during a typical workday, a criminal case is disposed of in an American courtroom by way of a guilty or nolo contendere plea. . . . Add in the millions of cases handled by county and municipal courts outside the state systems, and we are down to milliseconds.”).

Moreover, it has become respectable.<sup>56</sup> Courts once looked askance at the practice,<sup>57</sup> but today, even the Supreme Court sings its praises, calling it not only an “essential” component of the criminal process,<sup>58</sup> but “a highly desirable part for many reasons.”<sup>59</sup> Indeed, without plea bargaining, many argue that the criminal process would grind to a halt unless society were willing to increase by several thousand-fold the expenditures necessary to try criminal cases.<sup>60</sup> With more than 90 percent of all federal and state criminal cases disposed of by plea bargains today,<sup>61</sup> the criminal justice system would have to double in size just to increase the number of trials by a mere 10 percent.<sup>62</sup>

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56. See *Blackledge v. Allison*, 431 U.S. 63, 76 (1977) (“Only recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice. For decades it was a *sub rosa* process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges. Indeed, it was not until our [1971] decision in *Santobello v. New York*, 404 U.S. 257, that lingering doubts about the legitimacy of the practice were finally dispelled.” (footnotes omitted)).

57. See, e.g., *Whiskey Cases*, 99 U.S. 594, 606 (1878) (federal prosecutor lacked authority to bind the government in a plea bargain); *Pole v. State*, 47 So. 487, 489 (Fla. 1908); *Griffin v. State*, 77 S.E. 1132, 1136 (Ga. Ct. App. 1913); *Edwards v. People*, 39 Mich. 760, 762 (1878); *Deloach v. State*, 27 So. 618, 619 (Miss. 1900); *Swang v. State*, 42 Tenn. (2 Cold.) 212, 213–15 (1865); *Wight v. Rindskopf*, 43 Wis. 344, 354–55 (1877).

58. *Santobello*, 404 U.S. at 261; see also *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“[O]urs is for the most part a system of pleas, not a system of trials . . . . To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.” (emphasis in original); (internal citations and punctuation omitted)).

59. *Santobello*, 404 U.S. at 261. For a more lukewarm endorsement of plea bargaining, see *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (“Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system.”). Scholars credit the Supreme Court’s *Santobello* decision with the first public judicial approval of plea bargaining. See, e.g., HEUMANN, *supra* note 53, at 14. After *Santobello*, there were no more in-court “gibberish denials” of plea bargaining by prosecutors, defense attorneys, and judges. *Id.*

60. See, e.g., *Santobello*, 404 U.S. at 260. For the contrary view that plea bargaining is driven, not by case pressure, but by its utility in reaching appropriate case dispositions, see HEUMANN, *supra* note 53, at 25–26, 30–32, 156–57.

61. See *supra* note 55.

62. Plea bargaining’s apologists offer several rationales in its defense. See, e.g., *Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *Santobello*, 404 U.S. at 260–61 (1971); *Brady v. United States*, 397 U.S. 742, 751–52 (1970); DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 76–77, 95–99 (1966); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEASE OF GUILTY 1.8 (a) (v) (App. Draft 1967). Some argue that pleading guilty is a necessary first step in accepting responsibility and beginning the road to rehabilitation. See, e.g., *Brady*, 397 U.S. at 752 (1970); NEWMAN, *supra*, at 96–99. Cf. Harland, *supra* note 3, at 122 (“A common rationale advanced to support the use of criminal restitution is that it serves rehabilitative purposes.” (footnote omitted)). That claim is, to be polite, unpersuasive. In most cases prosecuted in state courts, which typically involve what are colloquially called “street crimes,” there is no legal or factual dispute about the defendant’s guilt.

Yet, despite the ubiquity of plea bargaining and the critical function that it plays in managing the criminal justice system, the Constitution plays little role in regulating the fairness of this practice.<sup>63</sup> The Constitution does not grant a defendant the right to

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Defendants plead guilty out of a desire for a reduced sentence or, in the case of a minor crime, just to get the matter behind them. *See* HEUMANN, *supra* note 53, at 156–57; NEWMAN, *supra*, at 26. Moreover, there are legitimate doubts as to whether imprisonment can rehabilitate offenders, and federal law instructs a sentencing judge not to consider the prospect of a defendant’s rehabilitation at sentencing. *See, e.g.*, 18 U.S.C. § 3582(a) (2006) (stating that a district court may not consider the possibility of rehabilitation when deciding whether to imprison an offender or for how long to incarcerate him); 28 U.S.C. § 994(k) (2006) (providing that the U.S. Sentencing Commission may not consider rehabilitation when promulgating guidelines); *Tapia v. United States*, 131 S. Ct. 2382, 2388–92 (2011); *Mistretta v. United States*, 488 U.S. 361, 367 (1989). *See generally* Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, GEO. J.L. & PUB. POL’Y 1, 8–10 (2012) (discussing the role of parole and rehabilitation). The belief that plea bargaining aids in the rehabilitative process is like the position of the drunk who grasps a street light: He does it, not for illumination, but for desperate support.

The most persuasive defenses of plea bargaining rest on considerations of practicality. There are too many cases for everyone to receive a trial, so some other disposition process is a necessity. Plea bargaining rationally and expeditiously disposes of cases in a manner that benefits all concerned. Defendants receive a reduced penalty, maybe even a favorable placement or recommendation by the judge regarding the place of confinement or treatment options. (In the federal system, the sentencing court can only recommend where a prisoner will be confined and what treatment opportunities he will receive. The authority to make those decisions rests with the attorney general and Federal Bureau of Prisons. *See, e.g.*, 18 U.S.C. §§ 3562(a), 3563(b)(9) & (b)(11), 3621(b) (e) & (f), 3583(c) (2006); *Tapia*, 131 S. Ct. at 2390–91. Prosecutors obtain a guaranteed conviction (and sometimes sentence, *see* FED. R. CRIM. P. 11(c)(1)(C) (stating that plea agreements may include a specific sentence to be imposed if the judge accepts the plea)), thereby avoiding the risk of an arbitrary acquittal. Judges avoid trials that are little more than “slow guilty pleas” that take time away from myriad other tasks, including presiding over trials where guilt truly is in dispute. (Of course, there are other, even less uplifting, motives for participants in the criminal process to negotiate pleas. For example, prosecutors maintain a high batting average for convictions. Defense counsel can pursue a high-volume practice that avoids all of the work necessary to prepare a case for trial. And judges avoid reversal and public censure by a higher court, as well as private criticism from their colleagues on the bench for not moving enough cases. *See, e.g.*, HEUMANN, *supra* note 53, at 24–26.) Victims are relieved from the minor burden of altering their schedules to fit the trial judge’s and the major burden of reliving their victimization in court. Those benefits, moreover, are the advantages of individual plea bargains. Viewed at the wholesale level, the practice of plea bargaining offers the criminal justice system systematic benefits of manageability and certainty. “Prosecutors’ offices are staffed, court calendars planned, and correctional facilities built in anticipation of these practices.” NEWMAN, *supra*, at 4. In sum, plea bargaining makes tolerable an otherwise unruly system.

63. That is one, but only one, of the criticisms launched against plea bargaining. Professors Albert Alschuler and Stephen J. Schulhofer are probably two of the leading critics of plea bargaining, and their articles catalog the theoretical and practical problems with this practice. *See, e.g.*, Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1122–49 (1976) (discussing reforms to plea bargaining); Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Stephen J. Schulhofer, *Plea*

plea bargain<sup>64</sup>—on the contrary, it guarantees him the right to a fair trial<sup>65</sup>—and it essentially imposes only four requirements, one on each participant. A defendant must enter a guilty plea voluntarily.<sup>66</sup> Defense counsel must adequately advise the defendant of the possible outcomes of a trial and guilty plea.<sup>67</sup> The prosecutor must keep his promises once the defendant pleads guilty.<sup>68</sup> And, before accepting a guilty plea, the trial judge must inform the accused of the charges against him, of the rights that the defendant waives by pleading guilty, including the right to a trial, and of the potential

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*Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

64. *See, e.g.*, *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (“[T]here is no constitutional right to plea bargain . . .”).

65. *See* U.S. CONST. amend. VI; *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”).

66. *See, e.g.*, *United States v. Ruiz*, 536 U.S. 622, 628–29 (2002); *Brady v. United States*, 397 U.S. 742, 748 (1970); Alschuler, *supra* note 53, at 12 (“[T]he formal requirement that a guilty plea be voluntary is at least as old as the first English treatise devoted exclusively to criminal law, Staundforde’s *Pleas of the Crown*.” (footnote omitted)).

67. *See, e.g.*, *Missouri v. Frye*, 132 S. Ct. 1399, 1406–07 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480–81 (2010); *Hill v. Lockhart*, 474 U.S. 52 (1985); *see also* BLUMBERG, *supra* note 53, at 112 (stating that counsel also must persuade the trial judge that “he has adequately negotiated the plea so as to preclude an embarrassing incident which might invite ‘outside’ scrutiny”).

68. *See, e.g.*, *Mabry v. Johnson*, 467 U.S. 504, 509–10 (1984); *Santobello v. New York*, 404 U.S. 257, 262 (1971). Before the defendant pleads guilty, the prosecutor can walk away from his offer. *See Mabry*, 467 U.S. at 507–08. Of course, the prosecutor cannot offer plea bargains based on illegitimate factors such as the defendant’s race or religion. *See, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Lies, deceit, and bribery also are verboten. *See Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev’d*, 356 U.S. 26 (1958) (“A correct statement of the applicable rule might be: a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must and unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).” (internal quotation marks omitted)). At one time there seemed to be a potential but vague proscription against the “vindictive” exercise of prosecutorial charging discretion. *See Blackledge v. Perry*, 417 U.S. 21 (1974). *Perry* held that the Due Process Clause prohibited the reindictment of a defendant on a felony charge after he challenged his misdemeanor conviction on appeal. *Id.* But neither *Perry* nor any later Supreme Court decision has ever made clear what the Court meant by the concept of unlawful “vindictiveness” or how far that proposition extends. The Court also has essentially rejected application of that ruling beyond its facts. For example, in *Hayes* the Court held that a prosecutor can lower the boom on a defendant who refuses to plead guilty to a lesser charge in order to take a chance on acquittal at trial by adding new charges. 434 U.S. at 357. After *Hayes* refused to accept a plea to larceny and a five-year prison term, the prosecutor charged him under the Kentucky recidivist statute, which had a mandatory term of life imprisonment. The Court upheld the prosecutor’s charging decision over the claim that *Perry* rendered it unlawful. *Id.* at 362–65. *Hayes* rendered *Perry* inapplicable to plea bargaining.

sentence that he faces.<sup>69</sup> Otherwise, the actual practice of plea bargaining<sup>70</sup> is largely unregulated.<sup>71</sup> In essence, the trial judge acts

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69. See, e.g., *Missouri v. Frye*, 132 S. Ct. 1399, 1406–07 (2012); *Henderson v. Morgan*, 426 U.S. 637, 645 & n.13 (1976); *Boykin v. Alabama*, 395 U.S. 238 (1969). Sometimes judges will sweeten the pot by offering a sentencing concession so that there will be no appeal in a case that might involve a questionable police practice. Other times, the judge may “encourage” defense counsel to “persuade” his client to “play along” with the process or face the judge’s wrath at sentencing. See, e.g., HEUMANN, *supra* note 53, at 63, 68–69.

70. The process generally works out in a standard fashion. Prosecutors and defense counsel dicker like general managers and sports agents over the outcome of a game neither one will play. Judges operate more like factory floor managers than jurists do as they process cases along an assembly line. Victims feel shunted to the side like Victorian children, who should be seen, but not heard. The defendant, of course, faces more immediate and more drastic choices. A guilty defendant who cooperates with the police and pleads guilty may receive a shorter sentence, but he runs the risk of retaliation by whomever he dimes out. See, e.g., *Roberts v. United States*, 445 U.S. 552, 560 (1980) (holding that a sentencing court may enhance a defendant’s sentence based on his refusal to cooperate with the government in an investigation). See generally John C. Coffee, Jr., *Twisting Slowly in the Wind: A Search for Constitutional Limits on Coercion of the Defendant*, 1980 SUP. CT. REV. 211 (discussing limits on government-applied coercion). Or he can demand the trial that is his right and run the risk of receiving a stiffer penalty. See, e.g., *Corbitt v. New Jersey*, 439 U.S. 212 (1978); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); BLUMBERG, *supra* note 53, at 129 (“Another aspect of the anomic character of the judge’s conduct is reflected in the reluctance to place an individual on probation if he has been convicted after a jury trial.”). An innocent defendant may be made an offer he can’t refuse: invoke rights that the Constitution says should be cost-free in order to clear his name, or plead guilty in order to avoid a harsh penalty, maybe even an unconstitutional one. See, e.g., *Parker v. North Carolina*, 397 U.S. 790 (1970); *Brady v. United States*, 397 U.S. 742, 750 (1970) (establishing that due process does not render involuntary a guilty plea entered to avoid the risk of facing a death sentence under a statute later held unconstitutional). Perhaps, the prosecutor and judge will throw in credit for the time already spent in pretrial custody, which allows him to be released immediately. See, e.g., Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 789 (1970). Some defendants try to split the difference by pleading guilty while adamantly denying their guilt, what is known in the system as entering an “Alford plea,” named after the Supreme Court decision that upheld this practice. See, e.g., *Alford v. North Carolina*, 400 U.S. 25 (1970) (establishing that due process does not forbid a judge from accepting a guilty plea by a defendant who simultaneously professes his innocence of the charged crime). Cf. FED. R. CRIM. P. 11(a)(3), (b) & (e) (permitting defendant to enter a *nolo contendere* plea, a guilty plea where defendant does not contest or admit the charges). Some defendants feel manipulated by the system; others may do the manipulating themselves. See BLUMBERG, *supra* note 53, at 5 (criticizing the “bargain-counter, assembly line system of criminal justice” in large municipal criminal courts); NEWMAN, *supra* note 62, at 43, 46. Some defendants will lie to defense counsel about their guilt in the belief that only by claiming to be innocent will counsel work hard on their behalf. See HEUMANN, *supra* note 53, at 169. Whatever beliefs the parties to the process may hold, plea bargaining operates less like the trial in a John Grisham novel than like a cross between a Turkish bazaar and a Detroit assembly line. See *id.*

71. That does not mean it should be; no one takes that position. See *Missouri v. Frye*, 132 S. Ct. 1399, 1413–14 (2012) (Scalia, J., dissenting) (“The plea bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained.”). The federal government and the states impose additional requirements by statute or rule. See, e.g., FED. R. CRIM. P. 11; *Blackledge v. Allison*, 431 U.S. 63, 65–66 & n.1 (1977) (describing a pre-*Santobello* 13-question form used by North Carolina state court judges for taking a guilty plea); see also STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 14-1.5, 14-1.6 & 14-3.3 (3d ed.

like the civil servant working in a highway toll booth; his job is to make sure that everyone pays the fee before moving on.<sup>72</sup> The result, all agree, is neither pretty<sup>73</sup> nor desirable.<sup>74</sup>

But plea bargaining has two important saving graces.<sup>75</sup> First, a defendant cannot be punished unless a judge accepts his guilty plea

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1999) (describing the role of the judiciary in oversight of the plea bargaining process); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3 cmt. (1975). There also are certain informal practices that certain judges or courts may follow. *See, e.g.*, BLUMBERG, *supra* note 53, at 113–14 (explaining that some trial judges will allow defense counsel to present an impassioned, even if inevitably fruitless, plea on his client’s behalf, to help persuade the defendant that he has received effective representation); *id.* at 131–36 (providing an example of a judge advising and questioning a defendant until the judge gets the “right” answer); HEUMANN, *supra* note 53, at 68–69 (stating that some judges will discourage defense counsel from aggressively litigating cases that will result in a guilty plea); NEWMAN, *supra* note 62, at 17–18 (describing Michigan practice in which trial judges allow the defendant to enter an “open” plea of guilty, with the judge reserving the degree of murder or assault until after reviewing the presentence report); *id.* at 48 (stating that some judges will “telegraph” the benefit a defendant will receive from pleading guilty).

72. *See* BLUMBERG, *supra* note 53, at 130–31 (“A[n] . . . area of decision-making in which the judge is supposed to have a major role, but which he relinquishes in large measure, is as overseer of the nature of the guilty plea which an accused offers before trial. Metropolitan court judges are large content to ‘pass the buck’ to the district attorney who will frame the nature of the lesser plea to be accepted.”).

73. As then-Associate Justice William Rehnquist once said: “It should be recognized at the outset that the process of plea bargaining is not one which any student of the subject regards as an ornament to our system of criminal justice. Up until now its most resolute defenders have only contended that it contains more advantages than disadvantages, while others have been willing to endure or sanction it only because they regard it as a necessary evil.” William H. Rehnquist, Speech Before the National Conference on Criminal Justice (Jan. 25, 1973), *excerpted in* Colquitt, *supra* note 17, at 704. Professor Alschuler’s descriptions of the day-to-day practice of plea bargaining by prosecutors, defense counsel, and trial judges explain in detail why Justice Rehnquist was on the money. *See also* HEUMANN, *supra* note 53, at 36–37, 47–152 (describing the “brief drama” that is part of the plea bargaining process).

74. As a society, we ostensibly want to see offenders justly punished for the crimes they committed while allowing the innocent to stand trial without fear of risking a penalty for exercising their constitutional rights. In fact, we are forced to surrender to the reality that no more than a fraction of cases can go to trial, and most defendants will not plead guilty and abandon any chance at an acquittal without getting something in return. That reality forces us to accept a criminal justice system with the flexibility necessary to guarantee that negotiations will dispose of the vast majority of criminal cases, while hoping that it also operates under rules that keep the process from spiraling totally out of control. Of course, almost no one consciously makes that choice; most people make it by default. They punt it to the courts, prosecutors, police, and defense bar to work it out. The public asks only to be left in the dark about the resolution, and the system honors that request. *See* Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime in PROSECUTORS IN THE BOARDROOM* *supra*, note 4, at 18; Barkow, *The Prosecutors Regulatory Agency*, *PROSECUTORS IN THE BOARDROOM*, *supra* note 4, at 188; HEUMANN, *supra* note 53, at 169. The result is that most people are oblivious to the “iceberg-” and “pandemonium-” like characteristics of the day-to-day workings of the criminal justice mechanism in local state court systems that lend a patina of respectability to the plea bargaining process, a process well described in BLUMBERG, *supra* note 53, at 131–37, 179 and HEUMANN, *supra* note 53, at 36–37, 47–152.

and imposes a sentence. That is a nontrivial safeguard. Rationality and procedural regularity have been two of the safeguards that the criminal justice system has demanded of the actors in that process for the last fifty years in order to constrain the exercise of governmental power and avoid arbitrariness and caprice.<sup>76</sup> The judiciary has been a critical ingredient in that process. One need not endorse the highfalutin proposition that federal and state court trial judges are “palladiums of liberty”<sup>77</sup> in order to agree that they are better at policing the government than the government’s own officers would be. Prosecutors, like police officers, are involved in “the often competitive enterprise of ferreting out crime,”<sup>78</sup> and they have been known to strike not just “hard blows,” but “foul ones” too.<sup>79</sup> Prosecutors also are people. People get their dander up when someone (say, a defendant or his attorney) annoys them (for example, by aggressively filing pretrial motions), particularly when that irritation seems pointless (as when a defendant has no tenable claim of innocence). Annoyance can turn into pique, then anger, followed by retaliation.<sup>80</sup> Atop that, senior prosecutors are often elected or appointed political officials,<sup>81</sup> and no politician is immune from influence by nonlegal considerations, especially when election time draws near.<sup>82</sup> Critics have assaulted plea bargaining on

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75. And a third, albeit less important. The Sixth Amendment Public Trial Clause requires a judge formally to pronounce a defendant guilty and impose his sentence in open court, which does keep the final disposition of a case from remaining a secret. *See In re Oliver*, 333 U.S. 257, 266–73 (1948). The clause, however, does not guarantee publicity for what transpires outside of court and so does nothing to expose “the secret negotiation sessions which become forever submerged in the final plea of guilty.” BLUMBERG, *supra* note 53, at 5.

76. The criminal justice system has maintained the demand for those requirements notwithstanding the shift from one focused entirely on the offender to one that also allows room for society to display concern for the victims of crime and the ripple effect that crime has on their families, friends, and the community. *See Harland*, *supra* note 3, at 126–27.

77. *Illinois v. Allen*, 397 U.S. 337, 346 (1970).

78. *United States v. Johnson*, 333 U.S. 10, 14 (1948).

79. *Berger v. United States*, 295 U.S. 78, 88 (1935).

80. *See HEUMANN*, *supra* note 53, at 122–24 (noting that prosecutors may retaliate against an attorney who files pretrial motions by, for example, refusing to disclose evidence in the file, refusing to negotiate a plea, etc.).

81. *See, e.g.*, 28 U.S.C. §§ 503, 541 (2006) (the president appoints the attorney general and U.S. attorneys); Beale, *supra* note 50, at 212 (noting that forty-three state attorneys general are popularly elected); Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012) (stating that voters generally elect senior local prosecutors).

82. *See, e.g.*, Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM, *supra* note 4, at 188 (“The NY AG may seek regulations [through nonprosecution agreements] that go too far or do not directly address the criminal behavior at issue in an effort to give the AG short-term political goodwill as opposed to long-term benefits

numerous grounds, but the fact remains that a plea agreement must result in a guilty plea formally accepted by a judge before the defendant must pay any price for what he allegedly has done.

The other important aspect of plea agreements also follows from judicial involvement in the process: a judge can impose only a punishment authorized by the legislature. Ultimately, that limitation traces its lineage to the “rule of legality,” an ancient proposition, known in Latin as “*nullum crimen sine lege*” and “*nulla poena sine lege*,” meaning that no crime can exist, nor can any criminal punishment be imposed, without first being identified in positive law.<sup>83</sup> Federal sentencing law reflects that principle. Federal courts lack authority to devise criminal sanctions on their own and can impose only the punishments that Congress has prescribed for conviction of a particular crime—e.g., imprisonment, a fine, probation, forfeiture, and restitution—not sanctions that the courts may devise independently.<sup>84</sup>

That is the lesson of the Supreme Court’s decision in *Ex parte United States*.<sup>85</sup> The district court there concluded that it possessed the inherent power to suspend imposition of the five-year mandatory-minimum sentence fixed by statute.<sup>86</sup> A unanimous Court reversed, stating, in no uncertain terms, that a district court lacks the inherent power to devise whatever it believes to be the appropriate sentence in a particular case. Allowing a court to craft its own sanctions, the Court reasoned, would authorize the court to disregard the legislative

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for the state or a sensible regime for an entire industry.”); William J. Holstein & Edward M. Kopko, *Spitzer’s Climate of Fear*, WALL ST. J., Nov. 23, 2004, <http://chiefexecutive.net/spitzers-climate-of-fear>; Michael G. Oxley, *Who Should Police the Financial Markets?*, N.Y. TIMES, June 9, 2002, <http://www.nytimes.com/2002/06/09/business/1-who-should-police-the-financial-markets-447650.html>; James Traub, *The Attorney General Goes to War*, N.Y. TIMES, June 16, 2002, <http://www.nytimes.com/2002/06/16/magazine/the-attorney-general-goes-to-war.html?pagewanted=all&src=pm> (“Eliot Spitzer is the most activist, or at least the most prominent, attorney general around.”); Bob Woodward, “*Watergate’s Shadow on the Bush Presidency*,” WASH. POST, June 20, 1999, <http://www.washingtonpost.com/wp-srv/politics/daily/june99/shadow20full.htm> (stating that Independent Counsel Lawrence Walsh obtained a grand jury indictment against former Secretary of Defense Caspar Weinberger on Friday, October 30, 1992, four days before the November 3 presidential election).

83. Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 178 (1937).

84. See 18 U.S.C. § 3551(a) (2006) (imprisonment, fines, and probation); *id.* § 3771(a) (restitution); 42 U.S.C. § 10607 (2006) (restitution).

85. 242 U.S. 27 (1916).

86. *Id.* at 37.

judgment as to what penalties are appropriate for a crime, authority that Article I vests in Congress.<sup>87</sup>

Does this mean that trial judges never impose punishments unauthorized by law? Unfortunately, no. Some parties in state court engage in what one commentator has labeled “ad hoc bargaining.”<sup>88</sup> The low visibility nature of most in-court criminal dispositions and the invisible nature of most plea bargaining mean that judges

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87. *Id.* at 42. The reasonableness of the district court’s sentence is immaterial. *Id.* at 42–43. As a result, a district court cannot award a victim restitution unless Congress has authorized the court to do so. *See, e.g., In re W.R. Huff Asset Mgmt. Co., LLC*, 409 F.3d 555, 564 (2d Cir. 2005) (“[T]he CVRA does not grant victims any rights against individuals who have not been convicted of a crime.”); *Gall v. United States*, 21 F.3d 107, 108 (6th Cir. 1994) (“[A] district court may order a defendant to pay restitution conditioned upon supervised release solely for crimes of which the defendant was actually charged and convicted.”). Moreover, district courts cannot impose a penalty not authorized by Congress, such as community service, even when it would accompany an authorized sanction, such as probation. *See, e.g., Downey v. Clauder*, 30 F.3d 681 (6th Cir. 1994); *United States v. Haile*, 795 F.2d 489, 491 (5th Cir. 1986); *United States v. John A. Beck Co.*, 770 F.2d 83 (6th Cir. 1985); *United States v. John Scher Presents, Inc.*, 746 F.2d 959, 963 (3d Cir. 1984) (explaining that the former Federal Probation Act, 18 U.S.C. § 3651 (repealed), does not authorize a district court to require a charitable contribution as a condition of probation); *United States v. Wright Contracting Co.*, 728 F.2d 648, 653 (4th Cir. 1984) (same); *United States v. Missouri Valley Constr. Co.*, 741 F.2d 1542, 1546–47 (8th Cir. 1984) (en banc); *United States v. Prescon Corp.*, 696 F.2d 1236, 1243–44 (10th Cir. 1982). *Cf., e.g., United States v. Turner*, 628 F.2d 461, 467 (5th Cir. 1980) (vacating lower court’s sentence that required payment of attorneys’ fees and travel expenses as condition of probation); *United States v. Jimenez*, 600 F.2d 1172, 1174–75 (5th Cir. 1979) (rejecting the First Circuit’s holding that conditioning probation on repayment of court-appointed counsel is a “fine” and holding that a fine “should be limited to monetary penalties that are provided for in criminal statutes”).

The Cruel and Unusual Punishments Clause of the Eighth Amendment also compels that rule. That clause traces its lineage to the English Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, ch. 2, which also outlawed “cruel and unusual punishments.” *Harmelin v. Michigan*, 501 U.S. 957, 968–69 (1991) (opinion of Scalia, J.); Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CALIF. L. REV. 839, 855–60 (1969). Historians disagree over the particular events that gave rise to that clause, but the more recent view is that Parliament enacted that provision to reign in actions like those of the infamous Lord Chief Justice Jeffreys of the King’s Bench during the Stuart reign of James II, who imposed sentences not authorized by statute or by the common law. *Harmelin*, 501 U.S. at 968–69 (opinion of Scalia, J.). That rule would apply here.

88. Colquitt, *supra* note 17, at 698. One commentator has characterized the typology as follows:

Ad hoc bargains exist in at least five forms: (1) the court may impose an extraordinary condition of probation following a guilty plea, (2) the defendant may offer or be required to perform some act as a quid pro quo for a dismissal or more lenient sentence, (3) the court may impose an unauthorized form of punishment as a substitute for a statutorily established method of punishment, (4) the State may offer some unauthorized benefit in return for a plea of guilty, or (5) the defendant may be permitted to plead guilty to an unauthorized offense, such as a “hypothetical” or nonexistent charge, a nonapplicable lesser-included offense, or a nonrelated charge.

*Id.* at 712 (citations omitted).

sometimes can get away with making it up as they go along.<sup>89</sup> Federal law does not allow that type of freelancing, however, at least not when a district judge plays a role.

Nonprosecution agreements are different. They do not involve a guilty plea, they do not require a judge to get involved, and they contain no safeguard against novel penalties. What is worse is that prosecutors know all this, and that is one of the reasons why these agreements should be closely scrutinized.<sup>90</sup>

### C. *The Hidden Issues in Nonprosecution Agreements*

Nonprosecution agreements appear to be all benefit and no cost: the company avoids a charge that exposes it to conviction and punishment, which would play havoc with its stock price and could include the loss of licenses, debarment from Medicare, Medicaid, and federal contracts, bankruptcy, or dissolution. The government protects the public interest (or claims a scalp, depending on your perspective) without the cost and risk of a trial. Judges have more time for other cases. The public sees a scallywag roughed up in the media and punished by a hard-charging prosecutor. Everybody wins from these informal, twenty-first century, plea-bargained, pseudo or informal consent decrees.<sup>91</sup>

But there may be more to the story. “Pseudo” is a legal term meaning “not really,” and even characterizing a nonprosecution agreement as an “informal” plea agreement gives it more legal heft than it merits. A plea bargain is an agreement between the prosecution and the defendant (sometimes involving the judge) over the charges to which the defendant will plead guilty or the sentence

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89. As one commentator (and former state court judge) has noted:

[M]any of the bargains struck are inappropriate, unethical, or even illegal. Judges and prosecutors have used the bargaining process to impose penalties including banishments, coerced charitable contributions, deprivation of rights unrelated to the crime at issue, forced military service, “scarlet letter” punishments, surrender of profits, and compelled waivers of appeal. They also have required pleas to nonexistent, inapplicable, or time-barred crimes. On the other hand, they have awarded benefits, such as agreeing to seal conviction records, in return for pleas of guilty.

*Id.* at 697–98 (citations omitted). One example is known as “sundown probation”—a form of banishment, meaning “get out of town before sundown.” *Id.* at 735–37.

90. See Barkow, *supra* note 82, at 179 (footnote omitted) (quoting one assistant U.S. attorney that the leverage prosecutors have over a corporation allows them to “get[] the sort of significant reforms you might not get even following a trial and conviction”); e.g., Wray & Hur, *supra* note 12, at 1138–70.

91. See Copland, *supra* note 4, at 2–3.

that he will or may receive. The agreement ordinarily is a prelude to a defendant's guilty plea, but the agreement itself does not have the force of a judgment of conviction; it is merely an "executory agreement."<sup>92</sup> Moreover, a defendant cannot agree to suffer a penalty that the trial court cannot impose.<sup>93</sup> For all of the warts that the plea-bargaining process may have, it remains a lawful dispute resolution mechanism for the two important reasons given above: no judgment of conviction can be entered without the active participation of a trial judge, and no penalty can be imposed that the legislature has not authorized in advance.

A nonprosecution agreement is different from a plea-bargained guilty plea. Like a plea agreement, a nonprosecution agreement is merely a contract solemnizing the result of the same type of give-and-take between the parties common to commercial and plea negotiations. Like a private contract, the terms may be whatever the parties wish. No statute, regulation, or rule defines what elements are required or out-of-bounds. The Constitution is irrelevant unless and until the government charges a target or seeks to enforce a nonprosecution agreement,<sup>94</sup> and the last result that either party wants is to go to court. Once a judge is drawn into a dispute over the agreement's terms or the parties' compliance, the judge has the

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92. *See Mabry v. Johnson*, 467 U.S. 504, 507–08 (1984) ("A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he convicted, and it is that conviction which gave rise to the deprivation of respondent's liberty at issue here." (footnotes omitted)).

93. Federal courts lack authority to create offenses. Only Congress can define crimes and affix their punishments. *See, e.g., United States v. Hudson*, 11 U.S. 32, 33 (1812). District courts may impose only the punishments set forth in the federal code. *See, e.g., 18 U.S.C. § 3551(a)* (2012) ("Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute . . . shall be sentenced in accordance with the provisions of this chapter . . ."). The Fourteenth Amendment Due Process Clause imposes a similar limitation on the States. The core meaning of that Clause protects a defendant by guaranteeing that he cannot be deprived of his life or liberty except by law. *See Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*."). An unauthorized penalty made up by a trial court on-the-spot hardly qualifies as a punishment authorized by law.

94. *See Mabry*, 467 U.S. at 504 (stating that a defendant does not have a constitutional right to enforcement of a plea agreement broken before he pleads guilty). The target of an investigation can challenge some of the government's investigative actions, such as the validity of a subpoena or a search warrant, but until there is a formal charge against the target, there is no actual criminal case that he can challenge in court.

ultimate say on what the agreement means and whether (and how) it can be enforced. The result is that nonprosecution agreements are, practically speaking, lawless in the Holmesian sense: there is no law or mechanism to police the parties' conduct.<sup>95</sup>

Nonprosecution agreements are therefore controversial, and commentators have criticized them on numerous grounds.<sup>96</sup> Some conditions raise particularly serious legal or public policy issues. In fact, some are quite dubious as a matter of law and ethics. Consider these examples:

- In a criminal prosecution of KPMG LLP for abusive tax shelters, the federal government coerced the company to cut

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95. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

96. See, e.g., Barkow *supra* note 4, at 179–97; Copland, *supra* note 4, at 9–12; Epstein, *supra* note 4, at 40–57; Khanna, *supra* note 4, at 229–30; Larry Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617, 627–30 (2011). A few critics urge the Justice Department to abandon this practice altogether, arguing that the agreements let off the hook corporations that should be publicly convicted and pilloried for their misdeeds. See, e.g., Garrett, *supra* note 1, at 856 & n.9 (quoting Ralph Nader's criticism that failures to convict corporations are a "shocking" and "systematic derogation" of the Justice Department's duty to seek justice); RUSSELL MOKHIBER, CRIME WITHOUT CONVICTION: THE RISE OF DEFERRED AND NON PROSECUTION AGREEMENTS, CORP. CRIME REP. (2005), available at [www.corporatecrimereporter.com/deferredreport.htm](http://www.corporatecrimereporter.com/deferredreport.htm). Most observers recognize that nonprosecution agreements are here to stay. Rather than tilt against windmills by arguing that the government should abandon nonprosecution agreements, commentators identify flaws in particular agreements or specific features that agreements contain. One flaw is that nonprosecution agreements bypass the normal criminal process and make the Justice Department both prosecutor and judge. See, e.g., Barkow, *supra* note 82, at 196; Garrett, *supra* note 1, at 857 ("[T]ypically [nonprosecution agreements] do not provide for judicial review of implementation or of any alleged breach . . ."); Henning, *supra* note 5, at 315 ("Deferred and non-prosecution agreements do not require judicial approval of the fairness of the terms or appropriateness of the monetary penalty, unlike a plea bargain."). The multi-factor analysis that the Justice Department uses to decide whether to ask a grand jury to indict a corporation makes predictability difficult and disparate treatment likely. Conditions in these agreements requiring structural changes in corporate practice have the same effect as regulations, yet they apply only to specific firms, not industry-wide, and are not subject to the type of cost-benefit analysis that the Office of Management and Budget (OMB) undertakes of proposed federal regulations. Some conditions, such as appointment of monitors, interfere with internal corporate governance and shareholder rights, thereby effectively preempting state law in the absence of any statute or regulation, and are rife with opportunity for favoritism and conflict of interest problems. The requirement that the company cooperate in an investigation pits the corporation against its own personnel. Agreements insisting that a company waive its attorney-client privilege deter corporate personnel from reporting potential misconduct. See, e.g., Spivack & Raman, *supra* note 5, at 180. There are no enforceable standards for the appointment, dismissal, or replacement of monitors, which leaves the matter ultimately in the Department's hands. Monitors have no incentive to reduce their oversight expenses, which must be paid by the corporation. And mandatory community service or charitable contribution requirements pose the risk that the government can direct payments to favored parties. See Arlen, *supra* note 5, at 67, 83 n.13; Anthony S. Barkow & Rachel E. Barkow, *Introduction*, *supra* note 4, at 4; Epstein, *supra* note 4, at 41, 59 n.5.

off funding that it previously had agreed to provide to its employees for their defense. The district court ruled that the government's actions unconstitutionally interfered with the employees' ability to mount a defense and so greatly jeopardized the likelihood of a fair trial that dismissal of the charges was appropriate, a decision and remedy that the Second Circuit upheld on the government's appeal.<sup>97</sup>

- As a condition of settling a prosecution of certain brokerage houses, the New York State attorney general insisted that the companies support new state legislation outlawing certain insurance contract features—viz., “contingent commission contracts.” Those provisions were not unlawful at the time of the settlement, and the settlement condition had the effect of compelling a company to take a public position on a controversial subject that the First Amendment ordinarily would have allowed the brokerage houses to decide on their own.<sup>98</sup> Settlement effectively forced the targets to agree to a waiver of constitutional rights that a judge could not have forced on them after a conviction at trial and that Congress could not have imposed as a sanction.
- Christopher Christie, former U.S. attorney for New Jersey and current governor of that state (but obviously not a master of the concept of irony), required Bristol-Myers-Squib to spend \$5 million to endow a chair in business ethics at his alma mater, Seton Hall University School of Law, as a condition of a deferred prosecution agreement.<sup>99</sup>

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97. See *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y.), 440 F. Supp. 2d 315 (S.D.N.Y. 2006), 495 F. Supp. 2d 390 (S.D.N.Y. 2007), *aff'd*, 541 F.3d 130 (2d Cir. 2008).

98. See *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310 (2010) (stating that the First Amendment protects corporations); Epstein, *supra* note 4, at 52–53.

99. See Arlen, *supra* note 4, at 67, 83 n.13; Anthony S. Barkow & Rachel E. Barkow, *Introduction*, *supra* note 4, at 4; Epstein, *supra* note 4, at 41, 59 n.5. Compare Patrick E. Hobbs, *Fighting the Infection of Unethical Behavior in Corporate Culture*, WALL ST. J., Dec. 8, 2006, <http://online.wsj.com/article/SB116554849782944325.html#articleTabs%3Darticle> (defending the contribution), with Richard A. Epstein, *Deferred Prosecution Deals Create Harmful Incentives*, WALL ST. J., Dec. 18, 2006, [http://online.wsj.com/article/SB116640272819652976.html?mod=todays\\_us\\_opinion](http://online.wsj.com/article/SB116640272819652976.html?mod=todays_us_opinion) (rebutting that view). In a footnote buried in a law review article, Christie tried to justify that condition on three grounds: (1) “[t]he idea for endowing the chair originated with counsel for Bristol-Myers,” (2) “[t]he only requirement from [his] Office was that the chair [be] endowed at a New Jersey law school,” and (3) “Rutgers University School of Law already had a chair in business ethics endowed by Prudential.” Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb*

Conditions such as these deserve special scrutiny. The remainder of this Article focuses on the last category of conditions—viz., compelled charitable contributions.

### III. THE PROBLEMS WITH “EXTRAORDINARY RESTITUTION” CONDITIONS

#### A. *The Justice Department’s Treatment of “Extraordinary Restitution” Conditions*

Justice Department policy approves the use of nonprosecution agreements but regulates their terms. The Department disapproves of conditions requiring a target to contribute to a “charitable, educational, community,” or similar organization unless it is a “victim of the criminal activity” or is “providing services to redress the harm caused by” the target.<sup>100</sup> The policy, however, expressly

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*Co.*, 43 AM. CRIM. L. REV. 1043, 1058 n.29 (2006). Said politely, those are rationalizations, not justifications.

100. Section 9-16.325 of the U.S. ATTORNEYS’ MANUAL (Rev. Feb. 2010) provides as follows:

Plea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to a charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant’s criminal conduct.

Such payments have sometimes been referred to as “extraordinary restitution.” This is a misnomer, however, as restitution is intended to restore the victim’s losses caused by the criminal conduct, not to provide funds to an unrelated third party.

Apart from the limited circumstances described below, this practice is restricted because it can create actual or perceived conflicts of interest and/or other ethical issues.

This section does not, of course, restrict a defendant’s own decision, outside the context of a plea agreement, deferred prosecution agreement or a non-prosecution agreement, to unilaterally pay monies to a charitable, educational, community, or other organization or individual, and then to request leniency from the judge at sentencing based upon such action.

This section also does not restrict “community restitution” payments made pursuant to 18 U.S.C. § 3663(c) (2006). That section provides guidance for such payments where the defendant is convicted under 21 U.S.C. § 841, § 848(a), § 849, § 856, § 861 or § 863. Among other factors, that section requires the absence of identifiable victims, as well as a nexus between the payment and the offense.

Neither does this section restrict the use of community service provisions in plea agreements, deferred prosecution agreements or non-prosecution agreements resolving environmental matters. United States Attorneys’ Offices contemplating such community service in a matter involving environmental crimes shall consult with the Environmental Crimes Section of the Environmental and Natural Resources Division, which has issued guidance to ensure that the community service requirements are narrowly tailored to the facts of the case. The guidance also requires that any funds paid by a defendant as community service be directed to an entity in which the

exempts “a matter involving environmental crimes.” Internal government policies are not judicially enforceable, however,<sup>101</sup> so the only recourse for an aggrieved party is to complain to a superior officer at the Justice Department. But in any case when one or more senior Department officials already have approved the agreement, an appeal would be little more than a formality.

Like most practices unregulated by law, nonprosecution agreements raise troubling public policy concerns. Consider the recent case of the Gibson Guitar Corporation. In 2012 federal agents raided Gibson Guitar’s factory looking not for heroin, explosives, or illegal firearms, but for guitar frets made from wood imported from India and Madagascar allegedly in violation of federal law.<sup>102</sup> The Justice Department ultimately agreed not to charge Gibson Guitar with an importation crime. In return (among other things) Gibson Guitar agreed to pay a \$300,000 fine and to make “a community service payment of \$50,000 to the National Fish and Wildlife Foundation” for it to benefit the environment. Gibson Guitar also “acknowledge[d] that no tax deduction may be sought in connection with” this payment.<sup>103</sup>

Of course, the government and a target could find community service or “extraordinary restitution” conditions mutually valuable. Requiring a target to make a charitable contribution enables the government to evade limitations on the amount of fines that could be imposed if the prosecution believes that the maximum fine provides an insufficient penalty.<sup>104</sup> The government also may find that such conditions have considerable public relations value, particularly in the community benefitting from them. A corporate target also might jump at the opportunity to engage in a charitable endeavor. In the short run, of course, a corporation will want to reduce publicity about the investigation and nonprosecution agreement and put the entire matter behind it. But a corporation may put a different spin on a nonprosecution agreement in the long run. Once the dust settles from

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prosecutors have no interest that could give rise to a conflict and that is legally authorized to receive funds.

101. See *United States v. Caceres*, 440 U.S. 741, 754–57 (1979) (refusing to exclude evidence obtained in violation of an agency’s electronic eavesdropping rules).

102. The Lacey Act makes it a crime to import flora or fauna in violation of a foreign nation’s laws. See 16 U.S.C. §§ 3371–78 (2006).

103. Letter Containing a Deferred Prosecution Agreement, *supra* note 10, at 3.

104. See Harland, *supra* note 3, at 125.

the criminal investigation and memories dim, a corporation could attempt to portray itself favorably as having contributed to a recognized charity—of course, without mentioning the event triggering that contribution.

Community service conditions in nonprosecution agreements, however, are problematic. Can the federal government require a target of an investigation to make a payment to an uninvolved third party as a condition of a nonprosecution agreement? Can the federal government demand that the target refuse to claim a tax credit for a charitable donation? Even if the federal government can do so, do we want to allow prosecutors to make those decisions? The initial step in deciding whether these payments are lawful or wise is to classify them, to find out what they are. It turns out that they are not what people say they are.

### *B. The Unauthorized Disbursement of Public Funds*

The first possibility is that the payments are fines. A fine is a financial penalty commonly used as a punishment for a corporation, because an artificial entity cannot be imprisoned, and for a person convicted of a small-scale offense, since the infraction is too minor to justify the severity and cost of imprisonment. Compulsory charitable contributions, however, are not fines. A fine is a punishment for *conviction* of a crime paid by an offender *to the government*.<sup>105</sup> A nonprosecution agreement substitutes for a conviction, and compulsory charitable contributions go to third parties, not the Federal Treasury.<sup>106</sup> A check payable to the “National Audubon Society” is not the same as one made out to the “U.S. Treasury.”<sup>107</sup>

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105. *See, e.g.*, *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 265–68 & nn.6–7 & 9–10 (1989); *Solem v. Helm*, 463 U.S. 277, 284 n.8 (1983); *Ingraham v. Wright*, 430 U.S. 651, 664 (1977); *United States v. Wright*, 930 F.2d 808, 810 (10th Cir. 1991); FREDERICK WILLIAM MAITLAND & FRANCIS C. MONTAGUE, *A SKETCH OF ENGLISH LEGAL HISTORY* 19 (photo. reprint 2010) (1915); *see also* II SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 540–41 (2d ed. 1898) (stating that fines were paid to the crown in lieu of imprisonment).

106. *See, e.g.*, *United States v. John Scher Presents, Inc.*, 746 F.2d 959, 963 (3d Cir. 1984) (“The probationary condition ordered by the district court merely requires the corporation to pay money. The only difference between this condition and a fine is that here the payee on the corporate checks would be a charitable organization rather than the United States Treasury.”).

107. In federal cases, the fine is paid to the clerk of the relevant district court. *See, e.g.*, 18 U.S.C. §§ 3611–12 (2006) (requiring that fines must be paid “as specified by the Director of the Administrative Office of the United States Courts,” pursuant to 28 U.S.C. § 604(a)(18) (2006));

Another possibility is that these payments are restitution.<sup>108</sup> That label, however, also is mistaken (the label “*extraordinary* restitution” should have been a clue)<sup>109</sup> and is unhelpful in any event. Federal courts lack inherent authority to award restitution in a criminal case.<sup>110</sup> The governing statutes require restitution to be paid to crime victims,<sup>111</sup> not third parties, and only after a *conviction*, which, again, a nonprosecution agreement avoids.<sup>112</sup> The result is that a nonprosecution agreement cannot justify an award of restitution, whether it is called “*extraordinary*” or “*run-of-the-mill*.”

Perhaps these payments can be deemed a voluntary contribution to a charitable organization as a sign of the subject’s good faith. That argument, however, does not accurately describe the scenario. The

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United States v. Haile, 79 F.2d 489, 490 n.1 (5th Cir. 1986) (“[S]aid fine in the amount of \$50,000 shall be paid into the Registry of the Court.”); H.R. REP. NO. 100-390, at 10 (1987); 28 C.F.R. § 0.22(e) (2012) (stating that the Executive Office for U.S. Attorneys is responsible for crafting DOJ’s fine-collection procedures); U.S. ATTORNEYS’ MANUAL § 3-12.1000 (1997).

108. There are two principal federal statutes authorizing restitution: the Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1227 (codified as 18 U.S.C. §§ 3556, 3663–64 (2006)), and the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. § 3663 (2006)).

109. Restitution is an ancient remedy originally devised, not to compensate the victim or his family for the loss suffered by a crime, but to “buy off” the victim’s clan in order to prevent violent retaliation that would further disturb the peace of the community. Over time, that rationale has been eclipsed by a concern to restore a victim to the position that he or she occupied before the crime. See Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 933 & n.18 (1984).

110. See, e.g., *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 564 (2d Cir. 2005); *United States v. Lachowski*, 405 F.3d 696, 698 (8th Cir. 2005); *United States v. Pawlinski*, 374 F.3d 536, 540 (7th Cir. 2004); *Gall v. United States*, 21 F.3d 107, 108 (6th Cir. 1994); *United States v. John Scher Presents, Inc.*, 746 F.2d 959, 963 (3d Cir. 1984). Cf. *Ex parte United States*, 242 U.S. 27 (1916) (holding that the district court lacks inherent power to devise a sentence apart from a statute); see also *supra* text accompanying notes 85–87.

111. See, e.g., Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A(a)(1) & (2) (2006); Crime Victims’ Rights Act, 18 U.S.C. § 3771(e) (2006); Victims’ Rights and Restitution Act of 1990, 42 U.S.C. § 10607(e)(2) (2006). In certain controlled substances cases in which there is no identifiable victim the district can order that restitution be paid to state victim-assistance or substance-abuse agencies, see 18 U.S.C. § 3663(c)(1)–(7) (2006), but there still must be a conviction “when sentencing a defendant *convicted of an offense*.” *Id.* § 3663(c) (emphasis added).

112. See 18 U.S.C. §§ 3551(a), 3663A(a)(1) & (2), 3771(e) (2006); 42 U.S.C. § 10607(e)(2) (2006); *United States v. Batson*, 608 F.3d 630, 633 (9th Cir. 2010); *United States v. Kyles*, 601 F.3d 78, 82–83 (2d Cir. 2010); *United States v. Speakman*, 594 F.3d 1165, 1175 (10th Cir. 2010); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 564 (2d Cir. 2005) (“[T]he [Crime Victims’ Rights Act] does not grant victims any rights against individuals who have not been convicted of a crime.”); *United States v. Cutter*, 313 F.3d 1, 6–9 (1st Cir. 2002); *United States v. Missouri Valley Constr. Co.*, 741 F.2d 1542, 1547 n.6 (8th Cir. 1984). The Model Penal Code is to the same effect. See MODEL PENAL CODE § 301.1(1) (Rev. A.O.D. 1981). Cf. *Kelly v. Robinson*, 479 U.S. 36, 53 (1986) (describing state restitution award as a criminal penalty).

subject of an investigation always can voluntarily contribute to a charitable organization, but a payment made to avoid or settle a criminal charge is not “voluntary,” certainly not when the subject cannot claim a tax benefit for it, as otherwise would be true.<sup>113</sup>

Think about the Gibson Guitar case. The nonprosecution agreement ending that investigation required Gibson Guitar to pay \$50,000 to NFWF. NFWF is not the Federal Treasury. It is “[a]n independent 501(c)(3)” charitable organization “chartered by Congress in 1984” that acts as “one of the world’s largest conservation grant-makers.”<sup>114</sup> The NFWF also is not a victim of Gibson Guitar’s crimes. The government did not prove that Gibson Guitar committed any crime—indeed, the nonprosecution agreement makes a powerful case that Gibson Guitar did *not* commit one—and any alleged harm occurred in India and Madagascar, not the United States. As for the payment being a charitable contribution, the agreement expressly states that it is not.

What authority, then, does the Justice Department have for demanding that companies like Gibson Guitar underwrite the work of organizations like the NFWF? The U.S. Attorneys’ Manual does not identify any authority, and the policy argument for creating it is weak.

The argument in favor of allowing “extraordinary restitution” in environmental cases is akin to the argument in favor of class actions: namely, the harm suffered by each individual is too small and too diffuse to justify the separate proceedings necessary to identify that harm and to dole out compensation for each victim. Only by empowering one party to act on behalf of the community of victims can justice be meted out efficiently. That argument has a surface plausibility to it. The harm suffered by each person might be too small for anyone to bring a tort action against an offender, and the costs of providing justice for environmental crimes might be prohibitive given the meager individual rewards. The problems with that result, however, more than outweigh any benefits it might bring.

To start with, at best that argument would require the Justice Department to ensure that all “extraordinary restitution” funds be

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113. See I.R.C. § 170 (2012).

114. Laysan Albatross, *About National Fish and Wildlife Foundation*, NAT’L FISH & WILDLIFE FOUND., <http://www.nfwf.org/Pages/WhoWeAre/home.aspx> (last visited Nov. 7, 2012).

spent exclusively in the community allegedly damaged by the environmental offense. Only that community, after all, was injured. Perhaps there is a local organization that could apply the necessary salve, for example, by planting trees in the damaged locale. Of course, if the claim is that a broad region was victimized—say, an entire forest the size of one of America’s national parks, such as Yellowstone, let alone the Gulf of Mexico—it becomes less likely that a local organization can remedy the aggrieved parties or vicinity.<sup>115</sup> Only a regional or national organization could efficiently remediate a problem of that magnitude, or more likely in fact, only the government itself. Of course, if only the federal government can remedy the insult, there is no justification for an “extraordinary restitution” payment; all money should go to the Federal Treasury. Also, requiring a party like Gibson Guitar to fund the work of a national organization—say, the National Audubon Society—looks less like a remedy for an identified harm and more like a payment to a crony. That purpose would be a difficult one for the government to defend because it more closely resembles extortion than restitution of whatever variety.

The problem only gets worse if the claim is that the ultimate fallout from the crime is a contribution to global warming or, as it is now called, “global climate change.” Were that the defense, a recipient could argue that it is entitled to spend the funds anywhere on the planet in support of any project that combats global warming in the slightest, now or someday, that seeks in some way to reverse the effects of that phenomenon, or that would educate and persuade the public to do something about it. The recipient even could spend the funds to hire additional personnel for any of those tasks or to raise funds for its work, because money is essential for communication. The result would be that there is effectively no limit on the uses to which a recipient could put funds it receives as part of any “extraordinary restitution” payment for remediation of global warming. Moreover, because any recipient also will argue that

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115. Yellowstone National Park is 3,472 square miles in size, making it larger than Rhode Island and Delaware combined. See *Yellowstone Fact Sheet*, NAT’L PARK SERVICE, <http://www.nps.gov/yell/planyourvisit/factsheet.htm> (last visited Oct. 16, 2012). Yellowstone is a pebble compared to the Gulf of Mexico, the world’s ninth largest body of water, which is approximately 600,000 square miles in size. See *Gulf of Mexico Initiative, General Facts about the Gulf of Mexico*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/gmpo/about/facts.html> (last visited Dec. 12, 2012).

“extraordinary restitution” monies are fungible and substitute for funds that could be devoted to other purposes, there is no realistic limitation on the use that could be made of the “extraordinary restitution” payments. And even if there were such a limitation, it would need to be clear and specific so that a recipient could easily know what was prohibited and the Department could readily enforce its limits. Otherwise, the information and enforcement costs make the entire effort unjustified. Under these circumstances, a requirement that the target of an investigation pay monies to an environmental organization dedicated to “doing something” about global warming is a charade. We might as well abandon any pretense of justifying the payment as a form of “restitution,” however defined.

Keep in mind that, unlike the common law of contracts, environmental law is a heavily politicized area. In the abstract, reasonable people should be able to disagree over the merits of environmental regulation while acknowledging the reasonableness of an opposing viewpoint. Unfortunately, that is not always the case. Environmental law touches a nerve in several different ways, and debates often generate more heat than light.<sup>116</sup> That controversy

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116. To start, environmental law has “redistributionist tendencies.” LAZARUS, *supra* note 31, at 24–28. The law imposes immediate, always easy-to-spot costs (e.g., higher production costs, lost jobs) on some parties (e.g., upstream businesses, current generations), while affording long-term, sometimes difficult-to-envison benefits (e.g., a marginally-smaller quantity of hazardous waste) to others (e.g., downstream residents, future generations). Parties bearing short-term economic costs might be more willing to suffer that burden, to sacrifice their wellbeing for the next generation if scientific evidence proved the inevitability of long-term harms. But that is not always the case. The lack of certainty makes it politically difficult to demand that some bear short-term economic burdens for others. Moreover, opposing parties in environmental debates often hold moralistic attitudes on the subject. Some members of the environmental community view “environmental protection as a moral, ethical, or spiritual obligation.” *Id.* at 27; *see id.* at 28 (footnote omitted) (“[Some] environmentalists derive their zeal for environmental protection, especially on matters such as endangered species protection, from their religious beliefs. For them, environmental degradation constitutes an affront to God.”). By contrast, some property owners see environmental regulation as both an affront to the right to use private property as they see fit and a hallmark of a fascist state. *Id.* With each side seeing itself as “good” battling “evil,” compromise often is not realistically possible. Finally, the controversial nature of those disputes play out in heated debates within each branch of the federal government. Some of those debates are between congressional committees concerned with the environment (e.g., the Senate Environment and Public Works Committee) and committees concerned with economic development (e.g., the Senate Commerce Committee), or between federal agencies dedicated to environmental protection (e.g., the EPA) and ones subject to environmental regulation (e.g., the Defense Department). Other times those debates occur between the two political branches of government—the (in)famous *Morrison v. Olson*, 487 U.S. 654 (1988), case, a criminal investigation raising the constitutionality of the now-defunct so-called Independent Counsel Act, Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1867 (codified as amended at 28

spills over into criminal enforcement of the environmental laws. As Professor Richard Lazarus has explained, it is a “myth” that criminal environmental decisions are made in a value-neutral context.<sup>117</sup> Political and policy considerations affect decisions to enforce particular regulations and the substance of those regulations.<sup>118</sup>

The decision whether to investigate or charge a particular corporate defendant rests on a host of factors. Some of them, of course, are value neutral, such as the amount and type of evidence showing that a firm has broken the law and the availability of resources to get to the bottom of a case.<sup>119</sup> Each side in the environmental debate may agree with the other over whether most potential defendants should be charged with a crime or only a civil penalty. But not every case fits into that niche. Some reflect policy judgments. “Scarce resources require the executive branch to make decisions about priorities, which, in turn, necessarily reflect significant value judgments regarding social policy.”<sup>120</sup> The more importance that an administration gives to a particular subject, the more resources the administration will commit to its enforcement and the more willing an administration may be to “push the edge of the envelope” to promote its policy agenda by advancing novel legal theories in criminal cases, rather than through the regulatory process.

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U.S.C. §§ 49, 591-599 (1982)), began as a controversy over environmental protection—or between the federal and state governments over federalism issues. Environmental issues raise some of the most contentious disputes in America today.

117. See Lazarus, *supra* note 34, at 2456, 2492.

Providing for a meaningful debate in the environmental crimes context is especially difficult. The environmental criminal penalty provisions can attract support from both the more liberal proenvironmental protection legislators and the more conservative “law-and-order” representatives. Both “environmental protection” and “criminal prosecution” enjoy a rhetorical advantage that masks the difficult policy issues underlying their scope and application—and that, unfortunately, render difficult the thoughtful public debate of the policy implications of different options. There is little political advantage for either liberal or conservative legislators to gain through concern for potential overreaching. It is far easier just to assume away those issues and rely on the exercise of prosecutorial discretion—a result naturally supported, notwithstanding the associated pitfalls, by the executive branch agency that wants its programs dignified by criminal sanctions and by a Justice Department that prefers maximum discretion. Consequently, the prospects for legislative or executive branch reform of the existing program are bleak, despite the tremendous need for such reform.

*Id.* at 2508–09 (citations omitted).

118. See Lazarus, *supra* note 34, at 2457 (footnote omitted); see also BURNS, *supra* note 34, at 209 (“[E]nvironmental crime enforcement efforts will likely continue to be influenced by the party affiliation of those controlling the presidency and Congress.”).

119. See BURNS, *supra* note 34, at 137; Lazarus, *supra* note 34, at 2456–57.

120. Lazarus, *supra* note 34, at 2457.

The environmental laws are a good example of where that development could occur. Environmental laws address a far more complicated problem than the protection of static property rights secured by the common law of theft. The latter sought to create rules, enforced by the courts in the slow, case-by-case decision-making process characteristic of the common law system that protected individuals against deprivation of a possessory interest in chattels.<sup>121</sup> Environmental law has a far more ambitious goal. Environmental law seeks not only to create static rules defining what is in and out of bounds, but also to create an ongoing regulatory body to take the place of the courts. The agency would be staffed by experts so that over time it can use its superior scientific and technical know-how to discover new threats to human health. The agency also would possess dynamic lawmaking authority, enabling it to adapt a matrix of rules governing a modern industrial society quickly and as often as need be. Specialized types of legal rules are necessary in order to effectively carry out those responsibilities. If environmental law is to safeguard the public against the harms created by a modern industrial society, the governing law must be capacious and flexible, and also must delegate a considerable degree of fact-finding power and discretion to regulators, so that they can mold the shape of the law over time to account for emerging data about known health risks. For that reason, environmental statutes often use broadly written, indeterminate terms representing dynamic, aspirational goals in order to allow agencies room to change their regulations to reflect medical and scientific advances in the hope that continued technological developments will help regulated parties eliminate problems and lower pollution through engineering solutions.<sup>122</sup>

Environmental criminal laws therefore are materially different from ones outlawing what is colloquially known as “street crime.” Laws criminalizing conduct such as murder, robbery, rape, arson, and larceny do not butt up against competing economic or social concerns. Laws criminalizing pollution do. Different administrations may give different weight to what it sees as the competing values of environmental protection, clarity in the criminal law, and promotion of business, and therefore may pursue a more-or-less aggressive

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121. See JEROME HALL, *THEFT, LAW, AND SOCIETY* (2D ED. 1952).

122. See Lazarus, *supra* note 34, at 2423–27; Lazarus, *Assimilating Environmental Protection*, *supra* note 31, at 882.

interpretation of the environmental codes through advice-giving, compliance-assistance, regulation, litigation, and prosecution. The problem is not limited to any one administration or political party. Political appointees in Republican and Democratic administrations may decide to pursue environmental cases, including criminal prosecution, with more or less vigor, depending on their very different assessments of exactly how clear a law should be before someone should be charged with a crime or just how far away from the line of illegality a private party should remain in order to protect a particular interest from environmental harm.<sup>123</sup> The differences may exist within one branch of government (e.g., the EPA vs. the Commerce Department or the House vs. the Senate) or between branches (Capitol Hill vs. the White House).<sup>124</sup> Those judgments, in turn, may hinge on the state of the overall economy or the affected industry, the administration's tradeoff between the fact or risk of environmental degradation and a hoped-for economic benefit of reduced criminal enforcement, the administration's willingness to withstand public criticism from the right or the left played out in the media, or the entreaties of very different constituencies in the legislative and executive branches, as well as elsewhere inside or outside the government.<sup>125</sup> It therefore should come as no surprise to anyone that "environmental law is the product of fiercely contested entrepreneurial politics within both the legislative and executive branches."<sup>126</sup> The result is that criminal environmental enforcement can become as intertwined as regulatory environmental enforcement

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123. Cf., e.g., Richard Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 721, 736-40 (1960) (stating that strict criminal liability is necessary to dissuade from entering potentially dangerous lines of work all but those parties committed to scrupulous exactitude in following safety protocols and to ensure that parties engaged in those activities steer clear of the lines necessary to protect the public against harm).

124. See, e.g., BURNS, *supra* note 34, at 209. As Professor Lazarus has noted:

A philosophical split has persisted between the two branches of government on environmental issues during the past twenty-five years [1969-84]. While Congress has enacted laws largely reflective of the nation's aspirations regarding environmental protection, the executive branch has been more responsive to those concerned about the economic and social costs of implementing those laws.

The upshot has been a steady supply of interbranch feuding.

Lazarus, *Assimilating Environmental Protection* *supra* note 31, at 876-77.

125. Lazarus, *supra* note 34, at 2427-28.

126. *Id.* at 2427; *id.* at 2494 ("Both sides [*i.e.*, the legislative and executive branches] therefore are engaging in the same misguided grandstanding when they claim that the other is 'playing politics with crime.' Environmental law has a political dimension. So too does crime.").

with an administration's environmental, economic, and legal policies.<sup>127</sup>

If so, there is a powerful policy argument for rejecting the use of "extraordinary restitution" conditions in nonprosecution agreements: namely, they are susceptible to abuse. Turn again to the Gibson Guitar case. Why did the Justice Department direct Gibson Guitar to give the NFWF \$50,000? Was NFWF injured by Gibson Guitar's actions? Doubtful. If the claimed injury was that Gibson Guitar's illegality marginally increased global warming, then everyone on the planet would be injured, not just NFWF. Can NFWF be deemed a representative for the parties injured overseas, akin to the representative in a class action? No. It suffered no injury, and the agreement does not require NFWF to spend the money in India and Madagascar. Is NFWF an adequate representative for everyone on the planet? That question answers itself. Did the Department choose NFWF because it is an environmental organization? The agreement is silent in that regard. But if that is the reason, NFWF is in no better a position than the National Audubon Society, Resources for the Future, or dozens of other environmental organizations. Did the Department choose NFWF because NFWF can disburse funds to other organizations? Maybe, but that is Congress's job, not the Department's. Is there a reason to favor environmental organizations over other charities? It is not obvious that there is. The Department could have chosen the Potomac Labrador Retriever Rescue Society, the Lighthouse for the Blind, or the Boys & Girls Clubs. They also are worthwhile organizations, they also pursue noble goals, and money is fungible.

What is most troubling about the Gibson Guitar case is not that the Justice Department gave no reason for its choice. The deeper problem is with the Justice Department making *any* such choice. If Gibson Guitar had paid the \$50,000 as a fine, the public would have benefitted. Instead, the taxpayers wound up subsidizing the NFWF or whatever environmental organization ultimately receives Gibson

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127. Commentators have made the same point in other contexts, as well. See JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 110 (2008) ("In the post-Enron world, the SEC, always a bureaucracy interested in maximizing political support, is guided by political considerations rather than policy considerations in its determination of which new corporate governance rules should be promulgated, and in determining how its existing rules should be enforced.").

Guitar's money. The Justice Department should not be in the business of making that decision. The Constitution bars the government from spending unappropriated funds<sup>128</sup> and the Anti-Deficiency Act<sup>129</sup> prohibits the government from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding . . . an appropriation" or relevant fund.<sup>130</sup> It is a prerogative of Congress, not the Executive, to allocate federal funds.<sup>131</sup> The upshot is that the Justice Department needs authority to give away the public's money,<sup>132</sup> and Congress has not given the Justice Department the necessary authority.

That is important because, viewed from an economic perspective, these restitutionary awards are an unauthorized distribution of public funds that otherwise would be deposited into the Federal Treasury. A corporation cannot be imprisoned; the only penalty that it can ultimately suffer is financial.<sup>133</sup> That penalty can be a direct cost (e.g., fines, restitution) or an indirect one (e.g., fees paid to a corporate monitor, an inefficient organizational structure demanded by the monitor). Either way, the company suffers a monetary loss, and the total penalty is the same regardless of the recipient. A \$1 million loss hurts the company economically just as much (or just as little) whether it is paid into the Federal Treasury or to a private party. In deciding whether to enter into a nonprosecution agreement, a corporation will determine exactly what penalty it is willing to pay to make an investigation go away, and it will care little about the name of the payee that its treasurer must put on the check. As a result, any money that the government demands to be paid to a private party is money that the corporation would be willing to pay into the federal fisc, which would help underwrite the general costs

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128. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .").

129. Pub. L. No. 97-258, 96 Stat. 923 (1982) (codified at 31 U.S.C. § 1341 (2006)).

130. 31 U.S.C. § 1341(a)(1)(A) (2006).

131. See THE FEDERALIST NO. 58, at 357 (James Madison) (Clinton Rossiter ed., 2003) ("They [*viz.*, the Senate and House of Representatives] . . . hold the purse. . . . This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people . . . for carrying into effect every just and salutary measure.").

132. See, e.g., *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (explaining that stoppel does not apply against the executive branch because it is Congress's prerogative to disburse federal funds).

133. See STONE, *supra* note 27, at 36 (any penalty imposable on a corporation ultimately is an economic sanction).

of running the government. Money that the government demands to be paid to a private party therefore is tantamount to disbursing money from the Federal Treasury to a private party that Congress has not authorized. Even if the Appropriations Clause and the Anti-deficiency Act do not expressly outlaw that practice, they surely express a public policy that only the elected officials in Congress should decide who may receive federal funds and how those funds should be spent.<sup>134</sup> Allowing the Justice Department to make those decisions at a retail level denies the public of the opportunity to learn how their elected representatives are spending tax dollars, which is an essential ingredient of the factors that the electorate would want to know when making the biennial, quadrennial, and sexennial decisions about who should represent them in Congress and the White House.

Aggravating this practice is the secrecy enshrouding most nonprosecution agreements. Trials and guilty-plea proceedings occur in courtrooms open to the public.<sup>135</sup> Plea bargaining occurs in offices or courthouse corridors, or by phone or e-mail.<sup>136</sup> Only the participants are invited. Plea bargaining always has been conducted out of the public eye, originally out of a need for secrecy, now out of a need for efficiency.<sup>137</sup> There is generally no reason to object to that practice. The government cannot punish a defendant until he publicly pleads guilty and the judge publicly sentences him. But there is no guarantee that the terms of nonprosecution agreements will become public knowledge. The government can withhold such agreements on the theory that they are pre-decisional memoranda, and the government could demand as part of the agreement that the target keep the agreement confidential.<sup>138</sup> And there is no statutory

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134. U.S. CONST. art. I § 9, cl. 7; 31 U.S.C. § 1341 (2006).

135. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

136. *See, e.g.*, *Barkow, supra* note 82, at 188; BLUMBERG, *supra* note 53, at 5 (describing “the secret negotiation sessions which become forever submerged in the final plea of guilty”); HEUMANN, *supra* note 53, at 169.

137. *See, e.g.*, *Blackledge v. Allison*, 431 U.S. 63, 76 (1977).

138. The Freedom of Information Act (FOIA) exempts from disclosure documents covered by the attorney work-product doctrine. 5 U.S.C. § 552(b)(5) (2012). *See Fed. Trade Comm’n v. Grolier, Inc.*, 462 U.S. 19 (1983); *Nat’l Labor Relations Bd. v. Sears Roebuck & Co.*, 421 U.S. 132 (1975). *Nonprosecution* agreements arguably can be withheld on the ground because they are temporary agreements *not* to file charges that the Department reserves the right to walk away from if the target does not keep his end of the deal. It is a closer question whether *deferred* prosecution agreements also can be withheld under FOIA on the ground. The government already has obtained an indictment, and it would need the approval of the district court to dismiss the

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requirement that parties like the NFWF publicly identify the ultimate recipients of extraordinary restitution and that those organizations or individuals provide a public accounting of how they spend the dollars they receive. Those results make it difficult for the public to know the identity of the parties who ultimately receive monies that otherwise would have been deposited into the Federal Treasury, effectively enshrouding recipients of the government's favor.

There is, however, an additional defense that could be offered for these payments. The government could argue that they are akin to payments made to informants who let the government know about crimes or criminals.<sup>139</sup> Law-enforcement agencies sometimes "put on the payroll" individuals, known in the vernacular as "snitches," who let the police know when they hear something about a crime that has occurred, is in the offing, or may just be in the wind. Paying informants for evidence regarding a crime is a longstanding and valuable law-enforcement practice.<sup>140</sup> If that is the explanation for contributions like these, the practice is not inherently an illegitimate one. But the method by which the Justice Department goes about this practice is problematic because it is done in secret.

It is far from obvious that payments to environmental groups should be kept secret. Secrecy cannot be defended on the ground that environmental groups fear retaliation by corporate America. Fortune 500 companies are hardly tantamount to Columbian drug cartels. Secrecy also keeps the public from learning why the government is paying environmental groups (viz., Are environmental groups supplying the government with leads or just receiving checks?), which groups are acting as government informants (viz., Is NFWF the only recipient?), whether those payments are effective (viz., Have any of those leads panned out?), or anything else that is necessary for the electorate to know in order to hold government officials accountable for how they disburse public monies. And it would be impossible to justify a \$2.394 billion payment to the NFWF as a bounty for bringing in BP for the Gulf of Mexico oil spill. After all,

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charges before trial. *See* FED. R. CRIM. P. 48(a). The Justice Department, however, likely would argue that the terms of the agreement could be presumptively withheld.

139. *See, e.g.,* Andrew S. Hogeland, *Criminal Enforcement of Environmental Laws*, 75 MASS. L. REV. 112, 114, 118 (1990) (providing examples of private environmental groups working with criminal prosecutors).

140. *See, e.g.,* Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1091 (1951).

the federal government offered only a \$27 million reward for the capture of Osama bin Laden.<sup>141</sup> Of course, environmental groups may object to being labeled “stoolies,” but their objection to how they might be portrayed is an insufficient reason for allowing the executive branch to disburse unappropriated public funds in a manner that obscures its conduct, that appears to be done for a purpose unrelated to law enforcement, and that is susceptible to abuse.

### C. *The Need for a Suitable Referee*

The final troubling feature of nonprosecution agreements is that they are designed without judicial review in mind—in fact, their goal is to keep any court from becoming involved at all. Trial judges are involved in the plea-bargaining process because a guilty plea results in a judgment of conviction that provides the necessary legal justification for a criminal punishment.<sup>142</sup> When the government and a defendant settle a case before charges are filed, however, a district court judge never becomes a participant. The agreement effectively serves as a private contract between the parties, and, like any other contract, a nonprosecution agreement does not inevitably and directly involve the judiciary. In contrast to a plea agreement or settlement of a pending lawsuit, no one needs to submit a nonprosecution agreement to a judge for his blessing before it can take effect. Only if one or the other party were to see a need for an independent construction of a nonprosecution agreement’s terms or for enforcement of its requirements against a recalcitrant party would a court become involved. Yet, some nonprosecution agreements foreclose any resort to judicial review and leave any question of

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141. Carrie Johnson, *Who Gets the \$27 Million Reward Offered for Bin Laden’s Capture?*, NPR (May 2, 2011, 4:48 PM), <http://www.npr.org/blogs/thetwo-way/2011/05/04/135929518/who-gets-the-27-million-reward-offered-for-bin-ladens-capture>.

142. See *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (“[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State’s imposition of punishment.”); *McMann v. Richardson*, 397 U.S. 759, 766 (1970) (“A conviction after a plea of guilty normally rests on the defendant’s own admission in open court that he committed the acts with which he is charged.”); *Kercheval v. United States*, 274 U.S. 220, 223 (1927) (“A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence.”). For the peculiar instance where a guilty plea does not rest on an in-court admission of the crime, see *North Carolina v. Alford*, 400 U.S. 25 (1970); *supra* note 70.

interpretation or compliance in the hands of the Justice Department.<sup>143</sup>

Avoidance of judicial review by contracting parties generally raises few legal concerns. The law encourages private parties to negotiate contracts as well as mutually acceptable mechanisms for dispute resolution. As part of that freedom, parties may choose their own forum for interpretation and enforcement of their agreement. They may use the federal or state courts, but they also can avoid the courts altogether, opting instead for binding arbitration, for example, as their chosen mechanism. In fact, a series of recent Supreme Court decisions liberally applying the protections afforded contracting parties by the Federal Arbitration Act<sup>144</sup> in light of the “national policy favoring arbitration”<sup>145</sup> would virtually guarantee a party the right to opt out of the judicial process altogether.<sup>146</sup>

Three (rather obvious) factors, however, make nonprosecution agreements different from run-of-the-mill contracts. Two are that the federal government is a party to the agreement, and the agreement resolves a criminal investigation. One consequence of those factors is that the Constitution may limit the type of agreements that the government may negotiate, either by forbidding certain elements (e.g., imprisonment) or requiring others that normally would not be demanded when private parties negotiate a compromise (e.g., representation by counsel). The rationale for those limitations rests in part on the fact that the parties to a nonprosecution agreement do not have equal bargaining power. The government has a monopoly over the criminal process, and, unlike cases where a private company holds a monopoly over some industry, “[t]hat power cannot be eroded by new entry, and no one in the crosshairs of the prosecutor can just walk away.”<sup>147</sup> The law may limit what a monopolist can do for the benefit of the public, and that may involve curtailing the monopolist’s power. As Professor Epstein put it, “[s]ometimes the greater power”—viz., the authority to forego nonprosecution

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143. See Greenblum, *supra* note 2, at 1871–72, 1881–82, 1892–93.

144. 9 U.S.C. §§ 1–16 (2006).

145. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

146. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that the Federal Arbitration Act preempts a state law rule deeming unconscionable the use of class arbitration waivers); *Preston v. Ferrer*, 552 U.S. 346 (2008) (holding that the act preempts a state law rule exempting certain types of contracts from arbitration).

147. Epstein, *supra* note 4, at 49.

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agreements entirely—“does not encompass the lesser power”—the ability to impose any condition it wishes in such an agreement.<sup>148</sup>

The third factor is also an important one. In the criminal process, the Constitution places numerous barricades in the government’s path in order to limit its ability to punish private parties for crimes, even when there is no factual or legal doubt of a suspect’s guilt. The Constitution seeks not only to protect an individual against his own improvident decisions, but also (on occasion) to deny the government the ability to demand of private parties even what they knowingly and freely might consent to abandon. A defendant cannot consent to be imprisoned when that penalty is not authorized, even if he agrees to be confined in lieu of paying a fine.<sup>149</sup>

The possibility that an agreement may contain an unlawful provision is not problematic when a party is able and willing to challenge the agreement in court or some other forum. But that possibility does pose a conundrum when neither party objects to the agreement because each one finds it favorable as a whole and neither party wants to see it set aside on the ground that one or more provisions are invalid. In fact, when that is true, and a nonprosecution agreement contains a legally suspect term, no party wants to involve a court in the interpretation or administration of the agreement because everyone would fear that the entire deal could unravel once the judge controls it. Yet, if a term in a nonprosecution agreement were unconstitutional or unjustifiable as a matter of public policy, the public would be better served by having that provision held invalid even at the cost of spoiling the agreement in its entirety and upsetting the expectations of the parties. All such provisions should be out of bounds regardless of whether a private party accepts or objects to them. The difficulty is that unless and until the government files a criminal charge against the target of the investigation, a federal court cannot referee a dispute over its terms

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148. *Id.* The Supreme Court’s decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) illustrates that point. *Citizens United* makes it clear that, although parties do not have a constitutional right to create a corporation, the federal and state governments cannot prohibit corporations from exercising the right to free speech. *Id.* at 368. See also, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“For at least a quarter-century, this Court has made clear that even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.”).

149. See *supra* notes 83–87.

because there would be no “Case or Controversy” between the parties necessary to establish federal jurisdiction. The attorney general could and should prohibit the government from entering into nonprosecution agreements that contain invalid terms, but it is the Justice Department that is responsible for that troublesome feature, so asking the Department to overrule itself is not likely to be successful. Congress could intervene and forbid the Department from using unlawful terms, but Congress could wind up chasing a variety of specific problems in these agreements because there may be more than one objectionable feature to them.

One approach is worth considering. Congress should require the parties to a nonprosecution agreement to submit it to review by a United States magistrate judge for him or her to determine whether the agreement is lawful. A federal district court may not be able to express an opinion on the validity of such an agreement because doing so could be tantamount to offering an advisory opinion on legal issues that are not part of a “Case or Controversy,” an action that an Article III court cannot undertake.<sup>150</sup> But a United States magistrate judge is not an Article III judge,<sup>151</sup> so he or she can be tasked with responsibilities that are not limited by the Case or Controversy requirement. Magistrate judges already perform functions such as issuing search warrants that are not governed by Article III.<sup>152</sup> Accordingly, there should be no objection to having magistrate judges review nonprosecution agreements. Directing them to do so enables a judicial officer to address the validity of such agreements and makes it easier for the public to gain access to their terms, since an agreement submitted to a magistrate judge likely would become a public record that the public could access via the Internet.<sup>153</sup> Those functions are worth directing magistrate judges to pursue.

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150. *See, e.g.*, *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (establishing that federal courts cannot issue advisory opinions).

151. *Compare, e.g.*, U.S. CONST. art. III, § 1 (federal judges serve during “good Behaviour”), with Federal Magistrate’s Act, 28 U.S.C. § 631 (2012) (full-time magistrates serve an eight-year term, and part-time magistrates serve a four-year term).

152. FED. R. CRIM. P. 41(b) (magistrate judges can issue search warrants).

153. *See, e.g.*, *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 509–10 (1984) (stating that the public and media are presumptively entitled to access court records); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (establishing that the public has a constitutional right of access to criminal trials); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–99 (1978) (footnotes omitted) (discussing the common-law right of access to judicial records); Colquitt,

## IV. CONCLUSION

The use of nonprosecution agreements to resolve criminal investigations fairly and efficiently is a practice that should be encouraged when it benefits all of the concerned parties. But the current mechanism can leave the public interest out of the mix of factors that must be evaluated. The practice of forcing the target of an investigation to contribute to a private organization is a very troublesome one. It deprives the public of funds that otherwise should be paid into the Treasury; it displaces elected officials' power to determine how government funds should be spent; and it poses the risk that the executive branch will disburse unauthorized public funds to favored organizations for projects that work more to the benefit of the recipients than the victims of a crime or the public generally. The Supreme Court's October Term 2011 plea-bargaining decisions display a practical concern for regulating the actual practice of plea bargaining as it is conducted in state and federal courts.<sup>154</sup> The same need exists with respect to nonprosecution agreements. Congress ought to forbid the Justice Department from engaging in this practice absent approval by a magistrate judge. Only that mechanism (or one similar) will ensure that the government does not end up quietly and secretly funding its favored sons and daughters.

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*supra* note 17, at 729 (“Courts are open governmental agencies. As such, the public generally has had access to plea agreements and proceedings. However, parties frequently bargain the closure of court proceedings or the sealing of court records during the settlement process.”).

154. *See Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

