

ARTICLES

CRIMINAL SUBSIDIARIES

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Corporate groups comprise parent companies and one or more subsidiaries, which parents use to manage liabilities, transactions, operations, and regulation. Those subsidiaries can also be used to manage criminal accountability when multiple entities within a corporate group share responsibility for a common offense. A parent, for instance, might reach a settlement with prosecutors that requires its subsidiary to plead guilty to a crime, without conviction of the parent itself—a subsidiary-only conviction (SOC). The parent will thus avoid bearing collateral consequences—such as contracting or industry bars—that would follow its own conviction. For the prosecutor, such settlements can respond to criminal law’s expressive purposes while avoiding socially unacceptable collateral consequences from parent-level conviction. This kind of settlement presents an under-considered application of entity partitioning in which adjudicated criminal liability is isolated to a subsidiary, leaving the rest of a firm’s assets unencumbered by a conviction’s collateral consequences. This criminal partitioning differs, however, from better-known private asset partitioning. That is because within a firm, entity borders tend to be more porous to criminal than to private liability. Thus, in the criminal context, partitioning occurs through ex post settlement between parents and prosecutors, rather than the ex ante and unilateral use of asset partitioning seen in the private context. After considering this extension in light of prosecutorial practice and a ten-year dataset of federal SOC settlements, this Article calls for expanded use of SOC settlements as a means for balancing

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competing public interests in corporate enforcement and the avoidance of social cost.

INTRODUCTION.....	2015
I. THE LAW AND POLICY OF CRIMINAL SUBSIDIARIES	2020
A. <i>Partitioning and Its Purposes</i>	2021
B. <i>Partitioning in the Criminal Context</i>	2028
C. <i>The Corporate Prosecutor's Dilemma and Criminal Subsidiaries</i>	2033
1. The Need to Prosecute, and to Protect, Corporate Criminals	2034
2. SOC Settlements as Calibrated Corporate Enforcement	2039
a. <i>No Enforcement</i>	2040
b. <i>Minimal Enforcement</i>	2040
c. <i>Underenforcement or Mitigated Enforcement</i> ...	2041
d. <i>Full Enforcement</i>	2042
e. <i>Over-enforcement or Aggravated Enforcement</i> .	2042
3. <i>The Limits of SOC Settlements</i>	2043
4. SOC Settlements and Culpable Individuals	2048
II. AN EMPIRICAL ANALYSIS OF SOC SETTLEMENTS	2049
A. <i>Descriptive Data and Method</i>	2049
B. <i>Are SOC Settlements Common?: Do They Involve Higher-than-Average Fines?</i>	2053
C. <i>Are SOC Settlements More Common for Firms that Face Securities Collateral Consequences?</i>	2054
1. Are SOC Settlements More Common for Public Companies?	2055
2. Are SOC Settlements More Common for Financial-Services Companies?	2055
D. <i>Preliminary Interpretations</i>	2056
III. CRIMINAL SUBSIDIARIES AND THE PUBLIC INTEREST	2058
A. <i>Expanding the Use of SOC Settlements Would Serve the Public Interest</i>	2058
B. <i>Toward an SOC Settlement Policy</i>	2060
1. A Presumption in Favor of Subsidiary Conviction (When Conviction Is Appropriate).....	2061
2. Meaningful Subsidiaries Only	2062
3. Wholly-Owned Subsidiaries Only	2063
4. Making SOC Settlements Transparent.....	2065

CONCLUSION	2066
APPENDIX	2068

INTRODUCTION

The Wolf of Wall Street—a three-hour dark comedy starring Leonardo DiCaprio¹—grossed \$389 million at the box office,² received five Oscar nominations,³ and set the record for most profanity in a single movie.⁴ Ironically, or perhaps appropriately for a film about the rise and fall of a fraudster, it was financed with more than \$100 million embezzled from 1Malaysia Development Berhad (1MDB), the Federation of Malaysia’s sovereign-wealth fund.⁵ *The Wolf of Wall Street* was not the only thing 1MDB involuntarily funded, however; the U.S. Department of Justice (DOJ) estimates that 1MDB lost over \$3.5 billion to an international conspiracy of theft, bribery, and money laundering.⁶ The scandal was, to say the least, one of the greatest financial crimes in recent history.⁷ Among the coconspirators in the 1MDB scandal were The Goldman Sachs Group, Inc. (“Goldman”), a leading American investment bank; its subsidiaries, Goldman Sachs (Malaysia) Sdn. Bhd., Goldman Sachs (Singapore) Pte., Goldman Sachs International, Goldman Sachs Bank USA, Goldman Sachs & Co. L.L.C., and Goldman Sachs (Asia) L.L.C.; and several of their executives.⁸ Goldman’s part in the scandal led Tim Leissner, former chairman of the firm’s Southeast

1. *THE WOLF OF WALL STREET* (Red Granite Pictures 2013).

2. *The Wolf of Wall Street*, NUMBERS, <https://the-numbers.com/movie/Wolf-of-Wall-Street-The> [<https://perma.cc/G8MV-V8VH>] (last visited Mar. 3, 2024).

3. *The 86th Academy Awards 2014*, ACAD. MOTION PICTURE ARTS & SCI., <https://oscar.org/oscars/ceremonies/2014> [<https://perma.cc/6XE3-X9ER>] (last visited Mar. 3, 2024).

4. Dan Thorne, *How The Wolf of Wall Street Broke Movie Swearing Record*, GUINNESS WORLD RECS. (Jan. 16, 2014), <https://guinnessworldrecords.com/news/2014/1/how-the-wolf-of-wall-street-broke-movie-swearing-record-54478> [<https://perma.cc/7PGW-TQK8>].

5. See Assistant Attorney General Leslie R. Caldwell Delivers Remarks at Press Conference Announcing Significant Kleptocracy Enforcement Action to Recover More Than \$1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund, U.S. DEP’T JUST. (July 20, 2016), <https://justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-press-conference-announcing> [<https://perma.cc/WHJ7-9XCG>] (“Red Granite Pictures, in turn, used more than \$100 million involved in the theft from 1MDB to finance the award-winning 2013 film *The Wolf of Wall Street*. Of course, neither 1MDB nor the people of Malaysia ever saw a penny of profit from the film . . .”).

6. *United States Seeks to Recover More than \$1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund*, U.S. DEP’T JUST. (July 20, 2016), <https://justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign> [<https://perma.cc/P387-5B8T>].

7. See Heather Chen, Kevin Ponniah & Mayuri Mei Lin, *1MDB: The Playboys, PMs and Partygoers Around a Global Financial Scandal*, BBC NEWS (Aug. 9, 2019), <https://bbc.com/news/world-asia-46341603> [<https://perma.cc/3S9F-LWYM>] (“It is one of the world’s greatest financial scandals.”).

8. Deferred Prosecution Agreement at 2, *United States v. Goldman Sachs Grp., Inc.*, No. 20-CR-437 (E.D.N.Y. Oct. 22, 2020), https://justice.gov/d9/press-releases/attachments/2020/10/22/goldman_sachs_dpa_0.pdf [<https://perma.cc/MT4A-XH2H>].

Asia division, to plead guilty to Foreign Corrupt Practices Act of 1977⁹ (FCPA) charges.¹⁰ A federal jury convicted Roger Ng, the investment bank's former Malaysia head, of money laundering and violating the FCPA.¹¹ As for the implicated Goldman entities, only one—Goldman Sachs (Malaysia) Sdn. Bhd. (“Goldman Malaysia”)—was convicted of any crime (another FCPA violation).¹² Its guilty plea followed a settlement between its parent company and the DOJ (which, for this Article, refers to both the criminal-litigation components of “Main Justice” as well as the ninety-three U.S. Attorneys’ Offices).¹³ As part of that deal, the parent company admitted to its and its subsidiaries’ wrongdoing, agreed to pay over \$2.9 billion in criminal fines and disgorgement, and undertook new compliance reforms, among other concessions.¹⁴ In exchange, it would not be convicted of the offenses it had admitted to, nor would any of its “branches, representative offices or direct or indirect affiliates, subsidiaries, or joint ventures” be charged in connection with the scandal.¹⁵ That is, except for Goldman Malaysia.¹⁶ That Goldman subsidiary, and it alone, would face criminal conviction and sentencing.¹⁷

This deal between Goldman and the DOJ is at odds with how prosecutors are usually thought to pursue conspiracies: all equal, are they not supposed to catch the big fish, not the minnows?¹⁸ If there are deals to be struck with

9. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

10. See Plea Agreement, *United States v. Goldman Sachs (Malaysia) Sdn. Bhd.*, No. 20-CR-438 (E.D.N.Y. Oct. 22, 2020), <https://www.justice.gov/criminal/criminal-fraud/file/1329901/dl?inline> [<https://perma.cc/MJ2A-65QH>].

11. Press Release, U.S. Att’y Off. E.D.N.Y., Former Goldman Sachs Managing Director Sentenced to 10 Years in Prison for His Role in Massive Bribery and Money Laundering Scheme (Mar. 9, 2023), <https://justice.gov/usao-edny/pr/former-goldman-sachs-managing-director-sentenced-10-years-prison-his-role-massive> [<https://perma.cc/UP5L-LLK5>].

12. See *id.*

13. See Deferred Prosecution Agreement, *supra* note 8, at 7 (expressing the DOJ’s conclusion that in consideration of Goldman’s actions before the deferred prosecution agreement (DPA), Goldman’s admission of wrongdoing and payment of fines and disgorgement, and the guilty plea of Goldman Malaysia, that dismissal of criminal charges against Goldman via a DPA was the “appropriate resolution”).

14. See *id.* at 2 (“[Goldman] admits, accepts, and acknowledges that it is responsible under United States law for the acts . . . as charged in the Information [against Goldman], and as set forth in the Statement of Facts, and that the allegations . . . are true and accurate.”); see also *id.* at 10 (stating that the disgorgement amount is \$606 million and the monetary penalty is \$2,315,088,000, totaling an amount over \$2.9 billion); *id.* at 4–20 (detailing concessions by Goldman and the DOJ as part of the DPA).

15. *Id.* at 12–13.

16. Cf. *id.* at 3–4 (providing that if Goldman Malaysia withdraws its guilty plea, the DPA with Goldman itself will be “null and void”).

17. See *id.*

18. See Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 729 (2005) (“Prosecutors have to start with the small fry and flip them to use their testimony in going after the big fish. Lower-level employees may feel loyalty to their bosses, and the code of silence may inhibit them from revealing their crimes.”); U.S. Dep’t of Just., Just. Manual § 9-27.620 (2022) (“Of course, ordinarily it would not be in the public interest to forego prosecution of a high-ranking member of a criminal enterprise in exchange for his/her cooperation against one of his/her subordinates . . .”).

coconspirators, it is that less-important participants provide evidence against senior participants in exchange for reduced charges, lighter sentences, or even non-prosecution.¹⁹ In the 1MDB scandal, Goldman itself was the big fish. So why was it able to negotiate a resolution that protected itself and all but one of its entities from criminal conviction in exchange (at least partly) for the conviction of a disgraced overseas subsidiary?²⁰ And why would the DOJ agree to a deal so inconsistent with how it handles conspiracies involving individual participants? Was this settlement a one-off deviation from standard practice, or did it reflect something bigger?

In answering these questions, this Article theorizes subsidiary-only conviction (SOC) settlements, a long-standing but underappreciated corporate-prosecutorial practice.²¹ SOC settlements occur when multiple members of a corporate group—often including parent companies—share criminal liability and are subject to a prosecutor’s jurisdiction. By contrast, this account excludes instances in which a subsidiary is convicted because it is the only member of a corporate group subject to criminal liability or jurisdiction. SOC settlements occur in at least 3.3 percent of all DOJ corporate criminal resolutions, including 5.6 percent of corporate criminal cases in which the DOJ seeks an entity conviction.²² In SOC settlements, a subsidiary accepts ultimate blame for wrongdoing that the parent and other entities within the firm share liability for.²³ For the parent and its other subsidiaries, isolating conviction to one entity protects the rest of the firm’s constituents and their assets and allows the firm to operate free of a criminal conviction’s collateral consequences.²⁴ This effect may be referred to as “criminal entity partitioning,” a subset of the entity partitioning known to the

19. U.S. Dep’t of Just., Just. Manual § 9-27.430 (2023) (describing considerations to be weighed in plea agreements and selection of plea-agreement charges); U.S. Dep’t of Just., Just. Manual § 9-27.620 (2022) (discussing non-prosecution).

20. For example, under 12 U.S.C. § 1829, a parent company “convicted of any criminal offense involving dishonesty or a breach of trust or money laundering” would be prohibited from owning or controlling a bank insured by the Federal Deposit Insurance Corporation (FDIC) (although the statute leaves the restriction waivable by the FDIC).

21. The practice has been observed by other scholars and is not hidden by prosecutors. This Article, however, is the first to offer an extended theorization of SOC settlements. For examples of prior observations regarding the conviction of subsidiaries and the deferred prosecution or non-prosecution of parents, see BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 169–70 (2014); Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter?: The Reputational and Collateral Consequences of Corporate Crime*, in RESEARCH HANDBOOK IN CORPORATE CRIME AND FINANCIAL MISDEALING 87, 137 (Jennifer Arlen ed., 2017) (“Alternatively, a prosecutor could narrow the scope of the [collateral consequence] by entering into a plea agreement with a subsidiary, rather than the parent corporation. This would limit the scope of the mandated exclusion to the subset of the firm’s activities that are located in the subsidiary.”).

22. *See infra* Part II.A.

23. *See supra* notes 8–16 and accompanying text; *see also* Letter from U.S. Dep’t of Just. Crim. Div., to Karen P. Hewitt, Partner, Jones Day, at 7 (June 20, 2019) (on file with author) (settling a foreign-bribery investigation with the DOJ’s promise not to “bring any criminal or civil [charges] . . . against [Walmart], or any of its present or former subsidiaries and joint ventures, relating to any of the conduct described in the attached Statement of Facts, except for the plea agreement with [Walmart’s Brazilian subsidiary] entered into on June 20, 2019”).

24. *See infra* Part I.B.

literature as a core function of organizational law.²⁵ For prosecutors, SOC settlements allow greater enforcement flexibility by balancing the need to avoid social cost that could result from fully prosecuting a firm's culpable constituents with the need to deter and punish corporate crime, prevent recidivism, and achieve other criminal-legal ends.²⁶ This effect is referred to as "enforcement calibration."²⁷

This Article contributes to both the corporate and criminal literatures. In the corporate field, it complicates organizational-law theory by framing criminal liability as a distinct problem for understanding the borders between firms and their constituent entities.²⁸ In doing so, it introduces criminal liability to the existing literature on partitioning in the private-liability and regulatory contexts.²⁹ In the criminal field,³⁰ it reexamines at-tension prosecutorial policies and incentives that drive corporate criminal enforcement and how prosecutors use negotiated settlements in response to those tensions.³¹ More, it spotlights distinctions between the criminal-legal

25. *See infra* Part I.A. Professor Mariana Pargendler has theorized corporate subsidiarization as having two distinct but related effects: asset partitioning and regulatory partitioning. *See* Mariana Pargendler *Veil Peeking: The Corporation as a Nexus for Regulation*, 169 U. PA. L. REV. 717, 741 (2021). She explains that these concepts are often conflated by courts and scholars as a singular asset partitioning, which can be overcome through veil piercing. *See id.* at 722. For its part, regulatory partitioning may be overcome through veil *peeking*, a concept related to, but distinct from, the better-known veil piercing. *See id.* ("Veil piercing as an exception to asset-partitioning can and does often appear in connection with regulatory claims and criminal law . . ."). Corporate criminal liability would seem to straddle these effects in that it includes financial liability (suggesting asset partitioning) as well as regulatory liability. Given this straddle, the Article will generally refer to partitioning in the criminal context as "entity partitioning" or "criminal entity partitioning."

26. *See* U.S. Dep't of Just., Just. Manual § 9-28.200(B) (2023) (identifying the "general purposes of the criminal law" as including "appropriate punishment for the defendant, deterrence of further criminal conduct by the defendant, deterrence of criminal conduct by others, protection of the public from dangerous and fraudulent conduct, rehabilitation, and restitution for victims").

27. *See infra* Part I.C.2.

28. *See infra* Part I.B.

29. *See infra* Part I.A; *see also supra* note 25 and accompanying text.

30. This Article generally relates to corporate crime and, with it, criminal prosecutors, criminal settlements, criminal adjudications, criminal punishments, and so on. But it also applies, perhaps with equal force, to quasi-crime. Quasi-crime refers to serious regulatory or civil offenses that approximate criminal offenses in corporate-criminal practice. *See* CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 7–8 (2d ed. 2001) (articulating the distinctions and commonalities between "true" crimes and quasi-crimes). For example, the DOJ may conduct criminal investigations and prosecutions of violations of the FCPA. The U.S. Securities and Exchange Commission (SEC) has parallel civil investigatory and prosecutorial jurisdiction over violations of the FCPA. 15 U.S.C. § 78dd–1. For a corporate offender, there is little substantive difference in an FCPA case brought by the DOJ or the SEC: the costs and experiences of investigation, settlement terms, and collateral consequences are much the same. Thus, this Article's analysis of crime and its use of the DOJ as a modal prosecutorial agency should yield broader conceptual application. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193 (1991) ("[T]he dominant development in substantive federal criminal law over the last decade has been the disappearance of any clearly definable line between civil and criminal law.").

31. *See infra* Part I.B.

system's approach to individual versus corporate offenders and recommends expanded use of SOC settlements.³² Expanded use would serve the public interest by combining the features of a non-prosecution or deferred prosecution agreement (N/DPA)—the standard mechanisms for achieving criminal law ends short of conviction—with conviction's expressive function, all without the social cost associated with convicting a parent. Further, expanded use of SOC settlements would reduce disparities between corporate and individual criminal enforcement. In making these contributions, this Article proceeds in three parts.

Part I outlines subsidiarization, in which a firm, rather than being structured as a single entity with multiple divisions, is separated into a parent company that owns the equity in one or more entities. Those direct subsidiaries may in turn be the equity holders of their own subsidiary entities, and so on. Such structures are ubiquitous and complex, especially among economically significant firms: a single enterprise might comprise dozens, if not hundreds, of entities.³³ Among other things, subsidiarization permits firms to partition internal pools of assets and liabilities to be accessible to, or remote from, private creditors. Part I contrasts criminal partitioning with the better-known asset-partitioning theory of firm/creditor relationships. Partitioning criminal liability among intrafirm constituents can be achieved only through ex post settlements with prosecutors. Such settlements are desirable to firms because they allow the worst consequences of conviction to be quarantined within a single entity rather than to affect entire enterprises. They are desirable to prosecutors because they allow for enforcement calibration in which the public interest in robust corporate enforcement is balanced against the social cost that would be caused by corporate criminal conviction. This part closes by considering the limits of partitioning in the criminal context.

Part II enriches Part I's theoretical development through a preliminary empirical investigation into several questions around SOC settlements. First, how common are they? They are not ubiquitous. But given that there have been at least forty-eight such federal settlements between 2013 and 2022, they are also not rare.³⁴ More, their collective total fine (\$10.6 billion, excluding non-fine financial penalties and amounts paid under parallel resolutions with other agencies) is noteworthy standing alone. Second, how do they compare to federal corporate criminal resolutions generally, including those in which prosecutors seek an entity conviction or agree to

32. See *infra* Part III.A.

33. See Mariana Pargendler, *The New Corporate Law of Corporate Groups* 2 n.1 (Eur. Corp. Governance Inst., Working Paper No. 702, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4412997 [<https://perma.cc/8MR8-TDE3>] (finding that of 2020's one hundred largest U.S. public companies, the average company had 204 "significant subsidiaries," as defined under federal securities rules); accord Richard Squire, *Strategic Liability in the Corporate Group*, 78 U. CHI. L. REV. 605, 606 n.1 (2011) (finding an average of 245 significant subsidiaries using the same cohort a decade earlier); see also 17 C.F.R. § 229.601(b)(21) (2024) (requiring disclosure by public companies of their "significant subsidiaries"); § 270.8b-2(k) (defining "significant subsidiary").

34. See *infra* Appendix.

deferred prosecution or non-prosecution? Using fine amounts as a proxy for seriousness of underlying misconduct, SOC settlements are bigger—sometimes by orders of magnitude—than other corporate criminal resolutions. This point raises the possibility that SOC settlements are employed when prosecutors perceive cases as being especially serious and thus warranting the expressive function of conviction, although there are alternative explanations. Third, are certain kinds of enterprises more likely to enter into SOC settlements than others? There is evidence that such settlements occur at higher rates in the case of publicly traded firms, as well as those in the financial-services industry, which are more sensitive to collateral consequences.³⁵ These observations are consistent with prosecutors considering collateral consequences, and their resulting social costs, when deciding to enter into SOC settlements.

Part III considers the public-policy implications of SOC settlements. Although a critical view of SOC settlement would characterize it as allowing parents to avoid full accountability, this part concludes that SOC settlement permits worthwhile enforcement calibration between accountability for corporate wrongdoing and avoidance of social cost. That is, limiting conviction to subsidiaries can reduce the salience of social cost in prosecutorial decision-making. This practice also supplements, but does not replace, other enforcement practices embedded in typical corporate criminal settlement. In other words, it is already a part of federal corporate prosecution. In light of their calibrating benefits, Part III calls for expanded use of SOC settlements. To reap the full benefits of this expansion, however, policy guidelines are needed to achieve consistency, transparency, and efficacy around the practice. Part III closes with recommendations for how prosecutorial agencies should approach expanded use of SOC settlement.

I. THE LAW AND POLICY OF CRIMINAL SUBSIDIARIES

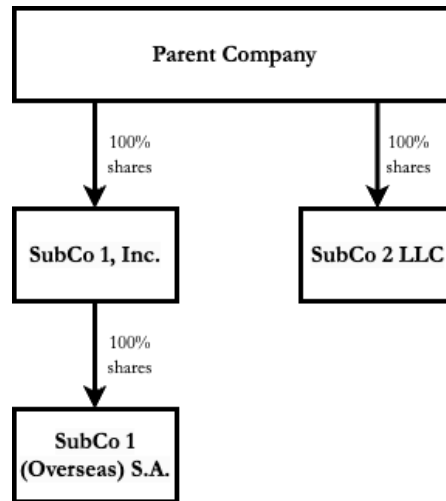
This part introduces a theory of criminal entity partitioning in which subsidiarization allows the worst consequences of criminal enforcement to be quarantined within a firm. One implication of this theory is that subsidiarization lacks *ex ante* reliability for partitioning in the face of criminal enforcement, whereas it is reliable for isolating private liabilities. Instead, effective criminal entity partitioning must occur *ex post* via settlement between a parent and prosecutor. Before turning to that criminal context, however, this part first reviews what partitioning managers can achieve via *ex ante* subsidiarization.

35. *See infra* Part II.D.

A. Partitioning and Its Purposes

Parent-subsidary structures turn on the ability of a business entity (a parent) to hold equity in other entities (subsidiaries).³⁶ Those subsidiaries may in turn hold equity in other entities such that a firm's overall structure has several entity layers, as stylized in the figure below.³⁷

Figure 1: Simplified Corporate-Group Structure



Although each entity is separate from the others and has its own (albeit perhaps overlapping) governing board and officers, the power of the parent as its ultimate owner, whether exercised through formal or informal governance channels, is largely absolute.³⁸ Although a firm may be viewed as a single economic unit regardless its internal structure,³⁹ it will

36. See Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910*, 32 J. CORP. L. 323, 340-41 (2007) (identifying state laws permitting corporations to own stock in other corporations as a significant development in the emergence of contemporary corporate structure).

37. See Mary Zey & Tami Swenson, *Corporate Tax Laws, Corporate Restructuring, and Subsidiarization of Corporate Form, 1981-1995*, 39 SOCIO. Q. 555, 555 (1998) (“Corporate form is the arrangement of units within the corporation, horizontally, vertically, and spatially.”).

38. See Jonathan R. Macey, *The Central Role of Myth in Corporate Law* 37-38 (Eur. Corp. Governance Inst., Working Paper No. 519, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3435676 [<https://perma.cc/8CCJ-CCGD>] (“Subsidiaries’ lack of independence and its corollary, their parent companies’ domination of them, is inevitable—and desirable—because parent companies themselves have shareholders, and parent companies owe fiduciary duties to those shareholders which require them to be attentive stewards of their investments in their subsidiaries.”).

39. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 772 n.18 (1984) (“[T]he ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit.”).

nevertheless subsidiarize.⁴⁰ A firm may subsidiarize to manage liabilities, facilitate transactions, structure operations, or comply with regulatory requirements.

Of the reasons just mentioned, managing tort and contract liabilities is the most significant.⁴¹ This purpose is enabled when chartering jurisdictions follow an entity theory of corporate liability, such that each entity within a group of related corporations is treated separately from the others.⁴² Under this theory, an entity's shareholders are not personally liable to its private creditors: those creditors may pursue the assets of the debtor entity, but they may not look to shareholders or sibling entities for any shortfall.⁴³ A parent that is the sole shareholder of a subsidiary may thus obtain cash flows and other benefits from its equity interest in a subsidiary while eschewing liability beyond the value of the subsidiary itself. As a result, subsidiarization reduces firm-level enterprise risk by insulating internal pools of assets from one another.

Given this effect, a hypothetical creditor who believes herself to be dealing with a solvent firm might be disappointed to learn that the actual debtor is an insolvent subsidiary.⁴⁴ Consider this example: Assume that a landlord owns two buildings that are identical in all economically relevant respects, each worth x .⁴⁵ Assume too that an uninsured personal injury representing a liability y occurs, with equal probability, at only one building. Assume

40. See Mary Zey & Brande Camp, *The Transformation from Multidivisional Form to Corporate Groups of Subsidiaries in the 1980s: Capital Crisis Theory*, 37 SOCIO. Q. 327, 340 (1996) (theorizing why major American corporations transformed in the second half of the twentieth century from having multidivisional to multi-subsidiary structures).

41. See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 399–401 (2000) (describing the liability-management effects of subsidiarization); John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091, 1094 (2009) (“[A] primary purpose for this parent-subsidiary organizational structure is to minimize the potential liability of the parent company for the operations and potential claims against its operating subsidiaries.”).

42. See Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 881 (2012) (“[T]he United States does not recognize the corporate group as a separate legal entity form”); Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 286 (1990) (“The American discussion of the corporate personality to date has largely ignored the modern development of corporate groups. The commentaries assume the existence of the corporation as a separate juridical unit”). But see Franklin A. Gevurtz, *Groups of Companies*, 66 AM. J. COMPAR. L. 181, 181 (2018) (“An attempt to present the law governing corporate groups in the United States covering [numerous substantive law] fields is hampered by the fact that there is no cohesive law of corporate groups in the United States.”).

43. See Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89–90 (1985) (“The rule of limited liability means that the investors in the corporation are not liable for more than the amount they invest.”).

44. See Hansmann & Kraakman, *supra* note 41, at 400–01 (observing that subsidiarization increases risks of intrafirm insolvency and expropriation from creditors).

45. Cf. Andrew Messamore, *The Institutionalization of Landlording: Assessing Transformations in Property Ownership Since the Great Recession* 26 (June 19, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4480068 [<https://perma.cc/UZ6C-RBPD>] (empirically identifying subsidiarization by landlords in the Austin, Texas housing market).

further that ($y > x$) and that ($2x > y > x$). If the landlord simply owns the two buildings directly, then the building where no tort occurs cross-insures the one where the injury does occur. That is because the entire value of the portfolio is available to satisfy claims arising from any discrete asset. The value of the landlord's portfolio is thus $(2x - y)$ and the tort creditor will receive her full damages. But if the landlord forms two separate corporations, each holding title to one building, then the property giving rise to the tort is no longer cross-insured by the rest of the portfolio: the creditor can claim only the assets of the tortfeasor subsidiary and so, because ($y > x$), there will be a shortfall.⁴⁶ As a result, the sum $|x - y|$ is reallocated from the creditor to the landlord. The post-claim value of the landlord's portfolio will be $(x - t)$, where t is the incremental cost of maintaining two corporate entities rather than one. Given that t will be negligible relative to overall portfolio value,⁴⁷ $(x - t)$ will be greater than the earlier $(2x - y)$. The landlord will thus increase its wealth—at the tort creditor's expense—through subsidiarization.⁴⁸

This example involves an involuntary tort creditor. Voluntary contract-creditor relationships further highlight the role of partitioning in organizational law.⁴⁹ Compared to tort creditors, contract creditors are less likely to be unpleasantly surprised by subsidiarization's allocative effects because they can participate *ex ante* in determining which liabilities will attach to what pools of assets within the enterprise.⁵⁰ It can, for example, obtain security interests, guarantees, protective covenants, or information rights. This creditor participation in asset partitioning is at its zenith when a transaction is large enough to justify meaningful due diligence and negotiation expenditures between the parties and when the median creditor (assuming a competitive market on the creditor side) will require diligence and negotiation.⁵¹

46. Even when assets are partitioned within a firm, they can be made to cross-insure (or cross-guarantee) through bespoke contracting between the firm and a private creditor. See Anthony J. Casey, *The New Corporate Web: Tailored Entity Partitions and Creditors' Selective Enforcement*, 124 YALE L.J. 2680, 2692 (2015).

47. Cf. Andrew K. Jennings, *Notice Risk and Registered Agency*, 46 J. CORP. L. 75 (2020) (suggesting that the annual costs of maintaining an entity are modest).

48. See Richard Squire, *The Case for Symmetry in Creditors' Rights*, 118 YALE L.J. 806, 839 (2009) (identifying the use of asset partitioning to transfer wealth from creditors to debtors as a form of opportunism).

49. See Henry Hansmann & Reinier Kraakman, *Organizational Law as Asset-Partitioning*, 44 EUR. ECON. REV. 807, 809 (2000) ("To serve effectively as a locus of contracts, a firm must have . . . a reasonably well-defined pool of assets—which we term the firm's *bonding assets*—that the managers of the firm can pledge as security for performance of the firm's contracts.").

50. Cf. Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1, 39–40 (1986) ("In anticipation of a potential mass tort, a firm could put the risky product line in a subsidiary corporation so that the limited liability of the subsidiary might shield the parent firm from mass tort liability.").

51. That is, rather than waive due diligence or bespoke negotiation, for example, to win business in market conditions that favor entrepreneurs over investors. See David Bogoslaw, *VCs Renew Their Focus on Due Diligence*, VENTURE CAP. J. (Mar. 1, 2023),

Diligence allows the potential creditor to reduce informational asymmetries that subsidiarization exacerbates,⁵² whereas negotiation allows it to obtain protection against counterparty opportunism that subsidiarization otherwise permits.⁵³ Through negotiation, a creditor can assure that a contract with a subsidiary will be performed and thus will agree to substitute a contract with a parent in favor of one with the subsidiary.⁵⁴ A creditor might actually prefer to contract with a subsidiary if it can more efficiently monitor a debtor subsidiary, in which case, subsidiarization may effect more efficient pricing and capital allocation.⁵⁵ Professors Henry Hansmann and Reinier Kraakman give an apt example of an airline that starts a rental-car business.⁵⁶ Car manufacturers will be natural contract creditors to that new business line, and they are likely better able to understand a company that rents cars than one that both operates an airline and rents cars.⁵⁷ After all, they know a great deal about cars and almost nothing about airplanes. As a manufacturer competes with other manufacturers for the rental company's business, it can share some of its monitoring efficiencies with that subsidiary in the form of improved price and non-financial terms. Thus, there is financial logic for the rental-car business to stand on its own, with its contractual relationships partitioned from those of the airline or the common parent. In the case of preexisting subsidiary debt, a creditor might not be an industry specialist (unlike the car manufacturer), but it might nevertheless be satisfied with its security interests in—or costs of monitoring—the subsidiary, and so it will maintain a legacy financing arrangement.⁵⁸

This asset partitioning has contracting applications outside debt financing. It also appears, for instance, in mergers and acquisitions (M&A) transactions and equity financing. All equal, M&A transactions involving the sale of a single entity (a whole-company sale) incur lower transaction costs compared to M&A transactions involving asset purchases and liability assumptions (an asset purchase); the more complex the target business and its assets, the

<https://venturecapitaljournal.com/ftx-fallout-vcs-renew-focus-on-due-diligence/> [<https://perma.cc/LE3X-2A5B>] (quoting a venture capitalist as saying that “[f]or better or for worse, a very common practice in venture capital is trusting another firm’s due diligence”).

52. The more complex the corporate structure, the harder it is to assess risks inherent in dealing with any one constituent within that structure. See Carliss N. Chatman, *Corporate Family Matters*, 12 U.C. IRVINE L. REV. 1, 43 (2021) (“If a company is not taking advantage of a complex parent-and-subsiary structure, it may pay additional taxes, face additional regulatory scrutiny, have lower returns on investment, and appear less valuable relative to similar companies that rely on the silos of complexity to improve their financial reporting.”).

53. See Hansmann & Kraakman, *supra* note 41, at 400–01; *supra* note 44 and accompanying text.

54. See Hansmann & Kraakman, *supra* note 41, at 400–01.

55. *Id.*

56. See Hansmann & Kraakman, *supra* note 49, at 811.

57. *Id.*

58. On the flip of that point, a firm might wish to opportunistically strip a subsidiary of its collateral assets, to the disadvantage of the creditor. See Mitchell Mengden, *The Development of Collateral Stripping by Distressed Borrowers*, 16 CAP. MKTS. L.J. 56, 57–61 (2021) (providing case studies of the nascent practice of collateral stripping and identifying conditions under which it may occur).

greater the transaction-cost savings from whole-company sales.⁵⁹ Although other transactional considerations might require a different structure, given reduced transaction costs, as a default, a parent would be expected to pool assets into a subsidiary before selling them. Likewise, when it acquires assets in M&A transactions, it might do so through a whole-company sale. Or it might establish a new subsidiary to serve as an asset purchaser's direct counterparty. After the acquisition, the acquired assets could be left by the acquirer as a separate subsidiary in anticipation of future resale, for other subsidiarization purposes (such as isolating acquired tort liability),⁶⁰ or simply as a transactional artifact.⁶¹ In other investment or transactional contexts, subsidiarization permits a firm to accept minority equity participation in only part of its overall business.⁶²

Asset partitioning through ex ante subsidiarization has its limits, of course. The doctrine of veil piercing provides the leading exception to a parent's limited liability for subsidiaries' debts. In a standard formulation of the doctrine, the unity of interest and ownership between a parent and a subsidiary, coupled with an element of fraud or injustice, will justify disregarding their separate legal personalities.⁶³ In that case, the parent shareholder would be on the hook for its subsidiary's debts.⁶⁴ Yet courts may be reluctant to pierce the corporate veil when the maintenance of corporate formalities by arm's-length dealing between parent and subsidiary supports their separateness, particularly if the parent does not act in ways that

59. See Kenneth Ayotte & Henry Hansmann, *Legal Entities as Transferable Bundles of Contracts*, 111 MICH. L. REV. 715, 724 (2013).

60. See Roe, *supra* note 50, at 39–40.

61. As a transactional artifact, the costs of intrafirm transfers of the acquired assets would outweigh any benefits of dissolving the acquired entity and transferring its assets and obligations. If the costs of maintaining the entity's corporate formalities are trivial and the assets are otherwise efficiently deployed for the firm's benefit, there could be no benefit at all to unwinding the entity. *But see* Memorandum from David Provost, Deputy Comm'r, Dep't of Fin. Regul., to House Comm. on Com. & Econ. Dev., at 2 (Mar. 20, 2020), <https://legislature.vermont.gov/Documents/2020/WorkGroups/House%20Commerce/Bills/S.255/Drafts,%20Ammendments,%20Summaries/S.255~David%20Provost~Summary%20of%20Bill~3-24-2020.pdf> [<https://perma.cc/23GW-QGBT>] (“Many [insurance companies] own subsidiaries through which they conduct portions of their activities. . . . Often, these affiliates are legacies of earlier regulatory, tax or structural considerations To simplify regulation, corporate structure, financial recordkeeping and governance, [insurance companies] routinely seek to close unneeded subsidiaries.”).

62. See, e.g., Brian M. Resnick, Note, *Recent Delaware Decisions May Prove to Be “Entirely Unfair” to Minority Shareholders in Parent Merger with Partially Owned Subsidiary*, 2003 COLUM. BUS. L. REV. 253.

63. 1 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 41, Westlaw (database updated Nov. 2023); 18A AM. JUR. 2D *Corporations* § 721 (2023) (“If the corporation is a mere instrumentality or alter ego of the shareholder, the corporate entity will be disregarded, and the [shareholder] owning the stock and the corporation treated as identical, with the result that such [shareholder] will be personally liable for the acts and obligations of the purported corporation.”).

64. See Easterbook & Fischel, *supra* note 43.

“dominate” the subsidiary.⁶⁵ Scofflaw operators might fail to maintain those formalities,⁶⁶ but for a sophisticated firm with adequate legal resources, creating subsidiaries and observing their corporate formalities is not a difficult task.⁶⁷ All in, subsidiarization effects low-cost insurance for firms by partitioning assets vis-à-vis creditors while permitting aggregation of intrafirm cash flows.

Veil piercing is not the only exception to asset-partitioning contra private creditors. Corporate law itself forbids the payment of dividends that would render the corporation insolvent and thus unable to pay creditor claims.⁶⁸ And state voidable-transactions law imposes real constraints on managers who wish to parcel assets and liabilities in ways that disadvantage creditors.⁶⁹ Because the allocation of wealth between firms and their creditors is an economic contest, creditors have motivation to challenge firms’ uses of subsidiarization and firms are motivated to defend those uses. As a result, courts enjoy opportunities to adjudicate those disputes, refine the law, and provide increasing fact-applied certainty around the effects of asset-partitioning for private parties.⁷⁰

There are also non-financial uses for subsidiarization. A firm might separate its operating businesses into distinct entities to reflect a managerial policy that subsidiaries operate autonomously, with the parent exercising residual governance and cash-flow rights.⁷¹ A prime example of this use would be a conglomerate with operating subsidiaries that have limited, if any, synergies. Extending the Hansmann and Kraakman example, although an airline and rental-car business have obvious synergies (i.e., they tend to be collocated and are both used for getting from here to there and back again), the managerial skills, technologies, personnel, and hard assets needed to run those businesses are likely to be distinct.⁷² A firm might determine that these distinctions justify an organizational, not just an operational, separation.⁷³

65. See Matheson, *supra* note 41, at 1125 (finding that in putative veil-piercing cases in which courts found “domination” of a subsidiary by the parent, they pierced the veil 82 percent of the time, versus only 2.1 percent of the time after finding no such domination).

66. An example comes from a case in which a nonstock corporation’s leaders kept no corporate books, held no board meetings, filed no tax returns, kept no corporate minutes, and used personal funds to pay corporate debts. *Bishop Eddie Long Ministries, Inc. v. Dillard*, 613 S.E.2d 673, 684 (Ga. Ct. App. 2005).

67. See Jennings, *supra* note 47 and accompanying text.

68. See, e.g., DEL. CODE ANN. tit. 8, § 170 (2023) (forbidding dividends exceeding statutory surplus or net profits).

69. See generally UNIF. VOIDABLE TRANSACTIONS ACT (UNIF. L. COMM’N 2014).

70. But see Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 FORDHAM L. REV. 1689, 1701 (2014) (“[Courts] must take concrete cases as they come, rather than investigating and initiating general proceedings, thus limiting [their] ability to control an agenda or track the effects of policy over time. Adjudication’s intense focus on the case’s particular facts rather than the broader picture may also lead to blinkered policymaking.”).

71. See generally Kenneth Ayotte, *Subsidiary Legal Entities and Innovation*, 6 REV. CORP. FIN. STUDS. 39 (2017) (theorizing one purpose of subsidiarization as being the relinquishment of real authority to internal entrepreneurs).

72. See Hansmann & Kraakman, *supra* note 41 and accompanying text.

73. Yves De Ronge, *An Analysis of the Subsidiarization Process of Multidivisional Companies*, 1 EUR. ACCT. REV. 462, 464 (2006).

Organizational separation might also result from regulatory compliance or arbitrage, that is, regulatory partitioning as distinct from asset partitioning.⁷⁴ A diversified financial-services firm, for example, might offer banking, securities, and insurance services.⁷⁵ Each business line would be subject to its own regulatory regime. More, those regimes could be mutually incompatible with each other. For example, the businesses of banking and insurance are regulated by federal and state banking regulators (for banks) or state insurance regulators (for insurers).⁷⁶ That financial-services firm would thus operate as a financial-holding company with distinct banking, securities, and insurance subsidiaries.⁷⁷ Or a firm based in the United States that does business globally might be required by foreign jurisdictions to operate through locally chartered entities.⁷⁸ Beyond compliance, subsidiaries may be used for regulatory arbitrage, such as to avoid comparatively high-tax or high-regulation jurisdictions. A firm headquartered in the United States, for example, might use its foreign subsidiaries to reduce its overall tax burden versus repatriating global earnings.⁷⁹

74. See Pargendler, *supra* note 25, at 741.

75. For example, Bank of America is the second largest U.S. bank by assets. *Federal Reserve Statistical Release, Large Commercial Banks*, FED. RES., <https://federalreserve.gov/releases/lbr/current/> [<https://perma.cc/P2MH-W5MZ>] (Feb. 16, 2024). Bank of America reports having not only banking subsidiaries, but also securities subsidiaries (e.g., Merrill Lynch) and insurance subsidiaries (e.g., Balboa Insurance Company). See *Bank of America Affiliate Companies*, BANK AM., <https://bankofamerica.com/security-center/affiliate-companies> [<https://perma.cc/M8U8-M427>] (last visited Mar. 3, 2024).

76. See NAT'L ASS'N OF INS. COMM'RS & FED. RES. SYS., A COMPARISON OF THE INSURANCE AND BANKING REGULATORY FRAMEWORKS FOR IDENTIFYING AND SUPERVISING COMPANIES IN WEAKENED FINANCIAL CONDITION 5–9 (2005), <https://federalreserve.gov/boarddocs/staffreports/naicfrs/naicfrs.pdf> [<https://perma.cc/X3PB-KV57>].

77. See 12 U.S.C. § 1843(l)(1) (setting conditions for a bank-holding company to become a financial-holding company and thus to engage in certain business lines that such companies are otherwise prohibited from entering).

78. See Geoffrey C. Kiel, Kevin Hendry & Gavin J. Nicholson, *Corporate Governance Options for the Local Subsidiaries of Multinational Enterprises*, 14 CORP. GOVERNANCE: INT'L REV. 568, 568 (2006) (“In most jurisdictions the [multinational enterprise] will have created a legal entity under that jurisdiction’s laws to conduct the business of the [multinational enterprise’s subsidiary]. In these jurisdictions this requires the appointment of local directors.”).

79. See, e.g., Cathy Hwang, *The New Corporate Migration: Tax Diversion Through Inversion*, 80 BROOK. L. REV. 807, 812–16 (2015) (“Inverted companies can save tens of millions—if not hundreds of millions—of dollars in taxes through an inversion and the related restructurings that follow it.”); see also *Tax Cuts and Jobs Act: A Comparison for Large Businesses and International Taxpayers*, INTERNAL REVENUE SERV., <https://irs.gov/newsroom/tax-cuts-and-jobs-act-a-comparison-for-large-businesses-and-international-taxpayers> [<https://perma.cc/BWJ4-7R38>] (last visited Mar. 3, 2024) (“Foreign-source income earned by a foreign subsidiary of a U.S. corporation generally isn’t subject to tax until the subsidiary distributes the income as a dividend to the U.S. parent corporation.”).

B. Partitioning in the Criminal Context

This section theorizes partitioning in the criminal context.⁸⁰ As a basic doctrinal start, corporations are vicariously liable for criminal acts that their employees and agents commit in the course of employment, provided the acts were done with some intent to benefit the firm.⁸¹ Although a corporation has “no body to kick” and “no soul to damn,”⁸² it can be fined, subjected to probation⁸³ and collateral consequences,⁸⁴ shamed,⁸⁵ and so on. It can even, in a sense, be put to death.⁸⁶ Prosecutorial policies around corporate crime—and, indeed, the very notion of corporate criminal liability—are disputed on consequentialist and retributivist grounds in a voluminous literature.⁸⁷ Although this section takes existing corporate criminal doctrine as given, it does complicate that deeper debate by adding the parent-subsidiary relationship to the fray.

If analogized to private liability, criminal liability implies three roles: the debtor (i.e., the corporation), the creditor (i.e., the government), and the debtor’s equity holder (i.e., the subsidiary’s parent or the parent’s external shareholders). Despite that analogy, however, the contours of vicarious and limited liability in the criminal context are decidedly underdeveloped relative to private liability. This underdevelopment finds explanation in firms’

80. In the United States, noncorporate regulatory settings—such as environmental regulation—are more apt to take an enterprise approach to parental liability. See Pargendler, *supra* note 25, at 740–41. Many major non-U.S. jurisdictions are apt to do so as well. See Meredith Dearborn, Note, *Enterprise Liability: Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 195, 214–29 (2009) (discussing major international jurisdictions that follow enterprise-liability approaches). In other words, theory around corporate liability typically studies the entity/enterprise distinction as two questions: What theory applies in the private context? What theory applies in regulatory contexts? This Article considers, but does not conclusively answer, a third question: What theory applies in the criminal context? Prior scholarship uses private liability as a touchstone for comparative analysis in the regulatory context, whereas this Article focuses its comparison on private versus *criminal* liability. See the discussion and sources cited in Part I.A for examples of the prior literature.

81. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493 (1909); Benjamin Thompson & Andrew Yong, *Corporate Criminal Liability*, 49 AM. CRIM. L. REV. 489, 491–92 (2012) (“A corporation has no physical existence and can be held vicariously criminally liable for the acts, omissions, or failures of employees acting as agents.”).

82. 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, 386 n.1 (1981) (citing a senior British jurist as the source of this familiar phrase).

83. 18 U.S.C. § 3561.

84. See Alexander & Arlen, *supra* note 21, at 123–24.

85. See W. Robert Thomas & Mihailis E. Diamantis, *Branding Corporate Criminals*, 92 FORDHAM L. REV. (forthcoming May 2024) (concluding that existing corporate criminal enforcement fails to shame organizational offenders adequately and proposing harsher shaming methods).

86. See MARY KREINER RAMIREZ & STEVEN A. RAMIREZ, *THE CASE FOR THE CORPORATE DEATH PENALTY: RESTORING LAW AND ORDER ON WALL STREET 11* (2017).

87. See Samuel W. Buell, *A Restatement of Corporate Criminal Liability’s Theory and Research Agenda*, 47 J. CORP. L. 937, 939 (2022) (“The abundant literature on corporate liability shares at least one idea in common: the doctrine needs justification.”); *id.* at 938 n.4 (collecting sources).

incentives when confronted with criminal, rather than private, actions, as well as in prosecutors' incentives and discretionary power.

To start with the civil/criminal dichotomy, firms settle criminal cases.⁸⁸ They are wary of criminal prosecution and the potentially ruinous effects of conviction, making trials of corporate defendants rare.⁸⁹ This expectation undermines the development of corporate-crime doctrine because it implies fewer chances for courts to engage in law development.⁹⁰ It further implies that novel prosecutorial theories asserting corporate criminal liability are less likely to be subjected to critical judicial review.⁹¹ Expansive liability theories and assertions of prosecutorial authority thus build on themselves, restricted by political and institutional checks on their expansion.⁹² That is, given that firms settle rather than press their luck in court,⁹³ precedent is generated by settlement practice rather than judicial decisions.⁹⁴ And importantly, settlement practice naturally tends toward expanding the ambit of corporate criminal liability and prosecutorial authority.⁹⁵

This relative underdevelopment of corporate-crime doctrine makes criminal entity partitioning a special case in organizational-law theory. In the private context, even costly litigation over the effects of subsidiarization—such as in contract disputes, class litigation, bankruptcies, and so on—can sometimes be preferable to settlement or other

88. See Alexander & Arlen, *supra* note 21, at 127 (noting that firms settle criminal liability rather than bear the consequences of conviction).

89. In the Corporate Prosecution Registry—a database of corporate criminal prosecutions built and maintained by Professor Brandon Garrett and Jon Ashley (“Garrett & Ashley Database”), see *infra* note 218—eighty-three cases involved a trial conviction or acquittal, out of 4,450 cases that resolved in settlement, dismissal, plea, or trial, a 1.9 percent trial rate. In comparison, in 2022, 2.3 percent of federal criminal defendants went to trial. John Gramlich, *Fewer than 1% of Defendants in Federal Criminal Cases Were Acquitted in 2022*, PEW RSCH. CTR. (June 14, 2023), <https://pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022> [https://perma.cc/CHQ7-HT9S].

90. Cf. Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 30 (2004) (explaining that another extrajudicial form of dispute resolution, arbitration, “resolves disputes without contributing to the body of law and without providing information to the public” and as a result “more and more potential law is being lost”).

91. Professor Jennifer Arlen frames this effect as a rule-of-law problem in which prosecutorial discretion is unfettered by judicial review and, even if courts could supervise corporate enforcement, there are no articulable standards for such review. See generally Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191 (2016).

92. *Id.*

93. Their luck is not so bad if they do press it, though. In the Garrett & Ashley Database, *infra* note 218, of the eighty-three corporate prosecutions that went to trial, 32.5 percent resulted in acquittal. That compares favorably to the 17.4 percent acquittal rate of all federal criminal defendants in 2022 who went to trial. See Gramlich, *supra* note 89.

94. See Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred?: Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1869–70 (2005).

95. See generally PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (collecting contributions from corporate- and criminal-law experts on the expanding scope of prosecutorial authority in corporate governance).

dispute-resolution options for plaintiff creditors or defendant firms.⁹⁶ Federal and state courts thus have ongoing opportunities to refine private organizational law and to police abuses posed by multi-entity structures.

The same cannot be said for partitioning and criminal liability. There, intrafirm borders—particularly between parents and subsidiaries—are more porous. Why? After all, the relationship between a parent and its subsidiaries is fundamentally a shareholding relationship; thus, general principles of limited liability ought to protect the shareholder parent.⁹⁷ Further, principles of separate legal personality ought to protect one subsidiary from its siblings' liabilities.⁹⁸ When employees of a publicly traded company bribe foreign officials, for example, those employees and the company may be prosecuted, but the retired school teacher who owns a few of its shares cannot be. As an investor, they might suffer pro rata the financial sanction and other related costs borne by the firm, but they may not be held personally responsible for the bribery.⁹⁹

The retired teacher, in some sense, is an owner of the offending firm, yet they have no control over it.¹⁰⁰ But parent companies enjoy both ownership of and control over their subsidiaries and can coordinate them to act in accord with enterprise objectives.¹⁰¹ If in this arrangement's course a subsidiary acts as a parent's alter ego or as its agent, the parent is vicariously liable for its offenses.¹⁰² When the separate legal personalities of subsidiaries are disregarded by the firm, prosecutors cannot be blamed for seeking to do the

96. See Andrew F. Daughety & Jennifer F. Reinganum, *The Effect of Third-Party Funding of Plaintiffs on Settlement*, 104 AM. ECON. REV. 2552, 2558 (2014) (observing conditions under which a plaintiff would prefer trial to settlement); see also Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1130 (1990) (same, regarding corporate defendants).

97. See *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." (quoting William O. Douglas & Carroll M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929))).

98. See, e.g., *Farmers Warehouse of Pelham, Inc. v. Collins*, 137 S.E.2d 619, 625 (Ga. 1964) (identifying factors to consider in disregarding the separateness of two subsidiaries, including whether "the two corporations have been operated as one business with common ownership, common management, common personnel, and with joint bank accounts and joint profit and loss statements"). But see *Trans-Am. Commc'ns, Inc. v. Nolle*, 214 S.E.2d 717, 719 (Ga. Ct. App. 1975) (holding that the separate corporate existence of two affiliate corporations will not be disregarded simply because the two share "the same offices and bookkeeping facilities and trading information and employees").

99. See Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1485 (2009) (observing that shareholders lose wealth following settlements of both private and criminal liability).

100. See ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) (articulating this separation of ownership by shareholders and control by managers).

101. See Macey, *supra* note 38, at 38 ("Parent companies can efficiently reduce risk by having multiple subsidiaries engaged in different lines of business or in the same line of business in different geographical regions.").

102. *Carl Schroeter GmbH v. Crawford & Co.*, No. 09-946, 2009 WL 1408100, at *4 (E.D. Pa. May 19, 2009) ("[A] corporate grandparent[] is not liable for its subsidiary's actions absent an agency or alter ego relationship . . .").

same.¹⁰³ In this sense, criminal liability may begin with the offense of an individual employee of a subsidiary, which becomes vicariously liable for its employee's offense just as its parent becomes vicariously liable for the subsidiary's (vicarious) liability. The same could be said for subsidiaries that act as each other's alter egos or agents. Liability for an offense can thus be shared by entities with relatively modest factual connections to its commission. Although courts often look to corporate law's veil-piercing doctrine in deciding whether to disregard entity borders, they must also consider the commands of other areas of common and statutory law. Just as, for example, environmental statutes may require disregarding entity borders in holding a parent responsible for a toxic spill at a subsidiary's plant, questions of corporate crime may require applying more criminal law than corporate.¹⁰⁴

Given this state of criminal doctrine in the context of multi-entity firms and the role of settlement precedent in filling the doctrinal gap, in many cases prosecutors can credibly threaten to hold parents responsible for their subsidiaries' offenses or to hold subsidiaries responsible for their siblings' wrongdoing.¹⁰⁵ And given that subsidiarized firms typically operate with some integration between entities—and, further, that those entities act toward common enterprise objectives—such a review would likely feature facts supporting parental (or sibling) liability.¹⁰⁶ The subsidiary might, for instance, act as the parent's distributor or receive instructions from the parent's officers, among a myriad of other factors that could render the subsidiary its parent's agent.¹⁰⁷ More, in public-law contexts, U.S. law is more apt to follow an enterprise, rather than entity, theory of liability.¹⁰⁸ In that light, mere observance of separate corporate formalities would tend to receive less weight from a criminal judge than from a civil one. Parental prosecution is thus a live threat even in cases when facts surrounding offenses were largely isolated to the subsidiary level.

103. Cf. 1 JAMES S. RANKIN JR., KAPLAN'S NADLER GEORGIA CORPORATIONS, LIMITED PARTNERSHIPS AND LIMITED LIABILITY COMPANIES § 3:23 (2023) ("The courts seem to take the position that where parent and subsidiary corporations, or sole or substantially sole stockholders and their corporation have so conducted their joint affairs as if they were one and the same, they cannot complain when third parties want to do likewise.").

104. See Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 117 (2014) (explaining that veil piercing against parent corporations can occur to further the regulatory purpose of a statute).

105. Cf. Marcela E. Schaefer, Note, *Should A Parent Company Be Liable for the Misdeeds of Its Subsidiary?: Agency Theories Under the Foreign Corrupt Practices Act*, 94 N.Y.U. L. REV. 1654, 1657 (2019) (collecting sources of scholarship criticizing FCPA enforcement by the DOJ and SEC against parent companies as being unfettered from traditional grounds for disregarding the legal separation of parents and subsidiaries).

106. See *Savin Corp. v. Heritage Copy Prods., Inc.*, 661 F. Supp. 463, 468 (M.D. Pa. 1987) (summarizing *Superior Coal Co. v. Ruhrkohle, A.G.*, 83 F.R.D. 414, 421 (E.D. Pa. 1979), which in turn collected authorities, and setting forth nineteen factors that courts might consider in assessing vicarious liability of corporate parents or siblings).

107. See *id.*

108. See *supra* note 80 and accompanying text.

A key implication of this porousness is that firms cannot credibly manage intrafirm criminal liability through ex ante entity partitioning, as they can in the case of private liability. Prosecutors will generally have colorable theories of parental (or sibling) liability available to them.¹⁰⁹ It follows then that multiple individuals and entities could be prosecuted for the same underlying act. This possibility risks over-prosecution if more than one entity within a firm is prosecuted. That possibility is distinct from prosecutors pursuing both culpable individuals and their employers, given that each could satisfy distinct prosecutorial aims. Prosecuting individuals can promote deterrence among workers (especially those in positions prone to abuse) against wrongdoing on the job,¹¹⁰ whereas pursuing their employers might promote ex ante corporate compliance and ex post remediation.¹¹¹ But if, all equal, there is no economic distinction between a corporate structure comprising a parent and subsidiaries versus one in which all assets and liabilities (and employment relationships) reside within one entity,¹¹² then prosecution of a parent and a subsidiary would not be justified on consequentialist or other grounds. A sanction imposed on a parent would punish the aggregate firm in that all the firm's assets (through the parent's equity interests in its subsidiaries) are available to satisfy the parent's sanction.¹¹³ And assuming that the parent is more famous (or infamous) than its subsidiaries, its prosecution would more robustly achieve the purposes, like general deterrence and victim vindication, that publicity serves.¹¹⁴

Making a subsidiary its parent's codefendant would thus not advance a prosecution's objectives over pursuing just the parent. It would, however,

109. See Rory Van Loo, *The Revival of Respondeat Superior and Evolution of Gatekeeper Liability*, 109 GEO. L.J. 141, 169 (2020) (observing that there is "sometimes a gap between liability in practice and liability in the law" whereby a parent company that might not be literally liable for its subsidiaries' wrongful acts can still be threatened with indictment itself).

110. See generally Nick Werle, Note, *Prosecuting Corporate Crime When Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review*, 128 YALE L.J. 1366 (2019) (concluding that prosecutors cannot credibly enforce against recalcitrant large firms and that managerial liability is required to achieve compliance).

111. See generally Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997) (analyzing approaches to corporate enforcement in light of their effects on corporate compliance).

112. A corporate group might generate nominal transaction costs necessary to maintain the more complex parent-subsidiary structure. See generally ERNST & YOUNG LLP, HOW CAN YOU EVOLVE ENTITY MANAGEMENT INTO EFFECTIVE GOVERNANCE? (2021), https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/tax/tax-pdfs/ey-entity-compliance-and-governance-report-2021.pdf [<https://perma.cc/UNQ2-GSHS>] (collecting data on entity-management challenges in corporate legal departments).

113. That is, the parent's assets are available to satisfy any financial penalty, and those assets include the stock the parent owns in its subsidiaries, thus indirectly making subsidiary assets available to pay the parent's financial sanction. See generally *Cannon v. Whitman Corp.*, 569 N.E.2d 1114 (Ill. App. Ct. 1991) (recognizing that a parent's shares in a subsidiary are assets available for satisfying judgments against the parent). More, depending on the source of the collateral consequence, the parent's control of its subsidiaries will trigger various control provisions that will impose the collateral consequences that affect the parent onto its subsidiaries, too.

114. See *infra* note 224 for examples of such intrafirm collateral consequences.

require incremental expenditures by both the defendant firm and prosecutors. More, gratuitous subsidiary prosecution would destroy firm value in that a subsidiary's M&A value would be reduced if its acquisition imposes successor liability on the buyer.¹¹⁵ It would, in that sense, be a tainted asset.¹¹⁶ In other words, a convicted parent's subsidiary has greater value if the parent can sell it without a criminal record. Such an outcome would not just impose collateral costs on a firm without advancing prosecutorial goals, but it would impose social cost by distorting the M&A market.¹¹⁷ Thus, if prosecutors pursue what they consider to be full enforcement against a parent, any further prosecution of a subsidiary would be excessive.¹¹⁸

But what about prosecution of just a subsidiary, and not its (colorably) liable parent? Assume that \vec{y} —a vector of financial and non-financial sanctions (e.g., fines, restitution, monitors, reform mandates, collateral consequences, and so on)—is the appropriate sanction for a given corporate offense. It is meant to satisfy the sanctions that are sufficient to achieve prosecutorial objectives, \vec{p} —deterrence, punishment, rehabilitation, and so on. In an ideal world, ($\vec{p} = \vec{y}$): the punishment fits the crime. If, however, a culpable subsidiary's ability to bear those sanctions, \vec{x} , is not strictly equal to or greater than \vec{p} , then there is under-prosecution: the sanction imposed on the firm is inadequate in light of prosecutorial objectives. Although the outcome of a criminal proceeding is perhaps broader than that of a tort case in which economic allocation is the only consideration, this illustration aligns neatly with the tort example in Part I.A. In that example, a landlord uses subsidiarization to avoid cross-insuring portfolio assets.¹¹⁹ Similarly, a parent might recognize that its culpable subsidiary can less ably bear full sanctions than it can and thus seek for the subsidiary to be prosecuted in lieu of itself. The result of that criminal entity partitioning would be to reduce the overall sanction borne by the firm. It is obvious why a parent would prefer under-prosecution through a settlement that criminalizes only a subsidiary. But why would a prosecutor go along with it?

C. The Corporate Prosecutor's Dilemma and Criminal Subsidiaries

DOJ policy directs prosecutors to bring charges if they “believe[] that the person's conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless (1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists

115. See generally Andrew K. Jennings, *The Market for Corporate Criminals*, 40 YALE J. ON REGUL. 520 (2023).

116. See *id.* at 562 (characterizing criminal successor liability as a doctrine of “tainted assets”).

117. See *id.* at 523 (explaining that criminal successor liability can contribute to a suboptimal level of M&A dealmaking).

118. Further, current DOJ policy discourages such piling on. See U.S. Dep't of Just., Just. Manual §§ 1-12.000, 1-12.100 (2018).

119. See *supra* Part I.A.

an adequate non-criminal alternative to prosecution.”¹²⁰ Once the prosecutor has determined that criminal prosecution is appropriate, after considering “whether the consequences of those charges for sentencing would yield a result that is proportional to the seriousness of the defendant’s conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation,” the prosecutor must ordinarily charge the most serious provable offense.¹²¹

In applying these principles to corporations, DOJ policy prohibits treating them more leniently or more harshly simply because they are “artificial” persons.¹²² However, policy also invites prosecutors “to consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases,” an invitation not extended in the cases of individual targets.¹²³ Indeed, corporate criminal conviction, or even indictment, tends to impose collateral consequences that are likely to exact some social cost.¹²⁴ This consideration will thus apply in most corporate cases. Directed to treat corporate offenders like everyone else while avoiding the social cost of doing just that, what is the corporate prosecutor to do?

1. The Need to Prosecute, and to Protect, Corporate Criminals

Corporate prosecutors face a dilemma.¹²⁵ On one hand, they wish to fully pursue corporate wrongdoing, including charging the highest provable offense in a given case.¹²⁶ They seek to do so because they hold an office¹²⁷ whose objectives include deterring corporate wrongdoers, punishing wrongs done, preventing recidivism,¹²⁸ and providing restitution¹²⁹ and vindication

120. U.S. Dep’t of Just., Just. Manual § 9-27.220 (2023).

121. *Id.* § 9-27.300 (2023).

122. *Id.*

123. *Id.* § 9-27.1100 (2023). Other prosecutorial agencies may allow, or even require, such considerations, however. See Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1217 (2016) (presenting a model of collateral-consequences mitigation by state and local prosecutors).

124. See Jennings, *supra* note 115, at 536–37 (citing disbarment from government contracts, losses of business relationships and licenses, limits on access to capital, among other things, as examples of collateral consequences to corporate prosecution).

125. Cf. Russell Christopher, *The Prosecutor’s Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93, 113–22 (2003) (dubbing the retributivist/consequentialist tension in plea bargaining “the Prosecutor’s Dilemma”).

126. See *supra* note 121 and accompanying text.

127. See Kay L. Levine & Ronald F. Wright, *Images and Allusions in Prosecutors’ Morality Tales*, 5 VA. J. CRIM. L. 38, 43–47 (2017) (presenting interview data of prosecutors’ self-conceptions as “wearing a white hat”).

128. See *supra* note 26 and accompanying text.

129. See Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 96 (2014) (“Restitution has long been an available criminal remedy in the United States, but courts only have imposed criminal restitution in a primarily condemnatory manner over the past decade.”).

to victims.¹³⁰ But prosecutors also seek to avoid creating social cost in their efforts to right corporate wrongs.¹³¹ That is, conviction of corporate wrongdoers can trigger collateral consequences that can in turn lead to unintended social costs like shrinking employment, harming customers and suppliers, hurting local economies, reducing research and development, and imposing shareholder losses.¹³² Thus, regardless the strength of the evidence and chances of conviction, prosecutors must temper their pursuit of prosecutorial objectives with a need to avoid, or at least to mitigate, social cost.¹³³

These concerns over collateral consequences may be greatest for economically critical institutions. Banks, for instance, are viewed as highly susceptible to the disbarment and reputational effects of being convicted of offenses that call into question their safety and soundness,¹³⁴ even if in particularly egregious cases prosecutors are willing to insist on parent-level convictions for offenses less likely to trigger those consequences.¹³⁵ Although the government seeks to deter and punish corporate wrongdoing, it

130. See Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 855 (2000) (“[T]he finding of [criminal] liability must recognize that . . . the victim or object’s value is beyond price.”).

131. In testimony before the Senate Judiciary Committee, then–Attorney General Eric Holder described this concern. See *Justice Department Oversight: Hearing Before the S. Comm. on the Judiciary*, C-SPAN, at 02:19:25 (Mar. 6, 2013), <https://www.c-span.org/video/?311311-1/justice-department-oversight> [<https://perma.cc/YYU5-ZFPP>] (providing testimony of Eric H. Holder, Jr.: “I am concerned that the size of some of these institutions becomes so large that it does become difficult . . . to prosecute them. When we are hit with indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy. And I think that is a function of the fact that some of these institutions have become too large It has an inhibiting impact on our ability to bring resolutions that I think would be more appropriate.”).

132. See Jennings, *supra* note 115, at 552 n.175 (collecting DOJ corporate criminal settlements that cite collateral consequences for employees, patients, shareholders, and other constituencies as reasons for granting an N/DPA to a corporate offender).

133. U.S. Dep’t of Just., Just. Manual § 9-28.1100(B) (2023) (“[W]here the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism.”).

134. See Catarina Marvão, Giancarlo Spagnolo & Valerio Poti, *Are Banks Too Big to Fine?* 11–12, 17 (Nov. 8, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4441329 [<https://perma.cc/Q5N2-NZTG>] (finding evidence that European banks face comparatively milder fines versus non-bank firms and that such differences are consistent with “too big to fine” considerations by regulators).

135. For example, in 2015, the DOJ obtained parent-level guilty verdicts against five leading international banks for violating antitrust laws in connection with rigging the London Interbank Offered Rate (LIBOR). See *Five Major Banks Agree to Parent-Level Guilty Pleas*, U.S. DEP’T JUST. (May 20, 2015), <https://justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas> [<https://perma.cc/GKA4-FQQG>] (“The penalty these banks will now pay is fitting considering the long-running and egregious nature of their anticompetitive conduct. It is commensurate with the pervasive harm done. And it should deter competitors in the future from chasing profits without regard to fairness, to the law, or to the public welfare.” (quoting then–Attorney General Loretta Lynch)). Two of those banks—Citigroup and J.P. Morgan Chase—are headquartered in the United States.

also cares about maintaining public confidence in the banking system.¹³⁶ Given their socially critical role, banks can directly harm thousands, or even millions, of people by engaging in criminal activity.¹³⁷ Yet ironically, given banks' critical status, prosecutors will be especially reluctant to fully enforce against them.¹³⁸ Socially important corporate offenders might also be protected because they are hard to replace. The U.S. military, for instance, relies on a handful of defense contractors to manufacture weapons systems and other materiel.¹³⁹ A full prosecution against, and resulting disbarment of, any of those contractors could undermine the national defense.¹⁴⁰ On a more humane plane, a medical system disbarred from Medicare and Medicaid could fall into a financial tailspin, resulting in turmoil for an entire region's healthcare, not to mention the harms to a local economy that relies on that system.¹⁴¹ This is all to say that the risk of social cost must weigh heavily on prosecutors' minds as they seek to balance the public's interest in corporate compliance, on one hand, and its interests in the physical and fiscal fruits of business, on the other.

It is not hard to see the concern over collateral consequences in the case of socially critical firms. But all large firms bear some fruit for some people. Fully prosecuting a large firm that operates a lawful business raises the prospect of meaningful social cost, which the prosecutor is apt to fixate on, even if there might be an aggregate net social benefit to full prosecution. For example, a monoline tobacco company—whose very existence is a net social negative—provides gainful employment to thousands and pays dividends to

136. See BD. OF GOVERNORS OF THE FED. RESV. SYS., STRATEGIC PLAN 2020–23, at 1 (2019), <http://federalreserve.gov/publications/files/2020-2023-gpra-strategic-plan.pdf> [<https://perma.cc/59QH-7LBA>] (“The Federal Reserve Board’s highest priority is to promote a strong economy for the American people by fostering the stability, integrity, and efficiency of the nation’s monetary, financial, and payment systems. We are committed to these goals, which have been assigned to us by Congress . . .”).

137. See, e.g., Uri Berliner, *Wells Fargo Admits to Nearly Twice as Many Possible Fake Accounts—3.5 Million*, NAT’L PUB. RADIO (Aug. 31, 2017, 1:02 PM), <https://npr.org/sections/thetwo-way/2017/08/31/547550804/wells-fargo-admits-to-nearly-twice-as-many-possible-fake-accounts-3-5-million> [<https://perma.cc/C3V9-YFGA>].

138. See *supra* note 134 and accompanying text.

139. See U.S. DEP’T OF DEF., STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE 1 (2022), <https://media.defense.gov/2022/Feb/15/2002939087/-1/-1/1/state-of-competition-within-the-defense-industrial-base.pdf> [<https://perma.cc/ZPU8-VNLT>] (“Since the 1990s, the defense sector has consolidated substantially, transitioning from 51 to 5 aerospace and defense prime contractors. As a result, DoD is increasingly reliant on a small number of contractors for critical defense capabilities.” (footnote omitted)).

140. See *id.* (“[H]aving only a single source or a small number of sources for a defense need can pose mission risk and . . . pose significant national security risks.”).

141. See Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1402–03 (2002) (“A firm may have a distinct and large set of employees, creditors, patients, or customers who will be affected.”); Jacob T. Elberg, *Health Care Fraud Means Never Having to Say You’re Sorry*, 96 WASH. L. REV. 371, 400 (2021) (“[T]he failure [by prosecutors] to require admissions [of wrongdoing in healthcare-fraud cases] is problematic because such settlements reduce the penalties for wrongdoing that come not from the financial component but from collateral consequences, including the reputational impact of being found to have broken the rules.”).

sympathetic shareholders, like pensioners.¹⁴² Those wages and dividends have some wholesome uses, like feeding the children of employees and funding retirements. But imagine a scenario in which a full prosecution of the tobacco company would have ruinous effects on its future viability. That result would produce a net social benefit in the form of improved public health, reduced mortality, and better allocation of resources that otherwise would go to commerce in tobacco products.¹⁴³ Yet, the benefits would diffuse across the public, whereas the costs would concentrate on current employees and shareholders. This concentration would allow for political reaction that prosecutors must be cautious of,¹⁴⁴ or it might simply become the outsized focus of their charging calculation. It is, after all, easier to picture the concrete harm of laid-off workers versus the less-visible social benefits of reduced tobacco use.¹⁴⁵

Firms, naturally, also care about the collateral consequences that affect them.¹⁴⁶ Thus, there is a potential deal to be reached between a parent and a prosecutor who must balance the need to convict the wayward firm with the need to protect its sympathetic constituents and perhaps even to obtain its cooperation in the broader enforcement process. Under a retributivist need to convict, prosecutors would pursue full enforcement against the parent.¹⁴⁷ But pragmatically, they would agree to a resolution via an N/DPA that would spare the parent from conviction in exchange for its presettlement

142. See David Blitz & Laurens Swinkels, *Who Owns Tobacco Stocks?*, 22 J. ASSET MGMT. 311, 312 (2021) (“[Tobacco] firms operate within democratic established laws, provide for jobs, and consumption goods that people seem to enjoy, at least in the short run. Second, systematically excluding any investment based on subjective moral considerations would conflict with the fiduciary duty to obtain the best financial results for clients.”).

143. See *Smoking & Tobacco Use: Costs and Expenditures*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/cost-and-expenditures.html [<https://perma.cc/XB27-R4XZ>] (last visited Mar. 3, 2024) (estimating that in 2018, cigarette smoking imposed over \$600 billion in social costs in the United States).

144. See Samuel W. Buell, *Why Do Prosecutors Say Anything?: The Case of Corporate Crime*, 96 N.C. L. REV. 823, 840–47 (2018) (framing prosecutors as sensitive to the views of the public, Congress, and industry).

145. This explanation is my best guess, at least, for why DOJ entered into a SOC settlement with British American Tobacco p.l.c. over the company’s years of illicit cigarette sales in North Korea. See Press Release, U.S. Att’y D.D.C., *British American Tobacco to Pay \$629 Million in Fines for N. Korean Tobacco Sales; Charges Unsealed Against Tobacco Facilitators* (Apr. 25, 2023), <https://justice.gov/usao-dc/pr/british-american-tobacco-pay-629-million-fines-n-korean-tobacco-sales-charges-unsealed> [<https://perma.cc/US6F-G73N>].

146. See, e.g., *McDowell Enterprises Settles Paving Suit with Nashville*, DOW JONES, July 30, 1981, <https://plus.lexis.com/api/permalink/def3e187-1538-4d79-a219-6a1d59fd9f23/?context=1530671> [<https://perma.cc/S7N5-3M6M>] (“McDowell also said that two of its subsidiaries . . . have been suspended by the Federal Highway Administration from employment on federally funded highway projects for one year. The company said *the suspension was expected after the subsidiaries had pleaded guilty . . . to antitrust violations* The company said the suspension of the two subsidiaries *will not affect the ability of the parent or its other subsidiaries to be employed on federally funded highway projects.*” (emphasis added)).

147. See Alec Walen, *Retributive Justice*, STAN. ENCYC. PHIL. (July 31, 2020), <https://plato.stanford.edu/entries/justice-retributive/> [<https://perma.cc/B7FX-NHYL>].

cooperation¹⁴⁸ and post-settlement undertakings.¹⁴⁹ That resolution would be in further consideration of the interests of third parties and the need to avoid social cost. As SOC settlements show, there is a path by which the prosecutor could achieve both these seemingly at-odds needs: agree to an N/DPA in the parent's favor, while substituting a subsidiary's conviction for that of the parent.

For the parent, a guilty plea by a subsidiary has bite. The subsidiary will be subject to the collateral consequences of having a criminal record, which could harm its ability to do business and contribute to the firm's success. A record of conviction is also apt to impair M&A value.¹⁵⁰ And if the subsidiary's name contains the parent's, some of the stigmatic harm of conviction could attach to the parent; even formulations like "a subsidiary of X pleaded guilty to three counts" has potential to transfer stigma to the parent.¹⁵¹ SOC settlements might also exert incremental reform pressure on corporate recidivists with credible and painful, but not deadly, sanctions for subsequent offenses. That is all to say, a firm would prefer that none of its constituents plead guilty to criminal offenses. Short of that outcome, however, a deal in which one entity pleads guilty is preferable to conviction of the parent or multiple subsidiaries; such a deal would mitigate a conviction's intrafirm effects.

As Part I.B observes, however, effecting this partitioning in the criminal context requires the exercise of prosecutorial discretion.¹⁵² That is because, in most cases, prosecutors will have a colorable theory of enterprise or parent-level liability. This point yields a key differentiation between partitioning in the private and criminal contexts: whereas *ex ante* subsidiarization¹⁵³ can effectively isolate entities from each other within a firm (along with their assets and private liabilities), subsidiarization isolates

148. See U.S. SENT'G GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENT'G COMM'N 2023) ("The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) *self-reporting, cooperation, or acceptance of responsibility.*" (emphasis added)).

149. *But see* Andrew K. Jennings, *Follow-Up Enforcement*, 70 DUKE L.J. 1569, 1593 (2021) ("After a company breaks the law, uncertainty abounds whether it will do so again. That uncertainty presents considerable challenges for incorporating recidivism prevention into the settlement process.").

150. See *supra* note 117 and accompanying text.

151. This example is a mild form of the "branding" sanction for corporate crime proposed by Professors Will Thomas and Mihailis Diamantis. See *generally* Thomas & Diamantis, *supra* note 85.

152. See *supra* Part I.B.

153. The choice to subsidiarize, and how, is a predicate to criminal entity partitioning. That is, entities need to be in existence before they can participate in criminal conduct and then be held responsible for it. In firms that are generally involved in legitimate business activities, however, it seems doubtful that managers would subsidiarize with a view toward partitioning future criminal liability. That is because whereas private liability is an unavoidable reality for a business of any scale or complexity, criminal liability—with its heightened mens rea requirements—is not a foregone conclusion. In a more or less law-abiding organization, managers or lawyers are unlikely to articulate criminal entity partitioning as a rationale for subsidiarization, if for no other reason than fear of raising questions around their own integrity.

criminal liability only after corporate wrongs have occurred and only with prosecutorial agreement.¹⁵⁴

2. SOC Settlements as Calibrated Corporate Enforcement

DOJ policy recognizes the corporate prosecutor's dilemma and recommends options to balance the public's competing interests in full prosecution and the avoidance of social cost.¹⁵⁵ On one extreme, not enforcing at all would avoid the possibility of imposing social cost, though it would also "allow a corporate criminal to escape without consequences."¹⁵⁶ On the other, "[o]btaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct."¹⁵⁷ Between these extremes, N/DPAs present a "third option."¹⁵⁸ DOJ policy observes that the third option presented by N/DPAs may "help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while maintaining the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement" and, further, that they may support other objects of criminal prosecution, such as obtaining restitution for victims.¹⁵⁹ These policies, and the prosecutorial decisions that follow from them, can be thought of as enforcement calibration¹⁶⁰: the exercise of discretion to balance competing public interests around the resolution of corporate crime. Although it sensibly recognizes a spectrum for interest balancing, the DOJ's policy commentary misses one point: there are more than three options available to corporate prosecutors. By my count, there are at least five, and

154. A complication of this point—that criminal entity partitioning may be achieved via consent of a prosecutor—is that a firm might be subject to enforcement for the same conduct by multiple prosecutors. These prosecutors might include different components of the DOJ, state prosecutors, quasi-criminal prosecutors from regulatory agencies, or foreign prosecutors. In such cases, firms will require a global settlement to achieve a full criminal asset partition. *See* U.S. Dep't of Just., Just. Manual §§ 1-12.000, 1-12.100 (2018) (directing DOJ components to cooperate with each other and other prosecutorial agencies to achieve global resolutions, to avoid duplicative enforcement, and to hold culpable individuals accountable).

155. *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, 501–02 (2015) ("As a result of the criminal charges and criminal conviction, Arthur Andersen suffered numerous collateral consequences, including the loss of its certified public accounting license and the resulting inability to audit public companies The perceived 'Arthur Andersen effect' (i.e. that criminal charges alone, and certainly criminal convictions, could be the death sentence of a business organization) caused the DOJ to reconsider its historical binary option to resolving alleged instances of corporate criminal liability." (footnotes omitted)).

156. U.S. Dep't of Just., Just. Manual § 9-28.1100 (2023).

157. *Id.*

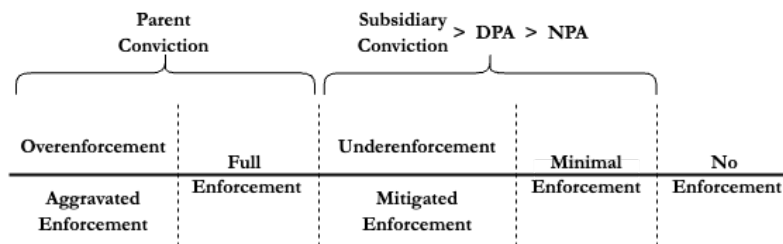
158. *Id.*

159. *See id.*

160. Professor Thea Johnson has identified this practice in the context of individual defendants, in which unfettered plea bargaining and a willingness to manipulate, or even falsify, the facts of criminal wrongdoing allow prosecutors to achieve outcomes that effect a "rough justice," as opposed to what the law and facts under full prosecution might strictly require. *See* Thea Johnson, *Lying at Plea Bargaining*, 38 GA. ST. L. REV. 673, 712–13, 726 (2022); Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 867–79 (2019).

a theory of SOC settlements that helps explain how corporate prosecutors engage in more granular enforcement than the “No Enforcement”—N/DPA—“Full Enforcement” set of options might suggest.¹⁶¹ The diagram and discussion below explain.

Figure 2: Corporate-Enforcement Spectrum



a. No Enforcement

A corporate prosecutor might find evidence sufficient to convict a corporation of criminal wrongdoing but conclude that the likely social cost of enforcement must be entirely avoided because it so outweighs the public interest in enforcement.¹⁶² In any case, the potential target firm will be required to expend substantial sums in responding to the prosecutor’s investigation, even if the prosecutor would ultimately decline to go further. Thus, even when there is declination, social cost is incurred.¹⁶³

b. Minimal Enforcement

If a prosecutor is unwilling to impose criminal conviction on a firm, they might nevertheless insist on settlement terms that require cooperation;

161. See Paul A. Ferrillo, *Collateral Consequences of the UBS and RBS LIBOR Settlements*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 12, 2013), <https://corpgov.law.harvard.edu/2013/03/12/collateral-consequences-of-the-ubs-and-rbs-libor-settlements/> [<https://perma.cc/Q7C5-JS33>] (suggesting subsidiary prosecution as a “middle way” for prosecutors that “is particularly useful if there are unique risks of collateral consequences associated with convicting a parent”).

162. An example might include a socially important institution on the brink of insolvency. Imagine that an important regional bank experiences a crisis of liquidity or shareholder/depositor confidence that might result in its failure. A prosecutor investigating wrongdoing at the bank (particularly relatively nonserious wrongdoing unrelated to its current plight) might determine that proceeding with enforcement could tip the bank into failure, whereas the public interest would be better served by the bank’s survival. In balancing the public’s need for prosecution and for the bank’s survival, that prosecutor would likely decline to bring a case at all.

163. See, e.g., Samuel Rubinfeld, *Costly Corporate Investigations Have No Natural End-Point*, WALL ST. J. (Oct. 10, 2017, 6:00 AM), <https://www.wsj.com/articles/costly-corporate-investigations-have-no-natural-end-point-1507630214> [<https://perma.cc/58GW-99LD>] (identifying six corporate investigations with costs ranging from \$130 million to \$1.3 billion).

remedial undertakings; payment of restitution, disgorgement, or fines; and so on.¹⁶⁴ The prosecutor might do so through an N/DPA. DOJ policy suggests that, to avoid unacceptable social cost, N/DPAs are an intermediate option between declination and conviction.¹⁶⁵ But practice reveals more granularity in calibrating corporate-criminal resolutions. For instance, even the choice between a non-prosecution agreement (NPA) and a deferred prosecution agreement (DPA) reflects enforcement calibration. A DPA requires formally charging the corporation, with the information to be dismissed after a number of years if the defendant abides by the agreement's terms.¹⁶⁶ That is, under a DPA, prosecution is deferred until its presumptive dismissal.¹⁶⁷ An NPA is distinguishable from a DPA in that it does not involve actual charging.¹⁶⁸ Under either form of settlement, the corporate offender will be made to pay similar sums, agree to similar undertakings, waive statutes of limitations, and admit to damning facts.¹⁶⁹ But, all equal, being charged with a crime would seem a more severe resolution. After all, although those who are merely charged remain legally innocent unless and until they are convicted, there are interim consequences, including stigma from public assumptions that allegations made are true.¹⁷⁰

c. Underenforcement or Mitigated Enforcement

Prosecutors' decision space is not necessarily linear: they are not limited to choosing from a range of enforcement options against a single corporate defendant. Rather, for a multi-entity firm, enforcement decisions may include pursuing not only parent companies but also culpable subsidiaries.¹⁷¹ This point means that the prosecutor has expanded options to calibrate corporate criminal resolutions. As explained in Part I.B, the prosecutor might accept the conviction of a subsidiary as a resolution to an offense involving

164. See, e.g., Deferred Prosecution Agreement, *supra* note 8.

165. See *supra* note 158 and accompanying text.

166. See BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 45–80 (2014) (providing case studies and descriptive statistics on the structures, effects, and deficiencies of N/DPAs).

167. See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 321–22 (2007) (comparing DPAs to a corporate pretrial diversion or probation program).

168. See GIBSON DUNN, NEGOTIATING CLOSURE OF GOVERNMENT INVESTIGATIONS: NPAs, DPAs, AND BEYOND 6 (2020), <https://gibsondunn.com/wp-content/uploads/2020/10/WebcastSlides-Negotiating-Closure-of-Government-Investigations-NPAs-DPAs-and-Beyond-01-OCT-2020.pdf> [<https://perma.cc/5U5E-N6QE>] (“NPAs signal a lesser form of resolution than a DPA, though they contain many of the same base provisions. NPAs are voluntary, out-of-court agreements between a corporation and DOJ/SEC. There is no indictment, no plea, and charges are not filed with a court.”).

169. See, e.g., Deferred Prosecution Agreement at 1–10, *United States v. Chipotle Mexican Grill, Inc.*, No. 20-CR-00188 (C.D. Cal. Apr. 21, 2020) (including in *terrorem* provisions in which the DPA recipient admits to facts sufficient to obtain conviction and waives other defenses, like statutes of limitations).

170. See Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 990–94 (2018) (noting that the public may view merely being charged with a crime as showing actual guilt).

171. See, e.g., Deferred Prosecution Agreement, *supra* note 8.

multiple entities within the same enterprise.¹⁷² That conviction, coupled with settlement concessions from the parent company, would achieve not only the cooperative, reformatory, and restitutionary ends of minimal enforcement, but it might also achieve further criminal-law purposes through the ritual of plea, conviction, and sentencing. As Part I.B explains, however, focusing blame on the subsidiary would tend to fall short of full enforcement when there is a culpable parent.¹⁷³

Another calibration possibility is that this enforcement tier is chosen by a prosecutor due to the parent's mitigation. Perhaps the parent self-reported the firm's misconduct, cooperated with prosecutors, and identified culpable individuals.¹⁷⁴ In that case, a resolution that underenforces in one view is, from another vantage, earned by the parent through positive efforts. In that case, some combination of the prosecutor accepting a subsidiary for criminalization and offering an N/DPA or even outright declination to the parent is justified by the parent's furthering of prosecutorial objectives.¹⁷⁵

d. Full Enforcement

Full enforcement against a corporate offender is a decision that satisfies the objectives of criminal law without consideration of social cost. In other words, under full enforcement, a corporate offender is prosecuted as an individual defendant in like circumstances would be.¹⁷⁶ An implication of full enforcement is that culpable parents are prosecuted for the most serious provable offenses identified.¹⁷⁷ But because, in reality, considerations of social cost and mitigation do bear on the prosecutor's decision, full enforcement is rare.¹⁷⁸

e. Over-enforcement or Aggravated Enforcement

Part I.B observes that if a parent and one or more subsidiaries are culpable, then prosecuting just the parent will be adequate to achieve the prosecutor's objectives.¹⁷⁹ Prosecuting subsidiaries in that case would not only do little to contribute to the prosecutor's objectives, it would also create a criminal history that would reduce subsidiaries' potential M&A values. That is, gratuitously prosecuting subsidiaries would reduce firm value and so impose social cost without offsetting enforcement gain. Thus, prosecuting both a

172. *See supra* Part I.B.2.

173. *See supra* Part I.B.2.

174. Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 755–57 (2020) (framing corporate cooperation with prosecutors as subsidizing public enforcement).

175. *See* U.S. Dep't of Just., Just. Manual § 9-28.200(B) (2023) (setting forth purposes of corporate prosecution).

176. *Cf. supra* note 121 and accompanying text.

177. *See supra* note 121 and accompanying text.

178. *But see* Plea Agreement, *United States v. IAV GmbH*, No. 16-CR-20394 (E.D. Mich. Jan. 11, 2017), ECF No. 138 (plea agreement of Volkswagen's parent company in connection with the company's emissions scandal).

179. *See supra* Part I.B.

parent and its subsidiary would over-enforce. In light of a prosecutor's reluctance to pursue even full enforcement, over-enforcement would also be rare.

A second calibration above full enforcement is aggravated enforcement. Under aggravated enforcement, prosecutors go beyond what they reckon to be full enforcement. Their reasons could include a need to respond to obstructive or other bad conduct by the firm during the investigation. These reasons might also include careerist motivations, or even a policy or political desire to be gratuitously punitive toward the offender firm.¹⁸⁰ Engaging in aggravated enforcement on the basis of the latter considerations would raise serious due process concerns and would violate DOJ policy.¹⁸¹ But because those considerations may potentially have personal appeal to the prosecutor, and given that their motivations could be disguised to supervisors, it is uncertain whether aggravated enforcement occurs and, if so, how frequently.

3. *The Limits of SOC Settlements*

Although subsidiarization makes SOC settlements possible, there are limits to the practice. Even if parents and prosecutors agree, not just any subsidiary will do. Multiple entities within the same firm may share responsibility for corporate wrongdoing.¹⁸² For example, a foreign subsidiary might pay bribes; a consolidated-services subsidiary might process illicit payments; and parent-level managers might direct, know of, or be reckless about the risk of bribery.¹⁸³ If one of those entities is to be criminalized, which is it to be?

Free to choose which entity will fill that role, a parent would be expected to select a subsidiary without significant assets or operations or that otherwise does not contribute significantly to the firm's overall results. Given that many firms have hundreds of subsidiaries, it is likely that at least one could fit that profile.¹⁸⁴ Parents would prefer such picayune subsidiaries for criminalization because their conviction would impose the most modest consequences on the corporate group. In contrast, employing an important subsidiary in a SOC settlement would be costlier because it would bear any

180. See U.S. Dep't of Just., Just. Manual § 9-27.260 (2023) (prohibiting prosecutors from considering a person's political associations; their own feelings concerning a person or victims, or any effect a prosecutorial decision may have on their personal lives or careers).

181. See generally Miriam H. Baer, *Corporate Compliance's Achilles Heel*, 78 BUS. LAW. 791 (2023) (identifying political decisions and polarization as a risk in corporate enforcement).

182. See, e.g., Deferred Prosecution Agreement, *supra* note 8 and accompanying text.

183. Cf. *In re* Gen. Cable Corp., Exchange Act Release No. 79,703, 3 SEC Docket 17755 (Dec. 29, 2016) (order instituting cease-and-desist proceedings) ("Some of these [foreign-bribe] payments were made even though employees of GCC's subsidiaries informed executives and employees at GCC that they suspected that payments to third parties were being used for improper purposes, including potential bribery."); see also Deferred Prosecution Agreement at A-10, A-19, *United States v. Teva Pharm. Indus. Ltd.*, No. 16-CR-20968 (S.D. Fla. Dec. 22, 2016), ECF No. 1 (finding that Teva executives were aware of corruption issues involving the company's Mexican and Russian subsidiaries yet failed to implement controls to prevent violations at those subsidiaries).

184. See Pargendler, *supra* note 33.

collateral consequences as well as the resulting negative impacts. Given that the results of its business will be consolidated with those of its parent and siblings,¹⁸⁵ the more important a subsidiary, the costlier it is to criminalize.¹⁸⁶ Still, the cost of a parent-level conviction will generally be greater than that of a subsidiary conviction.¹⁸⁷ That is, even a high-cost SOC is preferable for a parent than having no SOC if prosecutors are determined to obtain a corporate conviction.

For their part, prosecutors might be willing to accept a low-cost SOC.¹⁸⁸ After all, if prosecutors are motivated to obtain a conviction before resolving a matter, conviction of a low-cost SOC would suffice, and it would be easier to obtain in settlement negotiations than that of a high-cost SOC.¹⁸⁹ A faster resolution, for instance, might allow prosecutors to sooner reap personal rewards from achieving what their supervisors and peers view as a successful case.¹⁹⁰ More, the parent might have superior information about its subsidiaries' contributions to the corporate group's business, allowing it to steer negotiations toward lower-cost options.¹⁹¹

The purposeful selection of low-cost SOC's, however, could undermine the ends of corporate criminal enforcement. It would undermine general deterrence by signaling to other firms that legal violations can be settled in

185. See BROAD TRANSACTIONS, Statement of Fin. Acct. Standards No. 8, §10-10-10-1 (FIN. ACCT. STANDARDS BD. 2010) ("The purpose of consolidated financial statements is to present, primarily for the benefit of the owners and creditors of the parent, the results of operations and the financial position of a parent and all its subsidiaries as if the consolidated group were a single economic entity.").

186. In one example, multiple subsidiaries of major defense contractor Litton Industries were involved in a series of criminal offenses in connection with defrauding the U.S. government. One subsidiary pleaded guilty to a 321-count indictment and paid a \$3 million criminal fine, after which the government lifted contracting suspensions on the rest of the firm. The convicted subsidiary, the company noted, accounted for only 0.5 percent of its revenue from the prior year. Bryan Brumley, *Pentagon Partly Lifts Litton Suspension*, ASSOCIATED PRESS, Aug. 22, 1986, <https://plus.lexis.com/api/permalink/38b1c58e-11f6-4c13-99d1-b7d3e8a5e598/?context=1530671> [<https://perma.cc/KV68-YUX7>].

187. There could be instances in which a subsidiary conviction is costlier than a parent conviction, however. For example, if a firm's overall business is declining yet it has one crown-jewel subsidiary with a steeply positive growth trajectory, a conviction of that subsidiary could be more costly than of the parent.

188. *But see* Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 WASH. U.L.Q. 917, 929 n.63 (2003) (discussing the criminal prosecution of audit firm Arthur Andersen in connection with the Enron accounting scandal) ("At least one account suggests that Andersen tried to persuade the government to approve a restructuring that would allow Andersen to spin off the Houston office as a separate entity, reasoning that the Houston office could then be separately prosecuted without implicating the rest of the firm. The government persisted in its view that the firm as a whole would have to bear responsibility . . . so no agreement to that effect was ever reached.").

189. See William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 66 (1971) (theorizing that a prosecutor seeks to maximize their conviction function in determining whether to go to trial or to settle with defendants).

190. See Buell, *supra* note 144, at 838–40 (considering careerist motivations that prosecutors may harbor).

191. See Chatman, *supra* note 52.

part with essentially symbolic guilty pleas by unimportant subsidiaries.¹⁹² At worst, it could even incentivize parents to ensure that there are picayune subsidiaries available for future SOC settlements. Victims of corporate wrongdoing may perceive such low-cost pleas as diminishing their own victimization.¹⁹³ If a given parent firm caused harm, particularly if it did so under the direction or knowledge of the firm's management, victims might experience little vindication when an obscure subsidiary of the firm is offered as the object of blame.¹⁹⁴ Further, as prosecutors calibrate between just deserts for corporate offenders while avoiding social cost, low-cost SOC settlements might represent a larger penalty discount than is warranted to avoid those costs.¹⁹⁵ That is, perhaps prosecutors are unwilling to fully prosecute a parent due to the risk of unacceptably high social cost, whereas the social cost that follows from fully prosecuting even an economically significant subsidiary could be justified by the law-enforcement benefits of doing so.¹⁹⁶

Despite each having incentives to lay blame on picayune subsidiaries, in selecting a SOC, both parents and prosecutors face a meaningful external constraint: the factual-basis rule. That is, a factual basis for conviction of an offense is a prerequisite to pleading guilty to it.¹⁹⁷ A factually innocent subsidiary is unfit for SOC settlement because, unlike the blameless

192. See GARRETT, *supra* note 166, at 64 (“[A] central goal in prosecuting a corporation is to send a message to industry that violations will not be tolerated.”).

193. Cf. Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1838 (2015) (suggesting that prosecution of senior executives for misconduct at a pharmaceutical company “certainly add[s] far more of a deterrent to such a misdemeanor prosecution at the corporate subsidiary level”).

194. Perhaps that offense is lessened when the subsidiary contains the parent's name, like Acme Payroll Services LLC for its parent, Acme Corporation. For example, in 2013, a Japanese subsidiary of a Swiss banking giant pleaded guilty in connection with the bank's participation in the LIBOR manipulation scandal. Mythili Raman, the head of the DOJ's Criminal Division, expressed hope that “[t]hrough its guilty plea and sentence, UBS has been held to account for deliberately manipulating LIBOR, one of the cornerstone interest rates in our global financial system.” Press Release, U.S. Dep't Just., UBS Securities Japan Co. Ltd Sentenced for Long-Running Manipulation of Libor (Sept. 18, 2013), <https://justice.gov/opa/pr/ubs-securities-japan-co-ltd-sentenced-long-running-manipulation-libor> [<https://perma.cc/XT4N-4F7Y>]. Of course, UBS itself did not submit a guilty plea: UBS Securities Japan Co. Ltd. did, although “UBS” was certainly in its name. UBS, the parent company, received an NPA, although it was later forced to plead guilty to the LIBOR manipulation at a parent level after breaching the NPA. See *supra* note 135.

195. See Jennings, *supra* note 115, at 548 (“[T]he economic sanctions previously borne by the probationer might have been reduced by an unearned discount representing a compromise between its just deserts and its ability to pay.”).

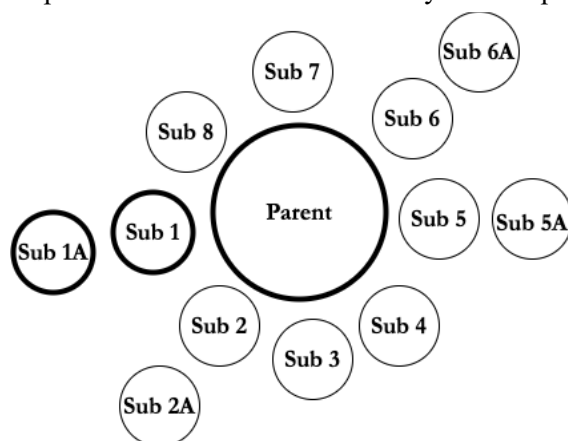
196. See Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 115–16 (2006) (arguing that although civil prosecution is typically the preferable approach to corporate law enforcement, in some cases the indictment and conviction of a corporation may be warranted).

197. FED. R. CRIM. P. 11(b)(3) (“Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.”); U.S. Dep't of Just., Just. Manual § 9-28.1600(B) (2023) (“[T]here should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.”). *But see supra* note 160 (discussing Professor Thea Johnson's scholarship regarding the use of plea bargains that lack factual basis).

scapegoat of Leviticus, it must bear its own colorable criminal liability.¹⁹⁸ In the Goldman/IMDB case, for example, Goldman Malaysia could be a SOC because its agents and employees participated in criminal activity.¹⁹⁹ Another Goldman subsidiary—say, a hypothetical Belgian subsidiary with no factual connection to the IMBD scandal—could not have been freely substituted into the SOC role. There would have been no basis to support its guilty plea. Thus, even if the Belgian subsidiary would have been a lower-cost SOC compared to the Malaysian one, Goldman could not have offered it up to accept blame, nor could the DOJ (or the district court) have, in good faith, accepted it for that purpose.

To illustrate this point further, the following diagram depicts a corporate group comprising a parent and twelve subsidiaries (some directly and others indirectly held by the parent). In the diagram, only the parent and Subsidiaries 1 and 1A (indicated by bold lines) are liable for a criminal offense, and thus only Subsidiary 1 or 1A can serve as the pleading subsidiary.

Figure 3: Representation of Criminal Liability in a Corporate Group



This factual-basis rule thus constrains criminal entity partitioning. Without it, parents could select comparatively low-cost subsidiaries to serve as a SOC or, taken to the extreme, they could create mere shell entities for the purpose. Prosecutors might even accede to such selections. The factual-basis rule, however, prevents such gaming and, in turn, ensures that the convicted entity shares responsibility for its wrongdoing. It also implies a comparatively higher price to SOC settlements than if there were no such

198. In other ancient scapegoating rituals, however, the scapegoat was a person convicted of a crime, but not yet punished. Their scapegoating via exile was intended to “ward off a potential calamity to the community.” Raymond Westbrook & Theodore J. Lewis, *Who Led the Scapegoat in Leviticus 16:21?*, 127 J. BIBLICAL LIT. 417, 420 (2008).

199. See Plea Agreement, *supra* note 10, attach. A, 1–31 (admitting in a detailed statement of facts to criminal wrongdoing by the subsidiary’s agents and employees).

constraint because the seriousness of corporate offending would tend to be correlated with the scale of the offending entities.²⁰⁰ That is, conditional on corporate wrongdoing being serious enough to trigger prosecutors devoting resources to its investigation and later insisting on conviction, it is more likely than not that the wrongdoing occurred at a large scale in financial or operational terms. If the wrongdoing occurred at a large scale, then the culpable subsidiaries might be financially or operationally significant. In contrast, misconduct involving an insignificant subsidiary is more likely to be committed at a scale that would be considered insignificant by prosecutors. It would thus be less likely to draw a robust response from them. Subsidiaries used in SOC settlements, on the other hand, are more likely to be among those that contribute meaningfully to a firm, making their conviction costlier.

This point finds some commonality with practices in the private context. The possibility for private asset partitioning is limited by contracts, veil-piercing doctrine, statutes governing voidable transactions, and other external sources of law.²⁰¹ In a similar vein, criminal entity partitioning is limited by the factual-basis rule. Criminal entity partitioning is distinct from private partitioning, however, in that the counterparty cannot waive the rule's protection. For instance, a private creditor may forgo protections it enjoys under contract. Prosecutors cannot waive the factual-basis rule, however, because it is enforced by an independent nonparty (i.e., a district court) with its own obligations under the Federal Rules of Criminal Procedure.²⁰² In this light, constraints on private asset partitioning protect the interests of private creditors, but their waivability permits highly flexible settlement practices.²⁰³ The factual-basis rule, in this setting at least, protects the public against

200. See U.S. Dep't of Just., Just. Manual § 9-28.300 (2023) (listing "the nature and seriousness of the offense" as the first consideration for corporate prosecution decisions).

201. See *supra* Part I.A.

202. Whether the factual-basis rule is observed consistently and with integrity is admittedly questionable. Defendants might plead guilty to crimes they did not commit and may assure courts that they are indeed guilty—that is, that there are factual bases for their pleas. Prosecutors might knowingly allow defendants to make such false assertions or even collude with them in offering mutually convenient lies to a court. See *supra* note 160. A judge might sense that some defendants—or even a particular defendant—is not in fact guilty of a pleaded offense yet might accept the plea anyway. After all, if the prosecution and the defendant both falsely agree that the defendant committed an offense, the court is poorly positioned to contradict them. Hayley R. Stillwell, *The Meaningless Factual Basis Inquiry of Rule 11(b)(3)*, 28 GEO. MASON L. REV. 1089, 1094 (2021) ("The district judge can also consult the petition to enter a plea of guilty and the indictment to support her finding of whether a factual basis exists. But that's it; that's all the district court has to rely on when making its factual basis determination under these circumstances."). That is all to say that a factually innocent entity might plead guilty to a crime. But for the sake of this Article, I make a legality assumption that Rule 11(b)(3) of the Federal Rules of Criminal Procedure constrains parents and prosecutors when they make SOC deals. Although it is possible that the rule is not honored in current practice, the prescriptive policy I call for in Part IV, *infra*, would help enforce it going forward.

203. *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 253 (Mich. 2003) (holding that contracts can be waived or modified notwithstanding antiwaiver provisions).

parents seeking, and prosecutors giving, an overly generous enforcement discount.²⁰⁴ It further protects the judiciary against being used to bless collusive settlements.²⁰⁵ The constraint imposed by the rule thus offers a perhaps attractive normative result, even if its non-waivability does reduce the room for calibration.

4. SOC Settlements and Culpable Individuals

Although the relationship between individual prosecution and SOC settlements is beyond this Article's scope, it is worth briefly highlighting this intersection as an opening to future work. Current DOJ policy prohibits trading corporate settlements for non-prosecution of culpable individuals.²⁰⁶ Rather, it emphasizes the prosecution of those individuals and conditions corporate settlements on a firm's assistance in identifying and prosecuting culpable individuals.²⁰⁷ Still, prosecutors have, in the past, agreed to settlements in which a subsidiary's guilty plea shielded both the parent and individuals within the firm, even to the point of individual charges being dropped as part of a deal with the target corporation.²⁰⁸ Prosecutors have been criticized for agreeing to settlements in which firms pay the consequences and culpable individuals are spared.²⁰⁹ Indeed, the DOJ's push

204. See William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71, 79–80 (2017) (expressing concern at “compliance games” in which there is a “regulatory status quo where both corporate and government players are, at times, equally captured”).

205. Cf. Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1105 & n.178 (1996) (considering the judicial-integrity implications of judges approving collusive class action settlements).

206. U.S. Dep't of Just., Just. Manual § 9-28.010 (2023) (articulating as a foundational principle of corporate-criminal prosecution that the prosecutor “identifies and holds accountable culpable individuals and not just the corporation”).

207. *Id.* § 9-28.010 (2023) (“[Individual] accountability deters future illegal activity, incentivizes changes in corporate behavior, ensures that the proper parties are held responsible for their actions, and promotes the public’s confidence in our justice system. Prosecutors should focus on wrongdoing by individuals from the very beginning of any investigation of corporate misconduct.”).

208. See Joann S. Lublin, *Conner Unit Pleads Guilty to 1 Charge of Defrauding VA*, WALL ST. J., May 29, 1985, at 12 (“Federal prosecutors dropped all criminal charges against Conner and its employees from the second indictment. In return, the concern agreed to pay \$8,000 in restitution and to cooperate with a continuing federal and state probe.”); *IU International’s Trucking Unit Pleads Guilty to a Felony*, WALL ST. J., Apr. 11, 1985 (“As part of the settlement [with a subsidiary pleading guilty to double billing customers], the government agreed it won’t seek prison terms or other criminal penalties against individual officers or employees of Ryder/PIE or its parent.”).

209. See Patrick Radden Keefe, *Why Corrupt Bankers Avoid Jail*, NEW YORKER (July 24, 2017), <https://newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail> [<https://perma.cc/232P-KEE4>]; William D. Cohan, *How Wall Street’s Bankers Stayed out of Jail*, ATLANTIC, Sept. 2015, <https://theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/> [<https://perma.cc/9RFB-ZGDT>]; Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAG. (Apr. 30, 2014), <https://nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html> [<https://perma.cc/Z43H-4RDD>]. *But see* Chris Isidore, *35 Bankers Were Sent to Prison for*

toward leveraging corporate enforcement to achieve greater individual accountability responds to those criticisms.²¹⁰ Criminal partitioning is conceivably not just a role for subsidiaries, of course. It is also conceptually plausible that culpable individuals take responsibility—whether of their own volition or not—in order to shield the firm’s constituents or even its other employees, a possibility that warrants separate investigation.²¹¹

II. AN EMPIRICAL ANALYSIS OF SOC SETTLEMENTS

Just how common are SOC settlements and to what extent do they differ from other corporate criminal resolutions? This part suggests that the practice is used by the DOJ in a meaningful number of corporate criminal resolutions and that SOC settlements differ meaningfully from other resolutions in terms of average fines. It also finds initial evidence suggesting that firms that are particularly vulnerable to the collateral consequences of parental conviction—including publicly traded and financial-services firms—are more likely to enter into SOC settlements.

A. Descriptive Data and Method

Using LexisNexis, I identified 4,281 reports in newspapers, the trade press, or web-based publications that discussed guilty pleas by subsidiaries.²¹² Research assistants and I then manually confirmed that stories reported on the kind of SOC settlements that are the subject of this Article and removed those that were not. We further removed duplicate reporting (i.e., multiple stories on the same case). We then reviewed the stories to construct a dataset that included (1) parent names, (2) pleading subsidiary names, (3) prosecutor jurisdiction (i.e., federal, state, or foreign), (4) public-company status, (5) U.S.-headquarters status, (6) parent industry, (7) nature of offense, (8) fines imposed, and (9) year of subsidiary plea. I also manually reviewed press releases, charging documents, or settlement agreements to confirm that a given settlement was factually within the scope of a SOC settlement:

Financial Crisis Crimes, CNN (Apr. 28, 2016, 6:53 AM), <https://money.cnn.com/2016/04/28/news/companies/bankers-prison/index.html> [<https://perma.cc/XMZ2-X6MK>] (“The idea that no bankers went to prison for crimes related to the financial crisis is a myth, according to the watchdog overseeing the federal government’s bailout fund.”).

210. The DOJ’s turn toward culpable individuals within corporations began in 2015 with the release of the “Yates Memorandum.” See Memorandum from Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Just., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://justice.gov/archives/dag/file/769036/download> [<https://perma.cc/6E2W-KFDH>]. That policy focus continues. See Assistant Attorney General Kenneth A. Polite, Jr., Remarks on Revisions to the Criminal Division’s Corporate Enforcement Policy (Jan. 17, 2023), <https://justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law> [<https://perma.cc/A5FQ-FZ76>] (“We are going to be closely examining how companies discipline bad actors and reward the good ones. *Our number one goal* in this area—as we have repeatedly emphasized—is *individual accountability*.” (emphases added)).

211. See Garrett, *supra* note 193, at 1795 (“The higher-ups, who may control negotiations with prosecutors, may themselves remain above the fray while lower-level employees are ‘thrown under the bus.’”).

212. The search term was: “subsidiar* w/10 (‘plead* guilty’ OR ‘pled guilty’)”.

multiple entities within a corporate group were criminally liable, but only a subsidiary pleaded guilty. Given the limitations of the search strategy (e.g., not all news publications are in the LexisNexis database and not all corporate criminal cases are reported in the press), it is likely that I have not identified all instances of SOC settlements. As a result, this empirical strategy should be viewed as likely undercounting the phenomenon.

Because corporate enforcement shifts over time as a result of economic developments, changes in prosecutorial behavior and policy, and other factors, I limit the analysis in this section to a ten-year period, starting with the most recently completed enforcement year at the time of this writing (2022) back to 2013. The 2013–2022 dataset is included in the Appendix. For the ten-year analysis, I identified forty-eight instances of the DOJ entering into SOC settlements, or 4.8 on average per year. The fines imposed in connection with these settlements (aggregating all such penalties paid by parents or their subsidiaries) ranged from \$0 to \$2.33 billion (\bar{x} = \$220.1 million; m = \$82.1 million; s = \$400.4 million). For fines, I excluded several components of financial sanctions, specifically amounts paid in restitution, disgorgement, or forfeiture. Fines have a punitive purpose²¹³ that can be viewed as roughly correlating with the seriousness of the corporate wrongdoing.²¹⁴ For more consistent comparison, I also excluded amounts paid to settle parallel investigations by other prosecutorial agencies or private litigation for the same underlying misconduct; that exclusion also covers credits against federal criminal fines for amounts paid to other agencies.²¹⁵ Given these exclusions, this fines-only reporting understates the economic magnitude of some of the forty-eight cases.

213. See W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 601, 613–14 (2017) (considering the possibility for corporations to experience fines as punishment).

214. 18 U.S.C. § 3553(a)(2)(A) emphasizes the need for criminal sentences “to reflect the seriousness of” and “to promote just punishment for the offense.”

215. In one stark example, Rabobank, National Association, a U.S. banking subsidiary of Dutch financial-services firm Rabobank, pleaded guilty to violating 18 U.S.C. § 1517 (obstruction of a financial examination). See generally Plea Agreement, *United States v. Rabobank, Nat’l Ass’n*, No. 18-CR-0614 (S.D. Cal. Feb. 7, 2018). The statutory maximum fine was \$500,000, which Rabobank paid. *Id.* It also paid \$368,701,259 in forfeiture. *Id.* In other cases, DOJ prosecutors may have credited amounts paid to other agencies (including civil regulators) against a criminal fine or considered a corporate defendant’s ability to pay. See Plea Agreement at 17, *United States v. Odebrecht S.A.*, No. 16-643 (E.D.N.Y. Dec. 21, 2016) (“The Defendant has made representations . . . that [it] has an inability to pay a criminal fine in excess of \$2,600,000,000 [T]he Defendant has agreed to a criminal penalty of \$2,600,000,000 payable to the United States, Brazil, and Switzerland”).

To illustrate what kinds of cases these were, I categorized the forty-eight settlements according to the primary offense to which a subsidiary pleaded guilty, as follows:²¹⁶

Table 1: SOC Settlements by Primary Offense

Primary Offense	Share of SOC Settlements	Avg. Fine (millions \$)
Antitrust	2.1%	90
Economic Sanctions	4.2%	311.7
Environmental	12.5%	28.7
FCPA	33.3%	276.8
Food & Drug	12.5%	117.5
Fraud (other)	16.7%	206.3
Hazardous Materials	2.1%	1
Healthcare Fraud	8.3%	76.4
Obstruction	2.1%	0.5
Securities Fraud	4.2%	1,174
Tax Fraud	2.1%	239.8

216. *See infra* APPENDIX.

To illustrate what kinds of defendants these were, I categorized the forty-eight settlements according to the parent's industry, as follows:²¹⁷

Table 2: SOC Settlements by Industry

Industry	Share of SOC Settlements	Avg. Fine (millions \$)
Automotive	2.1%	96.1
Construction	2.1%	33.6
Consumer Goods	2.1%	67.6
Media/Entertainment	4.2%	6.9
Financial Services	27.1%	544.9
Food/Agriculture	6.3%	10.4
Healthcare	25%	108.8
Logistics	2.1%	1
Metals	2.1%	209
Oil/Gas	6.3%	127.3
Retail	2.1%	138.0
Technology	6.3%	222.3
Telecommunications	4.2%	232.5
Utilities	8.3%	17.7

217. *See id.*

To compare this subset of DOJ corporate criminal enforcements against a broader sample, I excerpted all cases from the Corporate Prosecution Registry—a database of corporate criminal prosecutions built and maintained by Professor Brandon Garrett and Jon Ashley (“Garrett & Ashley Database”)—with a “date” field between 2013 and 2022, inclusive.²¹⁸

In addition, SOC settlements need not be a strictly criminal matter, although this Article focuses on criminal cases prosecuted by the DOJ. Civil regulators have their own enforcement divisions and the collateral consequences for serious regulatory violations can be as severe as criminal collateral consequences. Part II.B.2 uses New York University’s Securities Enforcement Empirical Database (NYU SEED) of actions brought by the U.S. Securities and Exchange Commission (SEC),²¹⁹ a civil regulator whose securities-law-focused prosecutions are quasi-criminal in nature and often take place in parallel with DOJ investigations and prosecutions.²²⁰ In demonstrating that other regulators might use SOC settlements, Part II.B.2 suggests that this Article, with its focus on federal criminal cases, only begins to document the SOC phenomenon.

*B. Are SOC Settlements Common?
Do They Involve Higher-than-Average Fines?*

The mean fine in the ten-year SOC sample was \$220.1 million; that average was skewed by the extremes (with a low fine of \$0 and a high fine of \$2.33 billion), although the median itself was an impressive \$82.1 million.²²¹ Settlements for FCPA violations—which occur overseas and so are especially likely to involve subsidiary misconduct—represented a third of the dataset and also had higher average fines than the rest of the settlements; excluding FCPA cases from the dataset leaves a \$179.5 million mean fine (with a \$35.6 million median).

How does this compare with other corporate resolutions in the United States during the same period?²²² Across all such cases ($n = 1459$; $s = \$148.8$ million), the mean fine was \$23.3 million, and the median was \$50,000. Cases that resulted in an acquittal, guilty plea, or trial conviction ($n = 850$; $s = \$128.2$ million)—that is, the cases that prosecutors determined at the

218. CORPORATE PROSECUTION REGISTRY, <https://corporate-prosecution-registry.com/> [<https://perma.cc/D6LL-EX2W>] (last visited Mar. 3, 2024). “Date” refers to the date of N/DPAs; for other outcomes, it refers to the date of acquittal, dismissal, entry into a plea agreement, conviction at trial, or declination. *Id.*

219. *Securities Enforcement Empirical Database (SEED)*, POLLACK CTR. FOR L. & BUS., <https://law.nyu.edu/centers/pollackcenterlawbusiness/seed> [<https://perma.cc/9CAC-W8BQ>] (last visited Mar. 3, 2024).

220. See U.S. SEC. & EXCH. COMM’N DIV. OF ENF’T, ENFORCEMENT MANUAL 84 (2017) (“Parallel civil and criminal proceedings are not uncommon. In furtherance of the SEC’s mission and as a matter of public policy, the staff is encouraged to work cooperatively with criminal authorities, to share information, and to coordinate their investigations with parallel criminal investigations when appropriate.”).

221. See *infra* Appendix.

222. I excluded 205 cases in the Garrett & Ashley Database during this period that are coded as “declination” or “dismissal.”

charging stage to be “conviction appropriate”—had a mean fine of \$18.8 million and a median of \$100,000. Finally, among cases that resulted in an NPA or DPA ($n = 356$; $s = \$222.3$ million), the mean fine was \$51.1 million, and the median was \$200,000.

A few points can be made from these descriptive data. First, SOC settlements comprise a small, but noticeable, portion of federal corporate criminal resolutions (3.3 percent) and a larger portion of resolutions in cases that the DOJ considered to be conviction appropriate (5.6 percent). Beyond collectively representing the staggering sum of \$10.6 billion in fines over ten years, the SOC settlements’ average fines were an order of magnitude larger than average fines for all cases, including conviction-appropriate cases and N/DPA cases. As a note of caution, DOJ practice is inconsistent in how fines are allocated in SOC settlements between parents receiving an N/DPA and subsidiaries being sentenced following guilty pleas. Although fine allocation matters little from an accounting perspective, the Garrett & Ashley Database does include separate entries for subsidiaries that enter into their own plea agreements, even if their parents enter into their own settlements with prosecutors.²²³ However, the median fines are less susceptible to inconsistencies in how the DOJ allocates fines between parents and subsidiaries, and there again the SOC median (\$82.1 million) is far greater than any of the other median fines. The same holds even if FCPA cases are removed from the SOC dataset (leaving a \$35.6 million median).

C. *Are SOC Settlements More Common for Firms that Face Securities Collateral Consequences?*

Securities law imposes collateral consequences on businesses found liable of wrongdoing, including wrongdoing unrelated to securities conduct. For firms that need or want to raise capital, these collateral consequences can increase the cost, timing, and uncertainty of financing or even block some corners of the capital markets.²²⁴ For firms that have business lines in the

223. See *Corporate Prosecution Registry*, *supra* note 218 (“[P]lea agreements, in contrast to deferred prosecution and non-prosecution agreements, sometimes formally include a separate conviction and agreement with the subsidiary, and where that occurs, the companion cases are listed separately.”).

224. For public firms, those consequences include the loss of well-known seasoned issuer (WKSI) status, which reduces the cost and timing of secondary public offerings. See generally 17 C.F.R. § 230.405 (2024) (establishing ineligibility for WKSI status). Although the felony conviction of a subsidiary also results in the loss of WKSI status for the parent, the SEC may waive that ineligibility. *Id.* Comparative parent/subsidiary culpability is one factor that SEC staff will consider in whether to grant a WKSI waiver, and so there may still be some value in isolating conviction at the subsidiary level. See *Revised Statement on Well-Known Seasoned Issuer Waivers*, U.S. SEC. & EXCH. COMM’N (Apr. 24, 2014), <https://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm> [<https://perma.cc/HB2V-QQFF>]. Other consequences for public companies include the loss of statutory safe harbors under the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.) (reducing litigation risk and facilitating capital formation as outlined under 15 U.S.C. §§ 77z-2(b)(1)(A), 78u-5(b)(1)(A)). For nonpublic firms, the consequences include loss of valuable offering exemptions under the

securities industry itself, those collateral consequences can be devastating and, conceivably, even fatal.²²⁵ The breadth of these collateral consequences, as well as the sheer number of firms that might need to access the capital markets or that participate in the securities industry, suggests that securities law offers a meta-regulatory study of subsidiary criminalization.²²⁶

1. Are SOC Settlements More Common for Public Companies?

Among firms in the Appendix's SOC dataset, 83.3 percent involved public companies (without regard to whether they are listed on a securities exchange in the United States or elsewhere). In the Garrett & Ashley Database, of 850 "conviction-appropriate" cases, only thirty-seven, or 4.4 percent, were associated with U.S. public companies.²²⁷ However, even if the SOC dataset is limited to firms listed and headquartered in the United States, 41.7 percent still fit the restriction—an order of magnitude more than the 4.4 percent in the broader conviction-appropriate sample.

2. Are SOC Settlements More Common for Financial-Services Companies?

The financial-services industry contributed 5.2 percent to the 2022 U.S. gross domestic product.²²⁸ It is also particularly sensitive to the collateral consequences of criminal conviction.²²⁹ Are prosecutors more likely to reach

SEC's Regulations D and A. *See* 17 C.F.R. § 230.262 (Regulation A ineligibility); *id.* § 230.506(d) (establishing the so-called bad-actor provision of Regulation D's Rule 506).

225. For example, a financial-services firm that serves as an investment advisor would be subject to discipline—including being suspended or barred from the industry—if convicted of a felony. *See* 15 U.S.C. § 80b-3(e)(3). A firm involved in the investment-companies industry—that is, sponsoring mutual funds—would face a ten-year bar from that industry if convicted of a felony or misdemeanor “arising out of such person’s conduct as an underwriter, broker, dealer, investment adviser, municipal securities dealer, government securities broker, government securities dealer, bank, transfer agent, credit rating agency, or entity or person required to be registered under the Commodity Exchange Act . . .” 15 U.S.C. § 80a-9(a)(1). For a financial-services firm with multiple business lines, criminal conduct is apt to hit the “arising out of such person’s conduct” trigger.

226. Matt Levine, *Money Stuff: It's Not Insider Trading If the President Does It*, BLOOMBERG OP. (Jan. 15, 2020, 12:18 PM), <https://bloomberg.com/opinion/articles/2020-01-15/it-s-not-insider-trading-if-the-president-does-it> [<https://perma.cc/LWW7-UBJ2>] (“[I]n our postmodern world, the securities regulator is the meta-regulator of everything.”).

227. *See* CORPORATE PROSECUTION REGISTRY, *supra* note 218.

228. *See supra* note 219 and accompanying text. The date of resolution allows for consistency in comparing cases. When the SEC brings an administrative action or reaches a settlement with an enforcement target, it often initiates a formal enforcement action in conjunction with settling it. *See, e.g., In re Van Eck Assocs., Investment Company Act* Release No. 35,132, 3 SEC Docket 21857 (Feb. 16, 2024) (order instituting administrative and cease-and-desist proceedings). But if the SEC seeks enforcement by filing suit in federal court, then given the time required for litigation, the suit might be filed in one year but finally resolved in another.

229. *See, e.g., supra* notes 224–25 and accompanying text.

SOC settlements with such firms, perhaps with the goal of avoiding securities collateral consequences from harming the parent or its affiliates?²³⁰

I used the NYU SEED database to examine SEC enforcement actions resolved from 2013 to 2022 (focusing only on public companies given the database's design).²³¹ From this sample, I stratified financial-services firms.²³² An important limitation is that unlike the DOJ sample, this sample does not directly pair cases in which a subsidiary faces an enforcement outcome, but a parent does not. The sample does, however, show a comparatively high number of financial-services subsidiaries facing enforcement (versus parents), as the following table shows:

Table 3: SEC Enforcement Actions Against Parents and Subsidiaries

Target	All Actions	Financial-Services Actions	All Actions (excluding Financial Services)
Parent	358	59	299
Subsidiary	408	343	65
Subsidiary %	53.3%	85.3%	17.9%

Enforcement actions against financial-services companies make up slightly over half of the actions in this sample. This result is not surprising given that the SEC is a primary regulator of that industry, whereas it is only a meta-regulator of other public companies.²³³ Importantly, however, in the parent-versus-subsidiary ratios, financial-services subsidiaries account for 85.3 percent of enforcement actions in the parent/subsidiary subsample, a highly significant difference compared to 17.9 percent for the non-financial-services firms.²³⁴ This result suggests that in SEC enforcement actions, SOC settlements are more likely to occur when a target is a financial-services firm than when the target is in some other industry.

D. Preliminary Interpretations

The foregoing discussions provide initial evidence for several propositions that can inform further consideration of SOC settlements.

230. See Anita K. Krug, *Constraining Corporate Law Principles in Affiliate World*, 72 EMORY L.J. 855, 856 (2023) (“The world of financial services is a world of affiliates.”).

231. *Division of Corporation Finance: Standard Industrial Classification (SIC) Code List*, U.S. SEC. & EXCH. COMM’N, <https://sec.gov/corpfin/division-of-corporation-finance-standard-industrial-classification-sic-code-list> [<https://perma.cc/54BN-DE4B>] (last visited Mar. 3, 2024).

232. That subsample included firms with Standard Industrial Classification (SIC) Codes 6011–99, 6111–63, 6211–89, 6311–99, 6411, and 6712–26, which cover firms in the banking/finance, securities/investment, and insurance industries. *Id.*

233. See *supra* note 226 and accompanying text.

234. This difference is significant at the 0.01 level in a one-way Analysis of Variance test (F -value = 640.39).

First, the data in Part II.B are at least consistent with SOC settlements occurring when prosecutors perceive corporate wrongdoing as particularly serious given the higher fine amounts. If that were the case, prosecutors might be motivated to combine the pragmatic aspects of parents' N/DPAs with the expressive value of a guilty plea by a subsidiary. It is also consistent with SOC settlements occurring when there is meaningful social cost in pursuing parent-level conviction (given that SOC settlements account for only 5.6 percent of "conviction-appropriate" cases). That is to say, Part II.B provides some evidence consistent with dilemma-constrained prosecutors calibrating enforcement decisions to combine the expressive functions of conviction with the deterrent and reformatory functions of fines, other financial sanctions, and remedial undertakings. Alternative explanations must be considered, however. For example, the largest companies tend to have more subsidiaries.²³⁵ Thus, they are more likely to have subsidiaries that have engaged in misconduct as opposed to just the parent engaging in misconduct.²³⁶ The largest companies also have the deepest pockets. Thus, Part II.B's data could in part reflect the size, organizational complexity, or ability or willingness to pay of some target firms.

This interpretation must contend with the reality that collateral consequences and resulting social cost do not affect all corporations equally. Two categories of firms that might be especially motivated to avoid collateral consequences are public companies and financial-services firms. Public companies wish to avoid the increased costs of capital associated with losing preferential securities-law statuses,²³⁷ and their prominent role in society could expose them to greater reputational harm, if convicted at the parent level, than similarly situated private companies.²³⁸ Part II.C.1 bolsters this point by showing that SOC settlements more frequently involve public companies than other corporate-criminal resolutions do. And Part II.C.2 suggests that industry-specific collateral consequences might correlate with whether corporate wrongdoing resolves through SOC settlements.

Further empirical research on SOC settlement would be worthwhile if it were to remain a niche prosecutorial practice. But if, as this work suggests, it becomes a regular part of the corporate enforcement playbook, the need for further research would be even greater. Indeed, Part III.B's calls for transparency around SOC settlement would foster that further study.

235. See *supra* note 33.

236. See Wim Huisman, *Criminogenic Organizational Properties and Dynamics*, in *THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME* 435, 447 (Shanna R. Van Slyke, Michael L. Benson & Francis T. Cullen eds., 2016) ("For a number of reasons, organizational complexity might be positively correlated to regulatory noncompliance. Complex organizations might be more difficult to control and might provide more opportunities for subsidiaries to use illegal means to achieve goals.")

237. Felony conviction of even a subsidiary causes the loss of WKSII status for the parent, although the SEC may waive that ineligibility and is more apt to do so when culpability appears to be greatest at the subsidiary level. See *supra* note 224 and accompanying text.

238. See Andrew K. Jennings, *The Public's Companies*, 29 *FORDHAM J. CORP. & FIN. L.* 191, 198 (2023) (describing the spotlight effect on public-company misconduct).

III. CRIMINAL SUBSIDIARIES AND THE PUBLIC INTEREST

The two previous parts presented a theory of SOC settlements and evidenced their use. In this part, the Article wrestles with the practice's merits. Can SOC settlements be squared with normative ideas of accountability and fairness in the criminal-legal system? And can they further the public interest in corporate compliance?

*A. Expanding the Use of SOC Settlements
Would Serve the Public Interest*

Under a critical view, not only do SOC settlements misallocate condemnation and punishment without warrant, but they also rob victims and society of the opportunity to exercise their voice against, and perhaps offer reconciliation to, sources of personal and social harm. Yet, considering the kind of settlements identified in this Article, that question becomes more concrete. Do SOC settlements necessarily allow criminal corporations to escape accountability? And when corporate wrongdoing affects individual victims, must using these settlements prevent their vindication?

Both questions can be answered with a qualified “no.” SOC settlements not only can coincide with the purposes of corporate criminal enforcement, but they can also advance those interests. Not only can they support victim interests in restitution and rehabilitation, but they can also—to the extent that criminal conviction ever can—give justice to victims.

SOC settlement offers a partial, pragmatic solution to the corporate prosecutor's dilemma.²³⁹ Although the social cost of convicting a parent may overwhelm retributive or consequential justifications for doing so, a conviction of a culpable subsidiary, although not socially costless, can achieve an easier public-interest balance. In making conviction a bigger threat for corporate wrongdoers, the practice promotes deterrence and compliance. When used with other settlement provisions and policies typical of N/DPAs—especially if coupled with individual prosecution—SOC settlement allows prosecutors greater latitude to communicate to the business world and to the public that corporate crime is taken seriously and will be met with the condemnation that attends conviction.²⁴⁰ That is to say, SOC settlement reconciles competing public interests around corporate enforcement and presents a means for treating criminal corporations more

239. This Article admittedly does not resolve the fundamental question why there should be corporate criminal liability, nor does it neatly resolve the corporate prosecutor's dilemma. But in a world in which these things are real, it does offer one way to partly reconcile them.

240. See David M. Uhlmann, *Deferred Prosecution and Non-prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1336 (2013) (“When we criminalize conduct, we make clear that it is outside the bounds of acceptable conduct in our society. While some civil penalties can have the same effect, there is a qualitative difference in labeling conduct criminal.”); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 362 (1997) (“Economists speak of criminal law as a mechanism for pricing misconduct, but ordinary citizens think of it as a convention for morally condemning it.”).

like individual defendants would be treated in similar circumstances (although the corporate/individual disparity would still persist).²⁴¹

For victims, subsidiary conviction can serve as a source of justice that is absent from no-conviction corporate criminal resolutions. Although a corporation cannot feel shame or remorse, its conviction expresses to victims that the harm they experienced was the sort of wrong that the community condemns. That includes the ability to exercise voice through the sentencing process.²⁴² It also conveys to employees (who can feel shame about their employer's wrongdoing) that they are part of an organization that has engaged in condemnable conduct, thus adding urgency to the project of corporate rehabilitation.²⁴³

SOC settlement does not mean that all culpable constituents within a firm, or even its most culpable constituents, are subject to full criminal accountability. Some level of organizational non-accountability persists after settlement. Yet, the organizational-law effects of criminal entity partitioning could prove irrelevant to victims who have otherwise received the fullest justice that can reasonably be given in light of the offender's artificial character and other public-interest concerns.

Part II shows that SOC settlement occurs in a minority of corporate criminal settlements; nonetheless, such settlements are not uncommon, and they may be used to punish more serious violations.²⁴⁴ But this part's observations lead to a policy conclusion: the use of such settlements should be expanded, including beyond especially serious cases. SOC settlement represents an underused enforcement option that allows prosecutors to better calibrate resolutions to serve the public interest.²⁴⁵ Additionally, it offers to reduce one kind of individual/corporate disparity in the criminal-legal system,²⁴⁶ and it appears to present an acceptably low risk of abuse or overreach (assuming proper governance and supervision of line prosecutors).²⁴⁷ Provided that it is used thoughtfully with other prosecutorial practices, SOC settlement ought to become a routine approach to corporate-crime enforcement. The question, then, is how should prosecutors proceed with its expanded use?

241. See Uhlmann, *supra* note 240, at 1335 ("We can debate whether too much conduct is criminalized in America and whether the criminal law has been used too often to address social and economic problems. But within the spheres that we impose criminal liability, corporations can engage in misconduct that deserves criminal punishment" (footnote omitted)).

242. See 18 U.S.C. § 3771(a)(4) (giving crime victims "[t]he right to be reasonably heard at any public proceeding in the district court involving . . . plea [or] sentencing . . .").

243. See Thomas & Diamantis, *supra* note 85, at 41 (suggesting that corporate shaming affects employees and prospective employees).

244. See *supra* Part II.B.

245. See *supra* Part I.C.

246. See *supra* note 123 and accompanying text.

247. Professor Miriam Baer has observed that in a time of growing partisan polarization, new prosecutorial enforcement tools are at risk of being politicized. See Baer, *supra* note 181. Avoiding the risk of SOC settlements becoming politicized will require clear policies on when those settlements are appropriate and how they are to be structured. See *infra* Part III.B for recommended policies.

B. Toward an SOC Settlement Policy

The DOJ is no stranger to SOC settlements.²⁴⁸ Still, those resolutions are the exception rather than the norm. Part III.A calls for an expanded, indeed routine, use of such settlements as a partial solution to the at-odds public interests in corporate accountability and the avoidance of social cost. This Article presents a theory that can inform prosecutors in deciding whether subsidiary-only conviction is appropriate in given cases. But to make full use of this enforcement option, a clear policy on its use and application will be necessary for several reasons.²⁴⁹

First, a publicly available policy on subsidiary prosecution promotes transparency and consistency. For firms subject to the policy, knowing how it will be applied promotes *ex ante* compliance. Such a policy would not only increase certainty that corporate wrongdoing will meet with a serious, but survivable, consequence—the conviction of a subsidiary—it would also incent greater attention to compliance risks within subsidiaries themselves.²⁵⁰

Beyond contributing to general corporate deterrence, a policy and its transparent and consistent application would increase the public's confidence in both prosecutorial and corporate integrity. Perhaps corporate wrongdoers will still not stand entirely even with individual defendants, but one disparity between their treatments will be reduced.²⁵¹ That is, in light of the corporate prosecutor's dilemma discussed in Part I.C and absent SOC settlements, corporate offenders against whom prosecutors would seek a conviction if they were individuals would likely receive declinations or N/DPAs. SOC settlements ensure that at least one member of the corporate group is convicted when that is the outcome that would be sought for a similarly situated individual.

More, a policy on subsidiary prosecution will require prosecutors to articulate how SOCs fit into a broader settlement practice, thereby increasing the chances that settlement terms act together toward prosecutorial objectives. And lastly, consistent, centralized policy permits agency leadership to review the efficacy of subsidiary-prosecution practices and to

248. *See supra* Part II.A.

249. *See* Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 291–99 (1980) (observing that leadership within prosecutorial agencies seeks to achieve uniform decision-making across cases).

250. *But see* Miriam H. Baer, *Three Conceptions of Corporate Crime (and One Avenue for Reform)*, LAW & CONTEMP. PROBS., Winter 2020, at 1, 2 n.6 (observing that after Purdue Frederick Company, a Purdue Pharma subsidiary, pleaded guilty to illegal opioid marketing, “the parent and its owners [were left] free to continue manufacturing and promoting the drug, much to the detriment of the patients who eventually became addicts”).

251. *But see* Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 133–34 (2020) (noting that DOJ policies are “merely guidelines” and are not always complied with by line prosecutors).

make needed policy changes.²⁵² This Article thus closes not only with a call for routine use of subsidiary prosecution, but also with recommendations for policies to be adopted by the DOJ, civil-regulatory enforcement divisions, state prosecutors, and other prosecutorial agencies.

This Article calls for increased use of SOC settlements as an alternative to a status quo of no-conviction corporate settlements. A more severe prosecutorial step is to insist on parent-level conviction. This Article's scope does not consider when prosecutors should pursue that step instead of a SOC settlement. Rather, it concludes that a SOC settlement is generally preferred to no-conviction settlements. At the same time, the availability of the SOC approach cannot rule out that, under some circumstances, prosecutors might wish to go further and seek the conviction of a parent.

1. A Presumption in Favor of Subsidiary Conviction (When Conviction Is Appropriate)

A benefit of SOC settlement is that it permits the treatment of corporate offenders to be brought closer to that of individuals within the criminal-legal system. To be sure, to what extent individuals should be prosecuted is always subject to debate. But whatever objection may be made to individual prosecution, the possibility that corporate offenders receive preferable resolutions exacerbates systemic unfairness.²⁵³ Prosecuting subsidiaries, however, offers a path toward treating individuals and corporations more similarly. By increasing the likelihood of conviction for corporate wrongdoers, "Corporate America" might use its wealth and power to advance substantive reforms in criminal law, procedure, and policy, thereby aligning the interests of an economically and politically powerful sphere with the less-empowered individual experiencing the criminal-legal system.²⁵⁴

Thus, policy should start with a presumption in favor of subsidiary conviction in corporate criminal cases when facts and circumstances are such that a prosecutor would insist on prosecution and conviction of a similarly situated individual. This presumption would help resolve the conflict between existing policies, ensuring that organizational targets are not treated better or worse than individuals while at the same time emphasizing the

252. See Brandon L. Garrett, William E. Crozier, Kevin Dahaghi, Elizabeth J. Gifford, Catherine Grodensky, Adele Quigley-McBride & Jennifer Teitcher, *Open Prosecution*, 75 STAN. L. REV. 1365, 1415–17 (2023) (noting that data can empower senior prosecutors to manage line prosecutors toward agency objectives).

253. Cf. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2468 (2004) (expressing concern that prosecutors' settlement decisions could be based on defendants' demographic or social characteristics); U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, introductory cmt., at 3 (U.S. SENT'G COMM'N 2023) ("Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.").

254. For an example of right-wing political actors serving as voices for reform of the criminal-legal system, see Philip Elliot, *The Koch Brothers Are Pushing for Criminal Justice Changes*, TIME (Jan. 29, 2018, 5:09 PM), <https://time.com/5123969/koch-brothers-criminal-justice-reform/> [<https://perma.cc/Y9VD-WFSN>].

social cost of treating corporations like anyone else.²⁵⁵ Circumstances that might overcome this presumption would include the absence of a suitable subsidiary for use as a SOC (based on the policy conditions recommended below) or earned mitigation.²⁵⁶

2. Meaningful Subsidiaries Only

If SOC settlement is to become routine prosecutorial practice, then risks emerge around the selection of the subsidiary to be convicted. Part I.C.3 considered the possibility of the picayune SOC and its tendency to frustrate the purposes of corporate enforcement.²⁵⁷ To overcome parents' tendency to create and sacrifice picayune subsidiaries in SOCs, and perhaps prosecutors' temptation to accept them, policy ought to require that a SOC settlement be with a meaningful subsidiary. Three conditions bear on meaningfulness and thus whether a subsidiary would make for a proper SOC.

First, a meaningful subsidiary contributes economic value to the enterprise in revenue or asset terms. It need not be material to the financial performance or condition of the firm,²⁵⁸ nor must it rise to the level of being a "significant subsidiary," as those terms are understood in the accounting and securities contexts.²⁵⁹ But it should not be a shell or managerial entity (like an internal-services subsidiary) that does not independently contribute to firm value.²⁶⁰ Otherwise, its conviction implies no real sanction: it simply can be disregarded and its functions, if any, assigned to another entity.

Second, a meaningful subsidiary is generally the most culpable one. That is, when there are multiple subsidiaries within the firm that are plausibly liable (as in the case of Goldman in the 1MDB scandal),²⁶¹ the SOC entity should be the one with the greatest culpability. Culpability might be measured by the intensity or significance of the offense-related conduct of a given entity's employees and agents, its contacts with coconspirators, its receipt or payment of illicit funds, and so on. This most-culpable condition is stricter than the factual-basis rule discussed in Part I.C.3 and serves to concentrate conviction where it is most deserved.²⁶² To be sure, even this

255. *See supra* Part I.B.

256. *See supra* Part I.C.3; *infra* Part III.B.2.

257. *See supra* Part I.C.3.

258. *See* George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. REV. 602, 636 (2017) ("Subject to a limited exception, materiality is evaluated at the firm level, and not at the level of subsidiaries.").

259. SEC rules define a significant subsidiary using several alternative tests. One test is satisfied if a subsidiary accounts for 10 percent or more of firm value. *See* 17 CFR § 270.8b-2(k) (2024).

260. In a world in which subsidiary prosecution becomes routine, a categorical rejection of those sorts of entities helps reduce corporate incentives to create entities for SOC-settlement purposes. SOC entities formed for the purpose of settlement would undermine the accountability that prosecuting a subsidiary would intend to promote.

261. *See supra* note 8 and accompanying text.

262. *See supra* Part I.C.3. Given that the factual-basis rule might not be strictly enforced by district courts, a meaningfulness requirement would foster compliance with the policy

approach could impose some collateral consequences on the corporate group (that is, the consequences borne by the convicted entity). But importantly, that result represents a calibration that avoids the worst collateral consequences and their resulting social cost.²⁶³ In other words, a SOC settlement can be painful but nonfatal.

If a resolution must balance the competing interests present in the corporate prosecutor's dilemma, then convicting the most-culpable subsidiary offers a salient articulation of public blame and victim voice. This meaningfulness condition also constrains parents and prosecutors from sacrificing picayune subsidiaries that are convenient, albeit suboptimal, SOC entities.²⁶⁴ But that constraint also points to an exception to the condition: if the most-culpable subsidiary happens to be a picayune one, but there is a more important subsidiary with a lesser but still substantial factual connection to the wrongdoing, using the latter as a SOC entity could better serve prosecutorial ends.

And third, a meaningful subsidiary has a business purpose, beyond merely serving as a SOC entity. Using entities that were created for that purpose would undermine public confidence by giving the appearance of collusive settlements. Further, the use of created-for-settlement SOC entities would flout the constraints imposed by the previous most-culpable condition and the broader-scoped factual-basis rule.²⁶⁵

3. Wholly-Owned Subsidiaries Only

This Article has implicitly assumed wholly-owned subsidiary-parent relationships: that the parent owns all equity in a subsidiary and thus may freely operate the subsidiary for the benefit of the enterprise.²⁶⁶ But subsidiaries sometimes have minority equity interests unaffiliated with the parent. For example, current or former subsidiary employees may hold stock in the subsidiary as part of their compensation.²⁶⁷ Or shares in an overseas

animating Rule 11(b)(3) of the Federal Rules of Criminal Procedure. *See Stillwell, supra* note 202, at 1090 (“Often, when you’ve been to one change-of-plea hearing, you’ve been to them all. Unsurprisingly, these hearings become formulaic. The Federal Rules are recited but are not necessarily followed and contemplated thoroughly.”).

263. A focus on meaningful subsidiaries also allows the SOC approach to be used with corporate recidivists. If enforcement against subsequent violations imposes real, but nonfatal, costs on parents, then prosecutors have a new and credible means to deter recidivism.

264. *See id.*

265. *See Brickey, supra* note 188, at 929 n.63 (noting that Enron Corporation’s plan—to scapegoat a subsidiary spun off for that purpose after illegal conduct had already occurred—would not have been plausible given the temporal misalignment between the completed conduct and the proposed spinoff).

266. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984) (“A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.”).

267. *See Yifat Aran, Note, Beyond Covenants Not to Compete: Equilibrium in High-Tech Startup Labor Markets*, 70 STAN. L. REV. 1235, 1261–63 (2018) (tracing the historical origins of employment-based stock options in Silicon Valley’s technology industry).

subsidiary may be sold to a local operating partner whose involvement is important to the firm's business in that country.²⁶⁸

SOC settlements ought to be limited, however, to wholly-owned subsidiaries. That is, such settlements should involve only subsidiaries whose equity is entirely owned by the parent, whether directly or indirectly through intermediate subsidiaries.²⁶⁹ This limitation would bolster the concept of meaningfulness discussed in the prior recommendation. It would do so by ensuring that a parent does not "share" a corporate sanction with minority investors and thus itself bear less sanction than prosecutors intended. More, minority shareholders likely lack the power to prevent the subsidiary's guilty plea because the parent is its controlling shareholder.²⁷⁰ Of course, as the controlling shareholder, the parent does owe fiduciary duties to its minority investors, which would prohibit the expropriative use of the non-wholly-owned subsidiary to reduce the parent's criminal liability.²⁷¹ Still, controlling-shareholder parents might nevertheless be tempted to do so. By accepting only wholly-owned subsidiaries as SOC entities, prosecutors can head off those potential intrafirm conflicts.

Importantly, however, this requirement does not mean that a parent must continue to wholly own a subsidiary after its guilty plea. Restrictions on a parent accepting outside investors in a SOC entity, or selling the subsidiary to someone else, would serve to reduce firm value, ossify capital allocation, orphan assets, and undermine M&A markets.²⁷² None of those outcomes is beneficial to society. Instead, prosecutors should maintain the use of M&A provisions in settlement agreements that expressly permit post-deal transactions that are likely to enhance, or at least to be neutral to, future compliance.²⁷³ Given the public interest in corporate rehabilitation,

268. See Jennifer Spencer & Carolina Gomez, *MNEs and Corruption: The Impact of National Institutions and Subsidiary Strategy*, 32 STRATEGIC MGMT. J. 280, 284 (2010) ("[Multinational enterprises' localization] strategies include taking on local partners (e.g., local firms or investors with partial stakes in the host country subsidiary; strategic alliance partners), and localizing control (e.g., decentralizing decision making to the host country subsidiary; using locals as managing directors).").

269. See Securities Act Rule 405, 17 CFR § 230.405 (2024) (defining "wholly owned subsidiary" as "a subsidiary substantially all of whose outstanding voting securities are owned by its parent and/or the parent's other wholly owned subsidiaries").

270. See Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 509 (2002) ("[W]hen an 800-pound gorilla wants the rest of the bananas, little chimpanzees, like independent directors and minority stockholders, cannot be expected to stand in the way, even if the gorilla putatively gives them veto power.").

271. Cf. *In re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, No. 11202, 2017 WL 3568089, at *11 (Del. Ch. Aug. 18, 2017) ("In the controlling stockholder context, a conflicted transaction typically will fit one of two scenarios. In one scenario, the controller stands on both sides of the transaction In the other scenario, the controlling stockholder does not stand on both sides of the transaction but exploits its position of leverage on the sell-side to extract 'different consideration or derive some unique benefit from the transaction that is not shared with the common stockholders.'" (quoting *In re Crimson Exploration Inc. S'holder Litig.*, No. 8541, 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014))).

272. See Jennings, *supra* note 115, at 526 ("The inhibition of criminal M&A imposes social cost to the extent that M&A is thought to increase economic efficiency, promote entrepreneurship and innovation, and reduce agency costs.").

273. See *id.* at 557 (describing successor-in-interest provisions typical of N/DPAs).

prosecutors should be willing to grant buyers of SOC entities amnesties or waivers from criminal successor liability when they are likely to be compliance-enhancing buyers.²⁷⁴

4. Making SOC Settlements Transparent

To its credit, in recent years the DOJ has disclosed more and more of prosecutors' reasons for agreeing to particular corporate settlements, including narrative descriptions of firms' self-reporting and cooperation, detailed application of the organizational sentencing guidelines, extensive statements of facts, and so on.²⁷⁵ Some of these disclosures have indicated that a parent's deferred prosecution or non-prosecution requires the conviction of a subsidiary.²⁷⁶ This disclosure promotes greater public understanding of, and confidence in, corporate criminal resolutions. But if SOC settlement is to become a routine prosecutorial practice, more needs be said. Public disclosures—whether in the form of settlement documents, press releases, or oral comments by prosecutors—should answer several questions. First, why is SOC settlement in a particular case appropriate to the facts and consistent with the public interest?²⁷⁷ Second, why was a given subsidiary selected for this role?²⁷⁸ And third, in what way is the SOC entity a “meaningful” constituent of the settling firm?²⁷⁹

Together, the answers to these questions would enable the public to assess the benefits and costs of a given settlement. For the corporate world, they would promote general deterrence by contributing to greater predictability of the consequences of corporate wrongdoing.²⁸⁰ And for line prosecutors,

274. *See id.* at 564 (explaining the compliance-enhancing potential of granting amnesties to buyers of corporate criminals); *see also* Remarks of Deputy Attorney General Lisa O. Monaco Regarding New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions (Oct. 4, 2023), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self> [<https://perma.cc/MY8M-4RVE>] (announcing a new DOJ-wide M&A safe harbor policy to this effect).

275. *See supra* Jennings, note 149, at 1613 nn.183–84.

276. In the Goldman/IMDB case, for example, Goldman's DPA made clear that its benefits under the agreement depended on Goldman Malaysia's conviction. *See* Deferred Prosecution Agreement, *supra* note 8, at 5.

277. For example, although the wrongdoing was egregious, other factors make parental conviction untenable, including the social cost of such a conviction and the firm's cooperation with prosecutors and attempts to make amends.

278. This question assumes that multiple subsidiaries might be culpable. In the case that there is only one, the “why” is simple: it was the only SOC option.

279. Information on meaningfulness and comparative culpability empowers the public to assess the level of corporate accountability a settlement achieved and incents prosecutors to weigh carefully meaningfulness and culpability, given the need to publicly justify a deal.

280. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 178 (1968) (concluding that increased certainty of punishment decreases the expected utility of offending, thereby deterring crime).

answering these questions in a public way would discipline their compliance with policies regulating SOC settlements.²⁸¹

CONCLUSION

This Article is the first to focus on the intersection of entity partitioning in organizational theory and criminal law. It points to the promise of an already existing prosecutorial practice to advance the public interest in corporate compliance and enforcement. On the corporate front, it has shown that entity walls break down more quickly when confronted with criminal liability, as opposed to the private claims that they were constructed to withstand. This greater vulnerability implies that ex ante planning to effect criminal entity partitioning is dubious, whereas ex post settlements between prosecutors and parents can reliably quarantine criminal liability within a corporate group. On the criminal front, the conviction of a single subsidiary as a substitute for convicting all culpable entities within a firm appropriately balances the expressive functions of criminal prosecution and the pragmatic need to avoid social cost that often follows the collateral consequences of corporate conviction. Although evidence supports the possibility that the DOJ now reserves such resolutions for more serious corporate wrongdoing, the public's corporate-accountability interests would be well served by an expansion of SOC settlement, provided that such an expansion proceeds from predictable, transparent policy guidelines.

281. See Bruce A. MacFarlane, *Sunlight and Disinfectants: Prosecutorial Accountability and Independence Through Public Transparency*, 45 CRIM. L.Q. 272, 274 (2001) (“[P]olicies, practices or legislation that emphasize accountability through public transparency can achieve the level of prosecutorial independence and accountability required to ensure that the public has confidence in the decisions being made.”); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657 (1995) (“[W]hen institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies.”).

APPENDIX

Table 4: Federal SOC Settlements, 2013–2022

Parent Pleading Subsidiary	Industry	Public	U.S.	Primary Offense	Total Penalty	Year
Archer Daniels Midland Co. Alfred C. Toepfer International (Ukraine) Ltd. ²⁸²	Food/Agriculture	Y	Y	FCPA ²⁸³	\$17,771,613	2013
ConvergEx Group LLC ConvergEx Global Markets Limited ²⁸⁴	Financial Services	N	Y	Securities Fraud	\$18,000,000	2013
Duke Energy Corp. Duke Energy Renewables Inc. ²⁸⁵	Utilities	Y	Y	Environmental	\$400,000	2013
Johnson and Johnson Janssen Pharmaceuticals Inc. ²⁸⁶	Healthcare	Y	Y	FDCA ²⁸⁷	\$334,000,000	2013
Omega Protein Corp. Omega Protein, Inc. ²⁸⁸	Food/Agriculture	Y	Y	Environmental	\$5,500,000	2013
Ranbaxy Laboratories Ltd. Ranbaxy USA, Inc. ²⁸⁹	Healthcare	Y	N	FDA	\$130,000,000	2013
The Royal Bank of Scotland plc RBS Securities Japan Ltd. ²⁹⁰	Financial Services	Y	N	Fraud (other)	\$150,000,000	2013
UBS AG UBS Securities Japan Co. Ltd. ²⁹¹	Financial Services	Y	N	Fraud (other)	\$500,000,000	2013
Alcoa Inc. Alcoa World Alumina LLC (partially owned) ²⁹²	Metals	Y	Y	FCPA	\$209,000,000	2014

Parent Pleading Subsidiary	Industry	Public	U.S.	Primary Offense	Total Penalty	Year
Avon Products, Inc. Avon Products (China) Co. Ltd. ²⁹³	Consumer Goods	Y	Y	FCPA	\$67,648,000	2014
Hewlett-Packard Co. ZAO Hewlett-Packard A.O. (HP Russia) ²⁹⁴	Technology	Y	Y	FCPA	\$74,200,000	2014
PacifiCorp (owned by Berkshire Hathaway) PacifiCorp Energy ²⁹⁵	Utilities	N	Y	Environmental	\$400,000	2014
Deutsche Bank AG DB Group Services (UK) Ltd. ²⁹⁶	Financial Services	Y	N	Fraud (other)	\$775,000,000	2015
Johnson & Johnson McNeil-PPC Inc. ²⁹⁷	Healthcare	Y	Y	FDA	\$20,000,000	2015
Schlumberger Ltd. Schlumberger Oilfield Holdings Ltd. ²⁹⁸	Oil/Gas	Y	Y	Economic Sanctions	\$155,138,904	2015
Traffic Group Traffic Sports International Inc./ Traffic Sports USA Inc. ²⁹⁹	Media/Entertainment	N	N	Fraud (other)	\$1,000,000	2015
Warner Chilcott PLC Warner Chilcott U.S. Sales LLC ³⁰⁰	Healthcare	N	N	Healthcare Fraud	\$22,940,000	2015
ConAgra Brands Inc. ConAgra Grocery Products LLC ³⁰¹	Food/Agriculture	Y	Y	FDA	\$8,000,000	2016

Parent Pleading Subsidiary	Industry	Public	U.S.	Primary Offense	Total Penalty	Year
Duke Energy Corp. Duke Energy Business Services LLC/ Duke Energy Carolinas LLC/ Duke Energy Progress Inc. ³⁰²	Utilities	Y	Y	Environmental	\$68,000,000	2016
Och-Ziff Capital Management Group LLC OZ Africa Management GP, LLC ³⁰³	Financial Services	Y	Y	FCPA	\$213,055,689	2016
Tenet Healthcare Corp. Atlanta Medical Center Inc./ North Fulton Medical Center Inc. ³⁰⁴	Healthcare	Y	Y	Healthcare Fraud	\$0	2016
Teva Pharmaceutical Industries Ltd. Teva LLC (Teva Russia) ³⁰⁵	Healthcare	Y	N	FCPA	\$283,177,348	2016
VimpelCom Ltd. Unitel LLC ³⁰⁶	Telecommunications	Y	N	FCPA	\$230,326,398	2016
SBM Offshore NV SBM Offshore USA, Inc. ³⁰⁷	Oil/Gas	Y	N	FCPA	\$224,800,000	2017
Telia Co. AB Coscom LLC ³⁰⁸	Telecommunications	Y	N	FCPA	\$234,603,972	2017
Zimmer Biomet Inc. JERDS Luxembourg Holding S.à.r.l. ³⁰⁹	Healthcare	Y	Y	FCPA	\$17,400,000	2017

Parent Pleading Subsidiary	Industry	Public	U.S.	Primary Offense	Total Penalty	Year
AmerisourceBergen Corp. AmerisourceBergen Specialty Group ³¹⁰	Healthcare	Y	Y	FDA	\$208,000,000	2018
BNP Paribas S.A. BNP Paribas USA, Inc. ³¹¹	Financial Services	Y	N	Antitrust	\$90,000,000	2018
Coöperatieve Rabobank U.A. Rabobank, National Ass'n ³¹²	Financial Services	Y	N	Obstruction	\$500,000 ³¹³	2018
Imagina Media Audiovisual SL US Imagine, LLC ³¹⁴	Media/Entertainment	N	N	Fraud (other)	\$12,883,320	2018
Société Générale S.A. SGA Société Générale Acceptance, N.V. ³¹⁵	Financial Services	N	Y	FCPA	\$860,552,888	2018
Health Management Associates LLC Carlisle HMA, LLC ³¹⁶	Healthcare	N	Y	Healthcare Fraud	\$37,555,846	2018
Telefonaktiebolaget LM Ericsson Ericsson Egypt Ltd. ³¹⁷	Technology	Y	N	FCPA	\$520,650,432	2019
Insys Therapeutics Inc. Insys Pharma, Inc. ³¹⁸	Healthcare	Y	Y	Fraud (other)	\$2,000,000	2019
TechnipFMC PLC Technip USA, Inc. ³¹⁹	Oil/Gas	Y	N	FCPA	\$81,852,966	2019

Parent Pleading Subsidiary	Industry	Public	U.S.	Primary Offense	Total Penalty	Year
U-Haul Holding Co. U-Haul of Pennsylvania ³²⁰	Logistics	Y	Y	Hazardous Materials	\$1,000,000	2019
UniCredit SpA UniCredit Bank AG ³²¹	Financial Services	Y	N	Economic Sanctions	\$468,350,000	2019
Walmart Inc. WMT Brasilia S.a.r.l. ³²²	Retail	Y	Y	FCPA	\$137,955,249	2019
Patterson Cos., Inc. Animal Health International Inc. ³²³	Healthcare	Y	Y	FDA	\$5,000,000	2020
Bank Hapoalim BM Bank Hapoalim (Switzerland) Ltd. ³²⁴	Financial Services	Y	N	Tax Fraud	\$239,809,983	2020
Invidior PLC Invidior Solutions, Inc. ³²⁵	Healthcare	Y	N	Healthcare Fraud	\$245,000,000	2020
The Goldman Sachs Group, Inc. Goldman Sachs (Malaysia) Sdn. Bhd. ³²⁶	Financial Services	Y	Y	FCPA	\$1,263,088,000	2022
Balfour Beatty PLC Balfour Beatty Communities LLC ³²⁷	Construction	Y	N	Fraud (other)	\$33,600,000	2021
Credit Suisse Group AG Credit Suisse Securities (Europe) Ltd. ³²⁸	Financial Services	Y	N	Fraud (other)	\$175,568,000	2021

Parent Pleading Subsidiary	Industry	Public	U.S.	Primary Offense	Total Penalty	Year
Fiat Chrysler Automobiles N.V. FCA US, LLC ³²⁹	Automotive	Y	N	Environmental	\$96,145,784	2022
ABB Ltd. ABB Management Services Ltd./ ABB South Africa (Pty) Ltd. ³³⁰	Technology	Y	N	FCPA	\$72,500,000	2022
Allianz SE Allianz Global Investors U.S. LLC ³³¹	Financial Services	Y	N	Securities Fraud	\$2,330,000,000	2022
NextEra Energy Resources LLC ESI Energy LLC ³³²	Utilities	N	Y	Environmental	\$1,861,000	2022

282. Press Release, U.S. Dep't of Just., Off. of Pub. Affs., ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act (Dec. 20, 2013), <https://www.justice.gov/opa/pr/adm-subsidiary-pleads-guilty-conspiracy-violate-foreign-corrupt-practices-act> [<https://perma.cc/AJH8-S43T>]; *see also* Plea Agreement, United States v. Alfred Toepfer Int'l (Ukr.), Ltd., No. 13-CR-20062 (C.D. Ill. Dec. 20, 2013).

283. "FCPA" refers to the Foreign Corrupt Practices Act of 1977. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

284. Press Release, U.S. Dep't of Just., Off. of Pub. Affs., ConvergeX Group Subsidiary Sentenced for Securities Fraud Scheme (Nov. 19, 2014), <https://www.justice.gov/opa/pr/converge-x-group-subsidiary-sentenced-securities-fraud-scheme> [<https://perma.cc/MB75-JGVN>].

285. Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects (Nov. 22, 2013), <https://www.justice.gov/opa/pr/utility-company-sentenced-wyoming-killing-protected-birds-wind-projects> [<https://perma.cc/C7LZ-VFT7>].

286. Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Johnson & Johnson to Pay More than \$2.2 Billion to Resolve Criminal and Civil Investigations (Nov. 4, 2013), <https://www.justice.gov/opa/pr/johnson-johnson-pay-more-22-billion-resolve-criminal-and-civil-investigations> [<https://perma.cc/GQD2-CM3C>].

287. "FDCA" refers to the Federal Food, Drug, and Cosmetic Act and other regulations regarding the production and marketing of food and drugs. See Pub. L. No. 75-717, 52 Stat. 1040 (codified as amended in scattered sections of 21 U.S.C.).

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289. Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Generic Drug Manufacturer Ranbaxy Pleads Guilty and Agrees to Pay \$500 Million to Resolve False Claims Allegations, cGMP Violations and False Statements to the FDA (May 13, 2013), <https://www.justice.gov/opa/pr/generic-drug-manufacturer-ranbaxy-pleads-guilty-and-agrees-pay-500-million-resolve-false> [<https://perma.cc/3WW5-YT5U>].

290. Press Release, U.S. Dep't of Just., Off. of Pub. Affs., RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Libor Benchmark Interest Rates (Feb. 6, 2013), <https://www.justice.gov/opa/pr/rbs-securities-japan-limited-agrees-plead-guilty-connection-long-running-manipulation-libor> [<https://perma.cc/SJE9-3TFB>].

291. Press Release, U.S. Dep't Just., Off. of Pub. Affs., UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-running Manipulation of LIBOR Benchmark Interest Rates (Dec. 19, 2012), <https://www.justice.gov/opa/pr/ubs-securities-japan-co-ltd-plead-guilty-felony-wire-fraud-long-running-manipulation-libor> [<https://perma.cc/J456-2UHD>].

292. Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay \$223 Million in Fines and Forfeiture (Jan. 9, 2014), <https://www.justice.gov/opa/pr/alcoa-world-alumina-agrees-plead-guilty-foreign-bribery-and-pay-223-million-fines-and> [<https://perma.cc/JY8E-4YN9>]; Plea Agreement, United States v. Alcoa World Alumina LLC, No. 14-CR-00007 (W.D. Pa. Jan. 9, 2014).

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300. Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Warner Chilcott Agrees to Plead Guilty to Felony Health Care Fraud Scheme and Pay \$125 Million to Resolve Criminal Liability and False Claims Act Allegations (Oct. 29, 2015), <https://www.justice.gov/opa/pr/warner-chilcott-agrees-plead-guilty-felony-health-care-fraud-scheme-and-pay-125-million> [<https://perma.cc/G6GJ-QA2D>].

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304. Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Hospital Chain Will Pay over \$513 Million for Defrauding the United States and Making Illegal Payments in Exchange for Patient Referrals; Two Subsidiaries Agree to Plead Guilty (Oct. 3, 2016), <https://www.justice.gov/opa/pr/hospital-chain-will-pay-over-513-million-defrauding-united-states-and-making-illegal-payments> [<https://perma.cc/Y6FR-B38G>].

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