

LIABILITY AND ADMISSIONS OF WRONGDOING IN PUBLIC ENFORCEMENT OF LAW

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Some judges and scholars have questioned the social value of the standard form in which the Securities and Exchange Commission settles its corporate enforcement actions, including the agency's use of essentially unreviewed consent decrees that include no admission of liability or wrongdoing. This essay, for a symposium on SEC enforcement, provides an analysis of the deterrent effects of the three main components of settlements in public enforcement of law: liability, admission, and remedy. The conclusions are the following. All three components can have beneficial deterrent effects. Cost considerations nonetheless justify some settlements that dispense with liability or admission, or even both. But a practice of uniformly institutionalizing settlements without admissions, such that the deterrent effects of admissions are never realized, even for bargaining leverage, is not justified. Further, there is reason to believe that some form of judicial review of enforcement settlements would contribute to deterrence. To put the argument another way, agencies engaged in public civil enforcement could learn something from contemplating why the federal criminal justice system strongly disfavors nolo contendere pleas and why a plea bargaining system dominated by nolo pleas would be so undesirable as to be unthinkable.

In public enforcement of law, settlement is the norm. Over ninety-five percent of federal criminal cases result in pleas of guilty, and the rate is not much lower in state courts.¹ Rates are still lower among criminal defendant corporations, for which trials are hens' teeth.² In the noncriminal area, enforcement actions brought by the Securities and Exchange Commission (SEC) for violations of the federal securities

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1. Between 2005 and 2011, about ninety-seven percent of all federal criminal cases resulted in a guilty plea. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, STATISTICS DIVISION, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, Table D-4, *Criminal Defendants Disposed of by Type of Disposition and Offense (Excluding Transfers) During a 12-month Period (2005-2011)*, available at http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/StatisticalTables_Archive.asp; see also *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

2. See Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK IN CRIMINAL LAW 144, 148 (Alon Harel & Keith N. Hylton eds., 2012).

laws, for example, almost never result in trials. In 2011, the SEC pursued 735 enforcement actions.³ Very few of those actions resulted in trials.⁴

If public enforcement of law—particularly in the realm of business conduct—is primarily aimed at deterring law violations, one must assess the performance of enforcement institutions by examining the deterrent effect of settlements. Settlement of a legal claim in a public enforcement action typically includes one or more of three components: attachment of legal liability; establishment or admission of the factual basis for that liability, as well as perhaps for additional liability avoided; and sanctions. Current practice uses a variety of arrangements involving these three components.

In this Essay, I examine the deterrent effects of these three aspects of enforcement settlements and conclude that admissions of liability should not be uniformly, or even typically, excluded from enforcement settlements. Doing so gives up too much of the public benefits of government enforcement of law. The issue of admissions has been a lively topic of late in the field of securities enforcement. This Essay is partly an intervention in that discussion and partly an occasion to step back from that debate and consider the issues on a somewhat more theoretical plane. Part I provides analysis of deterrence mechanisms in enforcement settlements. Part II provides normative insights.

I. COMPONENTS OF ENFORCEMENT SETTLEMENTS

Criminal cases resolved by guilty plea generally include both attachment of liability (the conviction imposed by the judge after the defendant pleads guilty) and a factual admission of legal wrongdoing (the plea “allocution” that is required by Rule 11 of the Federal Rules of Criminal Procedure⁵). But not always. Rule 11 permits continued use of the old common law device of the *nolo contendere* plea, which involves the attachment of liability (conviction upon plea of guilty)

3. See Press Release, SEC, SEC Enforcement Division Produces Record Results in Safeguarding Investors and Markets, Release No. 2011-234 (Nov. 9, 2011), available at <http://www.sec.gov/news/press/2011/2011-234.htm>; Testimony of Robert Khuzami, Director, Division of Enforcement, SEC, *Hearing Examining the Settlement Practices of U.S. Financial Regulators*, House Committee on Fin. Servs., May 17, 2012, available at <http://www.sec.gov/news/testimony/2012/ts051712rk.htm>.

4. According to the SEC’s Chief Litigation Counsel, the agency “litigated,” in any form, about 40 to 50 cases in 2011. See Joshua Gallu, *SEC Trials Increase 50 Percent as Execs Fight Lawsuits*, Bloomberg, May 22, 2012, available at <http://www.bloomberg.com/news/2012-05-22/sec-trials-increase-50-percent-as-execs-fight-lawsuits.html> (reporting that the SEC litigation director said the agency was “actively litigating” 90 cases, which was a 50 percent increase over the prior year).

5. FED. R. CRIM. P. 11(b)(3).

without any factual admission of wrongdoing by the defendant.⁶ Under *North Carolina v. Alford*,⁷ it is also constitutionally permissible, though not a matter of right, for a defendant to plead guilty and be criminally sanctioned, while affirmatively denying any factual basis for a finding of wrongdoing. In other words, one can plead guilty but say one is innocent. A primary distinction between the two forms of liability is that an *Alford* plea still requires the court to find a factual basis for guilt,⁸ whereas, a *nolo* plea is viewed as involving no actual factual inquiry into guilt and therefore has no collateral estoppel effect in civil litigation.⁹ (The defendant in *Alford* said, “I pleaded guilty on second degree murder because they said there is too much evidence, but I ain’t shot no man. . . . I’m not guilty but I plead guilty.”¹⁰)

The government seriously frowns on *nolo* and *Alford* pleas.¹¹ Department of Justice (DOJ) policy instructs federal prosecutors not to sign any plea agreement with a defendant who seeks to enter such a plea unless “the most unusual circumstances” justify an exception and approval has been obtained at the highest levels of DOJ.¹² DOJ also tells its prosecutors that if a court allows a defendant to enter a *nolo* or *Alford* plea to one or more charges in an indictment, the prosecutor

6. FED. R. CRIM. P. 11(a)(1); see *Hudson v. United States*, 272 U.S. 451, 453–57 (1926) (holding that use of the *nolo contendere* plea is not limited to cases in which the penalty is only a fine and finding the common law history of the plea to be both murky and without support for the claim that punishment in such cases could not include imprisonment); see also *Lott v. United States*, 367 U.S. 421, 426–27 (1961) (stating that a *nolo* plea is an admission that the elements of the offense are well-pleaded but is not a determination of guilt). The *nolo* plea became an institution of American criminal procedure largely as a means of resolving criminal antitrust cases without thereby conceding liability in civil treble damages actions. See Note, *Nolo Pleas in Antitrust Cases*, 79 HARV. L. REV. 1475 (1966).

7. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

8. *Id.* at 32–33, 35 n.8, 38 n.10.

9. FED. R. CRIM. P. 11 Advisory Comm. Notes 1966 Amends.; *Blohm v. Comm’r of Internal Revenue*, 994 F.2d 1542, 1553–55 (11th Cir. 1993). A *nolo* plea is still a conviction for other purposes, such as triggering recidivism penalties in future cases. *United States v. Brzoticky*, 588 F.2d 773, 774–75 (10th Cir. 1978).

10. *Alford*, 400 U.S. at 28 n.2.

11. It appears that the drafters of the Federal Rules of Criminal Procedure viewed retention of the common law *nolo* plea as a somewhat close call. See NEW YORK UNIVERSITY SCHOOL OF LAW, THE SECTION OF CRIMINAL LAW OF THE AMERICAN BAR ASSOCIATION, AND THE FEDERAL BAR ASSOCIATION OF NEW YORK, NEW JERSEY, AND CONNECTICUT, VI FEDERAL RULES OF CRIMINAL PROCEDURE 162, 187 (Hon. Alexander Holtzoff ed., 1946) (remarks of G. Aaron Youngquist: “There is some objection to permitting a plea of *nolo contendere* at all. It is not recognized in English practice, nor, I understand in the Canadian practice, but it has been recognized in our practice for a great many years. Historically the plea of *nolo contendere* was made only as a preliminary to an arrangement or any expectation that the punishment would be a fine and nothing more”; and remarks of the Honorable Learned Hand: “I suppose it was well enough to keep *nolo contendere* As far as my experience went it was a barbarous phrase and we had very vague ideas about it.”).

12. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL §§ 9-16.010, 9-16.015 (2008). Some states do not just frown on *Alford* pleas, they prohibit them. See *Carter v. State*, 739 N.E.2d 126, 128–29 (Ind. 2000).

should insist on proceeding to trial on any remaining charges.¹³ The government views these kinds of no-admission pleas as casting doubt on the legitimacy of public enforcement actions. It does not wish to be a party to a proceeding in which a defendant has neither admitted to having committed a crime nor has been found by a jury to have committed one.¹⁴

The Federal Rules disfavor *nolo* pleas too. Rule 11 states that a *nolo* plea may be entered only “with the court’s consent” and that “the court must consider the parties’ views and the public interest in the effective administration of justice” before allowing such a plea.¹⁵ Wright and Miller maintain that “it is far from clear that courts should be a party” to a guilty plea proceeding in which there is no finding of a factual basis for guilt.¹⁶

Criminal enforcers also use the inverse of this settlement structure. Prosecutions may be settled with no attachment of liability but with admission of wrongdoing. This is generally the form of deferred prosecution agreements and nonprosecution agreements. This settlement structure originated in a movement to divert low-level drug cases from the prison track but has come to be used, as is now well-known, as the preferred form of resolution for corporate criminal cases.¹⁷ In these settlements, liability does not attach unless something goes badly wrong. Either charges are filed, held in abeyance, and later dismissed if the defendant has complied with the agreement’s terms, or charges are never filed at all unless the defendant violates the deal. At the time of settlement, however, the defendant is generally required to agree to a detailed statement of facts that makes clear the defendant violated the criminal law. This typically amounts to a fulsome admission that strongly discourages the defendant from thinking that a viable future option would be to violate the agreement and let the

13. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.440. For a good example of a full-dress DOJ argument that a *nolo* plea is against the public interest, see Government’s Opposition to Defendant Florida West’s Motion to Enter a Plea of *Nolo Contendere*, United States v. Fla. W. Int’l Airways, Inc., No. 10-20864-CR-SCOLA (S.D. Fla., May 10, 2012). See also Mark Gurevich, *Justice Department’s Policy of Opposing Nolo Contendere Pleas: A Justification*, 6 CAL. CRIM. L. REV. 2 (2004).

14. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.440. For the full argument that *nolo* and *Alford* pleas undermine public confidence in accuracy, allow guilty persons to avoid accepting responsibility for wrongs, and send equivocal moral messages, see Stephanos Bibas, *Harmonizing Substantive-Criminal-Law-Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1363–64, 1382–1400 (2003).

15. FED. R. CRIM. P. 11(a)(1), (a)(3); see also United States v. Dorman, 496 F.2d 438, 440 (4th Cir. 1974) (stating that a defendant has no right to enter a *nolo* plea just so he can avoid civil liability).

16. CHARLES ALAN WRIGHT ET AL., 1A FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE RULES 8–14 § 175 (2008).

17. See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL §§ 9-28.200–1300; Arlen, *supra* note 2, at 146.

government prosecute.¹⁸

Sometimes nonprosecution agreements do not include an admission of wrongdoing by the defendant. But this is rare. As with *nolo* and *Alford* pleas, DOJ is reluctant to conclude a criminal matter without any finding or concession of the fact of the matter of the defendant's wrongdoing. The firm-level prosecution of the Arthur Andersen auditing partnership, for obstructing the SEC's investigation of accounting fraud at Enron Corporation, produced the rarities of both an indictment and a trial of a large firm in part because Andersen declined to agree to a nonprosecution settlement that would have required the firm to make a factual admission of wrongdoing.¹⁹

Settlements of civil public enforcement actions have fallen into a somewhat different pattern. Take the SEC, for example. The standard settlement of an SEC enforcement action brought in federal district court is in the form of a consent decree in which the defendant "neither admits nor denies" liability, while agreeing to the entry of an order by a federal judge imposing various injunctive and financial penalties that the SEC has authority to seek as sanctions under the 1933 and 1934 Acts.²⁰ This pattern holds in both individual and corporate cases.²¹ It is a type of settlement in which liability attaches, but there is no factual admission of wrongdoing—like the *nolo* plea in a criminal case.²² (Unlike the *Alford* plea, these settlements bar the defendant from walking straight out of court and saying that no law was violated.)

18. See, e.g., Press Release, U.S. Dep't of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty (June 27, 2012) (including links to nonprosecution agreement and statement of factual admission), available at <http://www.justice.gov/opa/pr/2012/June/12-crm-815.html>.

19. See Kurt Eichenwald, *Talks Break Down Between Andersen and Justice Department*, N.Y. TIMES, Apr. 19, 2002, at A1. As a participant in those negotiations while in a prior career in government practice, I can report that the factual admission of wrongdoing was the primary reason the firm proffered during negotiations for not signing a nonprosecution agreement before indictment and for refusing a deferred prosecution agreement after indictment.

20. See, e.g., Press Release, SEC, N.Y.-Based Investment Advisory Firm and Founder Settle SEC Charges for Fraudulent Management of CDOS (Sept. 7, 2012), available at www.sec.gov/News/PressRelease/Detail/PressRelease/1365171484620#.UldCZxbIZsM; Press Release, SEC, Oppenheimer Funds to Pay \$35 Million to Settle SEC Charges For Misleading Statements During Financial Crisis (June 6, 2012), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171482524#.UldDXRbIZsM>; Press Release, SEC, H&R Block Subsidiary Agrees to Pay \$28.2 Million to Settle SEC Charges Related to Subprime Mortgage Investments (Apr. 24, 2012), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171488676#.Uly-NRbIZsM>.

21. See, e.g., Press Release, SEC, Hedge Fund Manager to Pay \$44 Million for Illegal Trading in Chinese Bank Stock (Dec. 12, 2012), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171486854#.UldFVhblZsM>.

22. Once in a while DOJ takes the SEC approach, allowing a *nolo* plea in a corporate prosecution in order to get resolution of the case in spite of parallel civil claims. See, e.g., *In re Grand Jury Invest. of Cuisinarts, Inc.*, 516 F. Supp. 1008, 1010 (D. Conn. 1981).

This is where recent debate over the settlement of SEC enforcement actions comes in. Some judges, along with a handful of academics,²³ have questioned why public enforcement actions would be settled with imposition of liability—including the theoretically exceptional sanction of an injunction—but without any factual admission or finding of wrongdoing.²⁴ Mary Jo White, the former federal prosecutor who has taken up the chairmanship of the SEC, has said she intends to reduce the SEC's uniform reliance on the no-admission settlement.²⁵

The recent pushback, if I may call it that, shares affinity with DOJ's strong and longstanding stance against criminal guilty pleas and even nonprosecution agreements that do not include factual admissions.²⁶ There is something troubling about a public enforcement action that ends with a conclusion of "maybe he (they) did it, maybe he (they) didn't, but he's (they are) paying a price for it in any event."

To understand this worry better, and see whether it is a serious one, consider the relationship between settlements and deterrence and the potential deterrent effects of the possible components of a public enforcement settlement: liability, admission, remedy. The remedy component has obvious effects that are usually the primary or sole focus of deterrence analysis in this context. Sanctions—whether they take the form of prison time, monetary penalties, injunctions restricting behavior, terms of probation, or other common public law remedies—impose a price on behavior that affects future calculations of cost by the defendant and others similarly situated that, in optimal conditions, will induce a decision to forego the behavior. This deterrent effect is straightforward enough. It would seem not to depend in any way on what kind of legal action is brought or whether a settlement involves

23. See Brief of *Amici Curiae* Sec. Law Scholars for Affirmance in Support of the District Court's Order and Against Appellant and Appellee, *SEC v. Citigroup Global Mkts. Inc.*, 2012 WL 7009633, (2d Cir. 2012) (No. 11-5227-cv).

24. See *SEC v. CR Intrinsic Investors LLC*, 939 F. Supp. 2d 431, 436 (S.D.N.Y. 2013); *SEC v. Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d 328, 330–32 (S.D.N.Y. 2011); Peter Lattman, *Judge Is Skeptical of S.E.C. Deal with Hedge Fund*, N.Y. TIMES DEALBOOK, Mar. 28, 2013, available at <http://dealbook.nytimes.com/2013/03/28/judge-questions-s-e-c-settlement-with-steven-cohens-hedge-fund/>; Corporate Crime Reporter, *Judge Leon, the SEC, IBM, and the FCPA*; CORP. CRIME RPTR., Jan. 3, 2013, available at <http://www.corporatecrimereporter.com/?s=judge+leon+the+sec+ibm+and+the+fcpa>; Edward Wyatt, *In Challenging S.E.C. Settlement, a Judge in Wisconsin Cites a Court in New York*, N.Y. TIMES, Dec. 29, 2011, at B4, available at <http://www.nytimes.com/2011/12/29/business/judge-in-wisconsin-challenges-sec-settlement.html>.

25. See Yin Wilczek, *White Announces Revision of SEC "No Admit" Settlement Policy*, 45 BNA SEC. REG. & LAW RPT. 1150 (June 24, 2013).

26. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-28.100–9-28.1300; Press Release, U.S. Dep't of Justice, Assistant Attorney General Lanny Breuer Speaks at the New York City Bar Association (Sept. 13, 2012), available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html>.

attachment of liability or admission of wrongdoing—especially when the defendant is a corporation, which cannot be imprisoned and for which costs of doing business are highly fungible and carefully monitored.

But, on analysis, liability and admissions do matter to deterrence. Take liability first. Obviously, under many legal regimes, liability is a condition precedent to the imposition of some forms of sanction. A corporation can settle a dispute with the SEC by signing a contract with the agency and writing a large check to the public fisc, without any court having been the wiser. But a federal court is powerless to issue an injunctive order relating to securities violations under the 1933 or 1934 Acts without formally saying that provisions of those statutory schemes are being violated or are likely to be violated.²⁷ Likewise, as known from the comedic effect it produces in film and television, there is no volunteering for prison.²⁸ A criminal conviction is necessary for imposition of a prison sentence, probation, and many other sanctions. Liability itself contributes to deterrence because it exposes actors to sanctions that cannot be invoked in liability's absence.

Liability also deters through its so-called collateral consequences. This category of effects—or, if one prefers, sanctions—can be a bit amorphous and is certainly highly diverse. For present purposes, consider some easy, or core, examples. A felony conviction usually disables a person from possessing a firearm or voting. If one values the right to have a gun or cast a vote, one might hesitate marginally more before breaking the law. Felony convictions in many regulatory fields—government contracting, pharmaceutical manufacturing and marketing, waste disposal, oil drilling, and so on—can lead to presumptive or even automatic debarment or delicensing of a corporation from doing business in certain product lines or in an entire industry.²⁹ This is a potentially fatal sanction that gives firms in many sectors an intense fear of prosecution. Finally, consider how the attachment of liability in one legal proceeding can ease attachment of liability in another. Liability in a public enforcement action might unleash liability in a parallel private lawsuit through doctrines of collateral estoppel or simply rules of evidence admission.

Then there are the reputational or stigmatic effects of liability. A jury

27. See 15 U.S.C. §§ 77t(b), 78u(d) (2010).

28. Of course, under *Alford*, “An individual *accused* of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.” *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (emphasis added).

29. See, e.g., 21 U.S.C. § 335a(a) (2002) (provisions for debarment of pharmaceutical manufacturers for felony and misdemeanor convictions under the Food Drug and Cosmetic Act).

verdict of guilty is a powerful thing, but pleading guilty is a big deal too—"a grave and solemn act" requiring the defendant, who "stands as a witness against himself," to provide "an admission in open court that he committed the acts charged in the indictment."³⁰ A person or a firm that the law has labeled a felon, a securities fraudster, or a polluter carries a black mark that can affect others' willingness to transact with the labeled person or firm in the future. Fear of this loss of reputational and social capital can supply a strong motive to avoid violating the law. Of course, reputational sanctions are a complex and opaque matter—varying as they do with the type of defendant, the sector of industry or society involved, the nature of the law violation, and the future plans and activities of the person or firm. But there can be no doubt that reputational sanctions, despite problems of measurement, are real and potent.³¹ Nearly every day one can find a corporate manager somewhere declaring that criminal liability of her firm is her greatest fear, or a person under investigation vociferously maintaining in the press that he is not a criminal and has done nothing wrong.

Turn next to admissions of wrongdoing. These too have a role in deterrence, although specifying mechanisms here is somewhat more challenging. Depending on how parallel legal regimes are structured, a factual admission of wrongdoing in a public enforcement action could lead to some of the same collateral consequences as a finding of liability. To create a stylized example, a statutory framework might bar the issuance of licenses by a government agency "to any person convicted of a felony violation of section *x* of the Clean Water Act," or instead "to any person who engages in unlawful conduct as defined in section *x* of the Clean Water Act." To stay with the hypothetical, a private plaintiff might be able to make evidentiary or estoppel use of a corporation's conviction for violating the Clean Water Act or of a corporation's agreement in a settlement document that it "discharged without permit the following substances in the following amounts on the following dates at the following locations:" Perhaps the latter, more specific piece of evidence could even, in some circumstances, be more probative than the former.

Reputational sanctions also can follow from a factual admission. Again, the problem of observation and measurement is difficult, so there is uncertainty here. Some evidence suggests that publicly traded firms

30. *Brady v. United States*, 397 U.S. 742, 747–48 (1970).

31. See, e.g., Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Consequences to Managers for Financial Misrepresentation*, 88 J. FIN. ECON. 193, 194 (2008); Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANT. ANALYSIS 581, 582 (2008); Stephen Choi & Marcel Kahan, *The Market Penalty for Mutual Fund Scandals*, 87 B.U. L. REV. 1021, 1025 (2007).

caught violating the law suffer a greater decline in equity value upon initial revelation of the facts of wrongdoing, such as through press reports, than upon imposition of liability and sanctions in the legal process.³² Perhaps counterparties, in deciding whether to transact in the future, place more or at least additional weight on the nature and specifics of a firm's misconduct than they do on what the law later has to say about that conduct. If so, an admission to those facts by the firm—which is best positioned to know the facts and most motivated to deny their truth—might be expected to have particularly strong reputational bite. Firms would therefore wish to avoid situations in which such admissions might be necessary.

Two further instrumental mechanisms connected to admissions are more speculative but could be exceedingly important. First, a firm's public declaration of the nature and facts of its own wrongdoing might spur more introspection and reform among the firm's managers, employees, and owners than would a bare legal judgment in which a firm simply concedes that its government litigation adversary has something of a case, and the firm says it chooses to settle the whole thing so it can "move on." Institutional admissions might be important to institutional growth and reform, much as we seem to believe that confession is crucial to individual rehabilitation and redemption.³³ There is a connection back to the imposition of liability here: The stigmatic effects on a firm of being found liable may be amplified, or dampened, depending on how many, or how few, facts are admitted or established about what precisely the firm did wrong.

DOJ certainly seems to believe in these mechanisms. It has generally insisted on the inclusion of admissions in nonprosecution and deferred prosecution agreements. One reason for this insistence, as discussed above, is to deter firms from disregarding their reform and other obligations under those agreements and attempting to return to the status quo ante for a contest over the merits of the government's case. But another reason is that DOJ explicitly uses nonprosecution and deferred prosecution agreements as a means of bringing about reforms within firms, designed to prevent future law violations without many of the costs to both sides associated with full-blown prosecution.³⁴ DOJ does not want to confer that leniency, or make that trade, without assurance

32. See, e.g., Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear for Committing Criminal Fraud*, 36 J. LAW & ECON. 757 (1993).

33. See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 507 (2006).

34. See Press Release, U.S. Dep't of Justice, Assistant Attorney General Lanny Breuer Speaks at the New York City Bar Association (Sept. 13, 2012), available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html>.

that a firm—and specifically its managers—are fully and genuinely committed to the project of corporate reform. It is understandable that DOJ would adopt the common sense view that the first step to solving a problem is to admit that one has it. Another benefit, for the government, of obtaining an admission is to prevent any dispute about whether a corporation should be viewed as a recidivist in the event of new law violations in the future.

A final mechanism connected to admissions has to do with the legitimacy of the public enforcement system generally. Going back to the matter of *nolo* and *Alford* pleas, one reason federal prosecutors frown on these arrangements is that they call into question the legitimacy of the criminal justice system.³⁵ After all, if some people who plead guilty are not admitting guilt, or are even vocally denying it, doesn't that add further anxiety to the general worry about whether innocent persons are prosecuted and even plead guilty? DOJ's position is essentially this: "We are not interested in prosecuting innocent people. We only bring cases in which we are convinced that the proof is sufficient for the high burden in a criminal case. You can either admit that you committed this crime or we will ask a jury to find that you did it."

Prosecutors are doing this not just because they might take seriously their obligation to see that justice is done in each case, but also because they have a strong interest, as the dominant players in the deterrence market, in maintaining the public legitimacy of their overall project. Imagine a criminal justice system in which *nolo* and *Alford* pleas were the norm. The public would have far less reason than it does at present to believe that prosecutors bring meritorious cases, or to even think that prosecutors care whether their charges have merit. If the enterprise of public prosecution appears unprincipled or even random, then surely deterrence is seriously weakened. Admissions in the settlement of public enforcement actions have an important role in the legitimacy of public enforcement and thus also in the deterrence of law violations.

II. AN ARGUMENT AGAINST DISPENSING WITH ADMISSIONS

Let us briefly take stock, and then see what conclusions might follow about the particular questions that have been raised about SEC enforcement practices. Public enforcement, particularly in the corporate realm, is primarily designed to prevent future wrongdoing and is overwhelmingly resolved by settlement. Deterrent effects can flow from all three of the primary components of settlements: liability, admission,

35. See Bibas, *supra* note 14, at 1382–1400.

and remedies. Public enforcers, working in both the criminal and civil fields, have fashioned a variety of settlement structures that often dispense with one or more of these components. Dispensing with admissions has been disfavored in criminal cases. The deterrent effects of admissions include those relating to collateral consequences, reputational effects, and legitimacy of public enforcement.

The present worry about the SEC's enforcement practices is, to put the point a bit too roughly, that they have produced the civil equivalent of a plea bargaining system dominated by *nolo* pleas.³⁶ The overwhelming majority of serious SEC enforcement actions against sizeable firms are resolved by way of an agreement with the following structure:³⁷ The SEC files a civil complaint alleging violations of various provisions (usually the antifraud provisions) of the 1933 and 1934 Acts. (The Citigroup case, in which the Second Circuit is now reviewing Judge Rakoff's refusal to sign a requested injunction, is typical.³⁸) The complaint includes a lengthy description of what the SEC believes it could prove about what the firm did if the case were to proceed to trial. The SEC also files a consent decree with the court, which is a settlement document signed by both enforcer and enforcer, and which asks the court to order a series of remedies. In the consent decree, the defendant states that it consents to the filing of the complaint and the issuance of the injunctive order but neither admits nor denies that it violated any securities law. The judge then signs an order that requires the defendant to pay a sum of money to the SEC (up to hundreds of millions of dollars in a big case), enjoins the defendant from further violations of the securities laws (on penalty of contempt of the order, in addition to the usual statutory penalties), and increasingly often, requires the defendant to undertake some corporate reforms designed to decrease the likelihood of future violations by its employees.³⁹

This kind of settlement includes liability and remedies but no admission. It has been criticized primarily on three grounds. First, it has been said that the remedies are insufficient for adequate deterrence.

36. See Gurevich, *supra* note 13, at 14 (stating that corporate antitrust defendants are attracted to *nolo* pleas because they are a "face-saving device" which can lessen effects on a firm's reputation and allow it to contest wrongdoing in civil litigation), 33 (stating that white collar criminals are particularly attracted to *nolo* pleas because they are more concerned with reputation and bad publicity).

37. See sources cited *supra* note 20.

38. See Press Release, SEC, SEC Charges Citigroup and Two Executives for Misleading Investors About Exposure to Subprime Mortgage Assets (July 29, 2010), available at <http://www.sec.gov/news/press/2010/2010-136.htm>; SEC v. Citigroup Global Mkts. Inc., 827 F. Supp 2d 328, 338 (S.D.N.Y. 2011).

39. See Jayne W. Barnard, *Corporate Therapeutics at the Securities and Exchange Commission*, 3 COLUM. BUS. L. REV. 793, 794 (2008); Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89 (2006).

An injunction not to violate the law seems a bit redundant. True, its effect is to place the firm in a kind of probationary status under which the next violation could trigger sanctions simply on a showing of contempt to the judge who signed the injunction, rather than on the full-dress proof required in a new enforcement lawsuit. But the trouble is that the SEC virtually never asks courts to hold firms in contempt for violating “don’t break the law” injunctions.⁴⁰ In addition, it has been claimed that the monetary penalties in these settlements are too often too small to impose a serious economic consequence on firms.⁴¹ What is a few hundred million dollars, which has been a long foreseeable result during years of investigation, to the financial planning of a global megafirm like Citigroup? Or so the thinking goes.

Second, SEC settlements have been criticized as squandering, without good justification, all of the deterrence benefits of admissions of wrongdoing.⁴² The SEC is a public enforcer, just like DOJ, and it should want to create an enforcement environment in which its charges are taken seriously and the merits of each charge have important meaning for the reputations of firms and the legitimacy of the regulatory system. After all, the whole framework of securities regulation was designed to protect the common investor. The common investor, more than anyone, would like her public officials to inform her, for example, whether banks that had to be saved by government intervention during the financial crisis triggered that same crisis through the use of fraud to sell massive quantities of mortgage-backed securities and related derivative products. And it is not just that the “neither admit nor deny” two-step is harmful in a particular case. It is that the SEC has institutionalized this practice to the point that it is a feature of every settlement and does not appear even subject to bargaining. *Nolo contendere* is par for the course. Or so the complaint goes.

Third, the use of these settlement practices against a background in which the SEC takes almost none of its major corporate cases to trial produces the worry that there is no meaningful check on the SEC’s process of imposing liability on regulated actors.⁴³ How and when do

40. Brief of *Amici Curiae* Sec. Law Scholars for Affirmance in Support of the District Court’s Order and Against Appellant and Appellee, *SEC v. Citigroup Global Mkts. Inc.*, 2012 WL 7009633 (2d Cir. 2012) (No. 11-5227-cv), at 15–16.

41. See, e.g., Ezra Ross, *The SEC’s Band-Aid Solution and the Politics Behind It*, THE COLLECTION GAP: A BLOG ABOUT REGULATORY ENFORCEMENT FAILURE, July 2, 2012, <http://thecollectiongap.com/2012/07/the-secs-band-aid-solution-and-the-politics-behind-it/>.

42. See Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 87, 90–96 (A. Barkow & R. Barkow eds., 2011).

43. See *SEC v. Citigroup Global Mkts. Inc.*, 827 F. Supp 2d 328, 338 (S.D.N.Y. 2011); Brief of Appointed Pro Bono Counsel for the United States District Court, *SEC v. Citigroup Global Mkts. Inc.*, 2012 WL 3542014 (2d Cir. 2012) (No. 11-5375-cv), at *55. This argument has been most famously

these allegations ever get tested, even under the most forgiving of standards such as those applying to a motion to dismiss a complaint in a civil lawsuit? It is more than a bit ironic that the SEC has answered the criticism about settlements, including those without admissions, by saying, in effect, that the SEC's allegations when it files complaints have a seriousness and imprimatur that the public understands to mean the defendant actually did what is alleged. Given that so few of the SEC's allegations are tested in litigation, the possible mechanism for such a public belief is elusive. Of course, the SEC would insist that its rigorous internal review of enforcement actions, which require a majority vote of the commissioners, confers a seal of quality on its legal complaints.⁴⁴ But that is not much different from prosecutors asserting that they are not in the business of prosecuting innocent people. Or at least that is how the SEC's critics would describe matters.

As deterrence remains the overriding theme in public enforcement, the SEC's settlement practices ought to be evaluated from something like the standpoint of cost-benefit analysis. Those, including the SEC and Citigroup in their case before Judge Rakoff, who assert in blanket fashion that judicial deference to a consent decree is a basic feature of the Anglo-American lawsuit are badly eliding private and public law. Public lawsuits are brought principally for the purpose of deterrence, not compensation. Much analysis of the role of the consent decree in civil litigation is simply inapposite here.⁴⁵

It seems indisputable that the constant disposal of cases through "don't break the law" orders with "neither admit nor deny" statements from those said to have committed securities fraud gives up a great deal of potential deterrent effects. The institutionalization of these practices within the sometimes too clubby securities bar has the further effect of cutting the judiciary and the investing public almost entirely out of the process of public enforcement of securities law.⁴⁶ Even if the SEC were

generalized to the full institution of settlement by Owen Fiss: "Settlement is the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done." Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

44. See Brief of SEC, Appellant/Petitioner, SEC v. Citigroup Global Mkts. Inc., 2012 WL 1790380 (2d Cir. 2012) (No. 11-5375-cv), at *57; Brief of Amicus Curiae Former SEC Gen. Counsel & Chairman, Harvey Pitt in Support of Affirmance of District Court's Ruling, SEC v. Citigroup Global Mkts. Inc., 2012 WL 7009635 (2d Cir. 2012) (No. 11-5227-cv), at *13-14.

45. See generally Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43 (1987).

46. See Fiss, *supra* note 43, at 1085 ("Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates . . . [whose] job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.").

making the right cost–benefit analysis in each case, and in sum across all cases, that would seem to be undesirable as a matter of prudent institutional arrangements.

And it is highly unlikely that the SEC is in fact getting the cost–benefit analysis right. What the agency says is that it could not settle cases if it did not settle them this way. Firms would refuse to deal, primarily because the collateral consequences of factual admissions in public enforcement actions can cripple firms, particularly in class action litigation. The result would be more trials, and those trials would tend to be big and expensive. The SEC would be forced to bring far fewer enforcement actions, and overall deterrence would decline. The SEC has determined, it says, that the public is better served by a broader and shallower enforcement practice than a narrower and deeper one.⁴⁷ And it adds, with more than a touch of executive branch zeal, that Congress meant to delegate to the SEC, and to the SEC alone, the question of how best to allocate the government’s limited enforcement resources.⁴⁸

Suppose, unrealistically, that there were zero agency cost concerns looming over our evaluation of the SEC’s justifications for its practices. Assume it is not true that enforcers like settlements for boosting case statistics, generating press conferences, yielding checks with lots of zeros attached, and building credibility with a defense bar that typically hires enforcement attorneys to their next and higher-paying jobs.

Surely the SEC would still be overstating its case a bit, if not a lot. It is hard to imagine that some change—any change—in settlement practices would grind the securities enforcement machine to a virtual halt. Only myopic cost–benefit analysis would view the problem as a binary choice between lots of sanctions with no admissions and only very few instances of sanctioning with admissions or findings of wrongdoing. The SEC ought to have the creativity and the willingness to find a way to bring lots of cases, and settle most of them, while still pursuing some enforcement actions in which the full range of sanctions, including those associated with an admission or finding of the facts, are brought to bear. William O. Douglas’s “well-oiled shotgun behind the door” is generally meant to stay behind the door, of course.⁴⁹ But it is liable to rust and fall apart if it is not at least taken out and fired once in a while.

What I am about to point out is counterintuitive. It happens also to be

47. See Testimony of Robert Khuzami, Director, Division of Enforcement, SEC, *Hearing Examining the Settlement Practices of U.S. Financial Regulators*, House Committee on Fin. Servs., May 17, 2012, available at <http://www.sec.gov/news/testimony/2012/ts051712rk.htm>.

48. See Brief of SEC Appellant/Petitioner, *SEC v. Citigroup Global Mkts. Inc.*, 2012 WL 1790380 (2d Cir. 2012) (No. 11-5375-cv), at *41–46.

49. WILLIAM O. DOUGLAS, *DEMOCRACY AND FINANCE* 82 (J. Allen ed., 1940).

true. Criminal prosecutors face a much steeper litigation slope than the government's civil enforcement lawyers. The burden of proof is much higher in criminal cases. Criminal provisions in regulatory schemes often require proof of additional, more culpable mental states for liability. Securities law is a good example, allowing the SEC to win what is called a civil fraud case on a showing of mere negligence by a preponderance of the evidence but requiring proof beyond a reasonable doubt of "willfulness" for a criminal fraud conviction.⁵⁰ And the criminal process is filled with additional evidentiary hurdles and procedural rights (not least the Fifth Amendment privilege) that can be exploited by the defense to exclude evidence and make the adversary's job harder than it would be in a civil suit.

Here is the counterintuitive part. Even though prosecutors have the tougher litigation assignment, they seem far less willing to negotiate away their cases on terms favorable to the defense. To be sure, the access prosecutors have to more serious sanctions gives them a lot more bargaining leverage. But their risk of trial loss is much higher. And the consequences of trial loss—being labeled a reckless prosecutor who indicted an arguably innocent person—are worse than for the noncriminal enforcement lawyer. One would expect the SEC to drive the harder bargain. But it is prosecutors who insist on admissions of wrongdoing and seriously frown on *nolo* and *Alford* pleas. And it is prosecutors who seem more willing to go to trial and who may have (this part is perhaps not counterintuitive) the better success rate at trial. The most recent notable losses for the government in securities fraud cases have been in trials contested by the SEC.⁵¹

It might be true that a sudden about-face, in which the SEC decided to require admissions in every one of its settlements, would bring the enforcement process to a halt. Of course, that would be true in criminal cases too. If criminal defendants across the land managed to solve their collective action problem one morning and all refused to plead guilty at once, the conveyor belt to America's prisons would shut down.⁵² That is why prosecutors do not take a one-size-fits-all approach to settlement.

50. See 15 U.S.C. §§ 77h-1 (2010); 15 U.S.C. §§ 78a–78oo (2002); Aaron v. SEC, 446 U.S. 680, 701–02 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1976).

51. See Nathaniel Popper & Jessica Silver-Greenberg, *Money-Market Pioneer and Son Cleared of Fraud*, N.Y. TIMES, Nov. 12, 2012, at B1; Peter Lattman, *S.E.C. Gets Encouragement from Jury That Ruled Against It*, DEALBOOK, N.Y. TIMES, Aug. 3, 2012, available at <http://dealbook.nytimes.com/2012/08/03/s-e-c-gets-encouragement-from-jury-that-ruled-against-it/>; Walter Pavlo, *SEC Loses Insider Trading Case—You Can't Win 'Em All*, FORBES, June 21, 2011, available at <http://www.forbes.com/sites/walterpavlo/2011/06/21/sec-loses-insider-trading-case-you-cant-winem-all/>.

52. See Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737 (2009).

Some cases warrant pursuit of full sanctions, even if that means costly and difficult trials. And some do not. The sun would still rise over Washington and New York the next day if the SEC took a major, message-worthy enforcement case or two and insisted on more fines and an admission of the facts of wrongdoing—or, for that matter, if it asked a judge to sanction a company for violating the terms of an injunction. Perhaps that is what Mary Jo White now has in mind.⁵³

Of course firms would resist such terms, largely for fear of the consequences in civil litigation.⁵⁴ But settlement would not disappear as an institution. Either the cases would go to trial or they would settle eventually, on slightly less punitive terms or in conjunction with settlement of related private lawsuits. Charging and settlement practices change, bargaining leverage shifts, incentives adjust, and a new equilibrium is reached. This is in the nature of a litigation market.⁵⁵

What, then, of the role of the federal courts in all of this? After all, recent discussion of SEC enforcement practices has focused not only on the SEC's ways of doing business, but also on whether federal judges should have a meaningful role in public enforcement actions that take place in their courts. Some argue that the injunctive power is serious and exceptional, and judges would be right to say that they do not issue such orders unless they are satisfied, at some standard of review, that the allegations giving rise to invocation of injunctive power have merit.⁵⁶ Others point to a long practice in the federal courts of welcoming parties who wish to resolve their disputes by way of consent decree and deferring to the adversaries' informed judgment about the merits of the case and its proper resolution.⁵⁷

53. See Yin Wilczeck, *White Announces Revision of SEC "No Admit" Settlement Policy*, 45 BNA SEC. REG. & LAW RPT. 1150 (June 24, 2013).

54. See Yin Wilczek, *Defense Bar Reacts with Dismay at Revision of SEC "No Admit/Deny" Policy*, 45 BNA SEC. REG. & LAW RPT. 1150 (June 24, 2013).

55. The SEC has recently been touting that it *has* made a change in settlement policy, requiring firms to admit liability if they are also pursued by DOJ and have been criminally convicted. See Brief of SEC, Appellant/Petitioner, *SEC v. Citigroup Global Mkts. Inc.*, 2012 WL 1790380 (2d Cir. 2012) (No. 11-5375-cv), at *48 & n.21. That is hardly a sea change.

56. See *SEC v. Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011); Brief of Appointed Pro Bono Counsel for the United States District Court, *SEC v. Citigroup Global Mkts. Inc.*, 2012 WL 3542014 (2d Cir. 2012) (No. 11-5375-cv), at *40; Brief of *Amici Curiae* Sec. Law Scholars for Affirmance in Support of the District Court's Order and Against Appellant and Appellee, *SEC v. Citigroup Global Mkts. Inc.*, 2012 WL 7009633 (2d Cir. 2012) (No. 11-5227-cv), at *5-6; see also *Aaron v. SEC*, 446 U.S. 680, 701 (1980) ("In cases where the Commission is seeking to enjoin a person . . . the Commission must establish a sufficient evidentiary predicate to show that . . . future violation may occur"; "a district court may consider scienter or lack of it as one of the aggravating or mitigating factors to be taken into account in exercising its equitable discretion in deciding whether or not to grant injunctive relief.").

57. See, e.g., Brief of SEC, Appellant/Petitioner, *SEC v. Citigroup Global Mkts. Inc.*, 2012 WL 1790380 (2d Cir. 2012) (No. 11-5375-cv), at *24-25; Brief of Defendant-Appellee-Cross-Appellant, *SEC v. Citigroup Global Mkts. Inc.*, 2012 WL 1790381 (2d Cir. 2012) (No. 11-5375-cv), at *23-25.

I am not a scholar of civil procedure and do not pretend to have a theory of the judicial role in settlement of lawsuits. But the analysis of settlement of public enforcement actions supplied here would at least add weight to the argument for meaningful judicial review. Much of what I have said might be boiled down to the point that the more serious enforcement actions are, the more seriously they will be taken. If deterrence is the goal, we ought to be interested in enhancing the meaningfulness of enforcement actions. A stream of similar, rubber-stamped settlement contracts inevitably will be seen as less meaningful than a series of judicial orders, each of which comes with a judge's explanation of why she thinks the evidence of a firm's violation of the securities laws is compelling enough to justify placing that firm under a federal court's injunctive control.⁵⁸ Another point relevant to deterrence is that, as Owen Fiss argued in his famous criticism of consent decree practice, a judge is much less likely to hold somebody in contempt for violating an injunction if the judge never had much involvement in determining the factual basis for that injunction in the first place.⁵⁹

As with many problems of law reform, Congress could probably wave its statutory wand and make this happen, simply by adding some language to the enforcement provisions of the 1933 and 1934 Acts explicitly providing for judicial review.⁶⁰ The statutory scheme governing the use of consent decrees in the settlement of Superfund actions might be a starting place for a model. It includes many more directives to enforcers than the 1933 and 1934 Acts.⁶¹ And judicial involvement appears to have been more substantive as a result.⁶² In the meantime, which might be a long time, I would say that if the law of civil procedure turns out to be not so clear about the extent of a trial judge's power to question the basis for an injunction, or even her power to ask the parties for more of a factual showing before signing one, then plaudits to the judge who asserts the existence of that authority and to the appellate court that defers to its exercise.

58. See *SEC v. Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011); Brief of Amicus Curiae Former SEC Gen. Counsel & Chairman, Harvey Pitt in Support of Affirmance of District Court's Ruling, *SEC v. Citigroup Global Mkts. Inc.*, 2012 WL 7009635 (2d Cir. 2012) (No. 11-5227-cv), at *28 (suggesting form of judicial review of consent decree settlements that would approximate the sort of factual proffer used at guilty plea proceedings).

59. Fiss, *supra* note 43, at 1084.

60. See 15 U.S.C. §§ 77t, 78u (2010); see also *SEC v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 2004) (describing the factors required to be established for a court to issue an injunction in an SEC enforcement proceeding).

61. 42 U.S.C. § 9622 (2002).

62. See Beth I. Z. Boland, Comment, *Consent Decrees Under the Superfund Amendments and Reauthorization Act of 1986: Controlling Discretion with Procedure*, 1987 U. CHI. LEGAL F. 451, 463-67 (1987).

III. CONCLUSION

It is a tautology to say that settlement of public enforcement actions should further the public interest. But the routinizing of settlement practices can cause institutions and enforcers to lose sight of the public interest, or forget to continue to ask how to further that interest in each case they bring. When required in the disposition of enforcement actions, admissions of wrongdoing have several instrumental public benefits. There are costs involved. But it is implausible to maintain that those costs are so great as to make it necessary to dispense altogether with admissions, so that they vanish from the courts and cannot be discussed as a bargaining chip in crafting settlements designed to deter corporate wrongdoing. Maybe civil enforcers should not mimic their criminal counterparts, who have nearly banned *nolo* and *Alford* pleas. But they could learn something from thinking about why the criminal justice system has such distaste for that kind of settlement.