# PROSECUTION DEFERRED

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Abstract

Deferred prosecution agreements (DPAs) have been used with increasing frequency, particularly in corporate criminal prosecutions, over the past two decades. By allowing prosecutors to offer a path for rehabilitation without requiring a defendant to enter a guilty plea, DPAs present a valuable tool for progressive prosecutors to use in a broader movement for criminal justice reform.

However, data on how prosecutors use DPAs—how often they offer them and who they offer them to—has long been lacking. Drawing on a recent national experiment studying state and local prosecutors, this Article aims to supplement the existing data to help answer these questions, then to draw on this more complete picture to conclude that, contrary to congressional intent, DPAs have come to be used in practically every corporate criminal prosecution, while they are offered to resolve only a small fraction of individual prosecutions. This Article argues that this troubling trend is not only contrary to the legislation that initiated DPAs but also unjustified on public policy grounds. This misalignment can likely be remedied by using DPAs more frequently in individual prosecutions because DPAs are a valuable tool to respond to the endemic challenges of overcriminalization and mass incarceration while still holding individuals accountable for crime. Increasing the use of DPAs allows individuals facing criminal charges an opportunity at rehabilitation without the collateral consequences and the reputational tarnish of prosecution.

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## INTRODUCTION

In 2018, a Boeing plane plunged down to the earth in Indonesia.[1] The same tragedy occurred in Ethiopia one year later.[2] Both of these disasters involved the new Boeing 737 MAX, which had been "significantly changed" from the older 737 model's "configuration and flight characteristics."[3] The Department of Justice (DOJ) later identified the cause of these crashes: Boeing employees had conspired to defraud the government, "cho[osing] the path of profit over candor by concealing material information from the [Federal Aviation Administration] concerning the operation of [the] 737 Max [sic] airplane and engaging in an effort to cover up their deception."[4] Allegedly, Boeing failed to provide the pilots with training because of financial and competitive pressures.[5] The planes in both disasters were operated by pilots from smaller airlines;[6] neither had received the necessary training on how to operate the new model.[7] As a result, 346 passengers lost their lives.[8] DOJ officials filed an information accusing the company of criminal conspiracy.[9] But no Boeing executives were ever indicted. None of them saw a night in jail. Criminal fines weren't imposed. The DOJ later dropped the company's charges, too, and the corporate prosecution ended. Boeing successfully avoided prosecution by obtaining a deferred prosecution agreement (DPA) from the DOJ, saving its public

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1. *See* John C. Coffee, Jr., NOSEDIVE: Boeing and the Corruption of the Deferred Prosecution Agreement 7 (June 6, 2022) (unpublished manuscript), https://ssrn.com/abstract=4105514 [https://perma.cc/G94A-8SLC]; PETER ROBISON, FLYING BLIND: THE 737 MAX TRAGEDY AND THE FALL OF BOEING 5–6 (2021). Many of the facts in this Introduction are taken from the DOJ press release announcing Boeing's settlement. Press Release, U.S. Dep't of Just., Boeing Charged With 737 MAX Fraud Conspiracy and Agrees to Pay Over $2.5 Billion (Jan. 7, 2021) [hereinafter DOJ Boeing Press Release], https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion [https://perma.cc/LG49-P444].

2. *See* Coffee, *supra* note 1; ROBISON, *supra* note 1.

3. Coffee, *supra* note 1, at 5, 7.

4. DOJ Boeing Press Release, *supra* note 1.

5. *See* Coffee, *supra* note 1, at 5; DOJ Boeing Press Release, *supra* note 1; *see also In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934, at *7, *33 (Del. Ch. Sept. 7, 2021) (refusing to dismiss a derivative action against Boeing's Board of Directors that alleged that the Board had failed to exercise its duties under Delaware law).

6. DOJ Boeing Press Release, *supra* note 1.

7. *Id.*

8. *See* Coffee, *supra* note 1; DOJ Boeing Press Release, *supra* note 1.

9. DOJ Boeing Press Release, *supra* note 1.

reputation and avoiding the sting of a criminal conviction by merely paying a civil fine.[10]

The staggering tragedy that Boeing caused in these cases contrasts the normality of this resolution. The DOJ resolves the vast majority of its corporate criminal prosecutions by negotiating DPAs with its corporate defendants.[11] These DPAs—which some have called "sweetheart deals"—allow most corporate criminals to avoid prosecution by merely paying a civil fine.[12] Boeing paid a $2.5 billion civil penalty—roughly comparable to eight months of profits—and deducted it as an ordinary business expense.[13] Neither the corporation nor its executives or employees were otherwise held responsible for the criminal offenses that led to the deaths of 346 passengers.[14] Boeing simply continued running its business free from the reputational tarnish of prosecution[15]—a common story of how corporations address criminal charges.

However, the experience for individuals charged criminally is much different. The United States continues to struggle with the severe impacts of overcriminalization and mass incarceration,[16] and DPAs are offered at much higher rates to corporations such as Boeing than to individuals facing their

10. *See* Coffee, *supra* note 1, at 6–7, 13, 25 (noting that the DPA allowed the government and Boeing to minimize the prospect of a public or media outcry); *see also* Andy Pasztor & Andrew Tangel, *Ex-Boeing Pilot Complained of Management Pressure on MAX, Former Colleagues Say*, WALL ST. J. (Oct. 23, 2019, 3:28 PM), https://www.wsj.com/articles/ex-boeing-pilot-complained-of-management-pressure-on-max-former-colleagues-say-11571858920 [https://perma.cc/J4SD-WSKH] ("Federal investigators are looking into Mark Forkner's effort to preclude expensive pilot training before rollout, according to people familiar with the situation.").

11. *See* Peter R. Reilly, *Sweetheart Deals Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts*, 50 ARIZ. ST. L.J. 1113, 1119–21 (2018).

12. *See id.*; Coffee, *supra* note 1, at 4–5, 25 (discussing how the government is often protecting the corporate defendant from reputational damage by using DPAs).

13. Coffee, *supra* note 1, at 11–13 (mentioning that Boeing was able to deduct the $2.5 billion settlement as an ordinary business expense). *See generally* Deferred Prosecution Agreement, United States v. The Boeing Co., No. 21-CR-00005 (N.D. Tex. filed Jan. 7, 2021), https://www.justice.gov/d9/press-releases/attachments/2021/01/07/boeing_deferred_prosecution_agreement_ecf_stamped_0.pdf [https://perma.cc/6DCN-R492].

14. Coffee, *supra* note 1, at 15–17.

15. *Id.* at 25.

16. *See* Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1124–25 (2021).

own criminal charges.[17] While DPAs have been codified into almost every state's laws as a diversionary tool, comprehensive information on how frequently DPAs are used in individual prosecutions at the state and local levels is generally inaccessible.[18] However, while corporations are freely granted DPAs, individual defendants in the same criminal justice system—too often facing lengthy sentences for minor crimes and the collateral effects of prosecution—seem to generally lack any meaningful opportunity to bargain for a DPA.[19] Using DPAs in individual prosecutions offers defendants a second chance, providing them an avenue to rehabilitation or admission to a probation-like program without burdening them with the weight of pleading guilty to criminal charges and the collateral consequences that a conviction carries.[20] This Article's purpose is to provide new data on the use of DPAs in the context of individual prosecutions at the state and local level and to use that data to inform how contemporary use of DPAs in corporate and individual prosecutions aligns with both the original intent of DPAs and the current theories of their

17. *Cf.* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 263 (2014) ("Prosecutors rarely offer leniency to encourage individuals to rehabilitate.").

18. *See* Jon May, *Non-Prosecution, Deferred Prosecution, and Pretrial Diversion Agreements: Just Say No To Pleas*, 46 CHAMPION 40, 40 (2022) ("Lawyers hear almost nothing about the application of DPAs to individuals because individual liability is rarely disposed through a DPA."); *see also* Paola C. Henry, Note, *Individual Accountability for Corporate Crimes After the Yates Memo: Deferred Prosecution Agreements & Criminal Justice Reform*, 6 AM. U. BUS. L. REV. 153, 157 (2016) (noting that DPAs are now rarely used to encourage individual rehabilitation and are not used frequently in individual cases).

19. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 812–13, 821–22 (2015) (discussing the importance of collateral civil effects to an arrest and subsequent prosecution); *see also* May, *supra* note 18 (finding that, today, DPAs are almost exclusively used in corporate prosecutions and only occasionally offered to individuals); Michael O'Hear, *Mass Incarceration: Fiscal & Social Costs*, 91 WIS. LAW. 20, 22–23 (2018); Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477, 482–83 (2009); Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 109–14 (2008).

20. *See* May, *supra* note 18, at 42 (quoting Judge Emmet Sullivan: "[DPAs] could provide a powerful opportunity for a second chance for deserving individuals"); 16 FLA. PRAC., SENTENCING § 6:3, Westlaw (database updated Oct. 2024); Kristie Xian, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 631, 644 (2014) (finding that one of the benefits of DPAs in individual prosecutions is sparing the offender from suffering the lifetime of stigma that comes as a result of a conviction or prosecution); 28 MO. PRAC., MO. CRIM. PRAC. HANDBOOK § 7:8, Westlaw (database updated Dec. 2024).

value in addressing the challenges of mass incarceration. This Article ultimately concludes that increasing the use of DPAs in individual prosecutions would give individuals facing criminal charges an opportunity at rehabilitation without the collateral consequences and reputational tarnish of a criminal conviction. DPAs provide a way to hold individuals accountable for crime while allowing them a viable alternative to receiving a criminal record.

This Article proceeds in four parts. Part I provides one view of the history of deferred adjudication and its use in the American criminal system, shifting over time from a rehabilitative tool for low-level, usually first-time-offender individuals to a privilege available to defendants in many corporate criminal prosecutions. Part II analyzes these trends through the lens of data, supplementing the existing literature on this topic with new information from a national survey of state and local prosecutors. Using this data to draw a fuller picture regarding the use of deferred prosecution today, Part III addresses how DPAs are used—and how they ought to be used—concentrating on prosecutors' differential usage rates of DPAs in individual and corporate criminal cases. Part IV concludes on the future of deferred prosecution and provides insights on how increased deferred prosecution could help solve endemic problems of mass incarceration and overcriminalization while also maintaining accountability for crime.

## I. BACKGROUND AND HISTORY OF DEFERRED ADJUDICATION

Overcriminalization and mass incarceration remain the defining issues of criminal law today.[21] What is driving those

21. *See generally* Darren Lenard Hutchinson, *Who Locked Us Up? Examining the Social Meaning of Black Punitiveness*, 127 YALE L.J. 2388 (2018) (reconciling the historical punitive sentiment of African American social groups with the anti-Black social stigma and structural inequality faced by African Americans); Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 816–17 (2017) (describing the mass incarceration problem in the United States as unnecessary and unsustainable, necessitating an urgent need for reform); Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1063 (2016) ("Of the many crises in our criminal justice system, none is more critical than the problem of mass incarceration. The United States has the highest incarceration rate in the world, with over 2.2 million people in prison or jail and 4.7 million on probation and parole."); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349 (2012) (discussing mass incarceration in criminal law and its effects on felony

issues—and how we might address them—has been a topic of debate among scholars, activists, and politicians.[22] One dominant strain of argument maintains that prosecutors hold the capacity to solve the mass incarceration crisis through their charging decisions.[23] There is no doubt that prosecutorial

disenfranchisement and debt); Ting Ting Cheng, Steven Zeidman, Kathy Boudin, Mercedes Cano, Preeti Lala & Susan Tipograph, *Notes from the Field: Challenges of Indigent Criminal Defense*, 12 CUNY L. REV. 203 (2008) (summarizing practitioners' experience with the contemporary criminal justice system and their views on key issues within criminal law); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (noting that although the issues of mass incarceration and overcriminalization are frequently cited by criminal law scholars, they remain ill-defined).

22. *See, e.g.*, S. Thomas Perry, *Slavery, Jim Crow, and Mass Incarceration: Could the Thirteenth Amendment Hold the Key to Racial Equity in Criminal Justice?*, 88 GEO. WASH. L. REV. ARGUENDO 225, 236–39 (2020) (discussing the debates around criminal justice reforms by conservative and liberal politicians); Simon Bronitt, *Deferred Prosecution Agreements: Negotiation Punishment Before Conviction?*, *in* THE EVOLVING ROLE OF THE PUBLIC PROSECUTOR 45, 48 (Victoria Colvin & Philip Stenning eds., 2019) (analyzing the evolving role that public prosecutors play in gatekeeping the criminal process); Levin, *supra* note 21, at 265–74 (discussing the political and scholarly divides regarding criminal justice reforms); Obama, *supra* note 21, at 823–55 (discussing how the president can drive criminal justice reforms at the federal, state, and local levels); Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 306–07 (2017) ("While the war on drugs and increased severity of sentencing laws may have indirectly contributed, the predominant cause of the prison explosion is that, despite the drop in crime, prosecutors have brought and are bringing felony charges in more cases than ever before." (footnote omitted)); Cammett, *supra* note 21, at 353–55. *See generally* Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURV. AM. L. 205 (2021) (noting the connection between plea bargaining, mass incarceration, and overcriminalization); Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32 (2018) (considering the issue of mass incarceration and the role of overcriminalization in it).

23. *See* Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627, 631 (2021) (describing prosecutors as "one of the principal drivers of mass incarceration"); Heather L. Pickerell, *Critical Race Theory & Power: The Case for Progressive Prosecution*, 36 HARV. BLACKLETTER L.J. 73, 87 (2020); Solomon Miller, *Ending Prosecutors' Moral Hazard in Criminal Sentencing*, 32 GEO. J. LEGAL ETHICS 833, 844–45 (2019); Peter Elikann, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*, 100 MASS. L. REV. 111, 111–14 (2019); Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1616 (2019) (discussing the significant effect of prosecutors on incarceration rates and arguing that solving the mass incarceration crisis requires prosecutors to play an active part in reform efforts); Davis, *supra* note 21, at 1064 (arguing that prosecutors are uniquely situated to have the greatest impact on mass incarceration rates because of their vast discretion and power); Griffin & Yaroshefsky, *supra* note 22, at 307; Rachel Barkow, *Prisoners of Politics: Breaking the Cycle of Mass*

decision-making plays a major role, but this certainly remains an open question.[24] Deferred adjudication, including both DPAs and deferred sentencing agreements (DSAs),[25] has been advocated as a potential solution to the mass incarceration problem—at least to the extent that prosecutors' control of charging is a contributing factor to it.[26] This Article evaluates

*Incarceration*, 101 MASS. L. REV. 54, 55 (2020) (reviewing DAVID RANGAVIZ, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM BY JOHN PFAFF (2017)) ("The only institution that could plausibly stop this runaway train [is] the prosecutor.").

24. *See* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 856–57 (2018) (explaining that it is misleading and counterproductive to claim that prosecutors, not legislatures or judges, bear primary responsibility for mass incarceration); Seema Tahir Saifee, *Decarceration's Inside Partners*, 91 FORDHAM L. REV. 53, 56–57 (2022) (positing that prosecutors are ill-positioned to lead the way toward reducing prison population and that, instead, decarceration should be driven from within by considering the ideas of people who are incarcerated); Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 192 (arguing that the traditional progressive prosecutor platform of declination and diversion is insufficient to affect real reform); I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1564 (2020) (suggesting that the key to reform is not prosecutors but is rather the public, or, more specifically, restoring prosecution to the people by allowing victims to pursue criminal charges through public prosecution); Hana Yamahiro & Luna Garzón-Montano, *A Mirage Not A Movement: The Misguided Enterprise of Progressive Prosecution*, 46 HARBINGER 130, 130 (2022) ("While progressive prosecution is an improvement on traditional prosecution, it does not offer a path to ending mass incarceration, and in fact may distract or detract from that goal."). *See generally* I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795 (2022) (considering the racialized analysis of "progressive prosecutors"); Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071 (2017) (finding that the primary issue of mass incarceration is a lack of subconstitutional checks).

25. DSAs are similar to DPAs in their goals: preventing incarceration of defendants and clearing their records upon successful treatment or probation. Margarate Colgate Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT. REP. 6, 6 (2009). However, DSAs differ in their procedural timeline. *Id.* For a DSA, the defendant submits a guilty plea and then fulfills the stipulations surrounding probation. *Id.* If the defendant is successful, the sentence will be suspended, and the incident will be cleared from the defendant's record. *Id.* For an example, see N.M. STAT. ANN. § 31-20-3 (West 2024). DSAs are similar in nature to DPAs and are sometimes used interchangeably, but it is important to recognize that DSAs require a guilty plea. *See also* Love, *supra*. For more information on DSAs, see ROBERT J. DIETER, 15 COLO. CRIM. PRAC. & PROC. § 15.7 (2d ed.). Although DSAs have also been advocated as a potential solution to the mass incarceration problem, the focus of this Article remains on DPAs.

26. Certainly, other criminal justice actors are involved. Legislatures can pass over-criminalizing legislation, police can arrest more people than necessary to maintain public safety, and judges can sentence criminal defendants heavily. *See* Andrea Amulic, Note, *Humanizing The Corporation While Dehumanizing The*

DPAs as a possible remedy and, more specifically, provides a critique to a system in which defendants receive categorically differential treatment in the plea bargaining process without adequate justification.

### A. *Defining Deferred Adjudication*

A prosecutor has several options when an arrest is made. These options include declination or dismissal, plea bargaining, trial, and diversion, which includes deferred adjudication. One option with every case is dismissal or declination, which means that a prosecutor will refrain from filing charges with the court or voluntarily dismiss charges that were brought. Declination statistics (like other prosecutor charging statistics) are rare, but prosecutors in some jurisdictions have been said to decline roughly one quarter of their potential cases.[27] According to a recent study discussed in Part II, declination remains

*Individual: The Misuse of Deferred-Prosecution Agreements in the United States*, 116 MICH. L. REV. 123, 146 (2017) (recommending that prosecutors increase the use of DPAs in noncorporate criminal cases to combat the devastating consequences of mass incarceration in the United States); Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 108–09 (2017) (advocating for the increased use of pretrial diversion and deferred adjudication). *See generally* Charles J. Hynes, *Prosecution Backs Alternative to Prison for Drug Addicts*, 19 CRIM. JUST. 28, 30, 33 (2004) (discussing the benefits of diverting drug offenders into treatment and of DSAs and DPAs).

27. Variations exist between the percentage of cases in which prosecutors decline to bring charges, but most studies have shown that declination rates are usually around 3%–25%. *See* Baughman & Wright, *supra* note 16, at 1163 (finding that as few as 3% of prosecutors would decline a case that did not contain any evidentiary issues); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1717 (2010) (noting that, on average, approximately 3.67% of Iowa cases are declined); Travis W. Franklin, *Community Influence on Prosecutorial Dismissals: A Multilevel Analysis of Case- and County-Level Factors*, 38 J. CRIM. JUST. 693, 697 (2010) (finding that prosecutors dismissed approximately 25% of cases); Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 252 (2003) (finding that federal prosecutors' declination rates went down from 36% in 1994 to 26% in 2000). Declination rates vary depending on the type of criminal offense, the jurisdiction, and the race and ethnicity of the defendant. *See* Wayne McKenzie, Don Stemen, Derek Coursen & Elizabeth Farid, VERA INST. JUST., PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION 1 (2009), https://vera-institute.files.svdcdn.com/production/downloads/publications/Using-data-to-advance-fairness-in-criminal-prosecution.pdf [https://perma.cc/Z9AF-LV2T]; Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 54 (2002) (stating that it is hard to find a spirited defense of prosecutorial discretion today because "[m]ost authors see only the bad effects," namely "biased prosecutions that systematically harm defendants from particular demographic groups").

surprisingly uncommon even in the age of progressive prosecution.[28] The most common way a prosecutor deals with a criminal case is through plea bargaining.[29] Those are not a prosecutor's only options, though. A less common option is pretrial diversion of the case—typically after admission of guilt with a guilty plea—by encouraging court-ordered probation (for which the judge would set the terms)[30] or, in some jurisdictions, by referral to a specialized criminal court where a judge might direct some sort of diversion or treatment to avoid ordering incarceration.[31] Another diversion option is deferred

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28. *See generally* Shima Baradaran Baughman, *Do Prosecutorial Declination Trends Provide Hope for Reducing Mass Incarceration?*, 60 GONZ. L. REV. 255 (2025) (finding that declination decisions are rare and, when they are made, they are generally done so for evidentiary reasons, not policy concerns).

29. This is "because most plea agreements recommend sentences that are closer to the sentencing guideline minimum," and, therefore, most defendants prefer to enter into plea agreements. Shayna M. Sigman, *An Analysis of Rule 11 Plea Bargain Options*, 66 U. CHI. L. REV. 1317, 1326 (1999); *see also* LINDSEY DEVERS, BUREAU JUST. ASSISTANCE, U.S. DEP'T OF JUST., PLEA AND CHARGE BARGAINING 3 (2011) (finding that "[t]he overwhelming majority (90 to 95 percent) of cases result in plea bargaining"); *see also* Leipold, *supra* note 23, at 1613 ("[N]early all convictions are the result of a guilty plea (98% in the federal system), and a large percentage of those pleas are the result of a negotiated agreement between the prosecutor and the defense. The prosecutor's decision to offer a reduced charge in return for a guilty plea—or whether to increase the charges in the absence of a plea—has a dominant effect on who ends up behind bars and for how long." (footnotes omitted)); Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 62–63 (2015) (finding that approximately 97% of federal criminal defendants plead guilty, giving up their constitutional right to a jury trial in secretive plea bargaining negotiations with practically no public oversight); William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1437 (2020) ("[P]lea bargaining is ubiquitous. . . . [A]round 95% of criminal convictions are based on guilty pleas, most of which are the result of plea bargains.").

30. Scott-Hayward, *supra* note 26, at 54–57.

31. *Id.* at 59–60 (describing various types of specialized criminal courts, including drug courts operating on a "therapeutic or treatment model"; domestic violence courts organized around accountability; and status courts, such as veterans courts); Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1482–83 (2017) ("Problem-solving courts are specialized criminal or quasi-criminal courts that often substitute treatment, monitoring, or community service, alone or in combination, for incarceration, and purport to provide a more effective and efficient criminal justice intervention by focusing scarce resources on recurring, systemic issues. They have emerged in a dizzying variety of forms: drug courts, mental health courts, domestic violence courts, community courts, gun courts, sex offender courts, homelessness courts, human trafficking courts, and gambling courts." (footnotes omitted)); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1590–91 (2012) ("[B]eginning in the early 1990s, state court judges began to convene specialized criminal courts . . . [such as] drug courts, mental

adjudication.[32]

With deferred adjudication, a prosecutor may never bring charges; a prosecutor may also offer a DPA or DSA.[33] However, because the meaning of these forms of deferred adjudication

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health courts, veterans courts, and reentry courts, among others. These increasingly popular specialized criminal courts—of which there are approximately 3,000 in the United States and its territories—assume various legal institutional forms and divergent jurisprudential approaches. Nonetheless, despite considerable variation, what most of the courts share in common is the goal of reducing reliance on conventional jail- and prison-based sentencing in favor of problem-oriented alternatives." (footnotes omitted)); Bonnie Gill, Note, *Collateral Consequences of Pretrial Diversion Programs Under the* Heck *Doctrine*, 76 WASH. & LEE L. REV. 1763, 1769–76 (2019) (commenting on alternatives to incarceration such as alternative courts). *See generally* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., MUNICIPAL COURTS: AN EFFECTIVE TOOL FOR DIVERTING PEOPLE WITH MENTAL AND SUBSTANCE USE DISORDERS FROM THE CRIMINAL JUSTICE SYSTEM (2015), https://library.samhsa.gov/sites/default/files/sma15-4929.pdf [https://perma.cc/PA56-696X] (recommending the first court appearance as the optimal point of diversion for people with mental- and substance-use disorders); Order Establishing Mental Health Court for Charlotte County, FL. ST. 20 J. CIR. 30.23 (Fla. Cir. Ct. 2004), https://www.ca.cjis20.org/pdf/ao/par_20041201.pdf [https://perma.cc/M4L8-HJYV] (allowing a mental health court to handle cases that fall under certain categories); N.H. REV. STAT. ANN. § 490-G:2 (2013) (implementing drug courts that may allow dismissal of charges or probation upon successful completion of a program recommended by the court).

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

33. These programs can take two forms: "either as *diversion*, whereby the defendant does not receive a criminal conviction, or . . . as an *alternative to incarceration* program, whereby the defendant avoids the negative impacts of a prison sentence, but will still receive a conviction." Scott-Hayward, *supra* note 26, at 49; *see also* Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMPAR. L. SUPP. 643, 655–60 (2002) (discussing criticisms of prosecutorial discretion and legislative and regulatory approaches to standardize pretrial diversion); Brent E. Newton, *The Story of Federal Probation*, 53 AM. CRIM. L. REV. 311, 314 (2016) ("[P]robation was not viewed as simply a boon to a defendant but instead, as a form of criminal punishment that was designed to improve the defendant."); Gill, *supra* note 31, at 1767 & n.27 (discussing pretrial diversion program options, including probation and deferred adjudication); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 305 (1980) ("Such prosecution alternatives include pretrial diversion or deferred prosecution, restitution, prosecution by state or other federal authorities, civil or administrative remedies, parole or probation revocation, and civil commitment."). *See generally* Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827 (1974) (discussing the effectiveness of pretrial diversion programs and recommending solutions for abuse of discretion in the criminal justice system).

varies extensively throughout state codes,[34] a short definition and discussion of the types of deferred adjudication is warranted. For ease of discussion, we define both deferred prosecution and deferred sentencing, two common categories of deferred adjudication.

The idea behind a DPA is simple: A prosecutor grants a defendant the chance to avoid prosecution and maintain a clean record by agreeing to either delay the filing of criminal charges or delaying the case's resolution pursuant to a plea agreement; if the defendant honors the terms of the DPA, the prosecutor will agree to dismiss the charges after a set period of time.[35] Instead of seeking a conviction, the government thus monitors the defendant's actions to assess whether she complies with the conditions set by the prosecutor in the DPA, with rehabilitation (rather than punishment) serving as the prosecutor's primary goal.[36]

A DSA operates similarly, albeit with one key difference: the defendant must first plead guilty and stipulate to a set of probation-like conditions;[37] if the defendant successfully completes these conditions, the defendant may be discharged without a judgment of guilt and with her record expunged.[38] These options allow a defendant the ability to avoid the collateral consequences of a conviction remaining on her record and to seek necessary rehabilitation.[39]

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34. *See* MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., THE MANY ROADS TO REINTEGRATION: A 50-STATE REPORT ON LAWS RESTORING RIGHTS AND OPPORTUNITIES AFTER ARREST OR CONVICTION 64 n.141 (2020), https://ccresourcecenter.org/wp-content/uploads/2020/09/The-Many-Roads-to-Reintegration.pdf [https://perma.cc/ZBR5-FVDA] (collecting statutes).

35. *See* United States v. Saena Tech. Corp., 140 F. Supp. 3d 11, 12–13 (D.D.C. 2015); MICHAEL CLARK, 1 CORP. CRIM. LIAB. § 1:7, Westlaw (database updated Nov. 2024); Greenblum, *supra* note 32 (noting that DPAs provide an alternative disposition for juvenile and drug offenders that help them rehabilitate more effectively); *see also* Frederick T. Davis, *Judicial Review of Deferred Prosecution Agreements: A Comparative Study*, 60 COLUM. J. TRANSNAT'L L. 751, 755 (2022); Xian, *supra* note 20, at 642–43.

36. *See Saena Tech Corp.*, 140 F. Supp. 3d at 12–13.

37. *E.g.*, COLO. REV. CODE § 18-1.3-102(2) (2024).

38. *E.g.*, OKLA. STAT. tit. 22, § 991c(D) (2024).

39. *See Saena Tech Corp.*, 140 F. Supp. 3d at 12–13; *see also* 16 FLA. PRAC., SENTENCING, *supra* note 20; Amulic, *supra* note 26, at 128; Greenblum, *supra* note 32, at 1866–67.

Though both forms of deferred adjudication are effective prosecutorial tools, this Article focuses on DPAs.[40] For DPAs, the government will not move forward with the prosecution if the defendant successfully follows the stated conditions; otherwise, the government may continue prosecution.[41] In this way, the DPA process is administrative and dealt with between the prosecutor, the defendant, and the defendant's counsel; no court is involved at this stage to determine guilt.[42] Prosecution and punishment follow only if the defendant violates the DPA; otherwise, the charges are resolved administratively.[43] In

40. Another form of prosecutorial declination is a non-prosecution agreement (NPA). A NPA "is an agreement between the prosecutor" and a defendant (either an individual or an entity), "without any direct judicial supervision, in which the prosecutor agrees not to prosecute in return for cooperation and other concessions." Cindy R. Alexander & Yoon-Ho Alex Lee, *Non-Prosecution of Corporations: Toward a Model of Cooperation and Leniency*, 96 N.C. L. REV. 859, 862 (2019). In short, an NPA differs from a DPA in that NPAs are negotiated before charges are ever brought against the defendant.

41. *See Saena Tech Corp.*, 140 F. Supp. 3d at 13; *see also* Court E. Golumbic & Albert D. Lichy, *The 'Too Big To Jail' Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1299–1300 (2014) ("The mechanics of a deferred prosecution at the federal level are simple: once a prosecutor recommends a case for diversion, the pretrial services agency or the probation office must agree to accept the defendant into the diversion program. In exchange for the prosecutor's stipulation to 'defer' criminal charges, the defendant agrees to waive indictment and be charged criminally, and to fulfill certain requirements over a specified period of time. If the defendant discharges her obligations, the charges against her are dismissed and she is treated as if the government declined to prosecute at the outset. . . . If the defendant fails to abide by the terms of the deferred prosecution, however, she faces the specter of criminal prosecution just the same as if the government had never granted a deferral." (footnotes omitted)); Scott-Hayward, *supra* note 26, at 55–56 ("Eligible defendants will apply for admission into pretrial diversion. They will be screened by a pretrial diversion program and a decision made by either the prosecutor or the court to accept or deny the application. If accepted, participants enter into an agreement, usually with the prosecutor but in some jurisdictions with the court, to abide by certain terms, such as attendance at counseling, community service, or restitution to victims. Their criminal case is held in abeyance while they are in the diversion program. If they abide by the terms within the diversionary period[,] the charge is dismissed. If they fail to do so, the diversion is terminated, and their case is reinstated to the court docket for prosecution."); 16 FLA. PRAC., SENTENCING, *supra* note 20 (describing DPAs as out-of-court contractual resolutions to criminal cases that are subject to interpretation and enforcement under the law of contracts); Henry, *supra* note 18, at 155; Greenblum, *supra* note 32, at 1864.

42. Bronitt, *supra* note 22 ("The process that leads to the DPA is administrative rather than judicial in nature.").

43. *See id.* ("[C]onviction and punishment remains [sic] a fall-back for regulators, triggered in cases where the corporation [or individual] fails to adhere to, or breaches, the terms of the DPA.").

theory, DPAs seem to be a viable option to be used by prosecutors regardless of whether the defendant is an individual or a corporation. DPAs, moreover, were initially designed for use in prosecuting individuals arrested for low-level crimes. Nonetheless, the legal literature on the topic of DPAs almost exclusively discusses DPAs in the corporate prosecution context.[44]

The overall aim of a DPA used in individual prosecutions is to rehabilitate the defendant and prevent recidivism, and there is strong evidence that DPAs (and DSAs) can accomplish those aims.[45] In fact, some studies have shown that offenders

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44. *See* Davis, *supra* note 35 (noting that DPAs were initially used as a pretrial diversion program that would prevent individuals from obtaining a criminal conviction and downward spiraling into joblessness and recidivism); David Lawlor, *Corporate Deferred Prosecution Agreements: An Unjust Parallel Criminal Justice System*, 46 W. ST. L. REV. 27, 29 (2019) (noting that DPAs initially "emerged in the 1960s as a way to rehabilitate juveniles and non-violent drug offenders with means other than incarceration"); Amulic, *supra* note 26, at 127 (finding that in the early 1900s, prosecutors used DPAs in dealing with low-level and first-time-offender criminals); Jake A. Nasar, Note, *In Defense of Deferred Prosecution Agreements*, 11 N.Y.U. J.L. & LIBERTY 838, 844 (2017) (discussing the history of DPAs); Peter R. Reilly, *Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, 2015 BYU L. REV. 307, 314–15 (discussing the history behind the implementation of DPAs in individual prosecutions); Gordon Bourjaily, Note, *DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions*, 52 HARV. J. LEGIS. 543, 544 (2015) (discussing how DPAs were originally used in cases with juveniles); Xian, *supra* note 20, at 642 (noting that prosecutors had initially used DPAs to "protect vulnerable persons in society" and "impede future criminal conduct without saddling defendants with the scarlet mark of a criminal charge").

45. *See* Davis, *supra* note 35; Xian, *supra* note 20, at 642; *see also* Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329, 352 (2002) ("[O]ffenders sentenced to prison failed more often and more quickly than offenders placed on probation."); David J. Harding, Jeffrey D. Morenoff, Anh P. Nguyen & Shawn D. Bushway, *Short- and Long-Term Effects of Imprisonment on Future Felony Convictions and Prison Admissions*, 114 PNAS 11103, 11106 (2017) (finding that, when compared with probation, incarceration increases the chances of an individual reentering the prison system within five years of release by 10%–14%); Rohan Lulham, Don Weatherburn & Lorana Bartels, *The Recidivism of Offenders Given Suspended Sentences: A Comparison with Full-Time Imprisonment*, 136 CONTEMP. ISSUES IN CRIME & JUST. 1, 7 (2009) (noting that those who received a deferred sentence were not more likely to reoffend than defendants sentenced to prison); David J. Harding, Jeffrey D. Morenoff, Anh P. Nguyen, Shawn D. Bushway & Ingrid A. Binswanger, *A Natural Experiment Study of the Effects of Imprisonment on Violence in the Community*, 3 NAT. HUM. BEHAV. 671, 671–72 (2019) (finding that prison, rather than probation, "had no significant effects on arrests or convictions for

receiving deferred sentences or probation are less likely, or at most not more likely, to reoffend than those who are sentenced to prison.[46] Further, unlike incarceration, a DPA will generally not tarnish an individual's reputation or cause post-imprisonment collateral consequences, such as joblessness, loss of housing, or exclusion from society.[47] Additionally, DPAs are more cost-effective than other prosecutorial tools like incarceration.[48] In the United States, the average annual cost to supervise someone on probation within the community is $4,392; by comparison, $34,770 is required to incarcerate someone for the same length of time.[49] In some jurisdictions, a period of probation is not even a standard term of a DPA, further decreasing the societal cost of resolving a case.[50] Thus,

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violent crimes after release from prison" for felons and concluding that "imprisonment is an ineffective long-term intervention for violence prevention, as it has, on balance, no rehabilitative or deterrent effects after release"); Michael Mueller-Smith & Kevin T. Schnepel, *Diversion in the Criminal Justice System*, 88 REV. ECON. STUD. 883, 899 (2021) (finding that diversion decreased reconviction rates by 27% and reduced the number of future offenses by 75%–77%); Cynthia Soggs, Rampant Recidivism: Are Deferred Prosecution Agreements and Non-Prosecution Agreements Effective? 23–24 (Aug. 2022), (M.A. thesis, Utica University), https://www.proquest.com/docview/2705399986?fromopenview=true&pq-origsite=gscholar&sourcetype=Dissertations%20&%20Theses [https://perma.cc/GZ24-56SQ].

46. *See, e.g.*, Spohn & Holleran, *supra* note 45; Harding, Morenoff, Nguyen & Bushway, *supra* note 45 (finding that, when compared with probation, incarceration increases the chances of an individual reentering the prison system within five years of release by 10%–14%); Harding, Morenoff, Nguyen, Bushway & Binswanger, *supra* note 45 (finding that prison, rather than probation, "had no significant effects on arrests or convictions for violent crimes after release from prison" for felons and concluding that "imprisonment is an ineffective long-term intervention for violence prevention, as it has, on balance, no rehabilitative or deterrent effects after release"); Lulham, Weatherburn & Bartels, *supra* note 45 (noting that those who received a deferred sentence were not more likely to reoffend than defendants sentenced to prison); Mueller-Smith & Schnepel, *supra* note 45; Soggs, *supra* note 45.

47. *See* Davis, *supra* note 35; Xian, *supra* note 20, at 642.

48. *See* Lulham, Weatherburn & Bartels, *supra* note 45, at 12; Mueller-Smith & Schnepel, *supra* note 45 ("[There is] strong and consistent evidence that diversion leads to statistically significant and economically meaningful declines in recidivism (at both extensive and intensive margins).").

49. *Incarceration Costs Significantly More than Supervision*, U.S. COURTS (Aug. 17, 2017), https://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision [https://perma.cc/9WV8-8ZLD].

50. For example, in Washington, D.C., the Pre-Trial Services Agency (PSA) plays a role in determining a defendant's eligibility for various diversion programs but generally does not supervise individuals who have entered a DPA with the prosecution. *See Diversion Opportunities*, PRETRIAL SERVS. AGENCY FOR THE D.C., https://www.psa.gov/?1=programs/diversion_opportunities [https://perma.cc/7JZG-J6B6].

deferred adjudication may present better outcomes for criminal defendants and cost savings for jurisdictions that could be compelling.

### B. *History and Rise of DPAs*

This Section provides a brief summary of the history of DPAs in order to shed light on their intended purpose. Deferred prosecution arose in the environment of the late sixties and early seventies, when crime was on the rise in big cities across the United States and the "law and order" candidate—Richard Nixon—was on his way to over 300 electoral votes.[51] Within this period, two prominent pretrial diversion programs began introducing deferred prosecution as a tool for prosecutors to provide mostly young, first-time offenders a chance at rehabilitation while lessening pressure on overburdened courts, prosecutors, jails, and prisons.

Project Crossroads was a trial program in Washington, D.C., which saw the successful diversion of around 800 individuals, mostly juvenile first-time offenders.[52] Similarly, the Manhattan Court Employment Project in New York City targeted the pretrial diversion of individual male defendants aged 17–45 who fit a number of other criteria, including having never served more than six months in prison.[53] Both programs were widely considered successful, and Congress built upon them in the Speedy Trial Act of 1974,[54] paving the path for more widespread application of DPAs in federal courts. The Act allows federal prosecutors to enter DPAs by excluding those

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51. *See* , *Nixon Wins by a Thin Margin, Pleads for Reunited Nation*, N.Y. TIMES, Nov. 7, 1972, at 1, https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/1105.html [https://perma.cc/KXL4-JT65]; Terence McArdle, *The 'Law and Order' Campaign that Won Richard Nixon the White House 50 Years Ago*, WASH. POST: RETROPOLIS (Nov. 8, 2018), https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/ [https://perma.cc/S9W2-78SN].

52. ROBERTA ROVNER-PIECZENIK, NAT'L COMM. FOR CHILD. & YOUTH, PROJECT CROSSROADS AS PRETRIAL INTERVENTION: A PROGRAM EVALUATION 7–8 (Dec. 1970), https://files.eric.ed.gov/fulltext/ED113651.pdf [https://perma.cc/3M4H-YUDG] (noting that a majority of the defendants impacted by Project Crossroads were young men of eighteen or nineteen years of age).

53. CRIM. JUST. COORDINATING COUNCIL & VERA INST. OF JUST., THE MANHATTAN COURT EMPLOYMENT PROJECT 3 (July 1970), https://www.vera.org/downloads/publications/1448.pdf [https://perma.cc/YHM8-ME8Q].

54. Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2080 (1975).

agreements' terms from the speedy trial calculation "with the approval of the court."[55]

Congress designed section 3161(h)(2) of the Speedy Trial Act with the "inten[t] to provide a tool to assist in rehabilitating *individuals*."[56] The bill that became the Speedy Trial Act went through significant revisions over several years.[57] At the conclusion of that process, however, the Senate Judiciary Committee's report made clear that section 3161(h)(2) was explicitly intended to mirror the marked successes of both Project Crossroads and the Manhattan Court Employment Project.[58] Neither of these local programs contemplated the pretrial diversion of cases involving corporate defendants. By modeling section 3161(h)(2) after these two programs, Congress can be understood to have intended for DPAs to be used for the same purpose: to provide a path for rehabilitating individual defendants in low-level cases.

Federal DPAs evolved further when Congress passed the Federal First Offender Act in 1984, creating a specific procedure for extending DPAs to youthful offenders in drug cases.[59] Unlike the broadly applied federal DPAs stemming

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55. 18 U.S.C. § 3161(h)(2) (emphasis added); *see also* Nick Werle, Note, *Prosecuting Corporate Crime when Firms are too Big to Jail: Investigation, Deterrence, and Judicial Review*, 128 YALE L.J. 1366, 1368 (2019) ("From 2001 to 2014, individuals faced prosecution in only 34% of the 306 cases in which federal prosecutors reached negotiated criminal settlements with corporate wrongdoers, with only 414 total individuals prosecuted."); Peter R. Reilly, *Corporate Deferred Prosecution As Discretionary Injustice*, 2017 UTAH L. REV. 839, 839–40 (concluding that, because the D.C. Circuit vacated the first rejection of a DPA for involving a corporate defendant, the "district court can almost never reject the agreement based on its substantive terms"); Barr Benyamin, *Get Your Hands Off My DPA! The Proper Scope of the Judicial Supervisory Power in Deferred Prosecution Agreements*, 54 AM. CRIM. L. REV. 571, 572–73 (2017) (stating that, "[h]istorically, federal courts have approved DPAs unhesitatingly and without question" and questioning the constitutionality of this practice).

56. United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 23 (D.D.C. 2015) (emphasis added) (concluding that the Speedy Trial Act's legislative history and, in particular, the Senate Judiciary Committee's report on the bill confirm Congress's original intent to allow for DPAs to be used in cases with individual defendants).

57. *Id.* at 23–25.

58. *Id.* at 24.

59. *See* Federal First Offender Act, Pub. L. No. 98-473, ch. 229, sec. 211, § 3607, 98 Stat. 2001, 2003 (1984) (establishing pre-judgment probation if a person is found guilty of an offense listed in the Controlled Substances Act, has not previously been convicted, and has not previously been the subject of a disposition under the Federal First Offender Act); *see also* Margaret Love, *Federal Restoration of Rights & Record Relief*, COLLATERAL CONSEQUENCES RES. CTR. (Jan. 22, 2024), https://ccresourcecenter

from the Speedy Trial Act,[60] DPAs under the Federal First Offender Act were narrowly applied to first-time, youthful drug offenders and were described in detail by the statute.[61] The more general DPAs that are referenced in the Speedy Trial Act continued to be used but were regulated by courts and by the *Justice Manual*.[62]

The first use of DPAs in corporate settings did not begin until the early 1990s, nearly two decades after the Speedy Trial Act.[63] Today, federal prosecutors have relied on the same statutes and regulations to offer DPAs less frequently for individual criminal defendants while offering them more and more in the context of corporate prosecutions.[64] This evolution suggests both that Congress never considered that section 3161(h)(2) might provide a tool for the pretrial diversion of corporate prosecutions and that DPAs are not being used as intended.[65] However, although DPA use for individuals has become increasingly rare, DPAs are still occasionally offered to individuals. In the last few years, the federal government has used DPAs for a variety of defendants, including three former members of the U.S. Intelligence Community who assisted the United Arab Emirates in hacking U.S. companies and citizens; the Chief Financial Officer of Huawei, who deceived HSBC Bank about Huawei's business dealings with Iran; and Wake Forest University's former head women's volleyball coach, who had participated in a college admissions scandal.[66] Additionally, the *Justice Manual* does not prohibit prosecutors from using DPAs on individual defendants,[67] but, instead, encourages prosecutors to consider using "civil and

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.org/state-restoration-profiles/federalrestoration-of-rights-pardon-expungement-sealing/#III_Expungement_sealing_other_record_relief [https://perma.cc/6F6E-3VB6] (describing function of Federal First Offender Act).

60. *See* 28 U.S.C. § 3161(h)(2) (establishing that general prosecutorial time limits are delayed for deferred prosecutions); *see also* Love, *supra* note 59.

61. *See* 18 U.S.C. § 3607(a).

62. *See* Love, *supra* note 59 (asserting that the Justice Department has authority to enter into DPAs and that courts have had varied roles in regulating DPAs).

63. *See* Davis, *supra* note 35; Bourjaily, *supra* note 44, at 545.

64. Reilly, *supra* note 55, at 841.

65. *See* Lawlor, *supra* note 44 (asserting that the use of DPAs as originally intended has been largely abandoned).

66. *See* May, *supra* note 18, at 42 (emphasizing that although they are rare, DPAs are still used with a variety of defendants).

67. *Id.*

administrative remedies," including "pretrial diversion."[68] Nevertheless, the federal use of DPAs outside the context of corporate prosecutions (which occur predominately at the federal level) is minimal.[69] With that being said, there is a significant history of states incorporating DPAs into their statutory codes as early as 1909, with most adopting them later to build upon the successes of early programs such as Project Crossroads and the Manhattan Court Employment Project.[70]

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68. *See* U.S. Dep't of Just., Just. Manual § 9-27.250 (2024). The *Justice Manual* does mention DPAs in the comments to section 9-27.230, which focuses on weighing federal interests in relation to initiating and declining charges. *See id.* § 9-27.230. There, the *Justice Manual* states that "[w]hen considering whether to initiate a prosecution or pursue an alternative resolution, such as a deferred or non-prosecution agreement, prosecutors should be aware of the possible effect the decision may have on the Department's ability to compensate victims of the underlying crimes and on the Crime Victims Fund (CVF)." *Id.* § 9-27.230 cmt. 8.

69. *See* May, *supra* note 18, at 42 (finding that it is rare to see the use of DPAs in individual prosecutions). *See generally* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 UNIV. PA. J. BUS. L. 797 (2013). One of the reasons corporate crimes have historically been prosecuted in federal jurisdictions rather than state ones is that, unlike crimes such as murder, rape, and burglary, which are most commonly violations of state laws, white collar crimes often involve violations of federal laws or regulations that cut across jurisdictional boundaries. *See* H. SUBCOMM. ON CRIME, 95TH CONG., WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE 17 (Comm. Print 1978); Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 832 (2014) ("[M]ost corporate crime is pursued in federal court . . . ." (footnote omitted)). This may explain why there is no comparative data on the use of corporate DPAs at the state and local level.

70. *See generally* Cory R. Lepage & Jeff D. May, *The Anchorage, Alaska Municipal Pretrial Diversion Program: An Initial Assessment*, 34 ALASKA L. REV. 1 (2017) (providing an assessment of the Anchorage Municipal Pretrial Diversion program for individual minor criminal defendants); Jennifer L. Huck & Camie S. Morris, *Jail Diversion and Recidivism: A Case Study of a Municipal Court Diversion Program*, 28 CRIM. JUST. POL'Y REV. 866 (2017) (examining data from a large Midwestern city's jail diversion program for defendants deemed indigent or having mental health problems); WASH. STATE INST. PUB. POL'Y, DEFERRED PROSECUTION OF DUI CASES IN WASHINGTON STATE: EVALUATING THE IMPACT ON RECIDIVISM 14 (Aug. 2007), http://www.wsipp.wa.gov/ReportFile/992/Wsipp_Deferred-Prosecution-of-DUI-Cases-in-Washington-State-Evaluating-the-Impact-on-Recidivism_Full-Report.pdf [https://perma.cc/52KT-L5LR] (comparing DUI deferred prosecution defendants over different time periods in Washington, where there were 34,453 from 1994 to 1998 and 30,981 from 1999 to 2003, a decrease of approximately ten percent); Tracy Hahn, *An Evaluation of the Cook County State's Attorney's Office Deferred Prosecution Program*, ILL. CRIM. JUST. INFO. AUTH. (Aug. 20, 2015), https://icjia.illinois.gov/researchhub/articles/evaluation-of-the-deferred-prosecution-program [https://perma.cc/4BJW-BQBQ] (finding that between February 2011 and May 2013, an average of thirty-five people entered the deferred prosecution program in Cook County, Illinois, each month and that the majority of program participants were "facing charges of retail theft, burglary, and theft").

### C. *Current State of Deferred Adjudication*

Today, after a fifty-state survey, our research reveals that all fifty states have, to some extent, codified DPAs in state statutes or rules. These allow judges to dismiss charges and substitute probation or other diversion or deferral programs for traditional prosecution. Despite Congress's intent for DPAs to be used primarily (if not exclusively) as a tool for pretrial diversion in the prosecution of nonviolent *individual* defendants,[71] many states place substantial limits on the use of DPAs. While data in this area is limited, in 2022, the Collateral Consequences Resource Center launched a study on deferred adjudication, awarding each state a letter grade based on whether a relief system was (1) accessible, (2) effective, (3) coordinated, (4) fair, and (5) administrable, based solely on the texts of the statutes.[72] States that stood out for laudable deferred adjudication statutes included Colorado, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Mexico, North Dakota, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, and West Virginia.[73] These states are characterized by providing "broad eligibility for deferred adjudication by type of offense and record of defendant, with sealing upon disposition."[74] These states provided significant discretionary power to courts and state prosecutors to determine on a case-by-case basis who is eligible for probationary sentences.[75]

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71. *See, e.g.*, Alexi Jones, *Reforms Without Results: Why States Should Stop Excluding Violent Offenses from Criminal Justice Reforms*, PRISON POL'Y INITIATIVE (Apr. 2020), https://www.prisonpolicy.org/reports/violence.html [https://perma.cc/FAL5-JAHE] (noting that ten states bar violent offenders from all alternative sentencing programs).

72. MARGARET C. LOVE, COLLATERAL CONSEQUENCES RES. CTR., THE MANY ROADS FROM REENTRY TO REINTEGRATION 13 (2022), https://ccresourcecenter.org/wp-content/uploads/2022/08/MRFRTR_8.24.22.pdf [https://perma.cc/KQU4-MUZ3]. Today, all states have statutes allowing for some sort of deferred adjudication. *See id.* at 80; *see also* LOVE & SCHLUSSEL, *supra* note 34, at 66 (noting that, in 2020, only Kansas and Wisconsin did not allow deferred adjudication and recognizing the fast adoption of deferred prosecution statutes as, just two years prior, the 2018 report stated that a total of thirteen states prohibited deferred adjudication).

73. LOVE, *supra* note 72, at 86.

74. *Id.* at 85.

75. *Id.* at 81.

While some states establish DPAs through general diversionary programs,[76] others grant courts discretion in deferring prosecution and placing defendants on probation.[77] In some states, the power to dismiss a charge or defer prosecution rests with the prosecuting attorney.[78] Many states limit the use of DPAs based on a variety of factors, including the extent to

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76. *See* ALA. CODE § 45-8-82.40 (2024) (enacted in 1975; providing for pre-prosecution or pretrial diversionary programs); 730 ILL. COMP. STAT. ANN. 5/5-6-3.3 (West 2024) (codifying the Offender Initiative Program, which works similar to DPAs. Enacted in 2013); MONT. CODE ANN. § 46-16-130 (West 2023) (allowing for pretrial diversions. Enacted in 2021); N.D. R. CRIM. P. 32.2 (West 2024) (discussing the procedure for pretrial diversion. Enacted in 2009); TEX. GOV'T CODE ANN. § 54.745 (West 2023) (establishing pretrial diversion programs in 1989); WIS. STAT. ANN. § 971.39 (West 2024) (enabling a deferred prosecution program to be applied to a defendant. Enacted in 2022).

77. *See* ALASKA STAT. ANN. § 12.55.080 (West 2024) (allowing a court to dispense of a defendant's sentence at any time within sixty days from the date of entry of that judgment of conviction and to place a defendant on probation. Enacted in 1962); ARK. CODE ANN. § 16-93-303 (West 2024) (allowing a first-time offender's case to be deferred while placing the defendant on probation for a period of not less than one year. Enacted in 1975); DEL. CODE ANN. tit. 21, § 4177B(2)(a) (West 2020) (allowing a court to defer prosecution and to place the defendant on probation. Enacted in 1978); IDAHO CODE ANN. § 19-2601 (West 2024) (allowing courts to withhold judgment and to instead place a defendant on probation. Enacted in 2018); ME. REV. STAT. tit. 17-A, § 1902 (West 2023) (authorizing the court to defer prosecutions. Enacted in 2019); MD. CODE ANN., CRIM PROC. § 6-220 (West 2024) (allowing a court to defer further proceedings. Enacted in 2017); NEB. REV. STAT. ANN. § 29-2292 (West 2024) (allowing a court to defer entry of judgment and to place a defendant on probation. Enacted in 2019); NEV. REV. STAT. ANN. § 176.211 (West 2023) (allowing deferred judgments. Enacted in 2019); N.M. STAT. ANN. § 31-20-3 (West 2024) (implementing deferred sentencing agreements in 1978); TENN. CODE ANN. § 40-35-313(a)(1)(A) (West 2024) (allowing a court to defer further proceedings for certain defendants while placing them on probation. Enacted in 1989).

78. *See* ALASKA R. MINOR OFFENSE, RULE 11 (West 2024) (allowing the prosecuting attorney to dismiss a "minor offense charge" or defer prosecution. Adopted in 2013); ARIZ. REV. STAT. ANN. § 11-365 (2024) (giving the county attorney "sole discretion" in deciding whether to divert or defer prosecution of an offender. Enacted in 1999); HAW. REV. STAT. ANN. § 853-1 (West 2024) (allowing a prosecutor to defer prosecution for up to one year. Enacted in 1976); IND. CODE ANN. § 34-28-5-1 (West 2024) (allowing prosecutors to establish a deferral program. Enacted in 1998); MISS. CODE ANN. § 99-15-105 (West 2024) (granting the district attorney power to supervise and control a pretrial intervention program. Enacted in 1987); MO. ANN. STAT. § 557.014 (West 2024) (enabling prosecutors to use DPAs. Enacted in 2019); N.Y. CRIM. PROC. LAW § 95.00 (McKinney 2024) (discussing where the settlement money from a DPA needs to go after a county district attorney processes it. Enacted in 2018); UTAH CODE ANN. § 77-2-5 (West 2024) (allowing a defendant to enter into a pretrial diversion agreement with a prosecutor. Enacted in 1980); W. VA. CODE ANN. § 61-11-22(a) (West 2024) (stating that a prosecuting attorney may enter into a pretrial diversion agreement when "he or she considers it to be in the interests of justice." Enacted in 2001).

which the crime is violent,[79] the defendant's criminal history,[80] whether the defendant suffers from a behavioral health disorder,[81] whether the defendant is a veteran,[82] or whether the defendant is an adult or a juvenile.[83] Other states limit the use of DPAs to certain kinds of cases, such as criminal fraud cases,[84] misdemeanor cases,[85] and cases that are not domestic violence

79. *See* CAL. PENAL CODE § 1000.8 (West 2024) (allowing low-level, nonviolent felony drug offenses to be eligible for deferred prosecutions. Enacted in 2009); FLA. STAT. ANN. § 948.08 (West 2024) (providing the requirements needed to enter a pretrial intervention program: a nonviolent felony charge, having two or fewer nonviolent felony convictions, having a substance abuse problem, and so on. Enacted in 1974).

80. *See* KY. REV. STAT. ANN. § 218A.14151 (West 2024) (providing a deferred prosecution program for first- and second-time offenders. Enacted in 2011).

81. *See* COLO. REV. STAT. ANN. § 18-1.3-101 (West 2024) (allowing deferred prosecutions for individuals who suffer from behavioral health disorders. Enacted in 2002).

82. *See* NJ DIRECTIVES, DIR. 05-18 (implementing DPAs for veterans who meet requirements of probation).

83. *See* OHIO REV. CODE ANN. § 2935.36 (West 2024) (establishing a pretrial diversion program for adult offenders. Enacted in 1978); 18 PA. STAT. AND CONS. STAT. § 6321 (West 2024) (allowing deferred prosecutions for minors charged with transmitting sexually explicit images. Enacted in 2012); TEX. CRIM. PROC. CODE ANN. Art. 42A.101 (West 2023) (allowing deferred prosecutions for offenders. Enacted in 2015). For other factors, see IOWA CODE ANN. § 321J.2(b)(1) (West 2024) (allowing a court to defer judgment for a defendant convicted of driving under the influence if a defendant seeks probation. Enacted in 1986); KAN. STAT. ANN. § 21-5414 (West 2024) (allowing certain criminal defendants to enter into DPAs. Enacted in 2017); MINN. STAT. ANN. § 152.18 (West 2024) (deferred prosecutions for certain first-time drug offenders. Enacted in 1971); N.J. STAT. ANN. § 2C:43-13.1 (West 2024) (allowing a court to grant DPAs for certain crimes. Enacted in 2013); N.C. GEN. STAT. ANN. § 15A-932 (West 2024) (allowing DPAs to be applied to individuals who have been charged with a Class H or I felony or a misdemeanor. Enacted in 1977); OKLA. STAT. ANN. tit. 22, § 305.1 (West 2024) (applying deferred prosecution programs if it is "in the best interests of the accused and not contrary to the public interest." Enacted in 1979); OR. REV. STAT. ANN. § 813.200 (West 2024) (allowing diversion programs for individuals who meet certain criteria and are charged with driving under the influence. Enacted in 1983); S.C. CODE ANN. § 17-22-60 (2024) (listing the requirements to be eligible for a pretrial "intervention program." Enacted in 1980); VT. STAT. ANN. tit. 13, § 7041 (West 2024) (allowing for a deferred sentence if a defendant meets all the requirements of the program. Enacted in 1971); VA. CODE ANN. § 18.2-251 (West 2024) (allowing individuals to be enrolled into a substance abuse program and, during that time, to have further proceedings deferred against the defendant. Enacted in 1975); WYO. STAT. ANN. § 7-13-301 (West 2024) (placing a person found guilty, but who has not been previously convicted of a felony, on pretrial probation to defer prosecution. Enacted in 1909).

84. *See* GA. CODE ANN. § 50-8-3.1 (West 2024) (applying DPAs in criminal fraud or abuse investigations. Enacted in 2006).

85. *See* LA. CODE CRIM. PROC. ANN. art. 894 (2024) (allowing a court to dismiss or defer a prosecution in misdemeanor cases. Enacted in 1972).

misdemeanors.[86] States such as New Hampshire, Michigan, Massachusetts, Connecticut, and Rhode Island permit the dismissal of charges after an offender completes a program recommended by the court or specified by statute.[87] Statutes in states such as Delaware and Ohio limit the use of DPAs exclusively to first-time offenders, while other states allow DPAs to be used by second-time offenders.[88] Although most states have incorporated DPAs into their codes, there is no existing national or comprehensive state data on the frequency of the use of DPAs in individual criminal prosecutions.

Other states limit eligibility for DPAs based on a variety of factors. Arkansas, Montana, and Oklahoma limit the use of DPAs to only misdemeanors and first-time felony offenses.[89] States such as Illinois limit DPA-like diversion programs to drug court cases.[90] In Michigan and North Carolina, DPAs are available for first-time drug offenses,[91] while DPAs in Iowa, South Dakota, and Wyoming are available for most first-time

86. *See* WASH. REV. CODE ANN. § 10.05.010 (West 2024) (allowing DPAs for certain crimes, excluding domestic violence misdemeanors. Enacted in 1975).

87. *See* CONN. GEN. STAT. ANN. § 17a-697 (West 2024) (dismissing charges after a person completes a treatment program as a part of the suspension of prosecution. Enacted in 2002); MASS. GEN. LAWS ANN. ch. 276A, § 7 (West 2024) (granting judge discretion to dismiss original charges after the successful completion of a court-appointed program. Enacted in 1974); MICH. COMP. LAWS ANN. § 600.1076 (West 2024) (allowing deferred prosecutions and dismissing claims if a defendant successfully passes a drug treatment program. Enacted in 1961); N.H. REV. STAT. ANN. § 490-G:2 (2024) (implementing drug courts that may allow dismissal of charges or probation upon successful completion of a program recommended by the court. Enacted in 2012); R.I. SUPER. R. CRIM. PROC. § 5A (West 2024) (allowing the dismissal of a charge upon successful completion of a diversion program).

88. *See* DEL. CODE ANN. tit. 21, § 4177B (West 2020) (applying deferred prosecutions in cases involving only first-time offenders); KY. REV. STAT. ANN. § 218A.14151 (West 2024) (providing a deferred prosecution program for first- and second-time offenders); OHIO REV. CODE ANN. § 2935.36(A)(1) (West 2024) (prohibiting the use of pretrial diversion programs for repeat or dangerous offenders); *see also* ME. REV. STAT. ANN. tit. 17-A, § 1902 (2021) (requiring individuals to refrain from further criminal conduct); MINN. STAT. ANN. § 152.18 (West 2023) (deferring prosecutions for certain first-time drug offenders); WASH. REV. CODE ANN. § 10.05.010 (West 2024) (prohibiting individuals who previously participated in the deferred prosecution program from participating again).

89. ARK. CODE ANN. § 16-93-303 (2025); MONT. CODE ANN. § 46-18-201(1) (2024); OKLA. STAT. tit. 22 § 991c(A) (2024).

90. 720 ILL. COMP. STAT. 570/410, 550/10, 646/70 (2025); OHIO REV. CODE ANN. § 2951.041(A)(1) (2025); WIS. STAT. § 165.95(2) (2025).

91. MICH. COMP. LAWS § 333.7411(1) (2025); N.C. GEN. STAT. § 15A-1341(a1) (2025).

offenses.[92] Ultimately, states that do not grant broad eligibility for the use of DPAs rely on the above-mentioned factors, as well as others, to dictate how DPAs should be used. A significant example is Texas, where a 2020 analysis showed "strong and consistent evidence that diversion [in Harris County] leads to statistically significant and economically meaningful declines in recidivism (at both extensive and intensive margins)" for those facing their first felony charge.[93] Studies in Texas have led to "the largest diversion program in the U.S. with over 200,000 participants."[94] Studies support similarly strong relationships between deferred adjudication and lower rates of recidivism.[95]

All fifty states permit prosecutors or courts to defer adjudication, though the extent of deferred adjudication varies by state.[96] As many as ten of those states prohibit any defendant being charged with a violent crime from accessing sentencing alternatives or deferred adjudications.[97] These restrictions appear to have begun with concerns about violent recidivism, which led to the passage of mandatory minimums

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92. IOWA CODE § 907.3(1) (2025); S.D. CODIFIED LAWS § 23A-27-13 (2025); WYO. STAT. ANN. § 7-13-301(a) (2025).

93. *See* Mueller-Smith & Schnepel, *supra* note 45, at 899.

94. Margaret Love, *Study: Texas Diversion Provides Dramatic Benefits for People Facing Their First Felony*, COLLATERAL CONSEQUENCES CTR. (Feb. 23, 2021), https://ccresourcecenter.org/2021/02/23/study-texas-diversion-provides-dramatic-benefits-for-people-facing-their-first-felony/ [https://perma.cc/FA88-P9AJ]. Although these diversion programs seem to be falling in use over time. *See* Brandon L. Garrett, Sandra Guerra Thompson, Dottie Carmichael, David Shi & Songman Kang, *Liberty, Safety, and Misdemeanor Bail*, 76 FLA. L. REV. 321, 371 n.271 (2024) (finding that deferred adjudication in Harris County fell from 8% in 2015 to 2% in 2021 and 2022).

95. *See, e.g.*, José Cid, *Is Imprisonment Criminogenic?: A Comparative Study of Recidivism Rates Between Prison and Suspended Prison Sanctions*, 6 EUR. J. CRIMINOLOGY 459, 459 (2009) (finding that "offenders given suspended sentences had a lower risk of reconviction" in Barcelona, Spain); Lulham, Weatherburn & Bartles, *supra* note 45, at 13 (concluding that, in New South Wales, Australia, "suspended sentences are as effective as, if not more effective than, a sentence of full-time imprisonment").

96. LOVE & SCHLUSSEL, *supra* note 34, at 66 (asserting that only Kansas and Wisconsin do not authorize their courts to defer adjudication in cases involving criminal charges); KAN. STAT. ANN. § 22-2907 (West 2024) (allowing certain criminal defendants to enter into DPAs. Enacted in 1978); WIS. STAT. § 971.39 (2024) (authorizing a deferred prosecution program for criminal charges in Wisconsin counties with populations of less than 100,000).

97. *See* Jones, *supra* note 71 (providing a map showing California, Oregon, New Mexico, Arkansas, Missouri, Tennessee, South Carolina, West Virginia, Michigan, and Pennsylvania as the states that block access to incarceration alternatives for violent offenders).

and parole-eligibility restrictions for violent offenders.[98] However, excluding violent offenders from deferred sentences or prosecutions simply for the incapacitation effect of preventing future injury is illogical based on the current scholarly literature. In fact, state prisoners convicted of violent offenses have among the lowest rates of recidivism.[99] The Bureau of Justice Statistics found that 39% of prisoners released after serving time for violent offenses "were arrested for any type of offense" in the first year following release, compared to "51% of those released after serving time for a property offense."[100] Even seven years following release, violent offenders were still less likely to be arrested for any offense in comparison to property, drug, or public-order offenders.[101] These statistics support the theory that the act of violence may reflect only a singular moment in time rather than a violent behavioral trend that poses an ongoing threat to society.[102] Differences in rearrest rates between nonviolent and violent criminals may be statistically significant in some studies but are minor regardless.[103]

### D. *DPAs in Federal Corporate Criminal Prosecutions*

The DOJ's use of DPAs has dramatically shifted away from use in individual federal criminal cases and toward far more frequent use in cases with corporate defendants. DPAs are so prominently used in federal corporate prosecutions that they can effectively be viewed as a tool for corporate governance reform.[104] This trend is borne out in the limited data that exists in this area.

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98. *See, e.g.*, Michael O'Hear, *Managing the Risk of Violent Recidivism: Lessons from Legal Responses to Sexual Offenses*, 100 B.U. L. REV. 133, 136 (2020).

99. *See* Jones, *supra* note 71.

100. MARIEL ALPER, MATTHEW DUROSE & JOSHUA MARKMAN, U.S. DEP'T OF JUST., 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014) 10 (May 2018), https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf [https://perma.cc/Q646-RQJZ].

101. *Id.*

102. *See* Jones, *supra* note 71.

103. *See* U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL VIOLENT OFFENDERS 3 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf [https://perma.cc/H7E2-AP7N]; *see also* ALPER, DUROSE & MARKMAN, *supra* note 100, at 11 (noting differential rearrest rates of 43.4% and 40.4% between these groups).

104. *See generally* Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1 (2014) (arguing that corporate governance should be considered in prosecutions).

A large percentage of corporate criminal cases are resolved through DPAs, while federal individual criminal cases do not commonly involve DPA agreements. In 2012, U.S. Attorneys collectively declined to prosecute nearly 30,000 individual criminal cases brought before them.[105] That year, the DOJ reported in its annual Federal Justice Statistics that just under 1% of all declined cases—253 in total—were declined because they were resolved through pretrial diversion programs, including DPAs.[106] The following year saw a comparable rate of 0.7% of individual prosecutions declined as a result of pretrial diversion.[107] Between 2014 and 2016, the reported Federal Justice Statistics did not separate out pretrial diversions from other alternatives to federal prosecution, but the data that is available makes clear that fewer than 6% of individual prosecutions were resolved through any pretrial diversion tool, including DPAs.[108] Over the past several years, the DOJ has been releasing the backlogged Federal Justice Statistics reports for the years between 2017 and 2021; these reports follow the previous trend of not including specific information about the reasons for case declination.[109]

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105. *See* MARK MOTIVANS, U.S. DEP'T OF JUST. FEDERAL JUSTICE STATISTICS, 2012—STATISTICAL TABLES 12 tbl. 2.3 (2015), http://www.bjs.gov/content/pub/pdf/fjs12st.pdf [https://perma.cc/G93G-E5MN] [hereinafter 2012 FEDERAL JUSTICE STATISTICS]. Deputy Attorney General Sally Quillian Yates issued the most current memorandum setting the standards applicable to DPAs in 2015. *See* Yi An Pan, Note, *The Yates Memo: Watch Out, DOJ Is Coming – Or Is It?*, 69 RUTGERS U. L. REV. 791, 797 (2017).

106. 2012 FEDERAL JUSTICE STATISTICS, *supra* note 105.

107. *See* MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2013—STATISTICAL TABLES 12 tbl. 2.3 (2017), https://bjs.ojp.gov/content/pub/pdf/fjs13st.pdf [https://perma.cc/YU6F-FVLY].

108. *See* MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2014—STATISTICAL TABLES 12 tbl. 2.3 (2017), https://bjs.ojp.gov/content/pub/pdf/fjs14st.pdf [https://perma.cc/H7S2-YYP8]; MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2015—STATISTICAL TABLES 12 tbl. 2.3 (2020), https://bjs.ojp.gov/content/pub/pdf/fjs15st.pdf [https://perma.cc/4W9W-8H2B]; MARK MOTIVANS, DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2016—STATISTICAL TABLES 13 tbl. 2.3 (2020), https://bjs.ojp.gov/content/pub/pdf/fjs16st.pdf [https://perma.cc/S8AJ-Q95C].

109. *See* MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2017–2018 at 7 tbl. 4 (2021), https://bjs.ojp.gov/content/pub/pdf/fjs1718.pdf [https://perma.cc/V9P9-H3UP]; MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2019 at 7 tbl. 4 (2021), https://bjs.ojp.gov/content/pub/pdf/fjs19.pdf [https://perma.cc/4MMF-BE6B]; MARK MOTIVANS, U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2020 at 7 tbl. 4 (Rev. 2023), https://bjs.ojp.gov/content/pub/pdf/fjs20.pdf [https://perma.cc/9KTG-FGAB]; MARK MOTIVANS, U.S.

While the data on the use of DPAs in federal prosecutions of individual defendants is sparse, it supports a clear conclusion. Federal prosecutors resolve only a small percentage of their cases with individual criminal defendants—almost certainly less than 6%—through pretrial diversion tools such as DPAs.

There is similarly limited data on federal prosecutors' use of DPAs in corporate prosecutions.[110] What evidence exists, however, supports the conclusion that a corporate defendant is far more likely than an individual to receive a DPA. The U.S. Government Accountability Office (GAO) conducted a review of the DOJ's use of DPAs, and the related NPAs, between September 2008 and June 2009.[111] The GAO's report reached a stunning conclusion: "the use of corporate deferred-prosecution agreements and non-prosecution agreements . . . *were comparable to the number of corporate prosecutions undertaken*."[112] While fewer than six percent of individual defendants likely receive DPAs from the DOJ, nearly *all* corporate defendants have the opportunity to do so.[113] It hardly requires mention that this arrangement gives individuals the

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DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2021 at 8 tbl. 4 (2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fjs21.pdf [https://perma.cc/2KBB-H2ZU].

110. *See* Emily M. Homer & Michael O. Maume, *The Deterrent Effect of Federal Corporate Prosecution Agreements: An Exploratory Analysis*, 5 J. OF WHITE COLLAR & CORP. CRIME 15, 21 (2022) (noting that data on white-collar and corporate crime is difficult to come by).

111. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON–PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS (2009), http://www.gao.gov/assets/300/299781.pdf [https://perma.cc/Z8VC-MQAK] [hereinafter GAO REPORT] (evaluating the DOJ's efforts to track the number of DPAs and NPAs that it has entered into and noting that it lacks a mechanism to measure the effectiveness of such agreements).

112. *See* United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 42 (D.D.C. 2015) (citing GAO REPORT, *supra* note 111) (emphasis added). While this finding alone is stunning, it should be noted that in most corporate prosecutions, the corporation is offered the chance to negotiate a DPA to resolve its own criminal liability *and no individual in the corporation is charged, either*. *See* Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 TEX. L. REV. 285, 298 & n.51 (2021) (citing Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1791 (2015) (finding that in federal corporate prosecutions between 2001 and 2014, only thirty-four percent of cases involved charges being brought against an individual within the corporation who personally was involved in the criminal behavior)). This fact discounts the argument that the disparity between use of DPAs in corporate and individual cases is because corporate defendants can get a DPA so long as the individual *in* the corporation who committed the crime is separately charged.

113. *See supra* note 108.

short end of the stick. Corporations facing federal criminal charges are practically guaranteed the opportunity to negotiate a DPA and, thus, not take a plea or defend their case at trial to avoid criminal sanctions. Individual defendants do not receive the same opportunity.

The data provided to this point demonstrate that federal prosecutors have come to use DPAs predominantly in corporate prosecutions. What is unclear, and what the data has not yet shown comprehensively, is how often DPAs are being used by state and local prosecutions of individual defendants. Although DPAs were originally created for use in individual criminal prosecutions to grant individuals a second chance—and though there is some data that shows that states are using DPAs in individual cases—the *federal* government's use of DPAs in criminal cases is limited.[114]

Political culture reflects an individual's ability to seek a DPA in a federal prosecution.[115] This becomes clear when analyzing prosecution-related policies enacted during, and the use of DPAs during, both the Obama Administration and the first Trump Administration. For example, beginning on May 10, 2017, the first Trump Administration made it more difficult for individuals and corporations to seek DPAs "because prosecutors were required to seek a sentence for the most serious offense committed."[116] Although there is no available data on the effect of Trump-era policies on DPAs for individuals, there are such statistics for DPAs and NPAs for corporations. The Trump-era directive resulted in a total of forty-eight DPAs

114. *Compare* RICHARD G. MOORE, THE IOWA DIV. OF CRIM. JUV. JUST. PLAN., RECIDIVISM AMONG IOWA PROBATIONERS 6 (2005), https://publications.iowa.gov/15032/1/Recidivism%20Among%20Iowa%20Probationers.pdf [https://perma.cc/WE57-SKCV] (finding that sixty-three percent of probationers in Iowa between July and September 2001 were on probation due to deferred sentences), *and* Love, *supra* note 94 (noting that as of 2017, Texas boasted "the largest [individual] diversion program in the U.S. with over 200,000 participants"), *with* Amulic, *supra* note 26, at 150 (emphasizing that federal prosecutors rarely use DPAs in individual prosecutions). *See also* May, *supra* note 18 (citing recent federal cases that used DPAs in individual prosecutions); Deferred Prosecution Agreement at 7, United States v. Baier, 21-CR-577 (CJN) (2024) (granting a DPA in an individual federal prosecution and having defendants who were charged with conspiracy and computer fraud pay a fine); Bourjaily, *supra* note 44, at 550 (noting the lack of DPAs in federal individual prosecutions).

115. *See* May, *supra* note 18, at 45.

116. *Id.*

and NPAs during 2017 and 2018—twenty-four in each year.[117] This was the lowest number of annual corporate DPAs and NPAs since 2009.[118] In contrast to the first Trump Administration, both the Obama and Biden Administrations expanded prosecutorial discretion by allowing prosecutors to take into account an "individualized assessment" of a defendant's conduct, granting prosecutors increased discretion to use DPAs.[119] During the Obama Administration, there were an average of forty-one corporate DPAs and NPAs used per year, while the Trump Administration averaged twenty-nine per year.[120]

One of the aims of this Article is to help fill in the gap of what is presently known about state and local use of DPAs. I present data that I use to contemplate the rate at which state and local prosecutors employ DPAs in their work. I then compare state and local prosecutors' use of DPAs to that of federal prosecutors. This additional information helps enhance one's picture of how DPAs are being used throughout the country and then guides my evaluation of DPAs more broadly, including an evaluation of the reasons that have been offered for why DPAs might be better used in the corporate prosecution context. Ultimately, the collected data on the use of DPAs combined with the overall picture leads me to conclude that the disparate rate of deferred prosecution in corporate and individual cases cannot be justified and that DPAs should be used more often in individual prosecutions and more carefully in corporate prosecutions.

## II. WHAT THE DATA SHOW: STATE AND LOCAL PROSECUTORS' USE OF DPAS IN INDIVIDUAL PROSECUTIONS

### A. *National Prosecutor Study*

Between 2017 and 2019, researchers "designed a mixed methods study of prosecutor decision-making that contained a web-administered questionnaire embedded with experimental

117. *See* GIBSON DUNN, 2021 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS (2022) [hereinafter 2021 YEAR-END UPDATE], https://www.gibsondunn.com/2021-year-end-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements/ [https://perma.cc/R8FD-QA4J].

118. *Id.*

119. *See* May, *supra* note 18, at 45.

120. *See* 2021 YEAR-END UPDATE, *supra* note 117.

vignettes, close-ended questions, and open-ended questions."[121] In total, the study surveyed 541 state and local prosecutors who formed a roughly representative group for observation.[122] Each participating prosecutor was presented with police reports describing a low-level street crime that ended in an arrest.[123] The incident involved a male without any criminal record who had just broken up with his girlfriend, was drunk, and was asking people in a subway station for money.[124] He was seen with a knife, but he did not brandish it.[125] The scenario was minor, in that it was a first-time offender and that no one was harmed, but it could also be taken seriously, given that it can be classified as a violent crime. The prosecutors were then prompted with a series of questions regarding what process would be followed in their office to determine how or whether to charge and how they would personally charge the case based on their experience in the field.[126] Additional information on the sample, survey methods, and related findings can be accessed in the authors' other publications.[127]

The data collected in this survey sheds light on two questions that so far have lacked an empirical guide: Do state and local prosecutors employ DPAs in a manner similar to that of federal prosecutors in prosecutions of individual defendants? And does a more complete picture of how prosecutors currently use DPAs lead us to conclude that their use is beneficial, and thus should be expanded for individuals, or that their use is not beneficial, and thus should be curtailed for corporations?

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121. *See* Baughman & Wright, *supra* note 16, at 1154 (citing Christopher Robertson, Shima Baradaran Baughman & Megan S. Wright, *Race and Class: A Randomized Experiment with Prosecutors*, 16 J. EMPIR. LEGAL STUD. 807, 807–47 (2019)).

122. *See id.* at 1155. In some publications using this survey data, the authors reported experimental results from only 468 prosecutors. *E.g.*, *id.* at 1155 & n.158. Because every survey respondent answered the questions that are of interest here, the full sample collected can be used. *See id.*

123. *Id.* at 1156.

124. Christopher Robertson, Shima Baradaran Baughman & Megan S. Wright, *Race and Class: A Randomized Experiment with Prosecutors*, 16 J. EMPIR. LEGAL STUD. 807, 820 (2019).

125. *Id.*

126. *Id.*

127. *See generally id.*; Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133 (2022); Megan S. Wright, Shima Baradaran Baughman & Christopher T. Robertson, Supplemental Materials: National Prosecutor Survey (Sept. 7, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3917195 [https://perma.cc/4TLU-T42W].

### B. *Findings: The Use of DPAs in Individual Prosecutions*

The survey asked the participating prosecutors, after reading through the provided police reports, to select one or more options from a list indicating how they would proceed with the case.[128] The list of ten included options to charge various offenses, to decline the case, or to engage in a deferred prosecution.[129] The fact pattern was one of a low-level street crime committed by a first-time offender.[130] The police reports did not indicate that any injuries resulted or that any property was damaged; however, practically every surveyed prosecutor would have charged the case in some manner.[131] Fewer than two percent of the prosecutors indicated that they would have declined to bring charges.[132] Eighty-three percent would have charged disorderly conduct, while nearly thirty-seven percent would have charged assault.[133] Just fifteen percent of the surveyed prosecutors would have offered some sort of deferred prosecution, permitting the would-be defendant the ability to avoid a record of charges and the time to be rehabilitated as an alternative to facing criminal liability. These findings are summarized in Table 1 below.

Table 1. Responses to National Prosecutor Survey Q.116.1: Please indicate which charge(s) you would likely bring against the suspect.[134]

| | | |
|---|---|---|
| No Charges | 8 | 1.48% |
| Deferred Prosecution | 82 | 15.16% |
| Disorderly Conduct | 451 | 83.3% |
| Loitering | 123 | 22.74% |
| Public Nuisance | 175 | 32.35% |
| Criminal Nuisance | 98 | 18.12% |
| Harassment | 90 | 16.64% |
| Endangerment | 32 | 5.92% |
| Assault | 199 | 36.78% |
| Aggravated Assault | 87 | 16.08% |

128. Robertson, Baughman & Wright, *supra* note 124, at 821.
129. *Id.*
130. *Id.* at 821.
131. *Id.* at 829.
132. *Id.*
133. *Id.*
134. *See* Baughman & Wright, *supra* note 16, at 1158–60, 1189.

Table 2: Summary of Table 1 data organized to show how the surveyed prosecutors would have responded to the question if there were only three options: charge, decline, or defer.

| | | |
|---|---|---|
| Charge the Offender | 451 | 83.36% |
| Defer Prosecution | 82 | 15.16% |
| Decline Charges | 8 | 1.48% |

These survey data, of course, have their limitations. We cannot assert that it accurately represents the percentage of cases in which a state or local prosecutor would offer an individual defendant a DPA to resolve his case.[135] However, given the dearth of any other nationally representative data on the subject, it is helpful to consider what these data might indicate about prosecutorial charging and deferred prosecution.

The fact pattern presented here was of a low-level offense committed by a first-time offender. Several of the prosecutors indicated in their survey responses that such a fact pattern appeared to be a "one-off," unlikely to be repeated and likely well-suited to a form of rehabilitation rather than incarceration or serious monetary liability. In short, this is probably the type of case that a state or county prosecutor would be *most likely* to use a DPA to resolve. However, this case might be classified as a violent crime, which in many jurisdictions is not permitted to receive a DPA. Despite the limitations in how these data may be used, it signals that a state or local prosecutor might use a DPA in an individual prosecution in around 15% of her cases. That would certainly make DPAs more common at the local level than in cases brought by the DOJ, which uses DPAs to resolve its individual prosecutions in no more than 6% of cases. And of course, this data shows that local and state prosecutors still use DPAs very infrequently compared to how often federal prosecutors offer them to corporate criminal defendants. But this data is instructive in showing that for a certain type of low-level offense, prosecutors might be more likely to offer a DPA

135. Additionally, this data does not classify prosecutors' decisions based on experience. However, other data indicates that "young" prosecutors often suffer from so-called "Young Prosecutor's Syndrome," which refers to inexperienced prosecutors' tendency to charge broadly and push for trial. Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1068–69 (2014). By comparison, the study found that veteran prosecutors differ from their junior colleagues in that their "sense of balance inspires a prosecutor to economize, based on a pragmatic view of those times when a criminal sentence could add the most benefit for the public." *Id.* at 1081. Further research could reveal that more experienced prosecutors are more likely to utilize deferred prosecution.

(15% of the time) than to decline the case altogether (a very small percentage of cases).

## III. FLAWED JUSTIFICATIONS FOR DIFFERENTIAL USE OF DPAS IN INDIVIDUAL AND CORPORATE PROSECUTIONS

Using this national survey data to fill the gap in what had been published previously, we can now assess the state of how DPAs are used by prosecutors and whether that use is justified. Nearly all corporate defendants can elect to have their case resolved through deferred prosecution rather than taking a plea.[136] In individual prosecutions, federal prosecutors have historically used DPAs in no more than about 6% of cases.[137] And as this national survey data reveal, state and local prosecutors likely would resolve a garden-variety street crime case through a DPA in around 15% of cases.[138] The broad disparities in federal prosecutors' application of DPAs in individual and corporate prosecutions have received their share of criticism.[139] These critiques are well founded. The DOJ's current use of DPAs is not only contrary to congressional intent but also unjustified based on the major policy rationales of corporate criminal law. There is less discussion of state DPAs given the dearth of data, but, ultimately, changes in state DPA practice will affect many more defendants than changes in federal DPA practice.

This Part considers the core justifications presented for the differential use of DPAs in corporate cases compared to cases with individual defendants. The rationales commonly relied upon in criminal law to justify treating corporations more sympathetically than individual defendants, including by giving most corporations the option to enter a DPA rather than pleading guilty, are (1) the low standard for corporate criminal liability,[140] (2) corporations' need to avoid reputational harm

136. *See* United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 42 (D.D.C. 2015); *supra* text accompanying notes 112–13.

137. *See, e.g.*, 2012 FEDERAL JUSTICE STATISTICS, *supra* note 105, at 12.

138. *See supra* Table 2; *see also* Robertson, Baughman & Wright, *supra* note 124, at 822.

139. *See, e.g.*, Bourjaily, *supra* note 44 (advocating for the DOJ to stop using DPAs to resolve corporate criminal cases and to instead require guilty pleas from corporations guilty of committing a criminal offense).

140. *See* Reilly, *supra* note 44, at 331–33 (asserting that a criminal case against a company is virtually bulletproof if there is evidence that an employee engaged in criminal activity on the job).

that might accompany pleading guilty to a criminal offense,[141] and (3) the negative externalities of prosecuting a corporation.[142] These factors, however, are present to a comparable degree in cases with individual defendants, and they hardly justify such drastic differential use of DPAs in individual and corporate prosecutions. Though, it is argued that corporations are not sufficiently unique to be deserving of such differing treatment when liable for a criminal offense.

### A. *The Low Bar for Corporate Criminal Liability*

Defenders of the current usage of DPAs in corporate criminal cases point to the low standard of criminal liability for corporations.[143] Respondeat superior liability provides that a corporation may be held criminally liable for "the criminal acts of its employees if done on its behalf and within the scope of the employees' authority."[144] While this standard has long been applied to corporate criminal law, some litigants have argued that it sets the bar for criminal liability too low, in a manner not authorized by statute or Supreme Court precedent, and that it is even inconsistent with other applications of the doctrine, ultimately leading to perverse outcomes that thwart the goals of criminal justice.[145] The argument thus goes that because the bar for corporate criminal liability is so improperly low, corporations ought to be permitted access to a DPA to resolve their criminal cases, provided that they pay a fine, institute a compliance program, and potentially agree to be subject to monitoring for a period of time.

Of course, differential use of DPAs in individual and corporate prosecutions can be justified without comparing their bars for criminal liability. Though, such an explanation makes clear that the bar for corporate criminal liability is not so low

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141. *See* Elkan Abramowitz & Barry A. Bohrer, *The Debate About Deferred and Non-Prosecution Agreements*, 248 N.Y. L.J. (2012) (concluding that there is no question that criminal charges have a tremendous impact on a corporation's reputation).

142. *See* U.S. Dep't of Just., Just. Manual, § 9-28.1100 cmt (dictating that prosecutors can take into account the consequences to a corporation's employees, investors, pensioners, and customers).

143. *See* Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 707–08 (2020).

144. *See, e.g.*, United States v. Demauro, 581 F.2d 50, 53 (2d Cir. 1978).

145. *See* Brief for the Assoc. of Corp. Counsel et al., as Amici Curiae in Support of Appellant Urging Reversal at 5–26; United States v. Ionia Mgmt., 555 F.3d 303 (2d Cir. 2009) (No. 07-5891-CR), 2008 WL 8626038, at *5–26.

as to justify resolving all corporate prosecutions with DPAs while few individual defendants receive such lenient treatment.

We are living in an era of overcriminalization in which individuals must guard themselves against violating any of "4,400 federal criminal statutes and . . . as many as 300,000 federal regulations with accompanying criminal provisions."[146] When one considers jocular truths that the "void for vagueness" doctrine has fallen to the wayside[147] or that "the average American professional commits three felonies a day,"[148] it is not obvious that the bar for criminal liability is unjustifiably low only for corporate defendants. Instead, it appears as though this concern weighs equally in favor of providing individual defendants some relief, potentially through deferred prosecution, in order to account for the significant discretion and ease of proving up federal charges against an individual defendant.

One way to combat overcriminalization of individual crimes is to increase the use of DPAs in these prosecutions. There has been not only a rise in what is considered to be a crime but also a substantial increase in individual sentences over the past forty years.[149] Because the implementation of fines helps states meet their budgetary needs, there is a real incentive to "over-police and over-punish minor crimes,"[150] and police officers are increasingly arresting individuals for "even the most minor

146. Ellen S. Pogdor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 AM. U. L. REV. 1061, 1071 (2021).

147. *See* Harvey A. Silvergate & Monica R. Shah, *The Degradation of the "Void for Vagueness" Doctrine: Reversing Convictions While Saving the Unfathomable "Honest Services Fraud" Statute*, 2009–10 CATO SUP. CT. REV. 201, 237.

148. *See generally* HARVEY A. SILVERGATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2009) (explaining how federal criminal law has become dangerously overbroad, allowing prosecutors to pin crimes on anyone, even for seemingly innocuous behavior).

149. *See* Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, SENT'G PROJECT (Nov. 5, 2018), https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/ [https://perma.cc/8DLJ-R6WT]; John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 919–20 (2011) (finding that over the past forty years, "societal attitudes have become harsher and more punitive" and "[l]egislatures have ratcheted up the severity of criminal punishments to an unprecedented degree"); Tennessee v. Garner, 471 U.S. 1, 14 (1985) ("[M]any crimes classified as misdemeanors, or nonexistent, at common law are now felonies.").

150. *See* Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65, 68 (2020).

misdemeanors."[151] Especially now, there is no reason for DPAs to be justified in the corporate context while being neglected in the individual context. Indeed, the need for DPAs in individual prosecutions in the United States may heavily outweigh the need for DPAs in corporate ones.

Studies have shown that incarceration does not deter crime[152] but, counterintuitively, may increase crime rates in communities where crime is already high.[153] This may be attributed to the fact that incarceration has long-lasting consequences on families and communities.[154] But even a few days in jail can increase the likelihood of an individual to recidivate, and longer sentences are likely to further increase that likelihood for career offenders.[155] Crime is often rooted in

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151. *See* Maurice Baynard, Overcriminalization of Low-Level Offenses: Perpetuating Poverty and Racial Disparities in the Misdemeanor Criminal Justice System (2021) (Ph.D. dissertation, Duke University), https://dukespace.lib.duke.edu/server/api/core/bitstreams/260dcc36-14a3-4607-ac5e-bdae415243bd/content [https://perma.cc/3MXD-NSLM].

152. *See* Ronnie K. Stephens, *Explainer: Incarceration Rates vs. Crime Rates*, INTERROGATING JUST. (May 24, 2021), https://interrogatingjustice.org/ending-mass-incarceration/explainer-incarceration-rates-vs-crime-rates/ [https://perma.cc/KP9K-QATA]; Cameron Kimble & Ames Grawert, *Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem*, CTR. FOR JUST. (Aug. 6, 2019), https://www.brennancenter.org/our-work/analysis-opinion/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem [https://perma.cc/ZCX8-3PZS] (finding that Massachusetts recorded "the steepest decline in crime rate in the country in this period (about 40 percent) while reducing the number of people convicted of non-violent drug crimes in prison by 45 percent"); BRUCE WESTERN, JEREMY TRAVIS & F. STEVENS REDBURN, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 131–56 (2014).

153. *See* DON STEMEN, VERA INST. OF JUST., THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 2 (2017), https://vera-institute.files.svdcdn.com/production/downloads/publications/for-the-record-prison-paradox_02.pdf [https://perma.cc/UMD3-QETK] (finding that some communities may "reach an incarceration 'tipping point' after which future increases in incarceration lead to higher crime rates"). *See generally* Todd R. Clear, *Backfire: When Incarceration Increases Crime*, 3 J. OKLA. CRIM. JUST. RSCH. CONSORTIUM 7, 7–15 (1996) (discussing the unforeseen consequences of incarceration, such as the lack of decreased crime rates in areas of high incarceration).

154. *See* Wesley A. Shumway, *2017 Drug Laws in West Virginia: The Wrong Prescription for the State's Opioid Crisis*, 123 PENN ST. L. REV. 559, 575–76 (2019) (discussing how the war on drugs has been perceived as a "war on African-Americans" and the effects this has had on underprivileged communities in the United States); O'Hear, *supra* note 19, at 23–24.

155. *See* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 787 (2017) (finding that detention leads detained individuals to commit more crimes in the

poverty and deprivation, and the likelihood that an individual will commit a crime after release from prison is especially high.[156] Alternative sanctions to incarceration, such as the use of probation, community service, and—as this Article discusses—DPAs, serve as a deterrent to future crime more often than incarceration.[157] One of the primary aims of a DPA in the individual prosecution context is to grant individuals a second chance.[158] Some DPAs involve rehabilitative efforts,

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future); U.S. DEP'T OF JUST., NCJ 250975, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) 1 (concluding that 68% of released prisoners were rearrested within three years of release, 79% within six years, and 83% within nine years); Damon M. Petrich, Travis C. Pratt, Cheryl Lero Jonson & Francis T. Cullen, *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 CRIME & JUST. 353, 401 (2021) (asserting that imprisonment has no appreciable effect on reducing the number of repeat offenders and that it may even increase the number).

156. *See* Celeste Fremon, *New Study Finds That Prosecuting Non-Violent Misdemeanors Significantly Raises The Odds For Rearrest*, WITNESS LA (Apr. 1, 2021), https://witnessla.com/new-study-finds-that-prosecuting-non-violent-misdemeanors-significantly-raises-the-odds-for-rearrest/ [https://perma.cc/SX5P-F4S9] (finding that those who were not prosecuted had a fifty-eight percent lower likelihood of committing another crime in the subsequent two years than those who were prosecuted for the same crime); PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 10–11 (2011), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2011/pewstateofrecidivismpdf.pdf [https://perma.cc/BEL7-DR6H] (finding that over forty percent of all people leaving prison will reoffend within three years of their release).

157. *See* Lanny Bruer, Assistant Att'y Gen., Dep't of Just., Address at the New York City Bar Association (Sept. 13, 2012) (transcript available at https://www.justice.gov/archives/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association [https://perma.cc/M92U-DKPD]) ("[A] DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea."); *see also* Amulic, *supra* note 26, at 128 (noting that evidence suggests that deferrals and diversion programs do benefit society); Sandeep Gopalan & Mirko Bagaric, *Progressive Alternatives to Imprisonment in an Increasingly Punitive (and Self-Defeating) Society*, 40 SEATTLE U. L. REV. 57, 90–100 (2016) (finding that criminal sanctions have the capacity to effectively reduce crime through deterrence and rehabilitation of defendants); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 591 (1996). *See generally* Peter N. Salib, *Why Prison?: An Economic Critique*, 22 BERKLEY J. CRIM. L. 111 (2017) (discussing the benefits of alternatives to incarceration and their optimal deterrence levels). Data on the deterrent effects of DPAs is limited, with some scholars arguing that DPAs in corporate contexts are ineffective at deterring crime. In a recent study, researchers found that companies paying larger penalties were less likely to reoffend, while bigger corporations were more likely to reoffend. *See* Homer & Maume, *supra* note 110, at 15.

158. *See* May, *supra* note 18, at 42 (Judge Emmet Sullivan: "Deferred prosecution agreements could provide a powerful opportunity for a second chance for deserving individuals. Individual defendants should be given a chance to

which typically include counseling, training, treatment, or job placement.[159] These allow a defendant to rehabilitate without the "scarlet mark" of a conviction.[160] Although the deterrent effect of DPAs remains a contested issue, most studies have focused on the deterrent effect on corporations rather than on individuals.[161] However, diversion programs in general have been proven successful, and it is likely that individual DPAs might have similar results.

### B. *The Coercive Pressure of Harm to Corporate and Individual Reputations*

Some voice the concern that, because the reputational harm associated with criminal charges carries the risk of being so damaging to a corporation, the coercive power of bringing charges against a corporation is so great that corporate criminal prosecutions must be resolved through DPAs or NPAs.[162] In no small part, pervasive concerns over this issue seem to stem from a single corporate defendant prosecuted two decades ago: Arthur Andersen LLP. The Fifth Circuit Court of Appeals upheld the trial court's conviction of Arthur Andersen on the charge of obstructing an official proceeding of the Securities and Exchange Commission, in violation of 18 U.S.C. § 1512(b)(2).[163] The following year, the Supreme Court reversed Arthur Andersen's conviction.[164] However, by then, the firm

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rehabilitate, subject to the supervision of a court and prosecutor, with an eye toward avoiding the very serious collateral consequences that a criminal conviction can have for an individual and for society."); *see also* Amulic, *supra* note 26, at 148 (mentioning that the use of DPAs in noncorporate cases would give defendants second chances and serve a rehabilitative function).

159. *See* Xian, *supra* note 20, at 643.

160. *See id.* at 642–43 (finding that rehabilitation is "community-based").

161. *See* Homer & Maume, *supra* note 110; Nasar, *supra* note 44, at 849–58 (noting that positive internal changes occur within companies after issuance of a DPA). *But see* Bourjaily, *supra* note 44 (finding that there is no empirical evidence that DPAs succeed in "rehabilitating" corporations); Ellis W. Martin, *Deferred Prosecution Agreements: "Too Big to Jail" and the Potential of Judicial Oversight Combined with Congressional Legislation*, 18 N.C. BANKING INST. 457, 468–69 (2014) (finding that DPAs used in corporate prosecutions lack a deterrent effect).

162. *See, e.g.*, Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 486 (2006); *see also* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1382 (2009) ("DPAs and NPAs do look great when compared to full enforcement of the law, but full enforcement of the law is unthinkable.").

163. *See* United States v. Arthur Andersen, LLP, 374 F.3d 281, 284 (5th Cir. 2004).

164. *See* Arthur Andersen, LLP v. United States, 544 U.S. 696, 708 (2005).

had suffered such severe reputational harm that it was "effectively defunct," having crumbled from a company of 28,000 employees to a remaining staff of around 200 personnel.[165] From this prominent example, many prosecutors seem to remain deeply concerned that prosecuting a corporation without providing for pretrial diversion carries too much risk because the reputational harm of entering a guilty plea alone can undo a large corporation.

There are at least two reasons why differential use of DPAs in individual and corporate prosecutions should not be justified on that ground. First, one might reasonably ask whether the risk of reputational harm is really more significant when a corporation is required to plead guilty to avoid going to trial than when it is offered a DPA. DPAs provide some corporate defendants an opportunity to resolve a criminal charge without admitting fault. At the same time, prominent criminal cases against corporations that aren't resolved through a DPA—including Arthur Andersen's own prosecution—often involve corporate defendants that refuse to admit fault.[166] Thus, one can't fairly conclude that it is the reputational harm associated with taking a guilty plea rather than entering into a DPA that risks catastrophic effects for a corporate defendant. It is more likely that the public accusation that a corporation committed a serious criminal offense risks significant reputational harm. As a result, a corporation's reputation is hardly spared by entering a DPA instead of pleading guilty.

Second, allowing corporations, but not individuals, to avoid admitting fault and to resolve their criminal charges simply by paying a fine and agreeing to reform their behavior in the future, potentially under the microscope of a monitor, might displace the social and moral blameworthiness of corporate

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165. Jeffrey Goldfarb, *Memo to McKinsey: Avoiding Arthur Andersen's Fate*, REUTERS (May 14, 2024), https://www.reuters.com/breakingviews/memo-mckinsey-avoiding-arthur-andersens-fate-2024-05-14/ [https://perma.cc/JC3J-2U3J]; *see also* Jonathan D. Glater, *Enron's Collapse: The Auditor; Anxious Times for Andersen*, N.Y. TIMES, Jan. 15, 2002, at 31, 39 (discussing the "thousands of jobs" put at risk by Arthur Andersen's fall).

166. *See* Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship"*, 76 ST. JOHN'S L. REV. 979, 1014 (2002) (citing to Letter from Richard J. Favretto, Mayer, Brown, Rowe & Maw, Att'ys for Arthur Andersen LLP, to Michael Chertoff, Assistant Att'y Gen., U.S. Dep't of Just. (Mar. 13, 2002), http://www.fei.org/download/lettertojusticedepartment2.pdf [https://perma.cc/CK4T-36CD] ("[T]he expedited effort to destroy documents was confined to a relatively few partners and employees of the firm and was almost entirely limited to the Houston office.")).

crimes. The significant reputational harm of a criminal charge is arguably the primary factor distinguishing corporate prosecutions from civil enforcement actions.[167] Because corporations, unlike individuals, aren't subject to incarceration, "[t]he most powerful sanction that society can impose on a corporation is lost reputation or stigma."[168] By providing a path by which a corporate defendant may avoid moral blameworthiness, or reputational harm, prosecutors use DPAs in corporate prosecutions at the detriment of corporate criminal liability itself. This leads to a major disparity for individuals who have little in the way of avoiding moral blameworthiness for their mistakes.

For their crimes, individuals are subject to fines, incarceration, and, in twenty-three states, death.[169] To apply DPAs more leniently in corporate cases, simply because corporate defendants are arguably at greater reputational risk than individuals, is unjustifiable when prosecution subjects individuals to such severe other risks. Like a corporation that loses all but a few employees, individuals charged with a major crime can lose everything, including their job, family, and home. There might be an argument that the effects of criminal charges on a corporation (such as Arthur Andersen's employees losing their jobs after the company was charged) are farther reaching than those on individuals, but there are still reverberating effects in families and communities when a single member of a household is charged with a crime. These familial and community harms of incarceration are heavily documented by many scholars.[170] Both individuals and corporations have culpability for their crimes, and their reputational concerns alone cannot justify treating corporations different from

167. *See* Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 35–36 (2012).

168. *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1499 (1996); Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANT. ANALYSIS 581, 581 (2008).

169. *See States With and Without the Death Penalty* – 2025, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/BQ49-JDSJ].

170. *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2105 (2017) (asserting that incarceration negatively impacts the behaviors and worldviews of the families of incarcerated individuals); Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. U. L. REV. 65, 129 (2021) (finding that incarcerating members of a community can marginalize all who are involved and perpetuate the effects of the collateral consequences of incarceration on the community).

individuals in deferred prosecution. Both can be harmed in a devastating manner that has serious consequences for a community and an individual.

Additionally, individuals face the same, if not a greater, level of concern when it comes to reputational consequences post-imprisonment. Whether it comes from diminished employment opportunities[171] or the reputational and community harms,[172] individuals have a higher likelihood of carrying the weight of their mistake than corporations. Post-incarceration, people have difficulty finding jobs, are unable to participate in state and local politics, and experience a variety of familial consequences.[173] These reputational effects of imprisonment often lead individuals to reoffend, harming low-income and

171. *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 492–94 (2010) (finding that individuals with criminal records face numerous state and federal employment restrictions); CHRISTY VISHER, SARA DEBUS & JENNIFER YAHNER, URB. INST, EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASES IN THREE STATES, 3 (2008), https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF [https://perma.cc/P44P-9YTQ] (finding that two months after being released, only thirty-one percent of individuals were currently employed).

172. *See* Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. L. REV. 1, 3–22 (2014) (discussing the effects of imprisonment on an individual's ability to find employment, vote, find housing, and participate in the community).

173. *See* Utah v. Streiff, 579 U.S. 232, 253 (2016) (Sotomayor, J., dissenting) ("Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check." (citation omitted)); *see also* JEAN CHUNG & NICOLE D. PORTER, SENT'G PROJECT, VOTING RIGHTS IN THE ERA OF MASS INCARCERATION: A PRIMER, 1 (2024), https://www.sentencingproject.org/app/uploads/2024/11/Voting-Rights-in-the-Era-of-Mass-Incarceration.pdf [https://perma.cc/T83D-SAGD] ("As of 2024, 4 million Americans were prohibited from voting due to laws that disenfranchise citizens convicted of felony offenses. Voting rights vary by state, which result in a wide range of disenfranchisement policies."); U.S. COMM'N ON C.R., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES (2019) (finding that the effects of collateral consequences are usually permanent and that they affect all aspects of an individual's life); Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT'L INST. OF JUST. J. (Mar. 1, 2017), https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children [https://perma.cc/U22R-DXBP] (finding that familial bonds severely deteriorate when an individual is sentenced to prison); Amulic, *supra* note 26, at 140 (emphasizing that a criminal conviction will often "render an individual ineligible for welfare, food stamps, Social Security, or other public benefits").

underprivileged communities even further.[174] However, unlike corporations that are given a second chance without staining their records with a conviction, individuals must carry the weight of their mistake, which follows them for years after their imprisonment. It has long been said that corporations have "no soul to be damned and no body to be kicked,"[175] but at the same time, they also lack a moral compass. Thus, they should be punished long after a conviction. The almost exclusive use of DPAs for corporations, often justified by the collateral consequences they would face if prosecuted, prevent such punishment. Whether these collateral consequences justify such differential treatment is the focus of the next Section.

### C. *The Collateral Consequences of Corporate and Individual Prosecutions*

Some argue that the negative externalities of prosecuting a corporation for its crimes are too great and that, as a result, such cases are justly resolved through DPAs (or NPAs). This concern is so deeply held that the DOJ's *Justice Manual* makes explicit how prosecutors ought to consider the externalities when charging corporate defendants. It instructs that when charging corporate defendants, prosecutors may consider the consequences not only to the corporation but also to the individuals behind it: employees, investors, pensioners, and customers, many of whom played no role in the criminal conduct and may have been unaware of it.[176] Prosecutors should also be aware of the non-penal sanctions that affect a corporation's ability to apply for government contracts or federally funded programs such as health care programs.[177]

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174. *See* Tara O'Neill Hayes & Margaret Barnhost, *Incarceration and Poverty in the United States*, AM. ACTION F. (June 30, 2020), https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/ [https://perma.cc/CRF8-ADWR] (discussing the connections between poverty and imprisonment); Deborah Johnson, *Connections Among Poverty, Incarceration, and Inequality*, INST. FOR RSCH. ON POVERTY (May 2020), https://www.irp.wisc.edu/resource/connections-among-poverty-incarceration-and-inequality/ [https://perma.cc/DL6B-JRZQ] (discussing the cycle of incarceration and poverty among underprivileged communities of color); ABA CRIM. JUST. SECTION, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS JUDICIAL BENCH BOOK 4–5 (2018), https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf [https://perma.cc/Q9MT-MSHD] (finding that the collateral consequences of criminal convictions increase recidivism rates).

175. *See* Bronitt, *supra* note 22, at 51.

176. *See* U.S. Dep't of Just., Just. Manual § 9-28.1100, cmt. (2018), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/6UVM-P32P].

177. *See id.*

The *Justice Manual* contains no parallel provision to guide prosecutors to consider the collateral consequences of their charging decisions in cases with individual defendants.[178] Rather, it notes merely that prosecutors should be aware that prosecution of a defendant in another jurisdiction (i.e., state court) might result in collateral consequences, such as disbarment, that might be absent in a federal prosecution.[179] In contrast to the guidelines for prosecuting corporate entities, current guidelines for prosecuting individuals maintain that prosecutors do not need to be sensitive "to the potential severity of their decisions and recommendations."[180] Thus, prosecutors can bring charges and negotiate pleas without significant restraints, especially in the ninety-five percent of federal and state cases controlled by prosecutors that are not tried before a judge or jury.[181] The Supreme Court affirmed broad prosecutorial discretion in *McClesky v. Kemp*,[182] stating that "discretion is essential to the criminal justice process" and that inferring prosecutorial abuse requires "clear proof."[183] The U.S. Sentencing Commission's 2021 *Guidelines Manual* remedies this to some extent by providing that collateral consequences of an individual's conviction should be considered when determining the amount of a fine,[184] though the same provision applies when determining the appropriate fine in corporate criminal cases too.[185] But, at the same time, both federal and state prosecutors are encouraged to charge the most severe crime possible under the circumstances.[186] Specifically, the *Justice Manual* notes that, "[o]nce it has been determined to commence prosecution," the prosecutor should charge the most

178. *See generally id.* § 9-27.240.

179. *Id.*

180. *See* Baughman & Wright, *supra* note 16, at 1175 (asserting that prosecutors at both the state and federal level are encouraged "to charge the most severe charges possible").

181. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009) (addressing the lack of legal checks on prosecutors in making charging decisions, entering cooperation agreements, accepting pleas, and dictating sentences); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2156–59 (2013) (confirming that prosecutors possess broad, unchecked power).

182. 481 U.S. 279 (1987).

183. *Id.* at 297.

184. *See* U.S. SENT'G GUIDELINES MANUAL § 5E1.2(d)(5) (U.S. SENT'G COMM'N 2021).

185. *See id.* § 8C2.8(a)(3).

186. *See* Baughman & Wright, *supra* note 16, at 1170–76.

serious crime.[187] The National District Attorneys Association (NDAA) and the American Bar Association (ABA) say nothing about limiting or restraining prosecutorial charging.[188] Although both the NDAA and the ABA state that a prosecutor is not *obliged* to "file or maintain all criminal charges,"[189] without clear indications promoting prosecutors to utilize more deferred adjudication in cases, it is unlikely that prosecutors will dismiss charges.

Altogether, the charging and sentencing guidelines applicable in federal criminal cases treat the collateral consequences of corporate prosecutions as far more important than those in individual prosecutions. Indeed, the harm of collateral consequences for individual criminal prosecutions is not even a factor for prosecutors to consider in their decision to charge an individual.[190] While prosecutors are encouraged to seek justice, one important piece of the justice puzzle, the impacts on defendants—including on their communities, on their families, and on their chances of change and recidivism—is not in the prosecutor's calculus. Seeking justice for all involved and at least considering the future repercussions of carceral sentences on defendants should be considered by the prosecutor. If defendants are more likely to commit future harm following incarceration, which is often the case, that potential future harm should be considered when deciding whether to offer a deferred adjudication. The absence of collateral consequences from the list of factors to be considered in individual charging decisions is hard to justify because "[t]he prosecution of individual crime deserves at least as much purposeful consideration" as the prosecution of corporate crime.[191] This is especially true because of the high number of Americans incarcerated and facing post-incarceration collateral consequences,[192] which are at least as significant to them and

187. U.S. Dep't of Just., Just. Manual § 9-27.300 (2018), https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution [https://perma.cc/YU3K-3BBV].

188. *See* Baughman & Wright, *supra* note 16, at 1175–76.

189. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4(a) (AM. BAR ASS'N 2017), https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/ [https://perma.cc/UAW5-DTNK].

190. *See* Baughman & Wright, *supra* note 16, at 1166–68.

191. *See* Nicole T. Amsler, Note, *Leveling the Playing Field: Applying Federal Corporate Charging Decisions to Individuals*, 66 DUKE L.J. 169, 172 (2016).

192. *See* REBECCA VALLAS, MELISSA BOTEACH, RACHEL WEST & JACKIE ODUM, CTR. FOR AM. PROGRESS, REMOVING BARRIERS TO OPPORTUNITY FOR PARENTS WITH CRIMINAL RECORDS AND THEIR CHILDREN: A TWO-GENERATION APPROACH, 1 (2015),

their families as a corporate prosecution is to a company and its corporate shareholders.[193] Collateral consequences should be considered all around in a prosecutor's consideration of a charge.

## IV. A BETTER PATH FORWARD IN DEFERRED PROSECUTION

If corporate defendants aren't unique in ways that justify special treatment in deferred prosecution, as the prior Part discusses, then use of DPAs and other diversion tools should be considered equally in both individual and corporate contexts. There are three alternative paths to accomplish this: DPAs could be used more frequently in individual prosecutions, less frequently in corporate prosecutions, or more often in both types of cases. Guided by important public policy considerations, prosecutors should elect to consider deferred prosecution more often in both individual and corporate prosecutions.

### A. *Prosecutors Should Use DPAs in More Individual Prosecutions*

While a corporation cannot be incarcerated, an individual can be—and too many are. As a tool for pretrial diversion, DPAs are particularly well-suited for application in low-level individual criminal cases, in first-time offenses, and as an alternative to incarceration in other relevant cases. For this reason, advocates for criminal justice reform have repeatedly called for the increased use of DPAs to resolve both federal and state criminal cases against individual defendants because deferred prosecution can help decrease the effects of mass incarceration.

An expanded use of DPAs in individual prosecutions would be one option for prosecutors to further the aims espoused in President Barack Obama's plea to "give judges some discretion around nonviolent crimes so that, potentially, we can steer a young person who has made a mistake in a better direction."[194] The academy has echoed the belief that expanded use of DPAs

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https://www.americanprogress.org/wp-content/uploads/sites/2/2015/12/CriminalRecords-report2.pdf [https://perma.cc/84MC-4RLP] (presenting evidence that nearly half of all U.S. children have at least one parent with a criminal record).

193. *See* Amsler, *supra* note 191.

194. *See* President Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015) (transcript available at https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference [https://perma.cc/J5S2-VUS3]).

in individual prosecutions could serve an important role in addressing mass incarceration.[195] Further, such use of DPAs would be far more in line with Congress's original intent, which was to provide, in the Speedy Trial Act, for pretrial diversion for low-level, nonviolent offenses, including drug offenses.[196] Simply applying DPAs in these kinds of individual prosecutions would not wholly address the crisis of mass incarceration because low-level drug related cases account for no more than twenty-five to thirty-five percent of the incarcerated population.[197] But that's no reason to avoid using DPAs as a tool in the project of lowering overall incarceration rates in the United States. Beyond low-level, nonviolent offenses, DPAs for first-time violent crime cases should also be carefully considered given their low recidivism rates.[198] Prosecutors should greatly increase the use of DPAs and other pretrial diversion tools in individual prosecutions to carry out congressional intent and to participate in the project of addressing the ongoing harms of mass incarceration.

### B. *Judicial Oversight of Prosecutors' DPA Use in Corporate Prosecutions*

Neither statutory nor policy rationales dictate that corporate criminal prosecutions should be treated any different from individual criminal prosecutions, and prosecutors could appropriately consider both types of cases for DPAs. Some commentators oppose corporate deferred prosecution and call it a "failed DPA experiment," signaling that reform may be justified.[199] However, the need for reform in some historical use of DPAs does not mean that it is desirable or necessary to

195. *See, e.g.*, Amsler, *supra* note 191, at 209–10 (arguing that prosecutors should expand equitable considerations such as DPAs, rather than eliminate them); Amulic, *supra* note 26, at 124 (arguing that DPAs can "mitigate the harmful effects of criminal convictions"). *See generally* Henry, *supra* note 18 (highlighting the parallel trends of increasing use of DPAs for corporate crimes and increasing mass incarceration).

196. *See supra* Section I.B.

197. Current incarceration statistics indicate that, as of 2019, roughly 400,000 individuals were incarcerated for drug-related offenses out of a total of around 1.3 million individuals. *Criminal Justice Facts*, SENT'G PROJECT, https://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/DTZ7-T8GE]. Even cutting incarceration rates by twenty-five percent through a widely expanded use of DPAs in drug-related cases would be insufficient to return the United States's rate of incarceration to a level comparable to other developed Western nations. *See id.*

198. *See supra* notes 89–95 and accompanying text.

199. *See* Bourjaily, *supra* note 44.

completely prevent prosecutors from using the tool. In fact, there likely should be *more* use of DPAs, at least in individual prosecutions. Fortunately, in expanding the use of DPAs, there is an avenue to resolve some of the issues inherent in them: the judiciary can—and should—engage in more stringent review of DPAs.[200]

Admittedly, there may be barriers to this approach along both the judicial and legislative avenues.[201] However, there appears to be a path forward that would allow increased judicial review of DPAs in the corporate prosecution context. Proposals have highlighted the need for new legislation to permit such discretionary review of DPAs, in particular by federal judges.[202] Today, there is no congressional legislation specifically governing DPA use—or the judicial standards for reviewing DPAs.[203] Yet some judges have broadly asserted their existing authorities to engage in the type of review we advocate. Judge John Gleeson, a federal district court judge, contended that

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200. *See* Judith L. Ritter, *Making A Case For No Case: Judicial Oversight of Prosecutorial Choices - From* In re Michael Flynn *to Progressive Prosecutors*, 26 BERKELEY J. CRIM. L. 31, 70 (2021) (proposing that there be additional judicial scrutiny to protect the public from the corrupt use of prosecutorial discretion while protecting the exercise of that discretion to allow progressive reform); Reilly, *supra* note 44, at 357 (asserting that courts should review DPA agreements to ensure adequate protection of the government's interests, the defendant's interests, the public's interests, and respect for the law); Greenblum, *supra* note 32, at 1904 ("Narrowly tailored but effective judicial involvement could curb prosecutorial overreaching, minimize the negative externalities of the corporate deferral process, and ensure that deferral achieves its purpose."); Martin, *supra* note 161, at 479 (noting that judicial oversight could provide greater transparency in the DPA process and greater accountability for prosecutors and corporate entities). *But see* Benyamin, *supra* note 55, at 584 (arguing that courts should limit or expand DPAs only to remedy violations of recognized rights, preserve judicial integrity, or deter illegal conduct, because otherwise the use of the court's supervisory power to approve or reject DPAs is "inapplicable and improper"); Reilly, *supra* note 11, at 1134–35 (citing two federal judges who call for congressional action to clarify what standards courts should apply when dealing with DPAs).

201. *See* Coffee, *supra* note 1, at 3 ("Unless the Supreme Court decides otherwise, the bottom line is that federal judges cannot reject a DPA, even if the judge thinks that the settlement represents an egregious sellout by the Government.").

202. *See* Martin, *supra* note 161, at 478 (asserting that congressional legislation is needed to require judicial oversight to ensure that DPAs are fair and reasonable to the public and to involved parties); Lawlor, *supra* note 44, at 40 (suggesting that Congress could mandate court supervision of independent oversight of DPAs).

203. *See* Martin, *supra* note 161, at 464 (asserting that there has not been any formal congressional legislation on DPAs); United States v. HSBC Bank USA, 863 F.3d 125, 143 (2d Cir. 2017) (Pooler, J., concurring) (noting that courts lack meaningful oversight over DPAs and asserting that Congress should implement legislation empowering judicial review).

courts have the "authority" to approve or reject DPAs because of the "supervisory power" courts have over "parties before the bar."[204] Judge Gleeson cited this authority as the basis for approving a DPA between HSBC Bank, which was charged with willfully failing to maintain an effective anti-money laundering program,[205] and the government, even though both the government and HSBC contended that Judge Gleeson lacked such authority.[206] Because the DPA between the government and HSBC was placed "on the Court's radar screen" when it was presented as "a pending criminal matter," Judge Gleeson concluded that the parties were subject to the court's supervisory power.[207] Judicial decisions such as that of Judge Gleeson illustrate how judges, in the absence of legislation, can use their discretion to review DPAs. This extra level of supervision of corporate DPAs could provide the oversight needed to make commentators less weary of corporate DPAs. However, because there is already a mechanism in place for individual DPAs to have judicial oversight—if new charges are filed—that extra precaution does not need to be added to expand the use of individual DPAs.

### C. *The Path to Increasing Use of Individual DPAs in Criminal Cases*

The core proposal of this Article—that DPAs should be used more frequently in individual prosecutions and more carefully in corporate prosecutions—could be implemented in a handful of ways. First and foremost, the courts could play a significant role in reshaping the use of DPAs in federal prosecutions by discretionarily exercising their power under the Speedy Trial Act to approve (or disapprove) of DPAs. Notably, "[N]early every . . . DPA that the government has negotiated with a U.S. company has been approved without judicial modification."[208] Moreover, "It is well established that the Executive Branch has

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204. United States v. HSBC Bank USA, No. 12–CR–763, 2013 WL 3306161, at *4 (E.D.N.Y. July 1, 2013) (quoting United States v. Payner, 447 U.S. 727, 735 n.7 (1980).

205. *Id.* at *1.

206. *Id.* at *5; *see also* Christie Smythe, *HSBC Judge Approves $ 1.9B Drug-Money Laundering Accord on Money Laundering*, BLOOMBERG (July 3, 2013, 4:06 PM), http://www.bloomberg.com/news/2013-07-02/hsbc-judge-approves-1-9b-drug-money-laundering-accord.html [https://perma.cc/879M-WQ6M].

207. *HSBC Bank USA*, 2013 WL 3306161, at *7.

208. Peter Reilly, *Negotiating Bribery: Toward Increased Transparency, Consistency, and Fairness in Pretrial Bargaining Under the Foreign Corrupt Practices Act*, 10 HASTINGS BUS. L.J. 347, 393 (2014).

broad discretion to decide when to initiate criminal proceedings,"[209] and "[t]he power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see the faithful execution of the laws."[210] Nonetheless, the Speedy Trial Act provides for "[l]imited, [b]ut [m]eaningful, [c]ourt [r]eview" of negotiated DPAs.[211] Scholars contend that such judicial power extends far enough to allow the courts some role in reshaping the use of DPAs in corporate and individual prosecutions.[212]

Second, congressional action may be warranted to reform the use of these deferred adjudication tools in individual and corporate prosecutions.[213] State and federal legislators could encourage the use of DPAs in individual prosecution as a measure to increase public safety, to cut criminal justice costs, and to create equity between corporations and individuals who can be rehabilitated. It is more likely, however, that if the types of charging practices discussed herein were to be significantly changed, the DOJ and other prosecutors would have to be the source of that change.[214] Prosecutors could be convinced through budgetary practices to divert their less dangerous defendants[215] through DPAs instead of bringing prosecutions and plea agreements in as many cases as they currently do.[216] As of right now, prosecutors are heavily incentivized to make plea agreements with defendants, which has resulted in over ninety-five percent of all cases being resolved with a plea

209. United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 27 (D.D.C. 2015) (citing Cmty. for Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201 (D.C. Cir. 1986)).

210. Cmty. for Creative Non–Violence v. Pierce, 786 F.2d 1199, 1201 (D.C. Cir. 1986).

211. *Saena Tech Corp.*, 140 F. Supp. 3d at 28–31.

212. *See* Davis, *supra* note 35, at 765–69 (describing some potential bases for judicial review of DPAs); *see also* Amsler, *supra* note 191, at 208–09. *But cf.* Bourjaily, *supra* note 44 (arguing for *congressional* action to end the DOJ's current practice of using DPAs in corporate criminal prosecutions).

213. *See* Bourjaily, *supra* note 44.

214. *See* Amulic, *supra* note 26, at 145–46 (advocating for changes in the DOJ's internal policies to reform its use of DPAs and NPAs in individual prosecutions).

215. *See* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 507 (2012) (specifying what kinds of defendants are considered dangerous).

216. *See* Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 522 (2015) (asserting that DPAs "have 'less of a toll' on the DOJ's budget" than traditional trials).

agreement.[217] If incentives were instead shifted by legislatures or by the heads of individual district attorney offices to encourage DPAs, prosecutors might utilize DPAs more frequently. Pay and merit structures could also be adjusted to accommodate such changes within offices or in regions of the United States. Many offices across the country provide financial inducements for individual prosecutors by relying on their conviction rate to determine advancement and promotion. In some districts, state prosecutors with the highest conviction rates "stand the greatest chance for advancement internally."[218] If prosecutors were instead judged by greater measures of societal justice and safety, recidivism rates for defendants, community crime rates, and the costs they impose, prosecutors might consider broader justice measures over their conviction rates, which could change charging practices. A key piece of this equation would be to increase the use of DPAs given that they maintain a balance of holding defendants accountable while providing them flexibility to avoid collateral consequences (if they avoid future crime). DPAs are likely much more palatable to prosecutors than declinations or even pretrial diversions because DPAs do not require any special program to exist in the jurisdiction and do not appear to victims or the public as if the defendant is getting away with crime. Deferred agreements maintain criminal accountability without threatening to maintain high incarceration rates. Defendants will still be charged if they continue any of the same criminal behavior. Thus, we can rely on DPAs to resolve individual criminal cases without increasing threats to public safety.

## CONCLUSION

DPAs are a valuable tool for pretrial charging, and Congress was wise to provide for their use in prosecutions of low-level offenses by individual defendants. Based on the data contained in this piece, however, the way that DPAs are being used by federal, state, and local prosecutors is severely misaligned with Congress's original intent. Corporate criminal defendants are offered DPAs by federal prosecutors in almost every case, while

217. Julian A. Cook, III, *Crumbs from the Master's Table: The Supreme Court, Pro Se Defendants and the Federal Guilty Plea Process*, 81 NOTRE DAME L. REV. 1895, 1895 (2006) (finding that ninety-five percent of all federal cases are resolved through the guilty plea system).

218. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134–35 (2004) (discussing the role that conviction rates play in prosecutors advancing within their offices).

individual defendants appear to receive a DPA in no more than 15% of cases (though comprehensive data is lacking). DPAs provide criminal accountability while at the same time reducing recidivism and the collateral consequences of incarceration. Concerns with federal DPAs can be mitigated with increased judicial oversight, as there is with state DPAs.

The popularity of corporate deferred prosecution demonstrates that DPAs can be used in more individual criminal prosecutions. The differential use of deferred prosecution in individual and corporate contexts is unmoored from congressional intent and runs counter to the important public policy goal of combatting the plague of mass incarceration in the United States. Congress had hoped that DPAs would be used more prolifically in criminal cases. Given the strength in legislative backing, the benefits to defendants, and the public policy aims of reducing mass incarceration, there is a strong case that individual criminal prosecutions can benefit from deferred prosecution.