

Deferred Prosecution and Corporate Criminal Prosecution: A Comparative Analysis

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Abstract

Deferred prosecutions are frequently used in the U.S. as an alternative to prosecution in cases of corporate crime. In England, the Crime and Courts Act of 2013 adopted the deferred prosecution approach to corporate crime but with significant differences from the American model. At the same time, there is pressure for reform in the U.S. which may have the effect of aligning the American use of deferred prosecution more closely with the procedure now applicable in England and Wales.

Introduction

Traditionally, when a prosecutor is confronted with evidence of a crime, there are three options: decline the prosecution for reasons of evidentiary weakness or legal obstacle, negotiate a guilty plea on acceptable terms, or proceed to trial. However, since the early 1990's in the United States, and since last year in England, prosecutors have been able to deploy a different weapon in their arsenal with respect to corporate criminal liability-- the deferred prosecution agreement. ("DPA") The increasing prominence of such agreements in the United States, and their advent in England, presents an appropriate occasion for comparative analysis.

What is a Deferred Prosecution Agreement?

A deferred prosecution agreement is a formal written agreement between a prosecutor's office and a corporation with the following typical features: the prosecutor files an indictment setting out the criminal charges, which are held in abeyance. The prosecution does not proceed as long as the corporation abides by the terms of the agreement, such as the payment of a fine, restitution to victims, and the implementation of corporate governance reforms, such as new and strengthened compliance procedures and controls aimed at reducing the risk of further criminal behavior. The company's adherence to the terms of the agreement is often overseen by an independent monitor who submits periodic reports to the prosecutor's office. The duration of a DPA can be several years. Some have been considerably longer. If the remediation process is regarded as a success, the previously filed criminal charges are dismissed.

From Pretrial Diversion for Individuals to Deferred Prosecution for Corporations: The U.S. Model

The modern deferred prosecution had humble beginnings. Many years ago, prosecutors developed what were called pretrial diversion programs. When it was believed an offender's behavior had its roots in drug or alcohol addiction, mental illness, or the like, an agreement was often reached to divert the defendant from the criminal process to some appropriate social services program. If a defendant's issues were addressed effectively, the prosecution would be dismissed, after an agreed period of time, as long as the defendant had not committed any another crime during the period of diversion.¹

In the same way that the pretrial diversion programs seek to rehabilitate an individual, with the aim of reforming behavior to reduce recidivism, deferred prosecution agreements seek the structural reform of corporate organizations to enhance the prospect that the company will be a law-abiding corporate citizen.

¹ See, e.g., *Pretrial Diversion Programs: Research Summary*, Bureau of Justice Assistance, U.S. Department of Justice (Oct. 2010)

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Since 2003, prosecutors in the United States have entered into 255 such agreements.² In 2012, the head of the Criminal Division of the Justice Department described deferred prosecution agreements as a “mainstay of white collar criminal enforcement.”³

The use of DPA’s has also drawn the attention of the academy. Professor David Uhlmann of the University of Michigan Law School has described the use of deferred prosecution agreements as having “surged” to the point of being the basis for resolving corporate criminal prosecutions in two-thirds of all federal cases between 2010 and 2012.⁴ Professor Garrett of the University of Virginia Law School recently published a book-length treatment of deferred prosecution agreements based on a database he created to compile DPA’s and NPA’s from disparate sources.⁵ Even the Securities and Exchange Commission, which has solely civil enforcement powers, has begun entering into deferred prosecution agreements with securities law violators who provide cooperation leading to enforcement actions against more culpable persons or entities.⁶

Deferred Prosecution Comes to England

In May 2012, the Lord Chancellor and Secretary of State for Justice submitted to Parliament a Consultation Paper, entitled “Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements.” The Consultation Paper invoked the use of deferred prosecution agreements in the United States, and argued--over nearly 50 pages-- that “deferred prosecution agreements...can make a valuable contribution to efforts to identify and address corporate economic crime.”⁷ This was followed by enactment of the Crime and Courts Act of 2013, which became effective in February 2014, and which provides statutory authority for the use of deferred prosecution agreements.⁸ Section 6(1) of the Act required the Director of Public Prosecutions and Director of the Serious Fraud Office to issue a code to govern the use by prosecutors of deferred prosecution agreements. A detailed handbook, *The Deferred Prosecution Agreements Code of Practice*, was subsequently published.⁹

A Preliminary Word on the Legal Standard for Corporate Criminal Liability

An understanding of deferred prosecutions requires at least a brief discussion of the legal standards for corporate criminal liability in the United States and in England. The word corporation comes from the Latin

² This figure is based on the database created by Professor Brandon L. Garrett. See B. Garrett, *Too Big to Jail* (2014). The 255 figure includes both DPA’s and non-prosecution agreements (“NPA’s”). The terms of an NPA can be identical to a DPA except no criminal charges are filed if an NPA is negotiated between a prosecutor and a company.

³ L. Breuer, Remarks to New York City Bar Association (Sept. 13, 2012).

⁴ D. Uhlman, “The Pendulum Swings: Reconsidering Corporate Criminal Prosecution” (August 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642455.

⁵ B. Garrett, *Too Big to Jail*, *supra*, note 2.

⁶ SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations, SEC Release 2010-6 (Jan. 13, 2010); see also SEC Release, *Tenaris to Pay \$5.4 Million in SEC’s First-Ever Deferred Prosecution Agreement* (May 17, 2011); available at <http://www.sec.gov/news/press/2011/2011-112.htm>.

⁷ Ministry of Justice, Consultation Paper CP9/2012 *Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements*, p. 3. For the sake of convenience, I will refer to the adoption of the deferred prosecutions as occurring in the U.K. or England even though they apply only in England and Wales due to the different way the legal systems in Scotland and Northern Ireland have developed.

⁸ Crime and Courts Act of 2013, sched. 17, available at <http://www.legislation.gov.uk/wkpga/2013/22/schedule/17>.

⁹ SFO & CPS Deferred Prosecution Agreements Code of Practice: Crime and Courts Act of 2013, available at <http://www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf>.

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word corpus, meaning body. Although a corporation may in some sense be a body, it is an inanimate one. And though a corporation can commit a crime, it can only do so through one or more of its employees, officers, or directors. As Lord Chancellor Edward Thurlow is reported to have remarked in the 18th century, corporations “have no soul to damn or body to kick,” reflecting the reality that a corporation cannot be imprisoned or punished in the same way an individual can.¹⁰ In the United States it has been the rule for over a century that an organization commits a crime if even a single employee, acting within the scope of his or her employment, and at least in part for the benefit of the company, engages in criminal conduct. In other words, corporate criminal liability in the United States is based on a broad concept of *respondeat superior* “let the master answer,” which attributes the crime of an employee to its modern master, the employer.¹¹

The breadth of this rule may cause a prosecutor to doubt whether to charge a company with the crimes of its employee, or even crimes committed by senior management, especially when doing so could result in collateral damage to innocent parties, such as employees who did not engage in wrongdoing, shareholders whose investment might be imperiled by a prosecution that causes reputational damage and a drop in share value. Prosecution of a corporation can scare away vendors or sources of finance and cause debarment or loss of licenses which may jeopardize a company’s very existence.

Three examples will illustrate the point. One of the earliest deferred prosecution agreements involved Prudential Insurance Company, which in the early 1990’s, was found to have defrauded a large number of investors, through its Prudential Securities subsidiary, by falsely describing the nature and risks associated with investments in real estate limited partnerships. The United States Attorney’s Office for the Southern District of New York was preparing to prosecute the company. Prior to the decision to indict, however, Prudential’s lawyer pointed out that, as a mutual insurance company, Prudential was owned entirely by its policyholders. Prudential’s counsel argued that a prosecution of even the retail brokerage unit could destabilize the entire company, compromise its ability to pay benefits on policy claims, and harm innocent policyholders. In 1994, the company entered into one of the earliest deferred prosecution agreements.¹²

The second example involves Roger Williams Medical Center in Providence, Rhode Island. In 2006, three executives at the hospital were indicted for bribing a state legislator in order to have the politician promote the hospital’s interests in the legislature. By virtue of the crimes of its executives, the hospital itself faced prosecution. Lawyers for the hospital argued that a conviction of the hospital could debar it from participating in federal health care programs, such as Medicare and Medicaid, the source of significant revenue. If that occurred, the hospital would be forced to curtail its programs, resulting in a significant limitation on access to health care for many of the poorer residents of Providence. A deferred prosecution agreement was entered into which required the hospital to hire an ethics officer to strengthen its compliance procedures and training. In lieu of a fine or other financial penalty, the hospital was required to provide \$4 million dollars in free health care to uninsured low income residents of Providence.¹³

¹⁰ See John C. Coffee, Jr., “No Soul to Damn, No Body to Kick: An Unscandalized Inquiry Into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386 (1980) (“Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked.”) (quoting Edward, First Baron Thurlow).

¹¹ *New York Central & Hudson River Railroad*, 212 U.S. 481 (1909); *United States v. Nearing*, 252 F. 223, 231 (S.D.N.Y. 1981) (L. Hand, J.: “there is no distinction in essence between the civil and the criminal liability of corporations, based upon the element of intent or wrongful purpose.”).

¹² S. Walsh & J. Matthews, “Prudential Accused of Fraud, Gets Chance to Avoid Trial,” *Wash. Post*, Oct. 28, 1994. The terms of the deferred prosecution of Prudential’s agreement required the deposit of \$330 million into a fund for the benefit of defrauded investors. A former federal judge, Kenneth Conboy, was appointed to monitor Prudential’s efforts to enhance its compliance plans.

¹³ B. Garrett, *supra*, note 5 at pp. 76-77.

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The final example does not involve a deferred prosecution agreement but is nonetheless relevant because it is frequently cited as an example of the adverse consequences that can occur when prosecution is chosen over the option of a deferred prosecution. In 2002, the accounting firm Arthur Andersen was convicted of obstruction of justice for destroying documents related to its role as outside auditor to Enron. This led directly to the firm's collapse and the reduction of the Big Five accounting firms to the Big Four. The Supreme Court's subsequent reversal of the conviction came too late to save Arthur Andersen which had declared bankruptcy when it realized public companies would not retain an outside auditor to review their books and records when that auditor had been convicted of crimes committed while acting for an audit client.¹⁴

The Narrower Standard for Corporate Criminal Liability in England

The legal standard for corporate criminal liability is much narrower in England, making it more difficult for successful corporate prosecutions. In England, a corporation is regarded to be criminally liable for a crime having a state of mind element, such as fraud, only when the prosecutor can establish that the "directing mind and will" of an organization was responsible for the criminal wrongdoing. This is known as the "identification principle," and applies generally only to senior management of the corporation. In other words, unless a prosecutor in England can establish that senior management committed the crime, no crime is attributable to the company.¹⁵

The 2012 Consultation Paper submitted to Parliament acknowledged that its corporate criminal liability standard had reduced effective prosecutions of corporations, stating that the "options for dealing with offending by commercial organisations are currently limited, and the number of outcomes each year, through both criminal and civil proceedings, is relatively low" The Paper went on to blame the "difficulties with the law of corporate criminal liability which does not reflect the 21st century commercial organisation."¹⁶

Deferred Prosecution Agreements in the United States

There are two defining characteristics of deferred prosecution in the United States.

First, in the American model, deferred prosecution agreements are an aspect of broad prosecutorial discretion. Whether to enter into such an agreement, what its terms should be, whether an independent monitor is needed, and how long the agreement should be in place, are regarded as within the traditional scope of prosecutorial power. In other words, if American prosecutors possess discretion to decide whether or not to file a charge, and whether or not to engage in plea bargaining resulting in a guilty plea, they surely possess similar discretion to decide when and under what circumstances a prosecution should be deferred. The case for exclusive prosecutorial control when a non-prosecution agreement occurs is even stronger

¹⁴ *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (Professor Garrett has written that "[f]ederal prosecutors were widely called responsible for destroying Anderson, though they do not really deserve that blame or credit -- not fully at least.") B. Garrett, *supra*, note 5, at 4 (citation omitted).

¹⁵ See, e.g., *Consultation Paper*, *supra*, note 7, at p. 3 ("In modern corporations, where responsibility for decision-making is distributed quite widely, it is very difficult to prove criminal liability, which depends on establishing that the 'directing mind and will' of an organisation was at fault.") The analogous theory of liability in the United States is known as the "control group" theory, described in the *Upjohn* decision as being based on the theory that "only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole." The control group test was rejected by the Supreme Court in *Upjohn Co. v. United States*, 499 U.S. 383, 390 (1981).

¹⁶ *Consultation Paper*, *supra*, note 7, at p. 5.

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since the question of whether to file criminal charges or refrain from doing so is regarded as a core executive branch power.

The second distinguishing characteristic of deferred prosecution agreements in the United States is their aim of achieving structural reform of complex corporate organizations. Professor Garrett has written: “Prosecutors enter into [deferred prosecution] agreements that allow the company to avoid a conviction but which impose fines, aim to reshape corporate governance, and bring independent monitors into the boardroom. . . . [t]his represents an ambitious new approach to governance in which federal prosecutors help reshape the policies and culture of entire institutions, much as federal judges oversaw school desegregation and prison reform in heyday of the civil rights era in the 1960’s and 1970’s.”¹⁷

Two examples demonstrate this aspect of deferred prosecution agreements. In 2008, the global company, Siemens, entered into agreements with the DOJ and SEC to resolve charges that the company and several of its subsidiaries had violated the Foreign Corrupt Practices Act, which prohibits the payment of bribes to foreign government officials in order to obtain or retain business. The agreements, which involved guilty pleas, also required Siemens to subject itself to monitors in the U.S. and in Germany for four years, during which time the monitors were tasked with evaluating the effectiveness of Siemens’s internal controls, record-keeping, and financial reporting policies and procedures. During its supervision by the monitors, Siemens replaced most of its leadership, including its CEO, chairman of its board, general counsel, and chief compliance officer. Siemens hired more than 500 full-time compliance staff. New policies, handbooks and training were adopted. The German monitor, a former Minister of Finance, estimated that his supervision consumed two-thirds of a full-time job for him over four years. All of this was in addition to the payment by the company of \$1.6 billion in fines and penalties to authorities in the United States and Germany.¹⁸

In 2004, Bristol-Myers Squibb, the pharmaceutical and healthcare company, entered into a deferred prosecution agreement following disclosure of an accounting fraud. The company paid a total of \$750 million dollars in penalties, restitution to victims of the fraud, and in settlement of parallel shareholder litigation. A monitor, former federal judge Frederick Lacey, was put in place for two years. During his supervision of the company, Judge Lacey determined that he could not certify significant improvement in Bristol-Myers’ compliance culture as long as the company’s existing leadership was in place. He went to the board of directors and insisted that the CEO and General Counsel be fired. The board complied, which prompted the *New York Times* to publish an article with the headline: “A Corporate Nanny Turns Assertive,” referring to Judge Lacey’s intrusion into the company’s affairs.¹⁹

The use of deferred prosecution agreements in the United States is not without its critics. The criticisms focus primarily on the perceived undue leverage, bordering on coercion, exercised by prosecutors, the lack guidelines or protocols governing the deferred prosecution process, and the resistance to judicial review which combines, according to the critics, to an unacceptable risk of prosecutorial abuse and unwarranted disparity in the treatment of corporate criminality.

¹⁷ B. Garrett, *supra*, note 5, at p. 6.

¹⁸ United States Department of Justice Release: “Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines” (Dec. 15, 2008); *see, also* B. Garrett, *supra*, note 5, at 183-86.

¹⁹ *N.Y. Times*, Sept. 19, 2006. *See also* Securities and Exchange Commission Release: “Bristol-Meyers Squibb Company Agrees to Pay \$150 Million to Settle Fraud Charges” (Aug. 4, 2004).

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For instance, former Attorney General Dick Thornburgh has stated that deferred prosecution agreements “can border on the extortionate because the Justice Department knows it is in a far superior bargaining position, and such an imbalance can lead to abuse.”²⁰ Judge Lewis Kaplan described the approach of one prosecutor’s office to KPMG’s deferred prosecution agreement as the government pointing “the proverbial gun to [KPMG’s] head.”²¹ Mary Jo White, a former United States Attorney and current Chair of the SEC, stated (while in private practice) that it should be “the rare case where the government seeks a deferred prosecution agreement.” Referring to the breadth of corporate criminal liability, Ms. White said: “the law allows you to proceed against the company in virtually every case where you have a single employee who has committed a crime,” and she feared “it is almost becoming an automatic reaction” when “prosecutors are thinking--before we close out this case that involves any kind of corporate crime, we should get something from the company,” namely, a deferred prosecution agreement.²²

Criticism of DPAs and NPAs comes from other quarters as well. Many have questioned whether such agreements reflect undue lenience toward corporate crime.²³ Especially when no prosecution of individual corporate wrongdoers occurs, the deferred prosecution of the company appears to these critics as an abdication of the prosecution responsibility to apply the rule of law uniformly.²⁴ In apparent response to this latter criticism, the Department of Justice issued guidelines on September 10, 2015, advising federal prosecutors to give priority to bringing charges, where warranted, against individual corporate executives.²⁵

Deferred Prosecution Agreements in England

The Crime and Courts Act of 2013, Schedule 17, and the Deferred Prosecution Agreements Code of Practice, specify the following requirements:

- Only the Director of Public Prosecutions and the Director of the Serious Frauds Office can enter into deferred prosecution agreements.
- Such agreements can be entered into with a company, a partnership or an unincorporated association, but not with an individual.
- A prosecutor considering entering into a deferred prosecution agreement must consider two preconditions--an evidential and public interest test.
- First, the prosecutor must be satisfied either that there is sufficient evidence to provide realistic prospect of conviction, or reasonable grounds that further investigation would yield such evidence.
- Second, the prosecutor must be satisfied that the public interest in a deferred prosecution agreement outweighs the public interest in a prosecution. The Code of Practice lists factors to weigh in making this decision.

²⁰ D. Thornburgh, “Deferred Prosecution And Non-Prosecution Agreements,” Washington Legal Foundation (March 17, 2007), available at <http://www.wlf.org/upload/chapter6DPAs.pdf>.

²¹ “U.S. Improperly Pressured KPMG, Judge Rules,” N.Y. Times (June 27, 2006); see also *United States v. Stein*, 435 F.Supp.2d 330 (S.D.N.Y. 2006).

²² 19 Corporate Crime Reporter 18(11) (Dec. 12, 2005).

²³ On Feb. 15, 2015, Judge Richard J. Leon of the United States District Court for the District of Columbia refused to approve a deferred prosecution agreement on the ground that the DPA was “grossly disproportionate to the gravity” of the corporate misconduct. *United States v. Fokker Services*, Case No. 14-CR-121 (RJL).

²⁴ See, e.g., Judge Jed S. Rakoff “Justice Deferred is Justice Denied,” *N.Y. Rev. of Books* (Feb. 19, 2015).

²⁵ Memorandum of Deputy Attorney General Sally Q. Yates, “Individual Accountability for Corporate Wrongdoing,” (Sept. 9, 2015), available at <http://www.justice.gov/doj/file/769036/download>; see also “Justice Department Sets Sights on Wall Street Executives,” *N.Y. Times*, Sept. 9, 2015.

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- If these preliminary tests are met, the prosecutor may enter into negotiations with counsel for the company with a view toward reaching an agreement. If an agreement is reached, an application is submitted to the Crown Court for a declaration that the proposed deferred prosecution is in the public interest, and its proposed terms are fair, reasonable, and proportionate.
- If the court issues such a declaration, it must do so in open court and set forth the reasons supporting the declaration.

Once such approval is obtained from the court, the deferred prosecution becomes effective and the prosecutor is required to publish the agreement and the court's declaration together with its statement of reasons.

To date, no deferred prosecution agreement in England has occurred in the nearly 18 months since the effective date of the Crime and Court Act of 2013. There are hints in the legal press that at least one company has been invited to enter into negotiations under the procedures set forth above.²⁶

Points of Similarity and Difference

The similarities in the deferred prosecution process in the U.S. and England are not surprising in that the adoption of deferred prosecution in England was consciously based on the American model. The Crime and Courts Act and Code of Prosecution outline familiar features of DPAs in the U.S., especially the goal of achieving corporate culture reform through strengthened compliance procedures and the use of monitors to supervise this process. To its credit, the English model is more rule-based and formalized. Nothing similar to the Code of Practice exists in the U.S. to guide prosecutors when they are exercising their very broad discretion to consider the use of deferred prosecution.

The most significant difference between the U.S. and English model is that a deferred prosecution in the U.S. is entirely within prosecutorial control while no deferred prosecution agreement in England can become effective without the necessary judicial declaration. One may speculate about the reasons for the difference. In part, it may stem from an attitude of ambivalence in England about prosecutorial discretion, together with a belief, or hope, that judicial control will reduce unjustified inconsistencies in DPAs. A perhaps more cynical view is that the SFO and CPS prefer to shift any criticism about the use of such agreements from prosecutors to the courts.

A Final Point of Possible Convergence

If the hallmark of the U.S. model is prosecutorial discretion and the touchstone of the English model is judicial control, one interesting development is the growing concern of American judges that there should be a greater degree of judicial involvement in the deferred prosecution process. The first such case occurred in 2012 when the U.S. Attorney's Office for the Eastern District of New York, in Brooklyn, entered into a deferred prosecution agreement with HSBC to resolve allegations that it had laundered \$881 million dollars, over a four-year period, for Mexican and Colombian drug cartels.

Judge John Gleeson, the judge to whom the case had been assigned, and who was asked to defer all proceedings for several years, balked. He took the position that the pendency of the indictment before him allowed him to inquire, as an exercise of the court's supervisory power, whether the agreement was in the

²⁶ On July 21, 2015, the Wall Street Journal reported that "The UK's Serious Frauds Office has approached Barclays PLC with a deferred prosecution agreement as it looks to resolve a long-running probe into how the bank secured emergency funding from Middle East investors during the financial crisis." *Wall Street Journal* (July 21, 2015).

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“public interest” and within the “bounds of lawfulness [and] propriety.” In other words, Judge Gleeson sought to measure the proposed deferred prosecution agreement before him against factors similar to those in the Crime and Courts Act of 2013 and SFO-CPS Code of Practice. Both government counsel and counsel for HSBC objected, with the government arguing that the decision to enter into a deferred prosecution agreement was solely within the prosecutor’s broad discretion to decide which cases to prosecute and whether to defer prosecution. Judge Gleeson ultimately decided he would allow the deferred prosecution to go forward as long as he received periodic reports about HSBC’s compliance with its terms.²⁷

Since that case, other federal judges, in North Carolina, and Washington, D.C., have also asserted a right of judicial oversight of deferred prosecution agreements to ensure their fairness, reasonableness, and that they are consistent with the public interest.²⁸ Professor Garrett, the leading academic commentator on deferred prosecution agreements, has recommended that deferred prosecutions “should be supervised by a judge, through either a statute or supervisory authority, typically relying on regulators or monitors reporting to the judge.” He has also recommended the public disclosure of deferred prosecution agreements and the reports of monitors, similar to the transparency the U.K. model requires.²⁹

CONCLUSION

It has been commonplace for the British and America legal systems to borrow from each other. The United States transplanted the grand jury from England where it is enshrined in the Fifth Amendment to the Constitution despite its abolition in Britain over 80 years ago. Traditionally, the American bar has been unified while in England and Wales it has been bifurcated between client-facing solicitors and bewigged barrister-advocates. But even that is changing as solicitors’ rights of audience in Crown Court are becoming more common.³⁰

The focus of this article is the English adoption of the American deferred prosecution agreement and its modification of that model to restrict prosecutorial discretion and impose judicial control. Despite these formal differences, it appears that we may be on a path toward convergence, especially with regard to the relatively new phenomenon in the U.S. of judges seeking to impose control over prosecutorial discretion while applying the very factors of public interest, proportionality, and reasonableness used in the U.K. to guide deferred prosecutions in England and Wales.

²⁷ Memorandum and Order, *United States v. HSBC Bank USA, N.A. and HSBC Holding, PLC*, 12 CR 763 (Gleeson, J.).

²⁸ See *United States v. Fokker*, *supra*, note 23, *supra*. In 2013, Judge Terrence Boyle of the United States District Court for the Eastern District of North Carolina rejected a DPA between the U.S. Attorney’s Office and a North Carolina-based hospital system, which had defrauded federal healthcare programs, on the ground that the DPA amounted to “a slap on the hand.” “Judge Refuses to Accept WakeMed Settlement with Federal Prosecutors,” *The News & Observer* (Jan. 17, 2013). Judge Boyle subsequently approved the DPA but insisted that its terms be modified to require the filing of compliance reports with the court, and annual hearings before him to review compliance with the DPA’s terms. Memorandum and Order, *United States v. WakeMed*, No. 5:12-Cr-399 (BJ) (Feb. 8, 2013).

²⁹ B. Garrett, *supra*, note 2 at 286.

³⁰ See, e.g., “Higher Rights of Audience Regulations,” Solicitor Regulation Authority, *available at* <http://www.sra.org.uk/solicitors/handbook/higherrights/content.page>.

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