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THE RESPONSIBILITY GAP IN CORPORATE CRIME

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Abstract: In many cases of criminality within large corporations, senior management does not commit the operative offense—or conspire or assist in it—but nonetheless bears serious responsibility for the crime. That responsibility can derive from, among other things, management's role in cultivating corporate culture, in failing to police effectively within the firm, and in accepting lavish compensation for taking the firm's reins. Criminal law does not include any doctrinal means for transposing that form of responsibility into punishment. Arguments for expanding doctrine—including broadening of the presently narrow "responsible corporate officer" doctrine—so as to authorize such punishment do not fare well under the justificatory demands of criminal law theory. The principle obstacle to such arguments is the large industrial corporation itself, which necessarily entails kinds and degrees of delegation and risk-taking that do not fit well with settled concepts about mens rea and omission liability. Even the most egregious and harmful management failures must be addressed through design and regulation of the corporation rather than imposition of individual criminal liability.

INTRODUCTION

Perhaps not since the early twentieth century has there been so much outrage at large about the malfeasance of the large corporation, and particularly the relationship of senior managers to such conduct. The sentiment is understandable. In reckoning with the wrongs of the big business firm in one serious case after another, a responsibility gap has emerged.[1] The financial crisis of 2008 crystallized the problem, which has only repeated across many scandals since.

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[1] *See, e.g.*, JEFF CONNAUGHTON, THE PAYOFF: WHY WALL STREET ALWAYS WINS (2012); CHARLES H. FERGUSON, PREDATOR NATION: CORPORATE CRIMINALS, POLITICAL CORRUPTION, AND THE HIJACKING OF AMERICA (2012); Matt Taibbi, *Why Isn't Wall Street in Jail?*, ROLLING STONE, Feb. 16, 2011; Jed S.

Consider, for example, the case of General Motors, in which over one hundred people have died in road accidents caused or aggravated by a faultily designed starter switch, and in which GM's managers can be said to have run a dysfunctional organization but not to have had knowledge of or involvement in the operative engineering decisions.[2] Or British Petroleum's Deep Horizon well, where eleven workers died in a preventable explosion that spilled five million barrels of oil into the Gulf of Mexico, and in which BP's managers ran an aggressive deep-sea drilling program but had no knowledge of or involvement in the decisions on the well that led to its cataclysmic failure.[3]

More recently, the huge banking firm Wells Fargo became an emblem of the seeming impossibility of controlling management of big financial services corporations.[4] The bank fired over 5000 employees for a widespread but simple form of fraud designed to boost sales and therefore bonuses: signing customers up for accounts they had not requested. The CEO, John Stumpf, forfeited millions in compensation and resigned, after enduring the usual severe congressional chastisement. But aside from approving the bank's management structure and compensation systems, he appears, at most, to have been the recipient of a couple of warnings that there might be a problem, perhaps buried in a mountain of information coming through his office. In any event, Stumpf cannot be

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Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS, Jan. 9, 2014; William D. Cohan. *How the Bankers Stayed Out of Jail*, THE ATLANTIC, Sept. 2015, at 20; Jean Eaglesham & Anupreeta Das, *Wall Street Crime: 7 Years, 156 Cases and Few Convictions*, WALL ST. J., May 27, 2016.

[2] Anton B. Valukas, *Report to Board of Directors of General Motors Company Regarding Ignition Switch Recalls*, May 29, 2014.

[3] Guilty Plea Agreement, United States v. BP Exploration & Production, Inc., Crim. No. 2:12-cr-00292 (E.D. La 2012); Information for Seaman's Manslaughter, Clean Water Act, Migratory Bird Treaty Act and Obstruction of Congress, United States v. BP Exploration & Production, Inc., Crim. No. 2:12-cr-00292 (E.D. La 2012); *The Spill*, FRONTLINE, Oct. 26, 2010; Raffi Khatchadourian, *The Gulf War: Were there any heroes in the BP oil disaster?*, THE NEW YORKER, March 14, 2011.

[4] Stacy Cowley, "*Lions Hunting Zebras*": *Ex-Wells Fargo Bankers Describe Abuses*, N.Y. TIMES, Oct. 20, 2016; Michael Corkery, *Wells Fargo Fined $185 Million for Opening Accounts*, N.Y. TIMES, Sept. 8, 2016.

shown to have directed fraud, just as in the mortgage-backed securities fiasco leading up to 2008 top managers of the mega-banks appear to have floated well above the details of how their derivatives traders executed any individual deals that might have crossed the line from ill-advised for the buyers to intentionally deceptive.[5]

There are many more such contemporary cases, of course. They are to be distinguished from those in which firms are smaller and top managers have their hands on operational details: Stewart Parnell, the CEO of the peanut company whose products killed people after he directed "ship it" in spite of lack of required safety testing;[6] or Donald Blankenship, the CEO of the coal company Massey Energy, whose obsessive efforts to limit the costs of the federal government's mine safety rules led to the explosion of the Upper Big Branch mine in West Virginia, killing nearly thirty workers.[7] (Both men stand convicted, though neither of homicide.)

The case of concern here is the one of what we can call a responsibility gap—one in which conventional theories of criminal liability do not easily, or even under strain, satisfy understandable deterrent and retributive urges directed at corporate managers.

The problem in such cases arises structurally from, and is unique to, the large corporate institution. To ascribe criminal liability only at the "line" level of the workers on the ground—the GM switch engineer, the BP rig workers, the Wells Fargo branch officials—is not just to come up short in ascribing responsibility to all those who bear it. The problem goes beyond that. There is a sense in the corporate context that if

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[5] For extended discussion, see SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE (2016); Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823 (2014).

[6] *See* Indictment, United States v. Parnell et al., Case No. 1:13-CR-12-WLS (M.D. Ga. Feb. 15, 2013).

[7] *See* Indictment, United States v. Blankenship, Crim. No. 5:14-cr-00244 (S.D. W. Va. Nov. 13, 2014); *see also* United States v. Blankenship, 846 F.3d 663 (4th Cir. 2017).

management created a corporate culture and a system of incentives that made the relevant conduct and ensuing harm likely or even inevitable, then the line workers—at least morally though not legally—have a kind of partial excuse. This is what is meant when people, including those who have sat on juries in several high-profile cases, say that the prosecution treated the low or mid-level worker as a "scapegoat."[8] It is not just that management is also responsible. It is that management appears to be *more* responsible.

Of course, the other fact generating the responsibility gap is that management is not present in such prosecutions for good reason: settled criminal law does not contain tools to punish this sort of thing. Managers in this type of case have mostly omitted to prevent another person's crime. And they have generally omitted to do so while lacking knowledge that wrongdoing was afoot. Neither act nor mental state, the loci to which criminal liability attaches, is present, at least not in most recognizable form.

In the context of criminal organizations, doctrines of conspiracy and accomplice liability, as well as specialized statutes such as RICO that address group criminality, deal effectively (some would say too effectively) with the role of the hands-off manager. But those tools work in that context only because of its factual texture: the thorough criminality of the organization's business plan makes it vastly easier to infer the mental state of managers with respect to the crimes of their underlings. Not so with the large legitimate business firm, in which the serious criminal episode, however disastrous, is an aberration in a project that overwhelmingly involves legal, indeed often intensely desired, behaviors. Former BP CEO Tony Hayward, in other words, was no Tony Soprano.

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[8] *See*, *e.g.*, Susanne Craig et al., *In Complex Trading Case, Jurors Focused on Greed*, N.Y. TIMES DEALBOOK, Aug. 2, 2013; Peter Lattman, *SEC Gets Encouragement from Jury that Ruled Against It*, N.Y. TIMES DEALBOOK, Aug. 3, 2012; *see also BP Engineer is Not Guilty in Case from 2010 Gulf Oil Spill*, N.Y. TIMES, Feb. 25, 2016; Katy Reckdahl & Margaret Cronin Fisk, *Ex-BP Executive Acquitted of Lying About Size of 2010 Spill*, BLOOMBERG, June 5, 2015.

The responsibility gap has long exerted pressure on the criminal law in corporate cases. The problem may be acute at present but it is not new. A twentieth century appreciation for harms associated with corporate production of goods, especially substances that enter bodies, long ago produced the peculiar doctrine of "responsible corporate officer" liability.[9] RCO, as I will call it, provides that in certain federal regulatory regimes—most prominently, the food and drug laws and the clean air and water laws—a corporate manager can be held criminally liable, at the misdemeanor level, if he stood in "responsible relation" to a violation of the law anywhere within the corporation, even if he did not act or advert with respect to the violation.[10]

RCO is not a solution to the responsibility gap. Even in current form it is objectionable, if perhaps bearable. But to make it a real solution for cases such as those we have discussed, legislators and judges would have to expand the doctrine into many other areas of federal regulation and criminal law. As crimes became more serious (felonies) and more intent-based (fraud, for example—the most commonly relevant crime in the financial sector), RCO would become more than a slightly embarrassing but circumscribed and perhaps tolerable exception to principles of individual fault. It would require a sea change in Anglo-American theories of punishment. Justification for such change, as we will see, is exceedingly hard to construct.

Corporate criminal liability is another mechanism by which American law attempts to close the responsibility gap. As I have argued elsewhere, in partial opposition to the

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[9] United States v. Dotterweich, 320 U.S. 277 (1943).

[10] United States v. Park, 421 U.S. 658 (1975); Todd S. Aagaard, *A Fresh Look at the Responsible Relation Doctrine*, 96 J. CRIM. LAW & CRIMINOLOGY 1245 (2006); Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371; Amiad Kushner, Comment, *Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context*, 93 J. CRIM. LAW & CRIMINOLOGY 681 (2003).

standard law and economics account, the doctrine can perform a blaming function that has utility.[11] It does not imprison, of course. But it does more than impose monetary sanctions under a criminal label. Criminalizing a corporation for a serious offense that is the product of the firm's structure and culture—that is, of its management situation—can send a powerful message to those who operate that firm, as well as similarly situated firms, about what sort of behaviors in the corporate context are condemnable. When fault is generalized from the individual to the firm, managers are, at least in part, objects of meaningful blame. We know this not only because it makes sense but also because large firm managers perpetually express intense fears and complaints about the Department of Justice and its corporate criminal liability cudgel.

The function of corporate criminal liability in narrowing the responsibility gap is underappreciated. Nonetheless, the doctrine cannot close the gap. Its limitations and flaws have been well documented.[12] Among them is the obvious point that a criminal conviction of a corporation simply does not authorize or involve individual punishment of managers. Any influence they experience from a corporate conviction is indirect and refracted. In many cases, contrary and pernicious influences on managers may overwhelm effects of the legal doctrine, as for example in a "last period" when managers

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[11] Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006).

[12] Reinier Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996); Daniel Fischel & Alan Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); Buell, *supra* note ___ [Blaming].

conclude that failure of the firm, or at least of their tenures, is the only alternative to overly aggressive or even criminal decisions.[13]

And in the cases in which the responsibility gap is of greatest public concern—the GMs, BPs, and Wells Fargos—actual imposition of corporate criminal liability may be off the table. To convict such a firm, especially of a serious felony carrying de-licensing and debarment implications, is often to put that firm out of business. That is, the death penalty may be the only available punishment. Because the economic and social structure of the United States depends so heavily on the existence and survival of such firms, prosecutors understand that full prosecution is not a realistic option. Thus we have the now institutionalized practice of settling corporate criminal cases with deferred and nonprosecution agreements.[14] These deals can impose discomfort on managers, particularly if they include provisions requiring reform of corporate functions. Sometimes such agreements are even accompanied by removal and replacement of managers. But the parade of corporate disasters that continue to unfold in an era dominated by these settlements—and the only growing public outrage about such disasters—suggests that DOJ's settlements, however punitive, fall short of closing the responsibility gap.

The dominance of the corporate criminal settlement brings us to the nub of the problem. The responsibility gap is symptomatic of deep unease with the large corporation itself: the too-big-to-manage problem; the mismatch between the scale and

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[13] *See* Jennifer Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 2012 U. ILL. L. REV. 691.

[14] *See* Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (A. Harel & K. Hylton, eds. 2012); Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775 (2011); Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537 (2015).

power of the institution and human capacity to control it; the American dependence on these economic powerhouses and our resentment of their tendency to do us wrong.

Making it easier to use criminal law to punish corporate managers for wrongdoing within corporations might yield some additional deterrence, and perhaps some public satisfaction. But only at the cost of badly compromising principles of punishment, not to mention the potential for costly excessive deterrence. More to the point, the impulse to expand criminal liability for managers is not going to get us what we seem so badly to want: a humanizing of the corporation—a compression of this unwieldy legal and economic institution down to a size or into a form that appears amenable to control and punishment. For that, we would need to look outside the criminal law to the law and institutions that created the modern corporation in the first instance and that bear primary responsibility for its constitution and regulation.

The remainder of this essay proceeds as follows. Part I documents and explains the responsibility gap. Part II shows why RCO, even in imagined new forms, cannot close the gap. Part III shows why corporate criminal liability also cannot close the gap. Part IV concludes by considering how we might think about the problem of corporate criminality outside of, and prior to, the criminal law—indeed, how we might think about it more ambitiously than the persistent impulse to imprison corporate managers has conceived of the problem.

I. The Responsibility Gap

To see the problem of the responsibility gap in corporate crime, let us consider three hypothetical cases. All three involve CEOs who bear some form of responsibility for serious cataclysms. Their jobs include many duties, but perhaps paramount among them

are duties to ensure that the relevant events do not transpire on their watches. All three have the capacity to prevent what happens.

We can be sure that the three receive ample financial rewards for doing the CEO job, in all likelihood higher rewards than any others associated with their companies. That compensation, together with the CEO title, reflects in part the burden that is placed on them to worry about and prevent the most damaging things that can happen to firms in their particular industries. Beyond that, at least according to some intuitions, their lucrative pay differentiates them from most in society in terms of the quality of behavior others are entitled to expect of them. In other words, much is expected from those to whom much is given.

This account of CEO responsibility, which is only sketched here, is an account of serious moral fault. Especially if one believes harm is relevant to fault, the account involves the kind of reasoning that justifies consequences to a wrongdoer that are more than financial. Traditional principles of criminal law, however, do not permit the first two of our three CEOs to be held liable. They permit liability for the third only on an expansive account of punishment for negligence. All three cases present serious problems on the dimensions of both act and mental state.

Case 1: Albert is the CEO of a company that manufactures an industrial gas in a process including highly volatile chemicals, one of which is compound X. Albert thinks to himself one morning, "I know I'm supposed to go to work because I'm in charge of an important company but I'd rather play golf and drink scotch today, and perhaps tomorrow as well." As he does with some frequency, Albert eschews the office that day and goes to his country club where he plays eighteen holes and then has scotches with his

buddies. Meanwhile, the company's plant blows up, killing all of Albert's employees who are inside. The cause is aging equipment used to handle compound X.

Albert has omitted to do anything. Indeed, that is precisely the problem in his case. He simply did not do his job, either generally with respect to ensuring adequate safety at his chemical plant or specifically with respect to showing up at work on the day in question. Anglo-American criminal law, for reasons usually viewed as compelling, has long rejected a blanket rule making omissions to act an allowable basis for violating criminal statutes.[15] Omission liability is not entirely ruled out but is permitted only if a criminal statute is expressly constructed around a failure to act (not filing a tax return, for example) or if law otherwise imposes a duty to act (that of a parent to provide medical aid to a sick child, for example).

Of course, the limiting principles for omission liability only push the question back one level: *When* is a legislature justified in prohibiting a failure to act and *what* duties among the countless duties in law justify imposing punishment for failure to act? In Albert's case, we can postpone discussion of the former question for the moment—because RCO is a highly germane example of a legislatively imposed requirement to act. As for legal duties, Albert has no currently recognized duty in criminal law to act to prevent the explosion at his plant. There is no CEO-employee or CEO-investor duty akin to that of parent to child, spouse to spouse, or doctor to patient. Even more implausible as a footing for criminal omission liability would be a duty running from the CEO to the public at large.

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[15] *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.2 (2d ed. 2003); Otto Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615 (1942); Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958).

Albert has a well-recognized (though still somewhat controversial) duty in corporate law to exercise reasonable diligence in preventing criminal violations within his firm.[16] But this is a civil duty that, due to common indemnification rules,[17] carries limited personal consequences to Albert in the event he violates it. An argument to transform that general duty of corporate officers and directors to monitor the firm for criminal violations into a rule of omission liability for any crime not prevented would be, to say the least, hard to construct.[18] Virtually all theorists agree that omission liability, if justified, needs careful circumscription—for both retributive and utilitarian reasons.[19] If Albert's duty of care in monitoring for crime could qualify as the sort of "duty imposed by law" that criminal omission liability takes as its foundation, then so too might many tort duties of care such as the duties of innkeepers, tour guides, universities, and so on.[20] On the dimension of act, then, the core of the task in closing the responsibility gap is to

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[16] *See* In re Caremark Int'l Inc. Deriv. Secs. Litig., 698 A.2d 959 (Del. Ct. Ch. 1996); Jennifer Arlen, *The Story of Allis Chalmers, Caremark, and Stone: Directors' Evolving Duty to Monitor* in CORPORATE LAW STORIES 245 (J. Mark Ramseyer ed. 2009); Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967 (2009).

[17] *See* 8 DEL. C. § 145.

[18] At least one author has attempted such an argument, but without persuasively showing how to cabin the theory. *See* Aagaard, *supra* note ___, at 1281-87.

[19] *See* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 234-44 (2009); MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 25-59 (1993); Larry Alexander, *Criminal Liability for Omissions* in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 121 (A. Shute & A.P. Simester eds. 2002); F.M. Kamm, *Action, Omission, and the Stringency of Duties*, 142 U. PA. L. REV. 1493 (1994); *see also* Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437 (2007) (arguing for substituting capacity to control for the act requirement as a way of explaining, among other things, justified liability for omissions).

[20] *See* Hughes, *supra* note ___, at 620; Alexander, *supra* note ___, at 139-41; *see also* Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547, 555 (1988) ("Given that contract and tort law is primarily compensatory, it would be absurd to suggest that every breach of a civilly imposed duty should also be criminally punished if that breach led to a criminally proscribed harm."). The Model Penal Code is puzzlingly oblivious to this problem, at least on the face of the Code and Commentaries. The Code qualifies for omission liability any duty "imposed by law," then says in the Explanatory Note that the "duty to perform the omitted act must have been otherwise imposed by law" with reference in an accompanying footnote to "a statutory duty, a contractual duty, or a duty arising from tort law." AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES § 2.01(3) & Explanatory Note 3 (including n.30).

specify and cabin the managerial duty that could give rise to any theory of omission liability.

Albert's mens rea is also a legal problem. He certainly had no knowledge or intent with respect to his facility exploding. The tragedy was perhaps the last thing Albert wanted to see happen at his company. If, as his lassitude suggests, Albert was unaware of the existence of the faulty equipment at the facility, he also was not reckless because he did not consciously disregard the relevant risk.

Albert, then, was at most negligent in choosing to play golf and drink scotch rather than attend to his work. Any theory of negligence liability, however, must specify the relevant risk. It is not sufficient for criminal negligence to find that Albert, in playing hooky from work, failed to think about riskiness in the world or even riskiness in the entirety of his company's business—risk in the air, so to speak. One cannot be liable for being a negligent person; one must be found to have been negligent with respect to something, namely a specifiable risk.[21]

To hold Albert criminally liable in connection with the explosion of dangerous compound X, we must conclude: that Albert failed to advert to *that* risk; that the risk was both substantial (more facts needed perhaps) and unjustifiable (likely the case, though at least in part a question of cost-benefit analysis); and that Albert's failure to advert was a gross deviation from the conduct of the reasonable CEO. In other words, we must

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[21] *See* Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. LAW & CRIMINOLOGY 597 (2001) (exploring in depth the complexities of liability for general versus specific risk-taking); Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES IN LAW 333, 375-81 (2002) (showing the arbitrariness and malleability of a "harm within the risk" approach to determining risks with respect to which a negligent actor is responsible for his negligence). Hurd and Moore, if I understand them, set out to "defend a holistic view of negligence according to which all risks are taken into account in judging negligence," *id.* at 339, but in spending most of their effort debunking "harm within the risk," they do not say a great deal about their alternative approach to specifying responsibility for risk other than that it relies on proximate cause analysis.

conclude not only that Albert should have gone to work more often but that, while there, he should have attended more to the matter of the equipment used to handle compound X.

This will depend on knowing more about the structure of Albert's company, industry standards, the presence of any warning signs of risk that Albert failed to notice, and so on. Suppose, for example, that Albert—in part to relax himself on the golf course—had recently hired a safety expert with a sterling reputation in the industry and told him, "Do your job, I don't need to know about anything you do unless it's a major cost item." Albert might bear serious responsibility for the deaths—for example, because he could have done much more to monitor the expert's work—yet not fit even criminal negligence doctrine.

Then there is the additional problem of justifying punishment for negligence. Even if the risk of the explosion was substantial and unjustifiable, and Albert's failure to be aware of it was a gross deviation from the conduct of a reasonable CEO, does Albert deserve to go to prison for the deaths of the employees? Many members of the public undoubtedly will think so. But their intuitions will be driven in large part by the harm associated with Albert's negligence, a matter of what some would argue is largely irrelevant moral luck.[22]

One analytical view—perhaps reflected in the positive criminal law of most jurisdictions in the United States—would be that any punishment for negligence must be proportionately mild and that the moral luck factor cannot bootstrap a case of relatively minor culpability into a major one.[23] Other theorists of the criminal law would insist that

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[22] *See* Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. LAW & CRIMINOLOGY 1075, 1105-20 (1996) (and sources cited therein).

[23] Perhaps the hardest cases to deal with on this view are the negligently caused fires (or stampedes, etc.) in public facilities that claim dozens or hundreds of lives. For example, The Station nightclub fire of

a failure to advert to risk such as Albert's can never justify criminal condemnation because the absence of any choice on Albert's part means he has committed no moral fault.[24]

Case 2: Brad is the CEO of a very large global banking firm. His firm uses a bonus system to generously compensate traders who maintain profitable books. In the occasional year when the firm's profits are down, layoffs of traders are common. Lack of profitability in a trader's books is the primary basis the bank uses for selecting whom to layoff in such circumstances. A group of five traders in the bank's Frankfurt office who trade derivatives in currency markets make a bad bet, going long on a particular group of currencies that plummet due to a sharp unanticipated increase in oil prices. The traders hide the increasing hole in their positions by deliberately mismarking their books for six months. When their losses reach $1 billion, the truth emerges and Brad's bank is forced to announce a huge loss in earnings. Overall economic conditions are very poor and nervous creditors lose confidence in the bank, calling in loans and refusing to do new deals. Within two months, Brad's firm is bankrupt. Many investors and employees are wiped out.

The responsibility gap is perhaps more evident in Brad's case than in Albert's. No one died in Brad's case but many more people were harmed, some very painfully. More

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September 2006 in West Warwick, Rhode Island killed 100 and injured many more. The fire was caused by careless handling of a musical act's pyrotechnic show, coupled with installation of flammable insulation in the club. A co-owner of the club pled no contest to 100 counts of involuntary manslaughter and was released on parole after serving three years in prison. Eric Tucker, *Co-Owner of R.I. Club Where 100 Died to be Released Early*, BOSTON GLOBE, Jan. 17, 2008; *see also* Commonwealth v. Welansky, 316 Mass. 383 (1944) (owner of Cocoanut Grove night club held liable for homicide for deaths of hundreds of patrons who perished in a fire in a facility without adequate fire escapes).

[24] *E.g.*, ALEXANDER & FERZAN, *supra* note ___, at 70-85; for contrary views on the basic moral question, see, e.g., Seana Shiffrin, *The Moral Neglect of Negligence* in 3 OXFORD STUDIES IN POLITICAL PHILOSOPHY (D. Sobel, P. Vallentyne & S. Wall eds. forthcoming 2017); Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. LAW 545 (2012).

importantly, Brad actually did something. Brad implemented a compensation system that, as we know only too well after the last decade or more of banking scandals, was a powerful fuel for a crime committed by others under Brad's supervision. Brad also relevantly failed to act: by not monitoring the books of his traders sufficiently to detect and prevent emerging fraud.

But Brad's actions in designing a compensation system are not relevant actions to the crime of fraud, the gravamen of which is deceit. Brad was in no way involved in the decisions to mismark the Frankfurt books and thus cannot be said to have engaged in the actus reus of fraud, or to have conspired to do so or aided and abetted such action. As a basis for satisfying the act requirement, Brad's omission to monitor the books presents the same problems of duty as did Albert's omission to monitor plant safety.

Even though Brad appears to have thought a bit more about his traders than Albert thought about his safety processes, Brad's mens rea is even more of an obstacle than Albert's to constructing a theory of criminal liability. While in Albert's case it is conceivable that the relevant crime (homicide, most likely) could be committed negligently, in Brad's case the relevant crime is fraud. The mens rea for fraud is the specific intent to defraud the victim.[25] Fraud, which in the criminal context is constituted by purposeful deception, cannot be committed negligently. I have argued that criminal fraud cannot be committed recklessly either.[26] There is no such thing as "oops I defrauded you" or even "maybe this will defraud you but I'm going to do it anyway."

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[25] Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511 (2011).
[26] *Id*. at 555-61.

The relevant statutes require a "scheme to defraud," which necessarily involves planning.[27]

The mens rea problem in Brad's case will be common to many, though certainly not all, cases of corporate crime. White collar crimes such as fraud, obstruction of justice, and bribery often require high levels of mens rea for liability—typically knowledge of certain facts plus specific forms of intent, such as the purpose to defraud, to obstruct legal process, or to influence official action. ("Regulatory offenses" that involve strict liability will be discussed shortly.) In many cases, corporate managers can create fertile conditions for those under their supervision to commit such crimes without intending that crimes be committed. Indeed, though he exerted little effort to make it happen, Brad would no doubt have preferred that his traders return healthy profits and earn lavish bonuses while remaining assiduously within the confines of the law.

Case 3: Clara is the martinet CEO of an automobile company. Determined to succeed in the intensely competitive, low margin market for small sedans, Clara orders her team to design a new car following a "rule of fifteen": under no circumstances should the car cost more than $15,000 or weigh more than 1500 pounds.[28] Clara then turns her relentless focus to the company's core and most profitable line of business, trucks and SUVs. The team, which does not brief Clara on any details during the development process, delivers a car on time that complies with Clara's rule of fifteen—but only by including a cheap, vulnerable fuel tank that explodes easily on rear impact. After the car reaches market, collisions involving tank explosions kill five hundred people.

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[27] 18 U.S.C. §§ 1341, 1343; 17 U.S.C. § 78j; 17 C.F.R. § 240.10b-5.

[28] *Cf.* Mark Dowie, *Pinto Madness*, MOTHER JONES, Sept. 1, 1977; Malcolm Gladwell, *The Engineer's Lament*, THE NEW YORKER, May 4, 2015.

Loosely speaking, with respect to the wrongdoing and harm, Clara does more and has "more" mens rea than either Albert or Brad. Still, justifying criminal punishment of Clara is problematic—including in ways not as evident in the cases of Albert and Brad. On the negative side of Clara's ledger, many people are dead as a result of her express directive to her employees, which determined not the specifications but the nature of the car they would build. It is possible to say that Clara did more than omit to prevent the faulty conduct in this case (engineering of the fuel tank). On the dimension of action, Clara's case begins to approach, though not reach, those of the micromanaging CEOs of smaller companies who were convicted for their direct involvement in the shipments of tainted peanuts or the explosion of the coalmine.

It is on mens rea that Clara's case more pointedly raises the problem of the responsibility gap. Her rule of fifteen, elevating form over substance, followed by her lack of interest in knowing how the rule was satisfied—and her management style discouraging reporting of bad news—appear to make her more blameworthy than Brad, who simply paid salespeople on commission, and certainly more blameworthy than Albert who just ignored what the relevant employees were doing. Among the three cases, Clara's most displays what Ken Simons calls culpable indifference to risk—a callousness or morally obtuse attitude toward consequences that arguably aggravates blameworthiness beyond the minimum culpability required for recklessness or negligence.[29]

Clara, of course, did not act with knowledge or intent with regard to the collision deaths. Indeed, and not to her credit, Clara's management approach virtually guaranteed

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[29] Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992).

that she would be unaware of sufficient facts about the automobile to satisfy these demanding mental states. As to recklessness or negligence—whether Clara considered and disregarded death risk or failed to advert to it when she should have—her case is stronger than Albert's and Brad's with respect to specificity of risk. In Albert's case, one had to equate his failure to attend to his entire job with failure to attend to (or his disregard of) the risk of plant explosion. In Brad's case, one had to equate his failure to attend to (or his disregard of) the risk of bonuses incentivizing misconduct with failure to attend to the risk that bonuses would stimulate fraud in the Frankfurt books. And, even then, negligence does not, as we saw, work as a mens rea for fraud. Clara, however, specified limits on the construction of the sedan that necessarily involved risks of fatal accidents due to cheap construction of the car, at least at that level of specificity.

But this brings us to the additional problem with Clara as a case of recklessness or negligence. For either mental state, the risk must have been both substantial and unjustifiable. Cars crash and crashes kill people. This is, at least for now, a fact of the automobile business. Given the size of Clara's industry, even substantial numbers of crashes are justifiable—or we would not build cars and drive them. Clara is also allowed to offer a cheap car on the market. The question of the point at which Clara's "rule" becomes one of unjustifiable risk is a complicated matter of cost-benefit analysis, industry standards, and regulatory frameworks.[30] (I am assuming, of course, that the fuel tank on the car did not violate any then-existing laws.) Is a rule of fifteen not justifiable but a rule of twenty acceptable? Or is twelve the number below which Clara could not go without becoming a criminal?

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[30] Kenneth W. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. REV. 1, 62-66 (2012).

Criminal negligence relatedly requires that the failure to advert to risk constitute a major departure (a "gross deviation") from the conduct of the reasonable person in the actor's situation. The justifiability of the risk and the reasonableness of failing to attend to it are related and overlapping matters. On both scores, the norms of Clara's industry and the complex questions of cost-benefit analysis that govern (or ought to govern) it will have much to say about how to judge her case. This is so with respect to reasonableness not only because reasonableness is generally about norms but also because the reasonableness inquiry in criminal negligence depends in large part on how subjective to make the inquiry, that is, on how much of the actor's individual "situation" to take into account in determining what was reasonable.[31]

The problem of uncertainty about the justification line (as well as about reasonableness) is of course general to reliance on criminal negligence liability, and a reason some would reject negligence in the criminal law altogether. But the problem is particularly acute in the context of corporate crime, and especially in managerial liability for corporate crime, because lawful industries almost always involve justifiable levels of risk and managers have the central job of determining how much of what kinds of risks to take. When things turn out badly—when explosions kill people, for example—it may appear obvious that too much risk was taken when in fact the question, considered ex ante, is much less clear.[32]

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[31] *See* ALEXANDER & FERZAN, *supra* note ___, at 81-85. Even the thoughtful drafters of the Model Penal Code recognized this question to be essentially insoluble through rules, preferring to leave the matter of how far to subjectivize reasonableness to the discretion of the jury. *See*, *e.g.*, AMERICAN LAW INSTITUTE, *supra* note ___ § 210.3 cmt. 5(a) (the phrase "from the viewpoint of a person in the actor's situation" in the statute governing reasonableness for purposes of reducing murder to voluntary manslaughter is "designedly ambiguous" and has to do whether the facts "arouse sympathy in the ordinary citizen").

[32] *See* Simons, *supra* note ___ [statistical].

There are thus two prominent features of the corporate institution that give rise to the problem of the responsibility gap. First, the size and complexity of the large firm mandate division of labor and delegation. Indeed, those are express objectives of the legal and economic concept of the firm, pursued in the name of efficiency. As tasks divide and flow down a corporation's various ladders and ultimately lead to regrettable events, it becomes difficult to assign to those at the top, who initiate the flow of tasks, the sort of legal responsibility with which criminal law is comfortable.

Second, while the matter varies a great deal by industry, risk-taking in the corporate context is, generally speaking, beneficial and encouraged. It is thus much more difficult than in many other contexts for criminal law to specify—and thus to provide reasonable notice of—the degree and types of risk-taking that are clearly enough out of bounds to warrant punishment.[33]

II. THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

A. *Existing Doctrine*

RCO is actual law that seeks to close the responsibility gap—as well as being good evidence that the gap is a real problem, since the doctrine has persisted for decades and is embodied in some federal statutes.[34] As explained by the Supreme Court in the pivotal *Park* case, liability extends under RCO to "all who had a responsible share in the furtherance of the transaction which the statute outlaws." Park was the CEO of a large

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[33] Several helpful commenters on drafts of this and related papers have pointed out that these are really "large organization" problems, not strictly corporate problems. This is true. But I focus here on the legal firm (not just public corporations but also nonprofits, partnerships, and so on) because that is the institution that has generated the great majority of calls for legal action when things have gone wrong. The military is another large institution in which problems of managerial responsibility arise with some frequency. The normative structure there is sufficiently different from the corporate context that I believe it requires separate treatment. *See* Jenny Martinez, *Understanding* Mens Rea *in Command Responsibility*, 5 J. INT'L CRIM. JUSTICE 638 (2007).

[34] United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Park, 421 U.S. 658 (1975); *see also* 33 U.S.C. § 1319(c)(6); 42 U.S.C. § 7413(c)(6).

food company with many facilities including a warehouse in which regulators discovered rodent infestation. It was sufficient for conviction, the Court said, "[that] by virtue of the relationship [Park] bore to the corporation, [he] had the power to prevent the act complained of."[35]

The Court admitted and accepted that liability in the case was imposed without regard to culpability and on the basis of mere omission to act. (The rule, the Court said, dispenses with any requirement of "consciousness of wrongdoing."[36]) The government, it said, makes out its case if it "introduces evidence sufficient to warrant a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and he failed to do so."[37]

RCO is fiat. The doctrine sweeps away the problems of action and mental state by dispensing with inquiry into either. The *Park* Court was explicit in its intention to craft a doctrine—or find that Congress had crafted one—designed to close the responsibility gap: "The requirements of vigilance and foresight imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them."[38]

While existing RCO takes away with one hand, it gives back with another that perhaps makes the fiat of RCO tolerable. The Federal Food Drug and Cosmetic Act,

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[35] *Park*, 421 U.S. at 671.
[36] *Park*, 421 U.S. at 670.
[37] *Park*, 421 U.S. at 673-74.
[38] *Park*, 421 U.S. at 672.

from which the doctrine sprung when the Court interpreted the statute to encompass RCO in *United States v. Dotterweich*,[39] imposes strict liability at the misdemeanor level only. The same is true of two other federal statutory regimes in which strict liability RCO is expressly adopted: the Clean Water Act and the Clean Air Act.[40] Park, the food company CEO, took his case all the way to the Supreme Court after suffering a punishment of a $250 total fine for five counts of conviction. Even still, the Court was careful to allow that RCO permits an excusing defensive claim that the officer was "powerless" to prevent or remedy the relevant violation of law.[41]

The misdemeanor limitation on RCO is no happenstance. It is traceable to RCO's origins in a group of common law decisions involving criminal misdemeanor liability for matters that look, through a modern lens, quasi-criminal at most. For example, an eighteenth and nineteenth century practice was to grant utility-like rights to companies to build specific turnpikes and railroads by statute, which statutes included misdemeanor penalties—imposed through criminal prosecution—for failure to construct or maintain the thoroughfare as specified. These penalties (fines) could be imposed on the managers and directors of the corporation governed by the statute, sometimes regardless of proof of knowledge of the relevant failure.[42] A related line of decisions had to do with

[39] 320 U.S. 277 (1943).

[40] Responsible corporate officer liability for antitrust violations has also been found to apply under the Sherman Act. United States v. Wise, 370 U.S. 405 (1962).

[41] *Park*, 421 U.S. at 673.

[42] *E.g.*, Kane v. People, 8 Wend. 203 (Ct. Correction of Errors N.Y. 1831) (holding a director of a road and bridge company liable for a misdemeanor for failure to maintain a turnpike as required by a statute granting authority to build the road, and affirming a penalty of a $200 fine); Rex v. Medley, 172 Eng. Rep. 1246 (1834) (approving misdemeanor convictions of directors of a gas company for nuisance in polluting the Thames River, regardless of whether the directors were ignorant of what the company did); *see also* People v. Clark, 8 N.Y. Crim. R. 169 (Ct. Oyer & Terminer 1891) (approving misdemeanor indictment of the president and directors of a railroad corporation for the company's use of statutorily banned stoves to heat its rail cars, but stating that their "personal participation" in the violation must be proved at trial). These decisions, in turn, may have some provenance in matters of quasi-military responsibility involving colonial corporations. *See* King v. Hollond, 101 Eng. Rep. 340 (1794) (approving prosecution of an official of the

misdemeanor criminal liability for breach of responsibilities to keep the peace or enforce the law by public office holders, used as a vehicle for removing a defendant from office.[43]

These predecessor decisions, while involving actions of prosecutors, have a closer analogue in civil actions of the modern regulatory state, such as Securities and Exchange Commission enforcement proceedings, than in present-day criminal prosecutions.[44] The *Dotterweich* Court, in accepting a theory of guilt in the absence of mens rea, relied heavily on a body of decisional material that was explicitly regulatory in its orientation and that did not involve serious criminal punishments.[45] When the Court, in a crucial but conclusory passage, invoked "the historical conception [that] a 'misdemeanor' makes all those responsible for it equally guilty," it oddly cited to an 1833 Supreme Court case standing for the procedural proposition that at common law there could be no accomplices to misdemeanors, only principals.[46] Perhaps tellingly, the Court then refused to define what it meant by "the class of employees" who are liable because they "stand in responsible relation" to the offense, saying the matter would be "too treacherous to define

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East India Company for failing to pursue military action in the Indian state of Madras, as required by a statute granting the corporation its colonial authority) (cited in *Kane*).

[43] *E.g.*, Coffey v. Superior Ct., 147 Cal. 525 (1905); Hopewell v. State, 22 Ind. App. 489 (1899); State v. Gluck, 49 Kan. 533 (1892); People v. Meakim, 133 N.Y. 214 (1892); People v. Herlihy, 73 N.Y.S. 236 (A.D. 1st Dept. 1901); *see also Criminal Law: Liability of Public Officers for Neglect of Duty*, 4 U. FLA. L. REV. 264 (1951).

[44] Perhaps RCO appeared in twentieth century American law due in part to confusions, or obfuscations, about fundamental procedural differences of the eighteenth and early nineteenth centuries and between the American and English systems. For example, one relevant case involved a criminal prosecution in which the State of New Hampshire appears to have been pursuing, through criminal prosecution, a tort-like wrongful death action against the directors and superintendent of a road to recover funds on behalf of a victim killed during road construction. State v. Gilmore, 24 N.H. 461 (1852). In another action, from England, the Attorney General used a misdemeanor indictment as the vehicle for obtaining an injunction preventing a railroad company from operating its trains in excess of a statutorily permitted speed. Attorney-General v. London & North Western Railway Co., 1 Q.B. 78 (1899).

[45] *Dotterweich*, 320 U.S. at 280-285. *See*, *e.g.*, United States v. Balint, 258 U.S. 250 (1922) (validating indictment for failure to pay tax on narcotics); Commonwealth v. Mixer, 207 Mass. 141 (1910) (affirming conviction for transporting liquor without a license); Commonwealth v. Wheeler, 205 Mass. 384 (1910) (affirming convictions for selling milk with less than the statutorily mandated quantity of solids); Commonwealth v. Farren, 91 Mass. 489 (1864) (validating indictment for selling adulterated milk).

[46] *Dotterweich*, 320 U.S. at 281; *see* United States v. Mills, 32 U.S. 138 (1833).

or even to indicate by way of illustration" and must be left to juries.[47] Thus RCO's murky provenance lies nearly outside the criminal law and cannot be cited as authority for the novel concept of punishing corporate management failures with imprisonment.

Some have attempted to read *Park* and the RCO court decisions more narrowly, arguing that *Park* implied that CEO negligence is required for the imposition of RCO liability.[48] This is not persuasive. The argument rests largely on a fact in *Park* that the Court did not dwell on or analyze: that, some time before the warehouse inspection in question, Park had received a letter from the FDA notifying him of rodent infestation in a facility in another city and that, in response, he had merely directed his employees to address the matter. The Court's language about lack of mens rea and omission liability is clear. The Court did not engage in any negligence-like analysis by, for example, addressing the level of risk involved or Park's particular thinking, or lack thereof, with regard to the risk.

Current RCO, then, is harsh but also narrow and lenient. It is not a general doctrine of liability, like conspiracy or accomplice liability. It must be initiated by Congress and arise in the courts through statutory interpretation. The specialized field of antitrust law aside, only three federal statutory schemes contain RCO, all of which deal with safety regulation of substances that all Americans put into their bodies. No statute or court has embraced RCO for felony liability and there is an excusing defense built into RCO to alleviate its strict liability harshness.

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[47] *Dotterweich*, 320 U.S. at 285.

[48] *See* United States v. DeCoster, 828 F.3d 626 (8th Cir. 2016); *see also* Aagaard, *supra* note ___, at 1251-63 (arguing that *Park* did not resolve the question of RCO's mens rea requirements and that the mental state requirement for RCO varies by statute). Whether prosecutors in fact tend to select cases involving negligence facts when deploying RCO is another matter than whether the doctrine requires negligence.

We could, therefore, deal with RCO as a question of whether this modest compromise with principles of retributive desert is justified on utilitarian grounds—specifically those grounds of protecting public health and safety in the corporate context that the Supreme Court has named as motivating RCO. (I take as given that criminal liability in the absence of both act and culpable mental state poses serious retributive problems, at least as a facial matter; after all, the Supreme Court has ruled at least one such law unconstitutional.[49])

The germane question with respect to the responsibility gap, however, is whether RCO could be justified in broader form, on the dimension of crimes or punishment severity. The desire to see managers punished in cases like Albert's, Brad's, and Clara's extends the question of RCO well beyond food, air, and water law and far above misdemeanor fines of a few hundred dollars. Perhaps the most salient question of today in the field of corporate crime is whether, for example, a bank manager could be held liable for fraud, or a similarly serious offense, for failing to prevent his traders from breaking the law. Indeed the Justice Department, without admitting that it well knows the legal obstacles it faces, recently issued forceful guidance to its prosecutors (the "Yates Memo") requiring them to focus more intensely on pursuing individual prosecutions in investigations of corporate wrongdoing—guidance plainly issued defensively after years of criticism for insufficient zeal in prosecuting corporate managers.[50]

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[49] Lambert v. California, 355 U.S. 225 (1957); *see also* Peter W. Low & Benjamin Charles Wood, Lambert *Revisited*, 100 VA. L. REV. 1603, 1617-18 (2014) (stating that one (overly narrow) reading of *Lambert* is that "[a] legislature may not create strict liability *mala prohibita* crimes of omission").

[50] U.S. Dep't of Justice, United States Attorneys' Manual § 9-28.000; U.S. Dep't of Justice, *Memorandum of the Deputy Attorney General on Individual Accountability for Corporate Wrongdoing*, Sept. 9, 2015.

B. Expanding the Doctrine?

We can move quickly to the heart of the matter by dispensing with the idea that this sort of liability could be justified in the absence of any culpability inquiry at all. Serious constitutional questions aside, lengthy imprisonment (perhaps any imprisonment) for failing to prevent another from committing a crime in spite of exercising due care could only be justified by the kind of "even punishing the innocent deters crime" utilitarian reasoning that does not fare well under cost-benefit analysis. Further, that reasoning fails utterly in a system of justification based in part, as ours is, on some version of negative retributivism—roughly, the belief that some requirement of blameworthiness as a condition of punishment at least presumptively constrains the state's power to punish in the cause of crime prevention.

The central question is thus how a modified version of RCO requiring recklessness or negligence with respect to the legal violation in question would fare under justification analysis. Consider, for example, what the United Kingdom has recently done. A new statute punishes by up to seven years in prison what one might call reckless bankruptcy of a bank.[51] The offense elements are: (1) that the defendant was a "senior manager" of a "financial institution" (defined terms), (2) that the defendant participated in a decision or failed to take steps to prevent a decision, (3) which decision caused the failure of the financial institution, (4) the defendant was aware at the time of the decision that implementing the decision risked the failure of the institution, and (5) the defendant's "conduct in relation to the taking of the decision [fell] far below what could reasonably be expected of a person in [the defendant's] position."

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[51] UNITED KINGDOM FINANCIAL SERVICES ACT 2013 § 36.

This is not quite RCO because it does not hold the manager liable for someone else's offense. It criminalizes the "act" of managing a bank into bankruptcy, specifically an outcome-determinative decision (or failure to stop such a decision) with respect to insolvency. But the statute begins to look a bit like RCO in its idea of a crime of, so to speak, recklessness at the helm.

Even still, the statute is arguably symbolic. The term "financial institution" is defined to include only large and systemically important firms. It will be quite rare for such a firm to land in bankruptcy, rarer still that a specific management decision will be identifiable as having caused that bankruptcy, and even rarer that a prosecutor will pursue such a case and that a jury will arrive at a decision to convict because the conduct fell "far below what could reasonably be expected." It is doubtful that any UK court will ever send a manager to prison under the authority of this law.

But the statute is informative if taken a bit more seriously. It imposes a kind of recklessness standard: the manager must have considered the risk of failure and his decision to go forward in the face of the risk must have fallen "far below" (*i.e.*, grossly deviated) from the conduct of a reasonable manager in the situation. Both of these elements of the statute's fault standard are confusing. On the first element, when does a manager of a financial firm know that his decisions risk insolvency? Arguably all the time, since some measure of managing a bank profitably and competitively in today's financial markets necessarily requires taking on a degree of leverage that implicates a myriad of risks, not least the risks—the known unknowns—associated with potential global or commodity-specific financial crises. Without more detail, it cannot be said in any coherent way that it is blameworthy for a bank manager to risk insolvency.

A similar problem affects the "far below" element of the statute's fault standard. If chiefs of financial services firms necessarily must run insolvency risks then how much risk is too much to have been reasonable? That will be for a jury to decide, presumably on the basis—one might hope—of a tutorial from dueling experts about how banks are operated. It is hard to imagine how such a tutorial could produce, except in an extravagant case of total mismanagement, the kind of clarity one would want for a criminal conviction.

Consider, for example, the case of JP Morgan's derivatives traders in London, one of whom became known as the infamous "London Whale."[52] Robustly incentivized by a bonus compensation system and determined to solve their own problem in order to avoid management approbation, these traders dug a deeper and deeper hole in their books while concealing the problem by mismarking their positions. The hole reached $1 billion before the facts came out and Morgan had to admit that it had seriously defrauded its own shareholders.

Suppose that admission, contrary to the actual case, had cratered the entire bank and that something like the UK statute applied. Would the top manager of JP Morgan belong in prison because he used financial incentives to encourage his derivatives traders to take risk? Of course not. The banking industry has run on bonusing its salespeople forever. That decision could not possibly meet the fault standard, nor could some strained substitute, like a failure by the CEO to decide at some point to institute a more onerous system of controls on how traders across the massive bank mark their books.

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[52] *See* Indictment, United States v. Martin-Artajo, Crim. No. 13 Crim. 707 (S.D.N.Y. Sept. 16, 2013); In re JPMorgan Chase & Co., United States Secs. & Exchange Comm'n Exchange Act Release No. 70458 (Sept. 19, 2013).

The two central problems here are not specific to the UK statute's approach or to the banking industry. The first problem is the application of the risk inquiry involved in criminal recklessness and negligence to contexts in which our corporate-capitalist economic and social order has placed a high value on the benefits of the relevant activity. Corporate crime is not Russian roulette, or drag racing, or drunk driving, or angry fights inside homes or outside bars. It is embedded in economic activities—making food and medicine, manufacturing cars, extracting energy resources, providing credit and investment opportunities—that are both highly valued and necessarily entail risks, financial and physical.

The problem of risk specification is not entirely hopeless. To return to our example cases, one can see a path to criminal recklessness findings if Albert had been told, the day before his golfing and scotch hiatus, that the equipment for handling compound X was wearing out and at peril of immediate failure; if Brad's bank had a series of cases in which his bonus compensation system led directly to traders fraudulently mismarking their books and Brad nonetheless pressed ahead with the same compensation system; or if Clara had been told that her "rule of fifteen" could only be satisfied by using a fuel tank that might not be safe and she said to build the car anyway.

These are quite likely reckless CEOs. But, with additional facts like these tying them down to the harm, they also begin to look more like those who have been convicted in the smaller company cases—the peanut CEO who said "ship it," the coal CEO who micromanaged the handling of safety processes, and the egg company bosses whose facilities were infested with contaminants.

The BPs, GMs, and Wells Fargos—and their many analogues of recent years—lack this sort of evidence with respect to top managers. Recklessness in such cases can be argued only in an overbroad way: that, by virtue of the CEO's position and the industry in which she was employed, she was necessarily aware of the risks of what can go wrong in her business; if things went wrong, it was because she "disregarded" those risks by not doing more to prevent what resulted. Such an argument does not hold up. It would equate recklessness with any decision to spend less than all of the firm's available assets on prevention of law violations.

The second problem is that, unlike the paradigm case of a reckless or negligent violent crime outside the business context, corporate crimes occur within large firms that are designed to divide and delegate tasks so that very large projects remain humanly possible and can be accomplished reasonably efficiently. When we couple the necessity of general risk-taking in a firm with the separation of management from any individual risky act, it becomes especially difficult to construct an account of criminal-level fault for a specific instance of harmful behavior.

Take, for example, the explosion on BP's Deep Horizon rig. It appears that BP management pushed more aggressive drilling in deeper locations, perhaps on an insufficiently deliberate schedule. At some level of factual, even if not legal, causation, there is a relationship between that management agenda and what happened on the well. But the well exploded only because a small group of engineers on the rig failed to respond correctly to clear warning signs that should have led them to call urgently for help from shore—reckless or negligent conduct that BP's global management had no awareness of or participation in.

It is fair to say that those who manage a company such a BP have undertaken a duty not to egregiously pollute the oceans. We need not specify for present purposes the various potential sources of that duty in contract law, corporate law, environmental regulation, and tort law. Suffice it to say that the CEO of a petroleum company has a duty to do something like "extract oil at a profit without violating the law."

The complication is not so much in describing the duty as it is in specifying how one would determine, for purposes of criminal liability, whether there had been compliance with that duty. The context of the large corporation entails, indeed requires, that the CEO be able to delegate to others virtually all of the tasks associated with complying with the duty to extract oil without breaking the law. So the CEO's duty is more like a duty to delegate properly than a duty to accomplish the required mandate itself. If the CEO has delegated properly, then punishing the CEO if things go wrong downstream would appear to be employing a kind of vicarious liability that is at odds with fundamental principles of individual fault in criminal law.

This would be so *even if* we could solve the vexing problem of determining when a CEO has delegated properly as opposed to deficiently. But such a solution is not likely to be easily at hand. Has Albert delegated properly if he hires a safety expert so he can relax on the golf course and then does nothing to follow up (indeed, if the purpose of the hire was to facilitate golf)? Has Brad delegated properly if he reminds his traders each time he pays their bonuses that they must not commit fraud? Has Clara delegated properly is she tells the design team, "Follow the rule of fifteen but keep the car safe." These, after all, are the sorts of clichéd management statements and actions that are typically put forward in defense of a CEO's conduct after disaster strikes.

For RCO to operate in a broader way—across more industries and crimes and into more senior management suites—the doctrine would need to adopt a concept of reckless or negligent management of large corporations that appears elusive. The idea is too generalized: risk-taking across the entirety of what a firm does or over the entire set of law violations that any employee might commit in the course of his or her job, that is, over the entirety of the compliance function and over everything senior management delegates.[53] Aside from straining principles of individual blameworthiness, such an approach would require radical change in the conception of who corporate managers are in the social order—perhaps more like parents than professionals—and would certainly alter the set of persons willing to assume such positions.[54]

III. Corporate Criminal Liability

Criminalizing the corporation is another way to come at the responsibility gap. Utilitarian supporters of corporate criminal liability argue that the threat of criminal sanctions against the firm—coupled with some system that credits self-policing—encourages directors and officers of corporations to use management policies and practices to discourage crime by employees, principally by raising the probability of sanction through effective compliance programs that include reporting violators to the

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[53] This is, I believe, an implementation problem that presents a fundamental obstacle even if one is prepared to cross the initial threshold of arguing that the dangerousness and accompanying benefits of industrial activities justify imposing criminal negligence liability, and perhaps even placing the burden of proof of due care, on corporate officers. *See* R.A. Duff, *Strict Liability, Legal Presumptions, and the Presumption of Innocence* in APPRAISING STRICT LIABILITY (Andrew Simester ed. 2005).

[54] A further problem, which will not be explored here, is the extent to which retributive principles would require affording a mistake of law defense to this form of omission liability, in at least some circumstances, given the scale and complexity of criminal regulatory provisions that now govern many industries. *See* Hughes, *supra* note ___, at 602-03; *see also* Alexander, *supra* note ___, at 139-42 (raising similar legality concerns with respect to arguments for broadening status relationships giving rise to duties to act at pain of criminal liability).

government.[55] (Utilitarian skeptics wonder why criminal liability, as opposed to civil sanctions, is necessary to create such incentives; we will not divert into that debate.[56])

A convenient fact for utilitarians about corporate criminal liability is that it cannot lead to individual punishment of managers. They thus need not address the questions whether there are negative retributive constraints on punishment in this context and whether those constraints cancel benefits of the doctrine. This utilitarian orientation, however, which dominates analysis of corporate criminal liability, causes many to miss something important.

Corporate criminal liability certainly does not involve genuine retribution against managers. They can suffer no legal punishment from its imposition. But that does not mean that imposition of liability on the corporation cannot entail some blame of the firm's managers. Indeed, pick up a newspaper. It is routine to fault management for allowing or failing to prevent the sort of serious legal transgressions involved in cases like BP, GM, JP Morgan, Wells Fargo, Volkswagen, and many others we have not had space to discuss. Managers commonly lose their jobs over such scandals. The Justice Department, in its settlement agreements with companies in such criminal cases, typically goes out of its way to detail the failures of management and compliance implicated in the particular instance of illegality.[57] No wonder then that corporate managers, whenever they get a chance, express vocal complaints and fears about the potential "death knell" represented by the imposition of criminal liability on their firms.

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[55] Arlen & Kraakman, *supra* note ___.

[56] Khanna, *supra* note ___; Fischel & Sykes, *supra* note ___.

[57] *See*, *e.g.*, Deferred Prosecution Agreement, United States v. Och-Ziff Capital Management Group LLC, Cr. No. 16-516 (NGG) (E.D.N.Y. Sept. 29, 2016).

Corporate criminal liability thus has a blaming function—one that is connected to a social practice of blaming companies and their managers when disaster strikes.[58] We speak comfortably and commonly about what Exxon or Pfizer or Bank of America or Walmart or Penn State or the Catholic church *did*. We are not fundamentally misguided about the metaphysics of the corporation. We understand that people act in concert and function in particular ways when they behave together within large institutions—especially the people at the top. What we mean when we say "the corporation did it" is that "those people who run that place did it" and, often though not always, "they did it because that's the way people in that place tended to act." (A common but not very illuminating term for what we are referring to when we talk this way is "corporate culture.")

It makes sense, then, that corporate blame would involve management blame and that some of the blaming function of corporate criminal liability would "rub off" on managers. No bank CEO wants to get caught committing a large fraud. But, short of that, his biggest concern might well be the bank getting caught for a large fraud—an event that is likely to result in him losing his job, lowering his future employment prospects, suffering some public humiliation, and (if he is at all decent) dealing with a serious blow to his self-esteem.

Still, I do not think that any of this really has the potential to close up the responsibility gap.[59] It is not nothing. But it is also not law and therefore not punishment, at least not in the sense that criminal law theory defines punishment. No sanctions are

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[58] Buell, *supra* note ___ [Blaming].

[59] For some evidence in support of pessimism, see Brandon L. Garrett, Nan Li & Shivaram Rajgopal, *Do Heads Roll? An Empirical Analysis of CEO Turnover and Pay When the Corporation is Federally Prosecuted*, Va. Law & Econ. Working Paper No. 2017-11 (May 11, 2017), available at ssrn.com.

imposed on managers, no matter how factually, if not legally, responsible they may be for the corporate crime. The lack of individual sanction is conceded by the utilitarians to be a problem because many managers may have too much appetite for risk, willing to take greater chances with the firm's survival than is in the shareholder's interest.[60] In the end and after all, even the manager who presides over the worst sort of catastrophe, the one that leaves many deaths behind, walks away from the imposition of corporate criminal liability personally unmolested by police, prosecutors, or courts.

IV. CONCLUSION

To review, the large modern corporation produces, among other things, a particular kind of wrongdoing in which rank-and-file agents of the firm, individually or collectively, engage in wrongful or harmful acts as a result of firm-wide conditions that are created, or at least cultivated, by senior management. Particularly if one allows for a degree of harm-based retributivism—a stance consistent with many aspects of positive American criminal law—those senior managers bear serious moral responsibility for the fraud, deaths, cheating of regulatory regimes, or other wrongs involved in such cases. That responsibility is, in a way, only aggravated by the distance between management and the relevant actions: their richly compensated position as operators of the powerful device of the large firm makes them particularly salient objects of blame. Wrongdoing committed at the hands of workers lies at the feet of management.

Core doctrines of criminal law have nothing to offer those who would seek to convert this account of moral responsibility into a case for criminal punishment. Indeed those doctrines, and their animating principles, prohibit liability for corporate managers in the

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[60] *See* Arlen, *supra* note ___ [Controlling].

paradigm case of no action, no mental state, and high responsibility. Thus we have the responsibility gap.

The inability of RCO, and especially expanded conceptions of RCO, to make a persuasive case for closing the responsibility gap tells us something about that gap. Criminal law is a poor tool for managing the institution of the large modern business firm. (Criminal law may be a poor tool for managing institutions generally, but that is a broader discussion.) This is true whether we take criminal law as we find it, in which case doctrines for closing the gap simply are not there. Or whether we discuss "reforming" criminal law to include new doctrines for closing the gap, which then do not fare well under the justificatory structure of the criminal law.

The problem is the firm. It is the scale of the large corporation, the necessity of delegation and division of responsibility to the process of "team production," and even the founding principle of limited liability (and thus limited personal responsibility) that are both structural to the firm and that guarantee inevitable separation between action and responsibility. Criminal law, which paramount among all bodies of law is structured around the individual, cannot be plausibly molded around the firm—at least not when the prime objective is responsibility ascription and punishment rather than the production of incentives to alter behavior. Whether the law targets senior managers or the firm itself, it is engaged in a futile quest to humanize and individualize something that is an institution and a system. The mismatch is plain and unavoidable.

A backward-looking orientation thus seems unpromising for responding to the repeating problem of wrongdoing within the corporation. Rather than trying to close the responsibility gap ex post through punishment, we might think more deeply about how to

change the structure of responsibility ex ante—about how to get people to *exercise* responsibility rather than about how to *impose* it upon them.

This leads to a subject quite beyond the topic of this symposium, of course. So let us conclude by naming those areas of inquiry that might be more promising than a program for expanding criminal liability along the lines of RCO.

Responsibility is a matter, at least, of both capacity and commitment. Increasing capacity, I believe, means ensuring that the scale and complexity of the business firm do not extend beyond the ability of one or a few humans to handle them. Perhaps, then, if we wish to reduce the incidence of large-scale corporate malfeasance, we need a rethinking of the basic structure of corporate markets, along the lines of the movement at the turn of the twentieth century that produced antitrust law and related forms of regulation.

Commitment can be promoted in a number of ways. Certainly more effective and directed regulation of industries that involve routine and serious risks is likely to focus management attention on preventing the worst of problems. Maybe what is needed, depending on the industry of course, is not so much more regulation as better enforcement of regulation. The routine and predictable visit of the inspector might be a better mechanism for heightening management attention than the very occasional, and sometimes overly discounted, prospect of the prosecutor's arrival. Even before the involvement of inspectors, regulatory regimes could be enhanced to require more documentation of senior management involvement in review of facts and approval of decisions—a method, if not to deter wrongdoing in the first instance, perhaps to

transform some of the cases of management detachment from the wrongdoing into cases of more direct, provable management involvement.

Corporate governance is also a subject that our recent experiences with the large modern firm suggest might benefit from some deeper rethinking. There is an emerging literature about executive compensation as a matter that needs redesign and that might be a promising tool for enhancing the commitment of managers to controlling the most potentially damaging kinds of risk.[61] Much of the recent literature about the basic rules of the corporate road—the terms of the corporate charter, the relationship between the firm and the state, the legal duties and liabilities of corporate officers and directors—is engaged in an exercise of tinkering to optimize existing regimes.[62]

Those regimes, which remain oddly tethered to state law in just a few leading "markets for incorporation," and the professional discussions about them, appear increasingly detached from the experience of the contemporary citizen with the large American corporation and its presence on the ground of daily life. Among institutions of this age, the corporation has been far from under-theorized. But perhaps that body of theory has been too successful over time and now interferes with our ability to see where it needs a more basic rethinking. Corporate crime, on this view, is not nearly so much an interesting subculture within the sociology and law of crime—at it tends to be treated in

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[61] *E.g.*, Sanjai Bhagat, Brian Bolton & Roberta Romano, *Getting Incentives Right: Is Deferred Bank Executive Compensation Sufficient?*, 31 YALE J. REG. 523 (2014); Jesse M. Fried, *Rationalizing the Dodd-Frank Clawback*, European Corporate Governance Institute (ECGI) - Law Working Paper No. 314/2016 (Sept. 26, 2016), available at ssrn.com.
[62] *E.g.*, Lucian Bebchuk, Alon Brav & Wei Jiang, *The Long Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085 (2015); Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557 (2015); Frank Partnoy, *Delaware and Financial Risk* in THE CORPORATE CONTRACT IN CHANGING TIMES (S. Solomon & R. Thomas eds. forthcoming 2017).

this exciting and still relatively new field. Much more so, it is a symptom of something gone wrong with the idea of the corporation itself.