RISKY BUSINESS: A NEW(ISH) APPROACH TO CORPORATE CRIMINAL LIABILITY

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"[T]hat's not stupidity, that's fraud."

"Tell me the difference between stupid and illegal and I'll have my wife's brother arrested."

-The Big Short[1]

I. INTRODUCTION

The Big Short tells the story of an investor's bet against the American housing market.[2] Simply put, the bet (the "Abacus" deal) involved shorting a large number of financial instruments known as mortgage-backed securities ("MBS").[3] The investment bank working on

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[1] THE BIG SHORT (Paramount Pictures 2015).

[2] *See id.*; Phillip Whalen & Kara Tan Bhala, *Goldman Sachs and The ABACUS Deal*, SEVEN PILLARS INST. (Apr. 25 2011), https://sevenpillarsinstitute.org/goldman-sachs-case.

[3] Shorting a security entails "borrowing" the security from a current holder and selling it immediately, hoping that the price will drop, upon which the short seller can buy the security back and cover the prior loan of the security. MBS refers to financial instruments known as derivatives. Derivatives are investment contracts that "derive" their value from another underlying asset, such as stock, or in the case of MBS, a series of mortgages. Derivatives based on the mortgage of family homes are known as Residential MBS or RMBS. The underlying mortgages generate interest income and are then packaged together at different risk levels for the different preferences of investors, collectively organized as a Collateralized Debt Obligation, or CDO. A CDO is one type of MBS instrument; the Abacus deal involved a CDO. The problem behind the Abacus deal was that the mortgages that made up the CDO were "subprime" residential mortgages, which were risky loans given out to borrowers who characteristically are borrowers with poor financial metrics, such as high debt-to-income ratios, limited savings, low credit scores, and who would typically not qualify for financing. *See id.*

the deal found investors to supply the securities for the bet but failed to disclose the bet's nature to them.[4] Once the housing market failed, the bet paid off to the tune of one billion dollars.[5] The investors who provided the risky securities for the short lost about as much.[6]

Many trends, factors, and failures set the stage for the Great Recession.[7] The growing demand for deals like Abacus was a part of this prelude. But these complex transactions were new to everyone: to the government, to the homeowners who were unknowingly enmeshed in them, and to the individuals and firms initiating the transactions.[8] Millions of people and businesses lost trillions of dollars in wealth.[9] The Great Recession was one of the greatest market and regulatory failures of our time, and it "was the result of human action and inaction."[10] In concluding that the "crisis was avoidable," the Financial Crisis Inquiry Commission ("FCIC") observed that "captains of finance and the public stewards of our financial system ignored warnings and failed to question, understand, and manage evolving risks" in the financial system.[11]

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[4] *See id.*

[5] Whalen & Bhala, *supra* note 2.

[6] *Id.*

[7] *See* NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, THE FINANCIAL CRISIS INQUIRY REPORT XVII–XX, 27–28 (2011) [hereinafter FCIC REPORT]. The Financial Crisis Inquiry Commission ("FCIC") observed that massive changes in mortgage lending and deregulation all helped set the stage for the Great Recession. *Id.* Deregulation allowed larger banks to engage in increasingly riskier activity that put large institutions, such as AIG and Lehman Brothers, at risk, increasing the risk that the economy would fail if enough large institutions failed. *See id.* The lending industry saw a paradigm change. Banks that usually originated loans and held them to maturity shifted to packaging the loans into securities with the collaboration of Wall Street to then take advantage of a new massive new market for these securities. *See id.*

[8] *See id.* at XVI–XVII ("The financial system we examined bears little resemblance to that of our parents' generation. The changes in the past three decades alone have been remarkable. . . . Technology has transformed the efficiency, speed, and complexity of financial instruments and transactions.").

[9] *See id.* at XV (observing in 2010–2011 that "[a]s this report goes to print, there are more than 26 million Americans who are out of work, cannot find full-time work, or have given up looking for work. About four million families have lost their homes to foreclosure and another four and a half million have slipped into the foreclosure process or are seriously behind on their mortgage payments. Nearly $11 trillion in household wealth has vanished, with retirement accounts and life savings swept away.").

[10] *Id.* at XVII.

[11] *Id.*

Given such a stark conclusion, perhaps it is easy to understand public frustration with the government and "Wall Street," especially after government bailouts paid using taxpayer dollars.[12] One might ask, where are the criminal charges for this conduct—why are none of these individuals in jail for the harms they inflicted because of their ignorance and lack of judgment?[13] In many states, driving recklessly can result in imprisonment,[14] but it seems that those who recklessly drove the American economy to ruin have escaped the reach of criminal law. Such simple questions have no simple answers. Consider the quote above from Jared Vennet, a fictitious character based on the real-life Deutsche Bank executive Greg Lippmann, who bet against the housing markets.[15] The line between what is stupid, or perhaps negligent in legal terms, and what is criminal can be a hard one to draw. That line may be paper-thin in some circumstances, but it is the line at which we invite the government's most intrusive form of regulation into our lives, criminal sanction and incarceration.

This line-drawing challenge is not new—it is a settled principle that in criminal law the same act can be innocent or criminal based on the actor's state of mind at the time.[16] Most criminal statutes will specify what level of intent the offender must exhibit to find the offender guilty

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[12] Glenn Kessler, *Did Wall Street Get a 'Trillion-dollar Bailout' During the Financial Crisis?*, WASH. POST (Mar. 18, 2019, 3:00 AM), https://www.washingtonpost.com/politics/2019/03/18/did-wall-street-get-trillion-dollar-bailout-during-financial-crisis.

[13] *See* FCIC REPORT, *supra* note 7, at XVI ("There is much anger about what has transpired, and justifiably so. Many people who abided by all the rules now find themselves out of work and uncertain about their future prospects. The collateral damage of this crisis has been real people and real communities. The impacts of this crisis are likely to be felt for a generation."); Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAGAZINE (Apr. 30, 2014), https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html (observing that over one thousand executives were prosecuted after the savings-and-loan scandal of the 1980s, compared to one executive prosecuted after the financial crisis of 2008). While no one has put the specific question of whether or not bankers should go to jail for their conduct leading to 2008 to the polls, American confidence in banks has never returned to its pre-Great Recession levels, with only thirty percent of Americans reporting they had a "great deal" or "quite a lot" of confidence in banks. *See Confidence in Institutions*, GALLUP (2019), https://news.gallup.com/poll/1597/Confidence-Institutions.aspx.

[14] *See, e.g.*, N.J.S.A. § 39:4-96 (2013); CAL. VEH. CODE § 23103 (2011).

[15] Annabel Murphy, *Meet the Men* The Big Short*'s Jared Vennett and Mark Baum Are Based On*, SUN (Dec. 15, 2018, 5:53 PM), https://www.thesun.co.uk/news/7988107/the-big-short-jared-vennett-mark-baum.

[16] *See* JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS 157–59 (Jesse H. Choper et al. eds., 7th ed. 2015). This is the principle of "*actus non facit reum nisi mens sit rea*," or "[a]n act does not make [the actor] guilty, unless the mind be guilty." *Id.* at 157 (quoting United States v. Cordoba-Hincapie, 825 F. Supp. 485, 490 (E.D.N.Y. 1993) (quoting BLACK'S LAW DICTIONARY 55 (4th ed. 1968))).

and impose punishment, representing the legislature's choice for what state of mind is sufficient for the moral condemnation that criminal law brings upon a person.[17] It is well-accepted that this individual accountability is an important part of regulating legal entities such as corporations and banks as those entities only act through individuals.[18]

Accounting for this difficult-to-draw line, one can offer two theories to explain the lack of individual prosecutions after 2008. One theory is that falling budgets, a lack of experience in conducting complex fraud investigations, the prospect of the government's own involvement, and the ease with which a prosecutor can settle with an institution for a large fine compared to the difficulty of a full investigation and trial would lead any reasonable prosecutor to find that the costs do not justify the risk-adjusted benefits of charging and prosecuting the culpable individuals.[19] The other theory is much simpler. Under the governing laws, it is possible that the actions taken by the various individuals and entities leading up to 2008 were simply

[17] *See id.* at 4, 158. The mens rea requirement is one way to distinguish criminal law's punitive effect from civil law's pricing effect, distinguishing merely negligent or even reckless actors who produce harm through their failures to live up to objective standards from those with nefarious purposes who make conscious decisions resulting in harm. *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, 193–95 (1991) (explaining the importance of the distinctions and relative positions of criminal and tort law).

[18] *See, e.g.*, *Developments in the Law – Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1243–45 (1979) [hereinafter *Developments in the Law*] (explaining the importance of individual sanctions in corporate criminal law); 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, 387 (1981) ("[L]aw enforcement officials cannot afford to ignore either the individual or the firm in choosing their targets . . . ."); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1299 (2013) ("The most effective way to combat corporate crime, however, is to prosecute the individuals who committed the offenses *and* the companies involved. The law on corporate liability is well established in the United States, making clear that corporations are criminally responsible for the criminal acts of their employees committed within the scope of their employment.").

[19] *See* Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions (explaining both theories and the evidence supporting each); FCIC REPORT, *supra* note 7, at 163 (explaining how the FBI and DOJ officials "believed that other issues were more pressing" and "didn't get what [they] had requested during the budget process" to combat rising mortgage fraud (internal quotation marks omitted)); *see also* Steven L. Schwarcz, *Excessive Corporate Risk-Taking and the Decline of Personal Blame*, 65 EMORY L.J. 533, 535–37 (2015) (arguing that prosecutors have an easier time prosecuting entities compared to prosecuting individual actors).

not crimes.[20] If there is substantial difficulty in proving the mens rea of the criminal statute, it begs the question of whether that particular mens rea was present at all. The real answer perhaps lies somewhere between these two theories, but they both pose a problem to future criminal prosecutions of individual actors.

Recognizing that individual criminal accountability is an important part of the regulatory system in the context of corporate institutions, this Comment will argue that current approaches to individual criminal liability in the corporate setting are ineffective because they are not adapted for modern corporate settings. Namely, the unfitness lies in two intertwined areas: (1) that the mens rea standards in criminal statutes traditionally used in this context no longer track the behavior the statutes aim to regulate and (2) that the law fails to target, and subsequently incentivize or disincentivize, the individuals responsible for setting organizational policies and effecting change. This unfitness helps explain the lack of individual prosecutions of the institutional leaders that contributed to the financial crisis and exposes a weakness in the regulatory system, hindering its goals of protecting the public and ensuring ethical behavior.[21] More concerning, if left unaddressed, this unfitness will render the criminal sanction—one of the most effective tools of regulation—nearly useless in fighting corporate crime. At least to the casual observer who acknowledges that crime deserves punishment, this double standard[22] is troubling.

This Comment proposes a simple solution—make it easier to prosecute corporate officers and managers who engage in or allow criminal conduct in their institutions. In doing so, however, one must acknowledge that the criminal sanction is strong medicine, and any criminal statute must be carefully articulated to prevent overdeterrence and penalizing those who are not sufficiently culpable. This Comment argues that the combination of two doctrines in criminal law,

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[20] *See Duke Law Professor Sam Buell on Business Crime and Punishment in America's Corporate Age*, CORP. CRIME REP., (Aug. 31, 2016) [hereinafter *Buell Interview*], https://www.corporatecrimereporter.com/news/200/duke-law-professor-sam-buell-on-business-crime-and-punishment-in-americas-corporate-age.

[21] *See* FCIC REPORT, *supra* note 7, at XVIII, XXII (concluding that the "widespread failures in financial regulation and supervision, . . . dramatic failures of corporate governance and risk management at many systemically important financial institutions, . . . were [] key cause[s] of this crisis and that there was "a systemic breakdown in accountability and ethics").

[22] *See* Paul Krugman, *Springtime for Bankers*, N.Y. TIMES (May 1, 2011), https://www.nytimes.com/2011/05/02/opinion/02krugman.html (noting a similar "double standard" between the federal government's concerted efforts to save and prop up the financial sector post-2008 and its near absence of efforts to help the mortgage-debt-laden victims of the crisis).

Responsible Corporate Officer ("RCO") liability[23] and criminal recklessness,[24] can strike a balance between the need to deter misconduct and the need to punish only those who are sufficiently culpable. When combined, the result is a comprehensive tool to combat corporate misconduct that targets those who have the power to change corporate policy and employs a mens rea that tracks the way those individuals do business. It imposes an affirmative duty upon corporate officers to prevent criminal violations and backs the duty up with criminal sanction.

This approach revamps a theoretically similar proposal in a 1979 article in the Harvard Law Review, which was a response to circumstances in corporate behavior that also played a role in the 2008 financial crisis.[25] This Comment notes an analogous proposal in a Senate bill, the Corporate Executive Accountability Act ("CEAA"),[26] introduced by Democratic Senator Elizabeth Warren of Massachusetts. But this Comment will argue that Warren's proposal goes too far and would upset the important balance between seeking deterrence and retaining sufficient moral culpability. Instead, this Comment proposes a recklessness standard. It should also be noted that the proposed solution is not a panacea, but it will be a helpful step toward a more effective regulatory system.

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[23] RCO liability allows prosecutors to impose liability on a corporate officer or employee in certain industries who stands in "responsible relation" to the illegal conduct, even if the officer took no part in the conduct at all, imposing strict liability. *See infra* Part III. The FCIC's interviewed several executives who foresaw the financial collapse and attempted to alert their superiors to no avail. *See, e.g.*, FCIC REPORT, *supra* note 7, at 3–4. This Comment will argue that the RCO doctrine's expansive reach allows regulatory to target those superiors directly. *See infra* Part III (explaining the RCO doctrine).

[24] Criminal recklessness is a level of mens rea that requires finding the actor consciously disregarded a substantial and unjustifiable risk to impose punishment. *See* MODEL PENAL CODE § 2.02(c) (defining criminal recklessness). The FCIC's concluded that "[t]oo many of these institutions acted recklessly [in] taking on too much risk . . . ." FCIC REPORT, *supra* note 7, at XVIII. This Comment argues that because risk-taking is the financial community's norm, recklessness's doctrinal focus on risk-taking fits the norm. *See infra* Part IV (explaining criminal recklessness).

[25] *Developments in the Law*, *supra* note 18

[26] S. 1010, 116th Cong. (2019). Senator Warren alludes to RCO liability in her introduction of the bill. *See* Press Release, Off. of Senator Elizabeth Warren, Senator Warren Unveils Bill to Expand Criminal Liability to Negligent Executives of Giant Corporations (Apr. 3, 2019), https://www.warren.senate.gov/newsroom/press-releases/senator-warren-unveils-bill-to-expand-criminal-liability-to-negligent-executives-of-giant-corporations.

If the cinematic reference in the title was not enough, the structure of this Comment follows the English fairy tale of Goldilocks and the Three Bears.[27] In Part II, this Comment will discuss the background of corporate criminal liability. This includes a discussion of the regulatory function of criminal law in this context and modern corporate behavior. Part II will then discuss the ineffectiveness of present remedies geared toward individual accountability, or porridge that is "too cold." Part III will explore the RCO doctrine as a potential solution for corporate misconduct, a solution that has been called for by other commentators, but will conclude that doctrine alone goes too far, presenting problems of overdeterrence and punishing those not sufficiently culpable—porridge that is "too hot." Part IV will then explain how the CEAA, which incorporates RCO, is a step in the right direction but still goes too far in using a negligence standard, or a porridge that is still too hot. Part IV will then analyze the costs and benefits of combining RCO with criminal recklessness, concluding that this combination is "just right."

II. CORPORATE CRIMINAL LIABILITY: A BRIEF PRIMER ON A LENGTHY PROBLEM

This Part will serve to set the stage for the Comment's proposed solutions. Section A applies the traditional justifications applied in criminal law to the corporate environment. It then explains how individual accountability best serves these interests. Section B describes how modern corporate behavior falls outside the bounds of what current criminal statutes capture, using examples from the financial crisis. Section C considers some of the reforms and solutions already available, explaining how they are part of a trend geared toward effectively holding individuals accountable but fall short of being effective changes. This Part concludes by identifying two challenges that face regulatory focus on individual accountability: (1) targeting senior decision makers, who are the appropriate target of the corporate criminal law given their broad authority to shape corporate policy, and (2) targeting them in a way that is sufficiently justifiable to impose criminal sanction. The rest of this Comment addresses these challenges.

[27] Robert Southey, *Goldilocks and the Three Bears*, DOCTOR (1837). No bears or children were harmed in the writing of this Comment.

A. *The Weed That No One Planted*

Firms are not natural persons.[28] They are legal persons in some contexts, with rights, privileges, and duties similar or even identical to those enjoyed and held by natural persons.[29] It is settled that a corporate entity may be convicted of a crime.[30] Indeed, the concept of white-collar crime generally encompasses actions taken by corporate agents to increase revenue or reduce compliance costs for the corporation's gain.[31] But the corporate criminal law's development has been tortuous, adapting concepts from different areas of the law to address its unique problems.[32] On the regulatory side, the criminal sanction is but one action of many the State may take.[33] But the criminal sanction is a unique response because it involves moral condemnation and physical control (in the form of incarceration), representing a societal decision that the conduct at issue is worthy of punishment beyond the civil law's focus on making the victims whole.[34] Yet a corporation has "no soul to damn[,] no body to kick."[35] The State cannot

[28] *See* JEFFERY D. BAUMAN ET AL., BUSINESS ORGANIZATIONS LAW AND POLICY 52–53 (Jesse H Choper et al. eds., 9th ed. 2017) (explaining that corporations and other like business entities have "legal personhood").

[29] *See id.*

[30] N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494–95 (1909).

[31] Richard S. Gruner, *Corporate Criminal Liability and Prevention* § 1.02 (2019); *see also* Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. L. REV. 1, 2 (2004) (explaining the various categories of white-collar crime).

[32] *See, e.g.*, Kathleen F. Brickey, *Rethinking Corporate Liability under the Model Penal Code*, 19 Rutgers L.J. 593, 593 (1988) ("Corporate criminal liability is a paradox."); Gerhard O. W. Mueller, *Mens Rea and the Corporations - A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 21 (1957) ("[Corporate criminal liability] is a hybrid of vicarious liability, absolute liability, an inkling of mens rea, . . . a few genes from tort law and a few from the law of business associations. . . . Nobody bred it, nobody cultivated it, nobody planted it. It just grew.").

[33] *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 38–40 (1992). Ayres and Braithwaite introduce the idea of the enforcement pyramid paradigm, which posits that cooperative regulation sits at the bottom of a pyramid, and all other sanctions, including criminal liability, rise from there in increasing severity. *Id.* An effective enforcement pyramid requires remedies at different levels of severity for an effective and adaptable regulatory system. *Id.*; *see also Buell Interview*, *supra* note 20 (advocating for the enforcement pyramid paradigm for corporate regulation). This Comment's position is that individual criminal liability is at the very top of the pyramid as applied to corporate misconduct. That said, any improvements to the application of individual criminal liability have a trickle-down effect on all other sanctions by increasing their desirability to both regulators and the regulated entities.

DRESSLER & GARVEY, *supra*, note 16, at 1–3 (quoting Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 402–06 (1958)).

[35] Coffee, Jr., *supra* note 18, at 386 (quoting M. KING, POLICY AND THE CORPORATION 1 (1977)). In fact, some of the difficulty in adapting criminal law to a corporate entity stems from a lack of consensus on the theory animating corporate entities themselves.

employ its coercive power to punish a corporation in the way it can incarcerate an individual wrongdoer.[36]

Instead, an organization is a collection of individuals. Together, the individuals are responsible for the organization's actions, enjoy the organization's benefits, and suffer when the organization suffers.[37] Consequently, they must account for laws and regulations when acting for the organization. But when an individual acting for the corporation breaks the law, the State faces a choice in how to distribute its resources between prosecuting individual corporate agents and prosecuting the entity.[38]

This choice presents a problem. As it cannot incarcerate an organization, the State can only go so far in punishing it.[39] If the chosen sanction is monetary, the sanction needs to be severe enough to deter further misconduct.[40] Anything less would be a mere "license fee" for criminal conduct.[41] But go too far and you force the entity into bankruptcy, jeopardizing the jobs and capital of potentially innocent parties. Even assuming that the State can find that "sweet spot" with a sanction, responsibility is not the only thing that is diffuse; blame and

See generally Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1063 (1994) (offering three different "theories of the corporation"). Adopting one theory of the corporation would comport with some criminal law justifications, whereas adopting another would comport with other justifications.

[36] *Compare* Coffee, Jr., *supra* note 18 at 390 ("[F]or the corporation, which has no body to incarcerate, [a] wealth boundary seems an absolute limit on the reach of deterrent threats directed at it.") *with Developments in the Law*, *supra* note 18, at 1245–46 ("[E]ven if an individual defendant does not personally pay the fine or his legal fees, he still suffers the stigma of a criminal conviction with the ensuing damage to his reputation in the community and prospects within the corporation.").

[37] *See Developments in the Law*, *supra* note 18, at 1242.

[38] *See* AYRES & BRAITHWAITE, *supra* note 33, at 19–20 (discussing different approaches regulators can take).

[39] *See* Coffee, Jr., *supra* note 18 at 389–90.

[40] *See id.* Consider that if a corporation has the ability to generate ten million dollars at any given time to pay off a criminal sanction and no more, then a guilty plea of eleven million dollars will look logically similar to a fine of one hundred million dollars following a full criminal proceeding. *See id.* at 390. Both would bankrupt the corporation, meaning the incentives are the same, regardless of the size of the penalty. *Id.* For the sake of simplicity, this simple explanation ignores the complex decisions involving legal representation and reputation that a corporation might consider. This analysis views the corporation as a rational economic actor, or one that will calculate the costs and benefits of any particular decision, such as pleading guilty and paying a fine versus taking its case to trial, and choose whatever decision is best for its bottom line, irrespective of any collateral consequences. *See id.* at 389–90.

[41] United States v. Wise, 370 U.S. 405, 409 (1962) ("No intent to exculpate a corporate officer who violates the law is to be imputed to Congress without clear compulsion; else the fines established by the Sherman Act to deter crime become mere license fees for illegitimate corporate business operations.").

damage can be spread just as easily in a corporate entity.[42] In effect, all of the constituents of a corporate organization suffer when the organization suffers, not just the responsible parties.[43]

On the other hand, the effectiveness of punishing an individual acting for an organization depends to some degree on that particular individual's identity. Corporate organizations tend to be hierarchical, concentrating power toward the top of the ladder.[44] While the actor responsible for the criminal or harmful act might be easy to identify, it may be much more difficult, or even impossible, to know whether he or she was acting under the direction of someone else.[45] And while the sanctioned actor may be deterred from future wrongdoing, the higher-up is untouched and can continue to direct the organization to engage in unethical or criminal behavior, perhaps even in a more covert manner.[46]

This disparity both undermines the deterrence function of criminal law by failing to target the real party in power and distorts the moral condemnation function by failing to punish a culpable party.[47] A large corporation will characteristically have many levels of separation between its senior decision makers and its line employees.[48] Someone will be punished, to be sure. But little good comes of it. Individual

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[42] *See Developments in the Law*, *supra* note 18, at 1255 (explaining that "the existence of several tiers of middle-level supervisors" makes corporate prosecution even more difficult").

[43] *See* Coffee Jr., *supra* note 18, at 386–87 & n.4 ("[C]orporate punishment seems perversely insoluble: moderate fines do not deter, while severe penalties flow through the corporate shell and fall on the relatively blameless.").

[44] *See* DEL. CODE ANN. TIT. 8, § 141 ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors."); *see also* MODEL BUS. CORP. ACT, § 8.01(b) ("[A]ll corporate powers shall be exercised by or under the authority of the board of directors, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of the board of directors.").

[45] *See Developments in the Law*, *supra* note 18, at 1254–55 ("[C]orporations can more easily evade conviction since the top officials whose conduct would subject the corporation to liability are often too far removed from daily operations to be charged . . . [and] the existence of several tiers of middle-level supervisors makes it more difficult for the prosecutor to prove that a command or authorization originated with an upper echelon policymaking official.").

[46] *See id.* at 1254. Consider the analogy to the Lernaean Hydra, a mythical creature from Greek literature, which grows two heads whenever Hercules cuts one off. APOLLODORUS, BIBLIOTHECA, Book 2, Ch. 5, § 2, *reprinted at* http://data.perseus.org/citations/urn:cts:greekLit:tlg0548.tlg001.perseus-eng1:2.5.2. As with the Hydra, removing one bad actor could simply give rise to another, who may continue the behavior. *See Developments in the Law*, *supra* note 18, at 1266.

[47] *See Developments in the Law*, *supra* note 18, at 1261 (describing the need to prosecute "indirect actors" who command organizations).

[48] *Id.* at 1254.

criminal accountability is an important aspect of the regulatory system, but it must be imposed properly and addressed to the appropriate parties to have meaningful effects.

B. *Organizational Behavior During the Financial Collapse*

Even when targeting the proper individuals, the State faces more challenges. This Section builds upon the last, observing the corporate mechanism and how it diffuses responsibility, citing examples from the leadup to the Great Recession to demonstrate.

For prosecutors, the main weapons to respond to most corporate misconduct are the fraud statutes.[49] These criminal statutes contain difficult elements to prove when applied to upper-level executives.[50] These statutes require "that the defendant voluntarily and intentionally devised or participated in a scheme to defraud another out of money [and] that the defendant did so with the intent to defraud."[51] Indeed, "an executive's claim that he believed in good faith that he was following the rules presents a severe, even disabling, obstacle to prosecution" because of the high level of criminal intent the statutes require.[52]

Presumably, few organizations actively seek out and employ managers who encourage criminal acts or harbor immoral purposes. More likely is that corporate managers are too insulated from criminal acts or unknowingly encourage those acts.[53] Commentators and social scientists alike have long recognized the group dynamics of the "risky shift" and the tendency for corporate managers to be risk-takers rather than risk-averse individuals.[54] The decision-making framework that some managers apply is to consider the decision "purely a business decision rather than an ethical one."[55] This purely business or profit-

[49] Don Mayer et al., *Crime and Punishment (or the Lack Thereof) for Financial Fraud in the Subprime Mortgage Meltdown: Reasons and Remedies for Legal and Ethical Lapses*, 51 AM. BUS. L.J. 515, 523 (2014) ("Typically, prosecutors rely on two main approaches to combatting fraud in the financial sector: mail and wire fraud or securities fraud.") (citing 18 U.S.C. §§ 1341, 1343, 1348 (2012)).

[50] *See* MODEL PENAL CODE § 2.02 (equating specific intent crimes to the mens rea standard of purpose, the highest intent standard).

[51] United States v. Profit, 49 F.3d 404, 406 n.1 (8th Cir. 1995) (laying out elements of wire fraud).

[52] *See* SAMUEL BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 15–16 (2016) (citations omitted).

[53] *See* Max H. Bazerman & Ann E. Tenbrunsel, *Ethical Breakdowns*, HARV. BUS. REV. 59 (Apr. 2011) ("Much more often, we believe, employees bend or break ethics rules because those in charge are blind to unethical behavior and may even unknowingly encourage it."); *supra* notes 39–43 and accompanying text (observing the levels of separation between employees and organizational decision makers).

[54] Coffee Jr., *supra* note 18, at 395 (explaining the "risky shift" phenomenon).

[55] *See* Bazerman & Tenbrunsel, *supra* note 53, at 59.

maximizing framework that incentivizes employees may be the problem. For example, consider that setting sales goals may incentivize employees to be more productive in their efforts, while still behaving ethically. Yet it might also incentivize them to falsify sales to reach their goals.[56] No observer would fault the organization or its managers for setting productivity goals, but no observer would consider falsified sales a good consequence of setting goals.

Similarly, commentators perceive a paradigm shift in capitalism, a recent transition away from traditional economic models of behavior which rest on the assumption that competition between groups incentivizes them to behave ethically.[57] This old model gives way to "managerial capitalism" and a subsequent pronounced decline in ethical values.[58] The FCIC similarly found a decline in ethical values that contributed to the financial collapse.[59] If left unchecked, this problem may pervade throughout an organization and subsequently throughout an industry.[60] With only piecemeal fixes, there is little stopping another catastrophe in the name of profit.[61]

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[56] *See id.* at 60 (discussing the example in which Sears Roebuck management set sales goals for mechanics to find that the employees routinely made up invoices, repaired items that were not truly broken, and stretched out labor hours).

[57] *See* Neil Fligstein & Alexander Roehrkasse, *The Causes of Fraud in Financial Crises: Evidence from the Mortgage-Backed Securities Industry*, 81 AM. SOC. REV. 617, 635 (2016) (concluding evidence of the financial crisis "provides a critique of conventional wisdom about the relationship between market structure, regulation, and economic behavior" and limitations of previously accepted theories); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U.L.Q. 487, 493 n.16 (2003) (collecting sources that demonstrate that management's prioritization of and philosophy on business ethics play a significant role in the level of corporate misconduct).

[58] Mayer et al., *supra* note 49, at 530–31 (citing JOHN C. BOGLE, THE BATTLE FOR THE SOUL OF CAPITALISM 7, 220 (2005)).

[59] *See* FCIC REPORT, *supra* note 7, at XXII (concluding "there was a systemic breakdown in accountability and ethics").

[60] *See* MICHAEL SANTORO & RONALD J. STRAUSS, WALL STREET VALUES: BUSINESS ETHICS AND THE GLOBAL FINANCIAL CRISIS, 17 (2012) (discussing the proliferation of corporate "counterparties" and simultaneous decline of a focus on clients and customers); FCIC REPORT, *supra* note 7, at XVIII–XIX (observing that the changes in business operation "reflected a fundamental change in these institutions, particularly the large investment banks and bank holding companies").

[61] One can already see the beginnings of another potential rise in unethical lending given the widespread access to personal data of individuals. *See* AnnaMaria Andriotis, *Need Cash? Companies Are Considering Magazine Subscriptions and Phone Bills When Making Loans*, WALL ST. J. (Sept. 12, 2019), https://www.wsj.com/articles/need-cash-companies-are-considering-magazine-subscriptions-and-phone-bills-when-making-loans-11568280601 (discussing how lenders are beginning to use consumer data and even grades to determine creditworthiness of potential borrowers with traditionally low credit scores). The article notes that in 2018 alone, lenders loaned nearly $160 billion to borrowers with "limited or no credit histories." *Id.* Critics suggest that these

And to further add to the challenge, commentators have also long recognized the obstacle of corporate bureaucracy to a successful prosecution.[62] As organizations grow and divvy responsibility among distinct and autonomous divisions, each responsible for parts of the whole, the individual's role in any one corporate act shrinks.[63] As one's role in any criminal act decreases, one's potential awareness of the act's criminal nature and one's fear of apprehension both shrink in turn, further incentivizing misconduct or diminishing the deterrence function.[64]

The financial collapse occurred in part because of the accumulation of reckless behavior at different levels of our largest financial institutions.[65] The behavior of lenders and bankers challenged reigning economic theories that competition between firms could and would incentivize them to behave ethically.[66] Similarly, the growing demand for mortgages to securitize and distribute led banks to forgo their traditional due diligence.[67] Observers note a series of biases and rationalizations that explain the decline of ethical behavior among large financial institutions.[68] One powerful factor is "motivated blindness," which allows an individual to "see what they want to see and easily miss contradictory information when it's in their interest to remain ignorant . . . [which] applies dramatically with respect to unethical behavior."[69]

"could make millions of borrowers appear safer than they are" and may not be valid indicators of a borrower's ability to repay a loan. *Id.* Notably, lenders targeted similarly situated borrowers leading up to the financial collapse. *See* FCIC REPORT, *supra* note 7, at 6–7 (discussing the rise of loans to individuals with no jobs, no assets, and/or no income (termed a NINJA loan)).

62 Coffee, Jr., *supra* note 18, at 397.

63 *Id.* at 397–98.

64 *Id.* at 392.

65 *See supra* notes 2–3 (explaining the mortgage securitization process); *see also* FCIC REPORT, *supra* note 7, at 90 (same). While the behavior of lenders in creating bad loans began the cycle that would culminate in the financial collapse, securitization of these mortgages greatly exacerbated the crisis by amplifying the market without the requisite level of due diligence, resulting in the failure of major financial institutions and collapse of the market. *See* FCIC REPORT, *supra* note 7, at XXIV.

66 Fligstein & Roehrkasse, *supra* note 57, at 635 (concluding that "[i]ncreased scarcity and competition within markets pushed vertically integrated firms to commit crime in order to keep their securities businesses going").

67 FCIC REPORT, *supra* note 7, at 165 ("In theory, every participant along the securitization pipeline should have had an interest in the quality of every underlying mortgage. In practice, their interests were often not aligned."). *See generally id.* at 165–68 (discussing failures in completing appropriate due diligence).

68 Mayer et al., *supra* note 49, at 534–37 (observing "ethical blind spots" in business decisions).

69 Bazerman & Tenbrunsel, *supra* note 53, at 61.

In the lead up to 2008, there was a concerted push among banks to create more mortgage-backed investments to meet "burgeoning global demand for [them]."[70] This push led firms to increase the origination of risky, subprime mortgages and then misrepresent the risk of the subsequent investments.[71] The diminishing supply of mortgages and the government's encouragement of homeownership further exacerbated these pressures.[72] The vertical integration of the different functions in the derivative pipeline, previously thought to align interests, further pushed individual actors toward fraud and increased the opportunity for concealment.[73]

A potential source for these developments includes the priorities and incentives set by corporate management.[74] During its inquiry, the FCIC heard testimony from several executives at major lending institutions and banks that all fit a consistent pattern: the executives, mostly at middle levels, would raise concerns about the risky nature of investments to no avail and have their concerns "brushed aside" by their superiors to keep their organizations competitive.[75] JPMorgan Chase CEO Jamie Dimon's testimony to the FCIC is instructive: "I blame the management teams and . . . no one else."[76] Despite these internal reports and external observations from regulators and academics "that the housing market was slowing, Wall Street just kept going and going—ordering up loans, packaging them into securities, taking profits, earning bonuses."[77] When asked about his efforts to investigate reports

[70] FCIC REPORT, *supra* note 7, at 6.

[71] *Id.* at 28 (observing that "this became a market in which the participants—mortgage brokers, lenders, and Wall Street firms—had a greater stake in the quantity of mortgages signed up and sold than in their quality"); *see also* Fligstein & Roehrkasse, *supra* note 57, at 618 (observing that "a dwindling supply of legally contractible mortgages created new resource constraints").

[72] *See* Rakoff, *supra* note 19 (discussing the government's own involvement in the mortgage crisis); Bazerman & Tenbrunsel, *supra* note 53, at 60 (same).

[73] Fligstein & Roehrkasse, *supra* note 57, at 635 ("Increased scarcity and competition within markets pushed vertically integrated firms to commit crime to keep their securities businesses going.").

[74] *Id.* at 636 (asking whether "fraud spread through leadership and imitation" as a potential explanation for organizational behavior).

[75] *See* FCIC REPORT, *supra* note 7, at 18–20 (observing that "[a]t too many financial firms, management brushed aside the growing risks to their firms" and documenting examples of executives raising concerns to upper management to no avail). One Lehman Brothers executive who raised concerns explained that she was "shunted aside." *Id.* at 18–19. She left Lehman shortly thereafter. *Id.* at 19. A Citigroup executive continually raised concerns to upper management but noted his attempts "never translated into any action. Instead, . . . there was a considerable push to build volumes, to increase market share." *Id.* (internal quotation marks omitted).

[76] *Id.* at 18 (alterations in original).

[77] *Id.*

made by one of his employees, Citigroup Chairman of the Board of Directors and former Treasury Secretary Robert Rubin stated: "I do recollect this and that either I or somebody else, and I truly do not remember who, but either I or somebody else sent it to the appropriate people, and I do know factually that that was acted on promptly and actions were taken in response to it."[78] After raising those concerns, the employee was demoted.[79]

The decision to keep going despite the signs to stop was made in part because managers viewed their investment into mortgage markets "purely [as] a business decision rather than an ethical one."[80] Essentially, management "[saw] what they want[ed] to see" in the continued profits of and "easily miss[ed] contradictory information [because it was] in their interest to remain ignorant."[81] The diffuse nature of the institutions and levels of separation between the originators and underwriters on the ground and upper management all coalesced into a perfect storm when combined with the deregulated industry.

But given what we know about this perfect storm, it seems easy to argue that no one in upper management had the specific intent to defraud anyone. The upper executives certainly have some responsibility for consciously ignoring or even encouraging illicit behavior—one might even say they were reckless.[82] But suppose for the moment that at least some of these employees at these firms acted with that specific intent and that a prosecutor could prove their intent, which is typically not easily done.[83] Punishing these employees likely means little to upper management, given its myopic focus on profits and competitiveness.[84] Similarly, upper management's veiled ignorance and pressuring of employees means little to the prosecutor who needs to prove specific intent to defraud but cannot do so.[85] Punishing the entity

78 *Id.* at 19.

79 *Id.*

80 *See* Bazerman & Tenbrunsel, *supra* note 53, at 59.

81 *Id.* (describing motivated blindness).

82 *See infra* Part IV (advocating to apply a reckless standard to executives who oversaw fraudulent activities).

83 *See* MODEL PENAL CODE § 2.02 cmt. 2 (explaining the distinction between purpose, or specific intent, and other, lower criminal intent standards).

84 *See* Fligstein & Roehrkasse, *supra* note 57, at 635 ("Our evidence is most inconsistent with accounts emphasizing that firms care about their reputations enough that they tend not to engage in fraud.")

85 Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1996, 2014–18 (2006) (observing that fraud must be "open-textured" to keep up with novel forms of artifice but concluding that fraud morally requires a finding of "conscious wrongdoing").

may bring the executives within the State's reach, but brings collateral consequences upon innocent parties.[86]

These examples illustrate the aforementioned challenges facing the State as a corporate regulator. But the financial crisis is only the most recent example of unethical corporate behavior gone awry, and it likely will not be the last.[87] Here, if we accept that fraud requires specific intent, we must punish the lower-level actors because they fit the law's definition of culpability. But on the same token, we must also let upper executives go free because they are not sufficiently culpable to fit the law's definition. Or we punish the entity and let management decide who takes the fall. Culpability is masked by indirect actions that promoted illicit behavior and by ignorance of the risks of such actions or the actions themselves. This begs the question: given their ignorance and the substantial risks of their policies, are the senior decision makers in upper management not morally culpable for setting risky policies[88] and ignoring the signs of impending calamity? If criminal law fails to target the root of the problem, only treating the symptoms, is it effective? This Comment suggests that perhaps it is not.

C. *Present Remedies: Cold Porridge*

The Great Recession may have been the worst financial disaster since the Great Depression, but it was not the only financial disaster since the Depression. This Section describes several other events that drew responsive legislative attempts to refocus corporate criminal liability on management, where it would be the most effective. These responses are all steps along the trend toward individual accountability but fall short of effectively achieving it.

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86 *See supra* note 18 and accompanying text.

87 *See* Ben Eisen, *Charles Scharf Puts Stamp on Wells Fargo With Overhaul of Reporting Lines*, WALL ST. J. (Feb. 11, 2020), https://www.wsj.com/articles/charles-scharf-puts-stamp-on-wells-fargo-with-overhaul-of-reporting-lines-11581438600 (explaining how Wells Fargo, in the wake of its fake-account scandal, has changed its operating structure).

88 Prosecutors can distinguish fraudulent conduct from "sharp, innovative economic practices" is by comparing the conduct to market norms. Buell, *supra* note 85, at 2015. When a market undergoes a shift like the lending market did, however, that distinction becomes difficult to make. *See id.*; FCIC REPORT, *supra* note 7, at 28 (noting the "profound changes in the mortgage industry").

The Sarbanes-Oxley Act[89] was a legislative response to the Enron and WorldCom scandals.[90] The Act's primary focus is the internal compliance structures of corporations, introducing reforms such as requiring independent directors on corporate boards, measures to ensure auditor independence, and stricter evaluation of conflicts of interest.[91] The Act also increased the sentences for various white-collar criminal statutes, including mail and wire fraud, but made no substantive changes to the law.[92] Setting aside the sections targeting internal compliance, the Act's criminal provisions largely overlap with existing criminal laws, enhancing penalties in some areas.[93] Sentencing enhancement means little if prosecutors cannot charge and convict the right defendants.

The Dodd-Frank Act[94] was the legislative response to the financial crisis of 2008.[95] Dodd-Frank contains two sections related to criminal liability.[96] Section 741 criminalizes fraud in particular types of securities transactions; yet these actions already fall into the broad range of conduct under the wire or mail fraud statute and change nothing with respect to the level of intent prosecutors must demonstrate for conviction.[97] Section 747 lowers the mens rea for the originating party in a swap transaction but still requires that the counterparty have the intent to deceive, presenting almost as high of a

[89] Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, & 29 U.S.C.) [hereinafter Sarbanes-Oxley].

[90] *See* FCIC REPORT, *supra* note 7, at 59–60 (describing the Enron and WorldCom scandals).

[91] *See generally* William S. Duffey, Jr., *Corporate Fraud and Accountability: A Primer on Sarbanes-Oxley Act of 2002*, 54 S.C. L. REV. 405 (2002) (describing the provisions of the Sarbanes-Oxley Act). Internal compliance refers to an organization's own systems for policing and reporting on employees who break laws or internal regulations. *See* Krawiec, *supra* note 57, at 494 (defining internal compliance structures).

[92] *See id.* at 407–09.

[93] *See* Luke A. E. Pazicky, *A New Arrow in the Quiver of Federal Securities Fraud Prosecutors: Section 807 of the Sarbanes-Oxley Act of 2002* (18 U.S.C. § 1348), 81 WASH. U. L.Q. 801, 802 (2003) ("[I]t seems like the Securities Fraud Statute will only nominally impact federal securities fraud prosecutions.").

[94] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[95] *See id.* ("An Act [t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.").

[96] *See* 124 Stat. at 1729–31, 1739 (Section 741 entitled Enforcement, and Section 747 entitled Antidisruptive Practices Authority).

[97] *See* Jennifer Chawla, *Criminal Accountability and Wall Street Executives: Why the Criminal Provisions of the Dodd-Frank Act Fall Short*, 44 SETON HALL L. REV. 937, 959 (2014).

bar as the previous statutes that prosecutors relied on when alleging fraud in complex financial transactions.[98]

The most recent trend in combating corporate corruption does not involve new crimes or regulations. Rather, this trend involves the prosecution of and eventual settlement with the corrupt organization through Deferred Prosecution Agreements ("DPAs") and Non-Prosecution Agreements ("NPAs").[99] The most recent development in this trend is the Yates Memo, a communication from then-Deputy Attorney General Sally Yates titled: "Individual Accountability for Corporate Wrongdoing."[100] The Memo notes that seeking individual accountability is "[o]ne of the most effective ways to combat corporate misconduct" and that "it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system."[101]

The Yates Memo then acknowledges the difficulties in pursuing high-level corporate actors "who may be insulated from the day-to-day activity in which the misconduct occurs," noting that "responsibility can be diffuse and decisions are made at various levels, [and] it can be difficult to determine if someone possessed the knowledge and criminal intent necessary" to convict.[102] The Memo then provides guidelines to "strengthen [the DOJ's] pursuit of individual corporate wrongdoing," advising federal prosecutors to require corporations to provide "all relevant facts relating to the individuals responsible for the misconduct" to qualify for cooperation credit, and to "focus on individuals from the inception of the investigation."[103] Prosecutors sometimes simultaneously rely on the corporation's internal investigation to conduct its own investigation.[104] Relying on corporate internal

98 *See id.*

99 *See generally* Uhlmann, *supra* note 18, at 1303–17 (describing the rise of the DOJ's use of DPAs and NPAs). The DOJ's use of these agreements has a tumultuous history as different administrations have promulgated different guidelines for their use. *See id.*

100 Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice to All U.S. Att'ys et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), at 1, https://www.justice.gov/archives/dag/file/769036/download [hereinafter Yates Memo].

101 *Id.*

102 *Id.* at 2.

103 *Id.*

104 *See* Rakoff, *supra* note 19.

> Early in the investigation, you invite in counsel to the company and explain to him or her why you suspect fraud. He or she responds by assuring you that the company wants to cooperate and do the right thing, and to that end the company has hired a former assistant US attorney, now a partner at a respected law firm, to do an internal

investigations has both advantages and disadvantages.[105] But this Comment suggests that these practices are necessary rather than sufficient for an effective regulatory apparatus. They can significantly aid an effective prosecution of individual wrongdoing once started, but they do little to help initiate prosecutions.

Though they emphasize the right place, both the DOJ and the drafters of the Sarbanes-Oxley and Dodd-Frank Acts do not precisely address the diffuse nature of responsibility that makes prosecution so difficult. This challenge requires a different approach to combat corporate misconduct, one that addresses the difficulties of pursuing the right individuals in the diffuse corporate network but retains sufficient moral justification to impose criminal sanction.

> investigation. The company's counsel asks you to defer your investigation until the company's own internal investigation is completed, on the condition that the company will share its results with you. In order to save time and resources, you agree.
> Six months later the company's counsel returns, with a detailed report showing that mistakes were made but that the company is now intent on correcting them. You and the company then agree that the company will enter into a deferred prosecution agreement that couples some immediate fines with the imposition of expensive but internal prophylactic measures. For all practical purposes the case is now over. You are happy because you believe that you have helped prevent future crimes; the company is happy because it has avoided a devastating indictment; and perhaps the happiest of all are the executives, or former executives, who actually committed the underlying misconduct, for they are left untouched.

Id.; *see also* Sharon Oded, *Coughing up Executives or Rolling the Dice?: Individual Accountability for Corporate Corruption*, 35 YALE L. & POL'Y REV. 49, 75–78 (2016).

[105] *Compare* Oded, *supra* note 104, at 75–80 (explaining the conflict of interest created by the Yates Memo can cause tension between corporations and individual employees and may actually chill corporate prosecution), *with* Danielle Young, *No Longer a Cost of Doing Business; The Yates Memo Signals DOJ is Serious About Going After Individuals*, GLOBAL ANTICORRUPTION BLOG (Sept. 28, 2015), https://globalanticorruption blog.com/2-15/09/28/no-longer-a-cost-of-doing-business-the-yates-memo-signlas-doj-is-serious-about-going-after-individuals/ (discussing some advantages of the Yates Memo's reforms). Additionally, an internal investigation, like any other corporate activity, is completed at the behest of management. Management can decide what information the organization provides the government, where the funds to pay fines come from, and who goes on the chopping block. Coffee Jr., *supra* note 18, at 401; *see also* Peter J. Henning, *Pursuit of Individuals in Corporate Misconduct Still Arduous*, N.Y. TIMES (Sept. 24, 2014), https://dealbook.nytimes.com/2014/09/22/pursuit-of-individuals-in-corporate-misconduct-still-arduous ("The emphasis on delivering evidence to allow the prosecution of individual employees sounds like an effort to have corporations throw them under the proverbial bus to secure lenient treatment.").

III. RCO LIABILITY AND THE TRAVAILS OF PORRIDGE THAT IS TOO HOT

The RCO doctrine allows a prosecutor to hold accountable the leader of an organization that commits a crime, regardless of his or her participation or knowledge of the criminal action, employing strict liability.[106] It is a powerful tool that allows prosecutors to target high-level actors in business organizations in the face of diffuse responsibility.[107] Given this use, it would seem to be an answer to the first problem identified above, as it specifically targets the highest possible official who stands in "responsible relation" to the misconduct.[108] But its use of strict liability goes too far and fails to solve the second problem, as it does not target management in a morally justifiable way. This Part will first discuss the RCO and strict liability, explaining why strict liability goes too far to combat corporate misconduct. Finally, it will make similar arguments as to why a negligence standard, employed by the CEAA, also goes too far.

A. *RCO Liability: An Executive's Worst Nightmare*

The RCO doctrine "imposes not only a positive duty [on corporate officers] to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will ensure that violations will not occur."[109] The doctrine essentially imposes this duty

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[106] In *United States v. Dotterweich*, Supreme Court created the doctrine in its interpretation of the Food, Drug, and Cosmetic Act's ("FDCA") use of the words "any person" in a 5-4 decision. 320 U.S. 277, 281 (1943) (concluding the FDCA "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger"). The FDCA imposes a fine or one year of imprisonment on "any person" who conducts one the listed prohibited acts without specifying a mens rea component. *Id.* at 280 (noting that the FDCA imposed strict liability). Section 331 prohibits "causing" various actions, including the adulteration or misbranding of foods and drugs, and Section 333 sets forth the appropriate punishments. 21 U.S.C. §§ 331, 333. The Court again upheld RCO liability in *United States v. Park*, a 6-3 decision, where the Court resolved a circuit split on whether prosecutors needed to show that the defendant took some "wrongful action" to convict. 421 U.S. 658, 666–67 (1975). *Park* involved a misdemeanor conviction of a corporate officer who failed to remedy a rodent infestation at a food warehouse despite having notice of the problem under the FDCA. *Id.* at 658–59. The Court concluded that the FDCA imposed "not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur." *Id.* at 659.

[107] *See* Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371, 377–78 (2014); Todd S. Aagaard, *A Fresh Look at the Responsible Relation Doctrine*, 96 J. CRIM. L. & CRIMINOLOGY 1245, 1245 (2006).

[108] As identified above, Senator Warren's bill employs the RCO doctrine. *See supra* Part I.

[109] *Park*, 421 U.S. at 672.

on officers where the duty would only have applied to the principal, the corporate entity.[110] One of its justifications is the long-held principle that among the two innocent parties, the victim and the principal, the latter should be held liable for the harmful acts of its agent rather than the victim; however, RCO liability places the officer in the role of the principal.[111]

The RCO doctrine allows prosecutors to bypass subordinates who committed criminal acts to target managers in their oversight capacity.[112] Recall from above the executives who dismissed their employees' concerns about the housing bubble.[113] Like both the defendants in *Park* and *Dotterweich*, they had some awareness of and perhaps even indirect participation in their subordinates' criminal acts.[114] But some awareness and indirect participation are not enough for a fraud charge.[115] Willful or motivated blindness, or even implicit encouragement, will not be enough to reach the high intent standards required.[116] But under RCO, a prosecutor need not prove willful blindness to get to an officer, much less specific intent.[117] Thus, the charge brings to bear the regulatory effect of the criminal sanction, deterring future misconduct in the party in the best position to recidivate.[118] This would seemingly solve the first problem identified above of targeting corporate management.

But the RCO doctrine has been primarily applied to food, drug, and environmental regulatory violations that carry criminal penalties, largely conforming to the conception of "public welfare offenses."[119] The statutes punish a corporate officer of a misdemeanor on a strict liability theory, elevating to a felony charge if the officer also had the

110 Martin Petrin, *Circumscribing the "Prosecutor's Ticket to Tag the Elite"—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283, 301 (2012).

111 Dotterweich, 320 U.S. at 281 ("In the interest of the larger good [RCO liability] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 500 (5th Ed. 1984) (discussing the proper placement of liability among two actors).

112 *See supra* note 106 and accompanying text.

113 *See supra* notes 74–79 and accompanying text.

114 *See supra* notes 77–79 and accompanying text (describing how lenders and banks churning out bad mortgages, lowering lending standards, and waiving requirements, all to meet the growing demand for securitization).

115 *See* Buell, *supra* note 85 at 2014–18.

116 *Id.*

117 Dotterweich, 330 U.S. at 280 (noting that the FDCA imposed strict liability).

118 *See Developments in the Law*, *supra* note 18, at 1272–73 (describing how corporate managers would behave if a statute criminalized reckless supervision).

119 *See* Amiad Kushner, *Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context*, 93 J. CRIM. L. & CRIMINOLOGY 681, 683 (2003).

intent to defraud.[120] To support imposing strict liability, the Supreme Court observed that in the food and drug context, members of the public "are largely beyond self-protection."[121] One might argue the consumers affected by the Great Recession are similarly "largely beyond self-protection," and one might also argue that the hefty fines accompanying DPAs and NPAs are "license fees."[122] Strict liability itself exists in part "to ease the prosecution's path to conviction,"[123] which would seemingly be a direct solution to the difficulty in prosecuting high-level corporate officers. Yet, strict liability faces strident criticism.[124] The Supreme Court has recognized that strict liability prosecution under the RCO doctrine "holds out the distinct possibility of overdeterrence."[125]

B. *Using RCO Liability to Combat Corporate Financial Fraud*

Indeed, this overdeterrence problem should prove fatal to an expansion of strict liability as a mainstay tool to fight corporate misconduct. Corporate entities are statutory creatures that exist to manage and distribute the risks and rewards associated with business decisions.[126] While excessive caution may prevent exposure to liability, it also hinders business returns.[127] Adopting strict liability on such a large scale would thus be, to some degree, inconsistent with the purpose of corporate institutions. It would require almost *no* connection between the corporate officer and the criminal acts to impose criminal liability.[128] But it may be impossible to divorce senior decision makers

120 *See, e.g.*, 21 U.S.C. § 676.

121 Dotterweich, 320 U.S. at 280–81.

122 *Id.*; *see also Developments in the Law*, *supra* note 18, at 1236 (offering as an example that securities and antitrust "statutes seek to deter those who, for economic or other reasons, might be tempted to act in a socially harmful manner"); Christina Schuck, *A New Use for the Responsible Corporate Officer Doctrine: Prosecuting Industry Insiders for Mortgage Fraud*, 14 LEWIS & CLARK L. REV. 371, 389 (2010) (calling for an expansion of RCO liability to mortgage fraud in response to the economic consequences of the 2008 financial crisis).

123 Morissette v. United States, 342 U.S. 246, 263 (1952).

124 The two main critiques are that (1) strict liability does not effectively deter an actor who did not know he was engaging in misconduct, and (2) that "it is unjust to condemn a person who is not morally culpable." DRESSLER & GARVEY, *supra* note 16, at 195.

125 United States v. United States Gypsum Co., 438 U.S. 422, 441 (1978) (requiring a mens rea for antitrust offenses and rejecting the use of an "effects alone" test).

126 *See generally*, BAUMAN, *supra* note 28, at 7–8.

127 Gypsum Co., 438 U.S. at 441 (observing "salutary . . . conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.").

128 *See* United States v. Buffalo Pharmacal Co., 131 F.2d 500, 501 (2d Cir. 1942), *rev'd sub nom.*, Dotterweich, 320 U.S. at 278 ("Dotterweich had no personal connection with

from corporate acts, especially in an industry as interconnected and complex as banking or finance. Additionally, while the securitization process and subsequent derivative market heavily contributed to the financial collapse, they also proved to be extremely lucrative and useful, and continue to be profitable under closer scrutiny and new regulations.[129]

But while strict liability certainly presents an overdeterrence problem, it has a deeper issue with its moral underpinnings.[130] Our most basic intuition of fairness would preclude us from criminally sanctioning or morally condemning someone who has not behaved immorally.[131] Adopting strict liability wholesale would turn this intuition on its head by removing the question of whether the accused is sufficiently culpable. Yet, this observation has at least one moving target that confounds the issue: the precise definition of immoral. Assume that the behavior of executives at mortgage originators, at security underwriters, and at credit rating agencies, did not involve any specific intent to defraud. This is not a remarkably difficult assumption to make—many of the executives overseeing the mortgage securitization pipeline sought for all parties involved to enjoy the profits of the pipeline.[132] But consider again the executives' behavior in light of that assumption—does their pursuit of profit nullify their ignorance of the collateral risks of their conduct? Does their tendency to minimize the ethical considerations (motivated blindness) or ignore them completely qualify as immoral? Could one not label their behavior negligent—or perhaps even *reckless*? Certainly, the answers to these questions are sufficiently debatable for further inquiry.

While RCO liability is of judicial origin, expanding RCO liability to general corporate misconduct requires the appropriate statutory language—the CEAA is one potential application.[133] It uses a mens rea

either shipment, but he was in general charge of the corporation's business and had given general instructions to its employees to fill orders received from physicians.").

129 FCIC REPORT, *supra* note 7, at 10 ("Securitization was one of the most brilliant financial innovations of the 20th century . . . [i]t freed up a lot of capital. If it had been done responsibly, it would have been a wondrous thing . . . .").

130 Petrin, *supra* note 110, at 299 ("Contrary to a common approach to establishing individual liability under both tort and criminal law, liability under the RCO doctrine does not require any personal participation, commission, or authorization of any wrongful conduct.").

131 *See* DRESSLER & GARVEY, *supra* note 16, at 35 (explaining the retributivist theory of criminal law).

132 FCIC REPORT, *supra* note 18, at 117 (describing bank profits from asset-backed security deals).

133 S. 1010., *supra* note 26. The CEAA purports to use RCO liability as a broad-based mechanism to combat corporate crime using a negligence standard. Its provisions fit

standard of negligence, avoiding the difficulties of specific intent.[134] But commentators have also long criticized negligence as a basis for criminal liability.[135] Indeed, a negligence standard still exacerbates the overdeterrence problem.[136] The corporation and its agents must necessarily take risks to accomplish their goals, allocating the consequent benefits and costs of those risks.[137] Consider the parallel example of fiduciary duty litigation, where corporate directors owe the shareholders a duty of care "predicated upon concepts of gross negligence."[138] Criminal negligence is also, to some degree, predicated upon concepts of gross negligence.[139] But to equate the two standards would be to equate—or even subordinate—criminal law to civil law, an untenable proposition.[140] The procedural hurdles in shareholder litigation would further make a criminal prosecution easier to accomplish than a derivative suit.[141] In other words, prosecutors might have an easier time criminally charging an executive than a shareholder would in challenging a board action.[142]

A negligence standard also poses a practical problem due to its use of the reasonable person standard. A reasonable person standard is easy to conceptualize when applied to a tort action stemming from a car accident. But such a standard is significantly more difficult to define in the context of corporate corruption.[143] "Whether negligence is morally culpable is an interesting philosophical question," but it is safe to say that the lack of consensus belies any argument that we should employ a

squarely with the RCO doctrine's public welfare and consumer protection theories. *See* Off. of Senator Elizabeth Warren, *supra* note 26 (citing the FDCA as an example of legislation fighting corporate misconduct).

134 S. 1010., *supra* note 26.

135 *See, e.g.*, Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 949 (2000); Robert P. Fine & Gary M. Cohen, *Is Criminal Negligence a Defensible Basis for Penal Liability*, 16 BUFF. L. REV. 749, 751–52 (1967).

136 *Developments in the Law*, *supra* note 18, at 1271.

137 BAUMAN ET AL., *supra* note 28, at 6–8.

138 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

139 MODEL PENAL CODE § 2.02 cmt. 4 (considering different definitions of criminal negligence, including that of gross negligence).

140 *See* Coffee Jr., *supra* note 18, at 392–95.

141 *See, e.g.*, MODEL BUS. CORP. ACT, §§ 7.41 (requiring standing for derivative suits), 7.42 (requiring shareholders make a demand on the corporation before proceeding with a derivative suit).

142 Interestingly, this disparity seems to be the case in the context of Section 10(b) enforcement. *See* Ann M. Olazábal & Patricia S. Abril, *Recklessness as A State of Mind In 10(B) Cases: The Civil-Criminal Dialectic*, 18 N.Y.U. J. LEG. & PUB. POL'Y 305, 332 (2015) (observing that developments in the civil and criminal enforcement of securities laws have led to a mismatch in intent requirements).

143 *Developments in the Law*, *supra* note 18, at 1272.

negligence standard as a mainstay tool to combat corporate misconduct.[144]

So, we come now to a situation wherein there is a lower bound to any potential remedy that is ineffective for failure to track modern corporate behavior. There is an upper bound in pure RCO liability or RCO liability with a negligence standard for the failure to limit sanction to sufficiently culpable conduct. As the fairy tale goes, we now consider the solution that is just right.

IV. CRIMINAL RECKLESSNESS: JUST RIGHT

Recklessness is a state of mind that involves a conscious disregard of a substantial and unjustifiable risk.[145] Recklessness is used in a variety of contexts in both criminal and tort law.[146] This Part will discuss the definition of recklessness and its doctrinal underpinnings, concluding that when combined with RCO liability, it is an effective way to combat corporate misconduct.

A. *Criminal Recklessness: A Dialogue of Risk and Reward*

Recklessness comes in both objective and subjective varieties.[147] Objective recklessness, often invoked in civil liability, measures an actor's conduct against an objective standard.[148] Subjective recklessness requires finding that the specific actor consciously disregarded the risk.[149] Courts have considered both criminal recklessness and its civil counterpart "nebulous" and incapable of precise definition.[150] One might conceptualize recklessness as a culpable state of belief, a culpable state of desire,[151] or a combination of both.[152] Recklessness sits just below purpose and knowledge on the

144 Elonis v. United States, 135 S. Ct. 2001, 2015 (2015) (Alito, J., dissenting).

145 MODEL PENAL CODE § 2.02(3); *see also* Alexander, *supra* note 135, at 933 & n.12 (discussing the uniformity of different jurisdictional definitions of recklessness). From an etymological purpose, different conceptions of the word reckless range from mere carelessness to wickedness. *See* Olazábal & Abril, *supra* note 142, at 311–12.

146 Olazábal & Abril, *supra* note 142, at 308.

147 *See* Farmer v. Brennan, 511 U.S. 825, 836–38 (1994).

148 *See id.*

149 *See id.*

150 *See id.* at 836 n.4; *see also* Olazábal & Abril, *supra* note 142, at 309–10.

151 *See* Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 464–65 (1992). Professor Simons divides mens rea hierarchies into those involving culpable belief-states, such as knowledge, and culpable desire-states, such as purpose. *Id.* Recklessness sits on both sides, however, because it can involve a belief-state—that one is consciously aware of his risk creation—and a desire-state, such as callousness. *Id.*

152 *See* Alexander, *supra* note 135. One might also argue that recklessness always involves both a belief and desire-state, in that one must believe or be consciously aware

hierarchy of mental states but employs different considerations than the higher mental states.[153] Arguably, one can reduce both purpose and knowledge to binary considerations.[154] An actor either has a morally condemnable purpose or does not have one; he either knows his act is morally condemnable or does not know.[155]

In contrast, recklessness is not a binary framework as purpose and knowledge both are. It exists as a continuum of mental states all based on the relative weights of two factors—the substantiality and unjustifiability of the risk associated with the act.[156] With a recklessness standard, a jury can rely on circumstantial evidence to infer the defendant's conscious understanding or knowledge of the various factors that contribute to the substantiality of the risk and the factors that make up the defendant's justification for the risk.[157] Thus, suppose a jury had overwhelming evidence that any person, reasonable or unreasonable, who saw the same evidence the defendant saw would know that a risk was substantial. It can infer from this situation that the defendant knew the risk was substantial and then evaluate the defendant's offered justification.

B. *The New(ish) Solution: Criminalizing Risky Business*

The preceding sections explain that the RCO doctrine provides a mechanism to connect a corporate officer to the criminal conduct of their subordinates, putting the officer in the place of the principal rather than the organization. In a sense, this becomes the *actus reus* of the offense.[158] Each senior decision maker discussed in Part II exercised

of a risk and that one must have some desired justification for the risk. *See* Joshua Dressler, *Does One Mens Rea Fit All: Thoughts on Alexander's Unified Conception of Criminal Culpability*, 88 CALIF. L. REV. 955, 957 (2000).

153 *See* MODEL PENAL CODE, § 2.02.

154 From a practical perspective, all evidence of mental state is likely to be shown through circumstantial evidence that allows the factfinder to draw an inference that the defendant had the requisite mental state. In so finding, however, the jury is asked to make a binary choice, whether or not the actor had a criminal purpose or knowledge.

155 *See* MODEL PENAL CODE, § 2.02 cmt. 2.

156 Alexander, *supra* note 135, at 933. Recklessness standards range from "awareness that one is doing something wrongful," to a specific intent to defraud standard, to a mere negligence standard. Samuel W. Buell, *What is Securities Fraud?* 61 Duke L.J. 511, 556–57 (2011) (explaining the range of criminal intent requirements used by lower courts for criminal securities violations and collecting cases).

157 Olazábal & Abril, *supra* note 142, at 315–16.

158 Consider again an RCO strict liability crime. Without an intent requirement, all a corporate officer must "do" is be a corporate officer who has some oversight function over the offending conduct, proceeding on an omission-like theory. *See* Sepinwall, *supra* note 107, at 378 ("[T]he doctrine permits the prosecution and punishment of corporate

some oversight over individuals at some point in the mortgage securitization pipeline; at a minimum, they received reports from these employees.[159] Accordingly, they would fall within the doctrine's reach as they each have "a responsible share in the furtherance of the [conduct] which the statute outlaws" even if they lack "consciousness of [their] wrongdoing."[160] But the fundamental problem RCO liability raises is that "even if some executives who did not participate in the corporate crime deserve to be punished, many others do not, and nothing in the RCO doctrine itself provides a principled basis upon which to distinguish between the two sets of executives."[161]

Recklessness is that principled basis. When combined with criminal intent, prosecutors can use RCO beyond its public welfare justification.[162] A recklessness standard is a balanced approach to individual accountability in corporate misconduct by ensuring sufficient culpability without the near-impossible bar of specific intent to combine with the RCO's focus on oversight. A recklessness standard serves the goals of retribution by first applying a minimum level of culpability, thereby avoiding the overdeterrence problem presented by a lower standard.[163]

Recklessness also goes beyond mere negligence: it requires a conscious risk creation, an active effort to ignore the substantially harmful consequences of one's conduct that is accepted as morally culpable.[164] Recklessness's moral culpability draws from an actor's

executives who have not participated in their corporation's crime, even if they had no knowledge of the crime at the time of its occurrence.").

159 *See supra* notes 76–80 and accompanying text.

160 United States v. Dotterweich, 320 U.S. 277, 284 (1943).

161 Sepinwall, *supra* note 107, at 379; *see also* Staples v. United States, 511 U.S. 600, 605–06 (1994) (observing that "the requirement of some *mens rea* for a crime is firmly embedded," and requiring "some indication of congressional intent, express or implied, . . . to dispense with *mens rea* as an element of a crime"). The Model Penal Code ("MPC") also presumes a mens rea of at least recklessness when a statute is silent as to a culpability requirement. MODEL PENAL CODE § 2.02 cmt. 5.

162 *Developments in the Law*, *supra* note 18, at 1275. In simpler terms, this approach would create the crime of "reckless supervision." *See id.* at 1270. As *Developments in the Law* does, one might propose actual criteria for an *actus reus* of reckless supervision, but such a proposal is likely substantially similar to what the RCO doctrine already does. *Compare* United States v. Park, 421 U.S. 658, 672 (1975) (imposing "not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur"), *with Developments in the Law*, *supra* note 18, at 1271 ("Knowledge of a potentially criminal condition or course of conduct triggers a supervisor's duty to act nonrecklessly to avert the crime.").

163 *See Developments in the Law*, *supra* note 18, at 1270.

164 *See* Elonis v. United States, 135 S. Ct. 2001, 2015 (Alito, J., dissenting) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful

awareness of the risk created by his conduct, requiring a finding that the actor knew of the risk.[165] The only difference with criminal negligence is that the negligent actor is *unaware* of the risks associated with his conduct but should have been aware, as a reasonable person would have been aware.[166] This awareness is crucial, as the offered justifications to support criminal law fail without it.[167]

This awareness also helps elucidate the question of immorality surrounding corporate behavior. Given its flexible interpretation, recklessness would track the behavior of corporate executives during the financial collapse. The line at which a corporate officer's conduct becomes sufficiently culpable should be at the point when the officer knows of a substantial and unjustifiable risk but does nothing to prevent or mitigate the consequences of that risk.

Consider an executive at an investment bank who oversees asset-backed securities and has been pushing her subordinates to market more derivatives by setting near-unattainable profit goals. For many subordinates, the only way to meet these extreme goals is to resort to unethical behavior.[168] For some, this unethical behavior rises to the level of crime. Suppose that an employee in the compliance department sends the executive an email raising concerns about the strength of the loans underlying the security, suggesting that the derivatives that the executive continued to demand could calamitously fail. The email raises concern that the firm misrepresented a deal to its investors or even defrauded them because of improper diligence. The potential failure of the deal would result in massive losses for major institutional-investor

conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable."). *Elonis* involved the interpretation of an interstate threat statute without a mens rea requirement, and Justice Alito argued in favor of interpreting in a recklessness standard as it accomplished the goal of "separat[ing] wrongful conduct from otherwise innocent conduct." *Id.* at 2015 (quoting Carter v. United States, 530 U.S. 255, 269 (2000)).

165 MODEL PENAL CODE § 2.02 cmt. 3.

166 *Id.* § 2.02 cmt. 4. The drafters of the MPC justify criminal negligence by arguing the deterrent value exists in motivating a greater standard of care in one's actions and the "moral defect" associated with an "insensitivity to the interests of other people." *Id.* Lastly, the drafters propose that any distinction necessary can be made at the sentencing stage. *Id.*

167 Fine & Cohen, *supra* note 135, at 751. The deterrence and rehabilitation functions fail because the actor cannot be deterred or rehabilitated from taking a risk of which he is unaware; the retributive function fails because the actor has not committed an act that is sufficiently morally culpable to impose moral condemnation; the incapacitation function fails because incapacitation is only justified where less invasive measures cannot equally protect society from the actor and here, education serves that protective function. *Id.*

168 *See supra* notes 62–69 and accompanying text (discussing motivated blindness).

clients who manage the pension funds of hundreds of employees. Further suppose the executive ignores this email. She continues to demand mortgages for distribution. Could we not consider her ignorance to be reckless in the criminal sense? At a certain point, ignoring the concerns of calamity raised by her subordinates is ignoring a substantial risk. Would we not consider her behavior to be sufficiently culpable? She did not intend to defraud her clients. But she became aware of the substantial risk created by her policies; she ignored it, and, as a result, people suffered. This development was unfortunately common in the lead up to the Great Recession.[169]

Consider another situation in which evidence that a firm engaged in fraudulent activity is clearly sufficient to support a prosecution. The firm's acts resulted in innocent parties incurring substantial losses. The firm has a history of engaging in these activities and routinely returns to them even after the government responds. Given the diffuse nature of corporate organizations, there is not enough evidence to sufficiently connect any one executive to the firm's actions, but it is well-understood that someone high up is pushing the firm to engage in the misconduct. Using RCO liability, the government can reach that person, preempting the diffusion of responsibility. Under the old regime, the executive was well-protected by these evidentiary hurdles. But under the new one, the executive is vulnerable because they have an affirmative duty to prevent misconduct. A failure to do so invites the possibility of criminal prosecution on an omission-based theory. Even without a prosecution, this vulnerability can incentivize ethical behavior.

Similarly, a recklessness standard also suffers less from the evidentiary challenges of specific intent requirements.[170] A prosecutor need only prove that a corporate officer knew of the substantial risk of harm, meaning an officer cannot escape criminal liability through acquiescence or implicit authorization.[171] No longer would an executive's statement that he was relying on the statements of others be so disabling to a subsequent prosecution when it is discovered that his department engaged in fraudulent activity. While there remains a disincentive to obtain knowledge that might invite liability, this influence is narrowed by recklessness's focus on knowledge of risk rather than specific knowledge.[172] If anything, this disincentive may be outweighed by an incentive to better understand the risks taken by the organization to avoid criminal liability.

169 *See supra* note 75 and accompanying text.

170 *See Developments in the Law*, *supra* note 18, at 1268–70.

171 *See id.* at 1272–73.

172 *See id.* at 1274.

Operationally, the recklessness standard, as a continuum, plays a different role in this context than it would in most other criminal contexts. Arguably, the justification for corporate corruption can always be reduced to profit, personal or organizational.[173] Corporate crime is defined as criminal acts that achieve organizational goals, and corporations are profit-seeking organizations.[174] Thus, when considering whether an individual decision maker in a corporation was reckless, the justification is likely the same for all actors. The individual justifies his actions on the basis that his job was to make a profit. This narrows a jury's duty to determine only the substantiality of the risk and whether the defendant knew of the substantiality of the risk known by the defendant officer.

Prosecutors must still ask the question of whether that executive recognized the substantiality of the risk his department took. This determination, in turn, may guide the government in choosing which executive to pursue using its newfound reach by way of the RCO doctrine. Some executives will escape liability here as they were still not sufficiently informed to warrant sanction, and the prosecution ends there. Recklessness is still not an easy standard to prove to a jury. But executives who were aware of a substantial risk, whether through internal reports or communications, would still have to answer for their actions in a criminal proceeding.[175] This evidence can give rise to the inference of recklessness.

The threat of criminal sanction and incarceration would undoubtedly require management to ask more questions and investigate irregularities further.[176] The threat also signals a new focus on effective corporate compliance and ethics to supply adequate reporting mechanisms to seek out and prevent misconduct, or remedy

173 *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders."); State *ex rel.* Pillsbury v. Honeywell, Inc. 191 N.W. 2d 406 (Minn. 1971) (rejecting shareholder's "social and political" concerns as a basis to change corporate policy and requiring that shareholders' concerns in policy changes be economic); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985) (requiring corporate directors, in certain situations, to solely consider profit maximization). These cases are drawn from corporate law rather than criminal law; however, they illustrate the judicial perspective on corporate purpose.

174 *See supra* note 31 and accompanying text.

175 *See* Buell, *supra* note 156, at 557 (demonstrating all of the different ways courts have upheld a finding of recklessness); Olazábal & Abril, *supra* note 142, at 315–16.

176 *See Developments in the Law*, *supra* note 18, at 1273 ("For instance, if a vice president of sales knew that his sales managers met regularly with competitors, he would be reckless not to inquire into the possibility that they were fixing prices.").

misconduct that has already occurred.[177] A potential ancillary measure can define rebuttable presumptions of non-recklessness for effective internal controls, further incentivizing the controls against corporate misconduct.[178] The Supreme Court has recognized a potential defense to RCO liability, an impossibility defense that precludes liability where "it would have been objectively impossible for [the officer] to prevent the underlying violations."[179]

Lastly, developing this new liability scheme as a catch-all tool for corporate corruption signals an adaption in the corporate regulatory regime that reflects modern conceptions of corporate decision making. Reshaping criminal law to combat the most egregious situations, such as the lack of prosecutions of the individuals responsible for the financial collapse, might serve as a first step to reforming the corporate regulatory regime and invite further reform to civil sanctions and private remedies to maintain a balance between different responses to corporate corruption.[180] And adapting these civil and administrative remedies will reduce the need to rely on the heavy hand of criminal sanction.[181] The likely reality is that most

The combination of these doctrines creates an anti-corporate misconduct tool that addresses the key doctrinal challenges posed by corporate criminal liability. It is flexible, can be shown by inference, and captures wrongful conduct with a relative but accepted measure of moral culpability. It serves the goal of deterrence by targeting those with the authority and in the best position to create reforms that address organizational issues that result in corporate misconduct.

V. CONCLUSION

As the forgoing sections have argued, prosecutors need a new catch-all tool to combat modern corporate corruption. Due to decentralized structure, the diffusion of responsibility, and the complexity of the modern corporation, prosecutors may have begun to see the demise of the primacy of the fraud statutes as a tool against corporate corruption, save securities fraud and its quasi-recklessness

177 *See id.* at 1274–75.

178 *See id.*

179 Sepinwall, *supra* note 107, at 387 (citing United States v. Park, 421 U.S. 658, 671–73 (1975)).

180 Olazábal & Abril, *supra* note 142, at 332–33 (calling for a reconciliation of intent standards in securities law enforcement to improve the regulatory regime's effectiveness).

181 *See* AYRES & BRAITHWAITE, *supra* note 33, at 35–36 (discussing how effective action at lower levels on the enforcement pyramid leads to less reliance on action at higher levels).

willfulness standard. By combining the doctrines of criminal recklessness and RCO liability, the government can coopt the flexible nature of reckless conduct and the affirmative duty that RCO liability creates. Combined with criminal sanction and all its stigmas and deterrent value, the government can fashion a scheme of criminal enforcement that specifically charges corporate management with the duty to prevent violations. But the scheme only punishes those who consciously disregard this duty and are therefore worthy of the moral condemnation that accompanies criminal punishment. "It seems . . . that if there were any logic to our language, trust would be a four-letter word."[182] Does a new criminal standard signal the return of trust between the public and corporate America? Probably not right away, but it's a start.

182 RISKY BUSINESS (Warner Bros. 1983).