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Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability

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Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability

Abstract

When a corporation commits a crime, whom may we hold criminally liable? One obvious set of defendants consists of the individuals who perpetrated the crime on the corporation's behalf. But according to the responsible corporate officer ("RCO") doctrine, the government may also prosecute and punish those corporate executives who, although perhaps lacking "consciousness of wrongdoing," nonetheless have "a responsible share in the furtherance of the transaction which the statute outlaws." In other words, under the RCO doctrine, a corporate executive can come to bear criminal responsibility for an offense of her corporation that she neither participated in nor culpably failed to prevent. As long as the executive in question had the authority to prevent the corporate crime and failed to do so, she may be targeted in a criminal suit.

The RCO doctrine plainly poses a challenge to our traditional understanding of criminal culpability, according to which guilt is individual—one may be held responsible only for a wrong one has personally committed, and only if one has done so with a guilty mind. Thus, RCO liability, while representing the most common instance of strict criminal liability, has been deemed "at odds with fundamental notions of our criminal justice system," and likened to the primitive doctrine of frankpledge, under which innocent members of a group could be punished for the wrongful deed of one of their fellows. On the other hand, corporate crimes have an irreducibly collective aspect. If we take this aspect seriously, as this paper does, then departures from the paradigm of individual culpability may well be warranted. In particular, we may be justified in assigning responsibility not just to the corporate crime's immediate perpetrators, but also to those who held prominent positions within the corporation at the time of the crime's occurrence, and this responsibility may license just the kind of criminal liability that the RCO doctrine contemplates. This paper seeks to determine the circumstances under which this extension of responsibility is permissible, and the grounds of its permissibility.

More specifically, this Article critiques existing justifications for the doctrine by arguing that these mistakenly construe it as a kind of negligence liability, and in so doing deprive the doctrine of its transformative power. It next offers a defense of the doctrine, according to which personal guilt is not necessary, and then contends with objections to the doctrine, arguing that we need not dispense with the doctrine altogether in order to avoid the concerns of its critics. What is needed instead is a set of guidelines that guard against the doctrine's misuse or abuse. Finally, this Article ends with a specification of these guidelines.

Disciplines

Accounting Law | Banking and Finance Law | Business Administration, Management, and Operations | Business and Corporate Communications | Business Law, Public Responsibility, and Ethics | Business Organizations Law | Corporate Finance | Law

RESPONSIBLE SHARES AND SHARED RESPONSIBILITY: IN DEFENSE OF RESPONSIBLE CORPORATE OFFICER LIABILITY

Amy J. Sepinwall*

When a corporation commits a crime, whom may we hold criminally liable? One obvious set of defendants consists of the individuals who perpetrated the crime on the corporation's behalf. But according to the responsible corporate officer ("RCO") doctrine, the government may also prosecute and punish those corporate executives who, although perhaps lacking "consciousness of wrongdoing," nonetheless have "a responsible share in the furtherance of the transaction which the statute outlaws." In other words, under the RCO doctrine, a corporate executive can come to bear criminal responsibility for an offense of her corporation that she neither participated in nor culpably failed to prevent. As long as the executive in question had the authority to prevent the corporate crime and failed to do so, she may be targeted in a criminal suit.

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The RCO doctrine plainly poses a challenge to our traditional understanding of criminal culpability, according to which guilt is individual—one may be held responsible only for a wrong one has personally committed, and only if one has done so with a guilty mind. Thus, RCO liability, while representing the most common instance of strict criminal liability, has been deemed “at odds with fundamental notions of our criminal justice system,” and likened to the primitive doctrine of frankpledge, under which innocent members of a group could be punished for the wrongful deed of one of their fellows. On the other hand, corporate crimes have an irreducibly collective aspect. If we take this aspect seriously, as this paper does, then departures from the paradigm of individual culpability may well be warranted. In particular, we may be justified in assigning responsibility not just to the corporate crime’s immediate perpetrators, but also to those who held prominent positions within the corporation at the time of the crime’s occurrence, and this responsibility may license just the kind of criminal liability that the RCO doctrine contemplates. This paper seeks to determine the circumstances under which this extension of responsibility is permissible, and the grounds of its permissibility.

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I. INTRODUCTION

When the government announced that it was charging the hedge fund SAC with insider trading, the *Wall Street*

Journal responded with an editorial bearing the subtitle: "Can a criminal enterprise be run by someone who isn't a criminal?"¹ The *Journal* was reacting to the government's decision not to prosecute SAC's namesake, founder, sole owner, and CEO, Steven A. Cohen. The editorial argued that if Cohen was innocent of the charges, then his corporation must be innocent as well. But we might ask instead: "If an enterprise has committed a crime, isn't its leader necessarily a criminal?"²

This Article seeks to defend an affirmative answer to that question. In particular, the Article argues that executives should, at least in some cases, be prosecuted and punished for their corporation's crimes independent of their participation in, or even foreknowledge of, those crimes. It seeks to provide guidelines for determining in which cases executive criminal liability is appropriate.

The question seems especially apt in light of recent and dramatic instances of corporate crime, which have led to glaringly few prosecutions of the individuals who helm the offending corporations. The government has not charged a single high-level executive at any of the Wall Street banks whose wrongdoing helped precipitate the financial crisis.³

¹ Editorial, *The Troubling SAC Case*, WALL ST. J., Jul. 26, 2013 at A12.

² This point was raised in a recent *Washington Post* online op-ed. See Amy Sepinwall, Op-Ed, *Criminal Enterprises and Culpable Leaders*, WASH. POST (Nov. 12, 2013, 9:00 AM), <http://www.washingtonpost.com/blogs/on-leadership/wp/2013/11/12/criminal-enterprises-and-culpable-leaders/>.

³ As one commentator colorfully put it, "No man or woman who led one of the firms directly culpable for the catastrophe has been put in a prison-orange jumpsuit." Neil Irwin, *This Is a Complete List of Wall Street CEOs Prosecuted For Their Role in the Financial Crisis*, WASH. POST WONKBLOG (Sept. 12, 2013, 9:54 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/12/this-is-a-complete-list-of-wall-street-ceos-prosecuted-for-their-role-in-the-financial-crisis/>. See also Jesse Eisinger, *Why the SEC Won't Hunt Big Dogs*, PROPUBLICA (Oct. 26, 2011, 11:56 AM), <http://www.propublica.org/thetrade/item/why-the-sec-wont-hunt-big-dogs> ("No major investment banker has been brought up on criminal charges stemming from the financial crisis."); Jason Ryan, *DOJ Will Not Prosecute Goldman Sachs in Financial Crisis Probe*, ABC NEWS (Aug. 9, 2012, 8:38

Nor are executives in the financial sector unique in their apparent immunity to criminal prosecution. Inadequate controls are all too prevalent at big pharmaceutical companies, where drug recalls are at all-time highs, and yet the frequency of criminal prosecutions is appallingly low.⁴ Similarly, executives have escaped criminal liability at BP, where an explosion on the Deepwater Horizon led to eleven deaths and the worst oil spill in American history.⁵

PM), <http://abcnews.go.com/blogs/politics/2012/08/doj-will-not-prosecute-goldman-sachs-in-financial-crisis-probe/> (noting a series of “high-profile investigations” that the Department of Justice declined to prosecute); Sarah White, *RPT-In Post-Lehman Clean-Up, Top Banker Prosecutions Stumble*, REUTERS, Sep. 14, 2013, available at <http://www.reuters.com/article/2013/09/14/lehman-fiveyear-crime-idUSL5N0H929A20130914> (“In the United States, . . . no top executives at large Wall Street or commercial banks have been convicted of criminal charges relating to the 2008 crisis.”).

⁴ For example, in 2010, Johnson & Johnson issued record-breaking numbers of drug recalls. See *Johnson & Johnson's Recall Rap Sheet*, BUS. WK. MAG., Mar. 31, 2011, http://www.businessweek.com/magazine/content/11_15/b4223066662101.htm; Gardiner Harris, *Johnson & Johnson Settles Bribery Complaint for \$70 Million in Fines*, N.Y. TIMES, Apr. 9, 2011, at B3 (“The company has issued more than 50 product recalls since the start of last year involving such household brands as Tylenol, Motrin, Roloids and Benadryl.”); Parija Kavilanz, *Drug Recalls Surge*, CNNMONEY (Aug. 16, 2010, 11:40 AM), http://money.cnn.com/2010/08/16/news/companies/drug_recall_surge/index.htm (describing the skyrocketing number of drug recalls over the last year, including a four-fold increase in recalls relative to the previous year). In response, the Food and Drug Administration (“FDA”) announced that it would seriously consider prosecuting individual executives. See, e.g., CNN, *FDA May Prosecute Execs over Violations: Agency Hints It Will Become More Aggressive About Enforcing Its Regulations*, CHI. TRIB., Aug. 25, 2010, at 43 (“FDA Commissioner Margaret Hamburg wrote to Sen. Chuck Grassley, R-Iowa, in March to say that the agency intends to consider ‘the appropriate use of misdemeanor prosecutions, a valuable enforcement tool, to hold responsible corporate officials accountable.’”). Yet no executives were ever charged.

⁵ So far, the government has sought to prosecute only four individuals. Two of them were supervisors on the ship. See Erin Fuchs, *The BP Prosecutions Show a New Strategy For the Justice Department*, BUS. INSIDER (Nov. 16, 2012, 11:42 AM), <http://www.businessinsider.com/who-are-the-indicted-bp-executives-2012-11>. The third, Kurt Mix, is an engineer charged with obstruction of justice after deleting text messages

Furthermore, executive impunity seems to be the norm at mining companies where substandard safety conditions lead to explosions and deaths.⁶ Executives at companies manufacturing and distributing defective products seem to enjoy similar immunity even though the entity itself might be liable in a civil suit. Those executives who knew about the defect and yet failed to recall the product or even warn the public escape unscathed.⁷

It is no surprise, then, that the public is clamoring to see the heads of these companies roll,⁸ and with good reason. For one thing, executive convictions have an undeniable deterrent power. As one commentator notes,

The threat of prison can change a culture faster and more effectively than even the heftiest fine. If, after the Texas City explosion, one BP executive or more

relating to the spill. See Susan Bozorgi, *Women Criminal Defense Attorneys: Joan McPhee Defends BP Engineer Involved in Deepwater Horizon Oil Spill*, WOMEN CRIM. DEF. ATT'YS BLOG (Feb. 20, 2013), <http://www.womencriminaldefenseattorneys.com/women-criminal-defense-attorneys-joan-mcphee-defends-bp-engineer-involved-in-deepwater-horizon-oil-spill/>. Notably, none of them is a high-level BP official. The highest-ranking target is David Rainey, a vice-president of Gulf Coast operations, who is being prosecuted not for the spill itself but instead, like Mix, for obstructing the government's investigation. See Fuchs, *supra*.

⁶ See Howard Berkes, *Mine Disaster Probe Leads to Conspiracy Charges Against Former Executive*, NPR: THE TWO-WAY (Nov. 28, 2012, 10:11 AM), <http://www.npr.org/blogs/thetwo-way/2012/11/28/166064046/mine-disaster-probe-leads-to-conspiracy-charges-against-former-executive> ("Mining company executives are rarely charged when miners die in accidents.").

⁷ See generally Robert Steinbuch, *The Executive-Internalization Approach to High-Risk Corporate Behavior: Establishing Individual Criminal Liability for the Intentional or Reckless Introduction of Excessively Dangerous Products or Services Into The Stream Of Commerce*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 321–39 (2007) (detailing reams of cases in which corporations were sued for distributing defective products but their executives were not held criminally liable).

⁸ See, e.g., *Four in Five Want Bankers Prosecuted*, SKYNEWS (July 1, 2012, 3:07 PM), <http://news.sky.com/story/954671/four-in-five-want-bankers-prosecuted>; White, *supra* note 3 ("[T]he debate over how to hold senior bank bosses to account for failures is far from over, but legal sanctions for top executives remain a largely remote threat.").

had been prosecuted, it seems to me quite likely that the Deepwater Horizon accident would never have happened. A prison sentence would have done the thing that all those fines never did: force the company to begin paying attention to safety.⁹

In addition, targeting individuals allows prosecutors to evade the purported systemic risks of going after entities that are “too big to jail,” or prompting dissolution of entities that are “too big to nail”¹⁰—e.g., those whose innocent low-level employees are then left without work, as was the fate of most of Arthur Andersen’s 28,000 employees in the wake of its demise.¹¹

Nonetheless, those intent on seeing justice done must find the legal tools with which to mete it. The problem is that criminal law typically requires that a defendant culpably cause the conduct with which she is charged, yet corporate officers in the financial, mining, or big pharmaceutical sector may not have participated in the crimes of their corporation. If we seek to prosecute corporate executives only if and where we can prove that they culpably contributed to their corporation’s crime, we will see few, if any, individual prosecutions, let alone successful ones.¹²

But we need be neither so narrow nor so exacting in our response. Instead, we can and should target executives at wrongdoing corporations *independent of whether they participated in the wrongdoing*. The requisite legal ground for doing so can be found in the responsible corporate officer

⁹ Joe Nocera, Op-Ed, *How to Prevent Oil Spills*, N.Y. TIMES, Apr. 14, 2012, at A19.

¹⁰ Kathleen M. Boozang, Symposium, *Responsible Corporate Officer Doctrine: When is Falling Down on the Job a Crime?*, 6 ST. LOUIS U. J. HEALTH L. & POL’Y 77, 87 (2012).

¹¹ See Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 107 (2006).

¹² See generally White, *supra* note 3 (noting the near absence of executive prosecutions in the wake of the financial crisis and explaining it in this way: “At issue is the difficulty in pinning the blame on any one person for risks and decisions taken throughout a firm—one of the main obstacles to building such cases so far.”).

(RCO) doctrine. The Supreme Court articulated the RCO doctrine in 1946, and it is designed to target those executives who, although perhaps lacking “consciousness of wrongdoing,”¹³ nonetheless have “a *responsible share* in the furtherance of the transaction which the statute outlaws.”¹⁴ In other words, the doctrine permits the prosecution and punishment of corporate 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. Just so long as the executive in question had the authority to prevent the crime and failed to do so, she may be targeted in criminal prosecution.¹⁵ For this reason, the RCO doctrine has been deemed “potentially vastly more powerful—because lack of knowledge is not a defense—than other sources of liability for [executives] that have been much more analyzed in recent years (for example, securities laws and *Disney/Caremark/Stone v. Ritter*).”¹⁶

Perhaps because of its vast power and expansive reach, the RCO doctrine is reviled not just by the White Collar Defense bar, but also by most scholars and commentators as well.¹⁷ Their objections are of two types. The first is

¹³ *United States v. Dotterweich*, 320 U.S. 277, 284 (1943).

¹⁴ *Id.* (emphasis added).

¹⁵ *See infra* Part III.A.

¹⁶ Erik Gerding, *U.S. Suits Against Drug Executives: The “Responsible Corporate Officer” Doctrine Lives*, THE CONGLOMERATE (Sept. 14, 2011), <http://www.theconglomerate.org/2011/09/us-suits-against-drug-executives-the-responsible-corporate-officer-doctrine-lives.html>. Cf. Steven M. Morgan & Allison K. Obermann, *Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase in Criminal Prosecutions of Environmental Offenders*, 45 SW. L.J. 1199, 1199–1200 (1991) (noting the broad applicability of the responsible corporate officer doctrine in the “ever expanding” criminal enforcement context).

¹⁷ *See, e.g.*, Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1359 (2009) (likening RCO liability to the primitive doctrine of Frankpledge, under which innocent members of a group could be punished for the wrongful deed of one of their fellows); Jennifer Bragg, John Bentivoglio & Andrew Collins, *Onus of Responsibility: The Changing Responsible Corporate Officer Doctrine*, 65 FOOD & DRUG L.J. 525, 525 (2010) (contending that the doctrine is “at odds with fundamental notions of our criminal justice

principled: prosecuting and punishing executives who did not participate in the corporate crime, they argue, violates the foundational tenet of Anglo-American criminal law that “there can be no crime, large or small, without an evil mind.”¹⁸ The second is practical: 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. As such, the argument would go, the RCO doctrine is subject to prosecutorial over-reach and abuse.¹⁹

system”). Cf. Martin Petrin, *Circumscribing the “Prosecutor’s Ticket to Tag the Elite”—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283, 286 (2012) (“In many cases, the RCO doctrine represents an unwarranted augmentation of corporate agents’ duties and runs contrary to established tort, criminal, and corporate law principles.”).

¹⁸ 1 JOEL PRENTISS BISHOP, CRIMINAL LAW 192 § 287 (John M. Zane and Carl Zollman eds., 9th ed. 1923). See also *Williamson v. Norris*, [1898] 1 Q. B. 7, 14 (Eng.) (“The general rule of English law is, that no crime can be committed unless there is mens rea.”).

¹⁹ Two recent examples of scholarship taking issue with the application of the RCO doctrine include Petrin, *supra* note 17 and Andrew C. Baird, Comment, *The New Park Doctrine: Missing the Mark*, 91 N.C. L. REV. 949, 952 (2013) (objecting to the exclusion from federal programs that can accompany an RCO conviction). I address problems in the application of the RCO doctrine in Part V.A, *infra*.

Richard Singer and Doug Husak have argued that even if the RCO doctrine is defensible within the context in which it has been employed—for violations of food and drug regulations—it would be untoward to seek to extend the doctrine outside of the FDA context. Richard Singer and Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 877 (1999) (“Other cases are so easily distinguishable on their facts that *Dotterweich* and *Park*—both FDA cases—stand as the high water marks of strict criminal liability in the United States Supreme Court. Thus, any application of the general doctrine of strict criminal liability to areas outside the Food and Drug Act is problematic under the holdings of the Court—even if *Park* actually imposes strict liability.” (internal footnote omitted)). Singer and Husak are surely right that a bald transposition of the doctrine from one context to another would be illicit. The purpose of this article is to provide the justificatory tools that would render the transposition legitimate.

This Article seeks to counter these objections in three stages. First, it presents an account that justifies imposing criminal liability on the executive simply by virtue of her leadership role within the corporation. It then addresses each of the purportedly problematic applications of the RCO doctrine and argues that none of them are inevitable under the doctrine, and so none of them represent a knockdown argument against RCO liability. Finally, it articulates guidelines for the doctrine's application that will prevent its abuse.

The RCO doctrine has been disserved not just by its critics, but by its defenders as well. In response to the charge that RCO liability is an illicit form of strict criminal liability, defenders of the doctrine have justified it as a species of negligence liability instead. These defenses deviate problematically from the doctrine's original rationale, and do not adequately justify RCO liability. Nor does the doctrine find adequate support in the handful of recent calls to extend it beyond the health and environmental context.²⁰ In fact, these articles fail to take up the justificatory question at all, either because they contemplate a version of the doctrine in which the indicted officer acted negligently or worse²¹—in which case she would deserve punishment on a traditional understanding of culpability—or else they seek to defend the doctrine on deterrence or distributive justice, and not retributive, grounds.²² In this way, these calls to deploy the doctrine do

²⁰ See Christina M. Schuck, Note, *A New Use for the Responsible Corporate Officer Doctrine: Prosecuting Industry Insiders for Mortgage Fraud*, 14 LEWIS & CLARK L. REV. 372, 373 (2010); see generally Tyler O'Connor, *Prosecuting Executives for Financial Fraud: The Responsible Corporate Officer Doctrine as an Alternative Means of Criminal Liability* (Apr. 1, 2013) (draft manuscript) (on file with author) (advocating for the imposition of strict criminal liability on corporate bankers under the RCO doctrine).

²¹ See Schuck, *supra* note 20, at 379–80 (discussing theories under which individuals for a corporation are typically held criminally liable).

²² See generally O'Connor, *supra* note 20 (urging an extension of the RCO doctrine to executives at entities that have engaged in financial fraud, and arguing that the extension is beneficial because it will deter

not endeavor to establish that, on the basis of the RCO doctrine, *any* officer who plays an active role in the corporation can be held to *deserve* punishment.²³ In other words, these other efforts do not justify the very features of the doctrine that render it so radical and powerful.²⁴ This Article aims to supply the missing theoretical and practical pieces.

Part II presents an overview of the RCO doctrine and the reasons for its development. Part III traces the development of the doctrine and efforts to defend it, and argues that the proffered justifications both betray the doctrine's rationale and fail to convince. Part III ends by arguing that the doctrine can be justified, if at all, only by an account of responsibility that transcends the constraints of the individualist paradigm. Part IV seeks to provide the requisite account through an analogy to executive compensation. It notes that we reward an executive where her firm's performance improves even if the executive has not noticeably or significantly contributed to the improvement. By the same token, this Article argues, the circumstances under which we may punish an executive for her firm's wrongful act also need not require that the executive have contributed to the wrongdoing. Instead, the rationale for both rewards and punishments flows from a proper conception of the executive's role within the firm, which Part IV elucidates. With the justification for executive criminal liability in hand, Part V turns to objections to the RCO doctrine, and argues that each of them is beside the point, or otherwise unconvincing. That effort will allow us to see where the RCO doctrine has, and has not, been properly applied, and will provide guidelines for its future application, which the end of Part V articulates. Part VI concludes.

misconduct and fair because the executive is, relative to investors, the least cost avoider).

²³ An exception to this inattention to desert can be found in a piece by Kathleen Boozang, *supra* note 10, at 111–12, where she argues that corporate officers can come to deserve responsibility for the wrongs of their corporation independent of their participation in those wrongs.

²⁴ See *supra* note 17 and accompanying text.

II. RCO LIABILITY: AN UNABASHED EFFORT TO DETER CORPORATE CRIME THROUGH STRICT CRIMINAL LIABILITY FOR CORPORATE EXECUTIVES

The RCO doctrine developed at a time when federal law was much more comfortable with public welfare offenses than it is now.²⁵ Part II seeks to describe the doctrine's elements, and the concerns that motivated its adoption.

A. Doctrinal Elements

While in some cases the RCO doctrine is used to prosecute and punish an executive who carried out the corporation's crime,²⁶ the standard case involves a corporate officer who neither participated in, nor perhaps even knew about, the corporation's criminal conduct.²⁷

²⁵ For example, one major impetus for the Model Penal Code was a rejection of strict liability criminal offenses, and a commitment to subjective culpability with respect to each and every mental state element of a crime. See Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 287–88 (2012).

²⁶ See *United States v. Higgins*, CR No. 09-403-4, 2011 WL 6088576, at *10 (E.D. Pa. Dec. 7, 2011) (“Unlike *Park*, this matter does not involve holding an unaware corporate executive accountable for vermin in a warehouse. . . . Higgins’ case stands apart from other *Park* doctrine cases because the criminal conduct at issue is his own.”).

²⁷ See, e.g., *United States v. Dotterweich*, 320 U.S. 277, 285–86 (Murphy, J., dissenting) (“There is no evidence in this case of any personal guilt on the part of the respondent. There is no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction. Guilt is imputed to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation.”). See also *Carolene Products Co. v. United States*, 140 F.2d 61, 66 (4th Cir. 1944), *aff’d*, 323 U.S. 18 (1944) (“There is ample authority in support of the principle that the directing heads of a corporation which is engaged in an unlawful business may be held criminally liable for the acts of subordinates done in the normal course of business, regardless of whether or not these directing heads personally supervised the particular acts done or were personally present at the time and place of the commission of these acts.” (citing *Dotterweich*)).

This was the situation for Joseph Dotterweich, the defendant in the case that inaugurated RCO liability. *Dotterweich*, decided in 1943, arose in light of alleged violations of the 1938 Federal Food, Drug, and Cosmetic Act (FFDCA), which made criminal, *inter alia*, the interstate shipment of misbranded or adulterated drugs.²⁸ There were two defendants in the case, the Buffalo Pharmacal Company, Inc., a “jobber” in drugs (e.g., a company that purchased drugs from their manufacturer, repackaged the drugs under its own label, and then sold the repackaged drugs to pharmacies), and Dotterweich himself, president and general manager of the company. At trial, the jury acquitted Buffalo Pharmacal, but found Dotterweich guilty of two counts of shipping misbranded drugs and one count of shipping adulterated drugs.²⁹ Dotterweich appealed. At issue was whether the FFDCA’s use of the term “person,” referring to the party who would be subject to prosecution for FFDCA violations, applied only to the corporation or instead to the individuals through which the corporation acted.³⁰ The Court of Appeals adopted the former, narrower reading and in a 2-1 decision held that the conviction could be sustained only if Buffalo Pharmacal was a mere alter ego for Dotterweich. The Court of Appeals would have remanded for a finding of fact on this question,³¹ but the government appealed to the Supreme Court, which reversed the appellate court’s ruling below in a 5-4 decision.

The Court based its decision on the policy reasons underpinning the criminal liability provisions of the FFDCA, stating,

The purposes of this legislation . . . touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. . . . The prosecution to which

²⁸ Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 351–352 (2012).

²⁹ See *Dotterweich*, 320 U.S. at 278.

³⁰ See *id.* at 279.

³¹ See *id.*

Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation.³²

The Court reasoned that were the FFDCA to apply only to corporations, and not their officers, the law would treat the offenses as a mere "license fee for the conduct of an illegitimate business."³³ Individual liability was therefore necessary to adequately protect against the conduct that Congress sought to outlaw. The Court recognized that criminal liability under its construction of the FFDCA would be strict: "Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing."³⁴ It nonetheless concluded that the grave dangers the FFDCA sought to deter justified this departure from the traditional grounds of culpability, noting that "[i]n 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."³⁵ And thus Responsible Corporate Officer liability was born.

Even at its inception, the RCO doctrine was controversial. Justice Murphy authored a vigorous dissent in *Dotterweich*, noting that the Court's position contravened the "fundamental principle of Anglo-Saxon jurisprudence that guilt is personal . . ."³⁶ But he nonetheless would have allowed for strict criminal liability here had Congress explicitly authorized prosecution of officers—and not just corporations—under the FFDCA. His principal concern, then, lay with what he took to be a violation of the principle of legality:

Congress alone has the power to define a crime and to specify the offenders. It is not our function to supply any deficiencies in these respects, no matter

³² *Dotterweich*, 320 U.S. at 280–81.

³³ *Id.* at 282–83 (citing the House Committee Report accompanying adoption of the 1938 FFDCA).

³⁴ *Id.* at 281.

³⁵ *Id.* at 281 (emphasis added).

³⁶ *Id.* at 286.

how grave the consequences. Statutory policy and purpose are not constitutional substitutes for the requirement that the legislature specify with reasonable certainty those individuals it desires to place under the interdict of the Act. . . . Looking at the language actually used in this statute, we find a complete absence of any reference to corporate officers.³⁷

Yet subsequent decision-makers, as well as scholarly supporters of the RCO doctrine, seem to have taken the concern about strict criminal liability far more seriously. For that reason, they have sought to reconstruct the doctrine as a species of liability that more closely hews to the law's traditional understanding of culpability, as described below.

III. SPURIOUS ATTEMPTS TO DEFEND THE RCO DOCTRINE

Several rationales have been adduced to support criminal liability for the non-culpable corporate officer. In broad terms, these rationales can be grouped into four categories: first, those that understand RCO liability as a kind of negligence; second, those that focus on the unique nature of corporate conduct, which necessarily requires human participation; third, those that support RCO liability as a tool to target executives who culpably participated in the corporation's crime but against whom there is insufficient evidence for a conviction; and, finally, fourth, those rationales that rest upon the officer's willing assumption of the risk of liability inherent in her office. This part addresses each in turn, and argues that none provides a compelling defense of the doctrine.

A. RCO Liability as Negligence

The Court did not have occasion to revisit the RCO doctrine until *United States v. Park*, decided some thirty

³⁷ *Dotterweich*, 320 U.S. at 287 (Murphy, J., dissenting) (internal citations omitted).

years after *Dotterweich*. The defendant in that case was John Park, the president and chief executive officer of Acme Supermarkets. The case also involved violations of the FFDCA, except here the violations were due to a rodent infestation in a Baltimore Acme warehouse.³⁸ Park, whose office was in Philadelphia, and whom the Baltimore warehouse manager had assured that the rodent problem was being addressed, argued that he should not be convicted because he had done everything he could to remedy the violation.³⁹ The Court nonetheless affirmed Park's conviction as a responsible corporate officer in an opinion that largely endorsed the RCO doctrine as articulated in *Dotterweich*.⁴⁰

Even while *Park* largely reaffirmed the Court's commitment to faultless criminal liability for corporate executives, the Court betrayed its ambivalence about the RCO doctrine's departure from the traditional conception of culpability.⁴¹ The Court casted the elements of an RCO offense in language steeped with moral weight.⁴² It noted

³⁸ See *United States v. Park*, 421 U.S. 658, 661–62 (1975).

³⁹ See *id.* at 663–64.

⁴⁰ See *id.* at 671–73.

⁴¹ Norman Abrams recognizes the Court's wavering conception of the RCO doctrine as a species of strict liability. See Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on Dotterweich and Park*, 28 UCLA L. REV. 463, 475 (1981). (“*Dotterweich* and *Park* are subject to diverse interpretations. In tandem, they nicely illustrate how the Supreme Court has been unwilling or unable to develop a doctrinal modification of strict liability for corporate officers in unambiguous terms that avoids introducing confusion and uncertainty into the law.”). On the other hand, others continue to view the doctrine as enshrining strict liability even in the wake of *Park*. See Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 VAND. L. REV. 1337, 1345–46 (1982). One persuasive source regarding whether the Court in *Park* smuggled in a negligence requirement can be found in Justice Stewart's dissenting opinion, in which he wrote that, “[a]s [he] understand[s] the Court's opinion,” it includes the “language of negligence.” 421 U.S. at 678–79 (Stewart, J. dissenting).

⁴² The full text of the portion of the opinion in which the Court casts the executive's responsibility in the language of culpability reads:

that the defendant did not merely occupy a position of leadership at the time of his offense—he had a “duty” that he “fail[ed] . . . to fulfill.”⁴³ Moreover, the failure was not merely an omission, but a culpable one, in light of the serious “circumstances” in question—namely circumstances where the individual consumer’s health and life may be at stake.⁴⁴ Most notably, recognizing the potentially draconian nature of RCO liability,⁴⁵ the Court articulated an affirmative defense of “objective[] impossib[ility].”⁴⁶ Under this defense, a defendant rebuts the government’s *prima facie* case if she establishes that it would have been objectively impossible for her to prevent the underlying violations. Thus, the RCO doctrine holds “criminally accountable the persons whose failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of,”⁴⁷ but it allows these

[T]he Government establishes a *prima facie* case when it introduces evidence sufficient to warrant a finding by the trier of the 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 that he failed to do so. The failure thus to fulfill the duty imposed by the interaction of the corporate agent’s authority and the statute furnishes a sufficient causal link. The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability.

Park, 421 U.S. at 673–74.

⁴³ *Id.*

⁴⁴ “[T]his Court looked to the purposes of the Act and noted that they ‘touch phases of the lives and health of the people which, in the circumstances of modern industrialism, are largely beyond self-protection.’” *Id.* at 668 (citing *United States v. Dotterweich*, 320 U.S. 277, 280 (1943)).

⁴⁵ “The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous . . .” *Id.* at 672.

⁴⁶ *Id.* at 673. See also *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230, 235–36 (D. Mass. 1980) (discussing impossibility as an affirmative defense).

⁴⁷ *Park*, 421 U.S. at 671.

persons to avoid liability where they can establish that it would have been impossible for them to prevent the violation. The Court concluded that in this case Park could have remedied the rodent problem, and thus the objective impossibility defense was not available to him.⁴⁸

Nonetheless, introducing the objective impossibility defense markedly shifted the RCO doctrine from a strict liability to a negligence offense, greatly undercutting the power and reach of the doctrine in subsequent cases. With the impossibility defense available, only those defendants who could have prevented the corporation's crime were eligible for conviction.⁴⁹ Furthermore, this eligibility criterion implicitly altered the justification for holding the corporate officer criminally liable. An executive may be found guilty under the RCO doctrine only if (1) she had the responsibility and the authority to prevent the crime; (2) it would have been possible for her to prevent the crime; and (3) she failed to do so.⁵⁰ An executive's culpability now rests on her own delinquency, and not on the liability she incurs solely due to her role within the corporation.

⁴⁸ See *Park*, 421 U.S. at 677.

⁴⁹ Different courts will construe more or less broadly what it would have been possible for the defendant to do. Thus, for example, in *Park* the Court accepted the government's contention that it was possible for the president of a large supermarket chain to implement a rodent abatement plan in a warehouse located in a state other than the one where the defendant worked. See *id.* at 673. See also *United States v. Starr*, 535 F.2d 512, 515 (9th Cir. 1976) (concluding that allegations that food violations resulted from the "natural phenomenon" of vermin fleeing a nearby plowed field to contaminate a warehouse, and subsequent third-party sabotage of corrective efforts, did not negate the warehouse's duty of "foresight and vigilance" to support an objective impossibility defense). On the other hand, other courts have held the defendant to a less demanding standard in their understanding of what it was possible for the defendant to have prevented. See, e.g., *Reed v. Reid*, 980 N.E.2d 277, 298 (Ind. 2012) (citing *Comm'r, Dep't of Env'tl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556 (Ind. 2001)) (noting that corporation's sole officer could only be held liable under RCO doctrine if, at a minimum, he knew or should have known about the offense).

⁵⁰ *Park*, 421 U.S. at 671-73.

The RCO doctrine has played out in state courts in even more reactionary ways. For instance, in *Rooney v. Commonwealth*, the Virginia Court of Appeals reversed the conviction of the president of a cemetery company accused of failing to deposit preneed and perpetual care funds into a trust account, as required by statute.⁵¹ The court adopted a very narrow interpretation of the RCO doctrine that “impose[d] criminal responsibility only upon the officer or officers who are *directly* responsible or accountable for the corporation’s compliance” with the violated statute.⁵² In this case, the court found that there was no reason to think that compliance with the statute was part of the president’s job description, and thus it overturned his conviction.⁵³ But if it is doubtful that the president in *Rooney* had a responsibility to ensure that his company deposited the preneed and perpetual care funds into a trust account, it is at least as doubtful that John Park, the president of Acme, had a responsibility to lay rat traps in a warehouse located 100 miles from his office. Thus, the Virginia court’s requirement of “direct” responsibility for the task that the statute mandates incorrectly construes the RCO doctrine as a species of negligence.

Similarly, other state courts adopting the RCO doctrine maintain that they are following the Supreme Court’s formulation, but the elements they require to establish RCO liability contemplate a far tighter connection between the defendant’s conduct and the corporate violation.⁵⁴ For example, Minnesota’s formulation, which Indiana later adopted,⁵⁵ requires not only that the defendant be in a position to prevent the violation, but also that the

⁵¹ See *Rooney v. Commonwealth*, 500 S.E.2d 830, 831 (Va. Ct. App. 1998).

⁵² *Id.* at 833 (emphasis added).

⁵³ See *id.* at 832–33.

⁵⁴ See, e.g., *In re Dougherty*, 482 N.W.2d 485, 490 (Minn. Ct. App. 1992) (requiring that “three essential elements” be satisfied before liability is imposed under the RCO doctrine).

⁵⁵ See *Comm’r, Dep’t of Env’tl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556, 561–62 (Ind. 2001).

defendant's actions or inactions facilitate the violation.⁵⁶ In this way, these state analogs have favored negligence over strict liability. In fact, it is not just courts that have sought to appease the doctrine's critics by lending it a negligence construction. Commentators calling for the expanded use of the RCO doctrine have also preferred the negligence understanding of it.⁵⁷

Yet, it is not clear that it makes sense to construe the doctrine as a species of negligence liability, or that doing so would allay concerns about RCO liability. For one thing, why should the defendant's (mere) negligence result in criminal, rather than civil, liability? Scholars have argued that deterrence can be secured at least as readily—and more cheaply—through a civil suit.⁵⁸ One might attempt to defend the use of criminal liability by pointing to the moral condemnation inherent in criminalizing an offense. It was for this reason that the Court in *Dotterweich* insisted that criminal liability was necessary, lest the Court otherwise encourage a view of the FFDCA's criminal penalties as a "license fee for the conduct of an illegitimate business."⁵⁹ But the concern about moral meaning should be allayed just so long as the corporation itself, and/or those of its members who participated culpably in its offense, were facing criminal liability. And there is a countervailing concern—namely,

⁵⁶ *Dougherty*, 482 N.W.2d at 490 (formulating the RCO doctrine as follows: "(1) the individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.").

⁵⁷ See, e.g., Schuck, *supra* note 20, at 371 (contemplating use of the RCO doctrine to prosecute executives who have proceeded at least negligently with respect to the corporate crime).

⁵⁸ See Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 864 n.89 (1994); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 323 (1996); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1499 (1996).

⁵⁹ *United States v. Dotterweich*, 320 U.S. 277, 282–83 (1943).

that imposing criminal liability in the face of mere negligent fault risks diluting the force of the criminal law.⁶⁰

In any event, there is reason to doubt whether a corporate executive really could prevent her corporation's violation. The impulse to lend a negligence construction to the RCO doctrine is understandable because negligence imports a measure of culpability that strict liability lacks, and thereby renders criminal liability more palatable. The doctrine permits this construction, because criminal liability under the doctrine is not simply status-based, but rather depends on the officer's "responsible relationship" to the violation,⁶¹ and the officer can defend against liability if she can establish that she could not have prevented the crime no matter what she did. Nonetheless, negligence is a hollow justification for prosecuting or punishing the corporate executive who is several layers removed from the individuals participating in the offending conduct, as John Park argued he was when contesting his conviction for Acme's rodent infestation. Of course, Park *could have* intervened to remedy the rodent infestation, but is the president of a very large corporation really expected to be laying rat traps and bait stations?⁶² The RCO doctrine ignores the reality of the large, decentralized modern corporation and its accompanying economic benefits. It holds the corporate executive criminally liable on the basis of a set of purported expectations—that the high-ranking executive will monitor

⁶⁰ See Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 79–80 (1933); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 765 (2005); Paul H. Robinson, *Moral Credibility and Crime*, ATLANTIC MONTHLY, Mar. 1993, at 72, 76.

⁶¹ See *Friedman v. Sibelius*, 755 F. Supp. 2d 98, 111 (D.D.C. 2010) ("As made clear by the Supreme Court, it is simply not the case that a defendant can be convicted of a misdemeanor under the responsible corporate officer doctrine based solely on his position within the corporate hierarchy.").

⁶² By way of analogy, we might say that it is undoubtedly true that President Obama has the power and authority to prevent drug deals from occurring on the streets of Washington, D.C., but he also presumably has better things to do with his time.

all facets of the company's operation—that few of us harbor. The corporate executive may well be blameworthy—and Part IV argues that she is—but it seems unsupportable to place blame on her for a failure to prevent the kind of offenses that the RCO doctrine paradigmatically contemplates. Negligence, that is, fails to track the nature of the corporate officer's responsibility.

B. The Ineluctable Human Contributions to Corporate Crime

This rationale for the RCO doctrine focuses on the corporation's unique ontology, where corporate action necessarily requires human execution. Since the corporation can act only through its members, the argument goes, its crime necessarily redounds to them. Thus, for example, in a Hawaii Supreme Court case involving an auto wrecking company that had violated Hawaii's anti-burning statutes, the court affirmed the conviction of the corporate president and vice president on the ground that the company's illegal acts could have occurred only at the hands of its human members.⁶³

One might respond that this ontological argument makes too much of the corporation's parasitic reliance upon its human members. The fact that the corporation can act only through individuals is compatible with the corporation's nonetheless bearing a guilty will. This is especially true where no one individual who participates in carrying out the corporation's crime satisfies the mens rea elements of the crime individually even though, together, these various individuals do. These are the facts of *United States v. Bank of New England*,⁶⁴ where the First Circuit affirmed the

⁶³ See *State v. Kailua Auto Wreckers, Inc.*, 615 P.2d 730, 736 (Haw. 1980). See also *Dotterweich*, 320 U.S. at 281 ("[T]he only way in which a corporation can act is through the individuals who act on its behalf" (citing *New York Cent. & H.R.R. Co. v. United States*, 212 U.S. 481 (1909))).

⁶⁴ *United States v. Bank of New England*, 821 F.2d 844, 855–56 (1st Cir. 1987).

bank's conviction for violating a reporting requirement even though no one employee possessed all of the information prompting the requirement, and thus no one employee knew that reporting was required. The court found that it was acceptable to aggregate the knowledge of several individuals and impute this collective knowledge to the corporation as a whole. The court thereby found that the corporation satisfied the crime's knowledge requirement. The collective knowledge doctrine has been ridiculed for its implausibility⁶⁵—rightly, in my opinion. The relevant point, however, is that the fact that corporations cannot carry out acts on their own does not establish that the humans who act on their behalf necessarily come to bear culpability, just as the individual employees in *Bank of New England* did not bear culpability for having failed to produce the required report.

Furthermore, even if it were the case that individuals who together carried out the corporate crime were necessarily guilty of that crime (or their contribution to it), we would still not arrive at a justification for RCO liability. After all, the RCO doctrine is typically invoked precisely when the executive has not participated in the crime; if she had, she could be prosecuted on a direct liability theory. One could respond that the executive's omission was a but-for cause of the corporation's crime and that, therefore, the executive prosecuted under the RCO doctrine did contribute to the crime's commission. But this proffered justification for RCO liability has nothing to do with the corporation's unique ontology—the executive would be liable not because the corporation can act only through humans, but because she had failed to fulfill her duty to prevent criminal violations, a duty she bears with respect to her individual subordinates' conduct just as much as with respect to the corporation's. In other words, it is not the corporation's inability to act on its

⁶⁵ See, e.g., David Luban, *What's Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43, 70 (1996) (quoting *Bank of New England*, 821 F.2d at 855–56) (deeming the collective knowledge doctrine “as bizarre as announcing that four fiddlers playing in separate rooms make a string quartet.”).

own that would ground liability, but instead the executive's purportedly culpable omission. This is a negligence account of RCO liability and we have already seen that that account is wanting.

C. An End-Run Around the Evidentiary Burdens of Direct Liability

Some commentators defend the RCO doctrine because they see it as a useful tool for a prosecutor who wants to target an executive who is believed to have participated in the corporation's crime, but against whom there would be insufficient evidence to secure a conviction.⁶⁶ If charging the executive on a theory of direct liability looks untenable, the RCO doctrine at least provides a second-best alternative. To provide an example sympathetic to this line of defense, imagine that police uncover the most convincing of smoking guns, establishing that a CEO directed the corporate crime, and perhaps even helped to carry it out, but the evidence in question was acquired illegally and so is inadmissible. In such a case, RCO liability provides a prosecutor with an alternative route to criminal sanctions—to be sure, one that carries lesser penalties than a conviction as an accomplice to the crime, but nonetheless one that ensures that the executive does not escape liability altogether.

As satisfying as this outcome may be, it does nothing to bolster the case for RCO liability. Our desire to see the executive pay for her crime would not justify convicting her falsely, or through some other process involving a miscarriage of justice. The justifiability of convicting her as a responsible corporate officer turns on the justifiability of RCO liability itself. If RCO liability is a travesty of justice, as some jurists and commentators have argued,⁶⁷ then her

⁶⁶ See Amiad Kushner, Comment, *Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context*, 93 J. CRIM. L. & CRIMINOLOGY 681, 682 (2003) ("The strongest rationale for the [RCO] doctrine does not lie in the activity sought to be regulated, but in the elusiveness of the defendant sought to be prosecuted.").

⁶⁷ See *supra* note 17.

conviction under the doctrine is no more justifiable than her conviction for some trumped-up charge. Thus, defenders of the RCO doctrine need a justification independent of its ability to ensnare guilty executives who would otherwise be off the hook.

D. Consent to RCO Liability

A final justificatory strand points to the corporate officer's willing assumption of the risk. For example, as various courts have noted, the corporate officer knows in advance of assuming her position the obligations of foresight and vigilance that the corporate officer will come to bear, and the corresponding liability she would come to incur if she were to neglect to fulfill these. One can therefore infer her (at least) tacit consent to the liability scheme.⁶⁸ We are justified in prosecuting and punishing her for her lapses, then, because she willingly consented to the risk of liability when she assumed her officer position.

In response, it should be noted that consent can furnish no more than a necessary pre-condition for the imposition of liability, and not a justification for it. Liability for the corporate officer who did not participate in her corporation's crime would indeed be deeply problematic if she had been conscripted or otherwise compelled to hold her position in the corporation.⁶⁹ But assuming that she came to hold the

⁶⁸ See, e.g., *United States v. Park*, 421 U.S. 658, 672 (1975) ("The requirements of foresight and vigilance 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"); *United States v. Morissette*, 342 U.S. 246, 256 ("The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.").

⁶⁹ There is a more general version of this concern—viz., that shared responsibility will cause individuals who share religious, ethnic, or racial ties to bear responsibility for one another's acts—that likely accounts for a good part of the resistance to the notion of shared responsibility. To be clear, the account advanced here is intended to apply only to those groups one joins freely, and in which one enjoys a genuine right of exit. Cf. Amy

position freely, knowing and implicitly or explicitly consenting to the exposure to liability that the position entailed would not itself justify imposing the liability. To put the point bluntly, the fact that someone is willing to die for the sins of the rest of us does not make killing her permissible. By the same token, more than the executive's consent is necessary to justify responsible corporate officer liability.

E. Summary

None of the four proffered rationales serve to justify prosecuting and punishing executives for corporate crimes in which they have not participated. It is nonetheless notable that each of the four rationales attempts to shoehorn the doctrine into the traditional understanding of criminal liability as rooted in personal guilt. Thus, the negligence rationale focuses on the corporate executive's purported fault; the corporate ontology rationale seeks to identify a culpable act element in the executive's omission; the prosecutorial tool rationale presupposes the executive's complicity; and the consent rationale foregrounds a kind of voluntarism, or willing assumption of the risk, especially congenial to the individualist paradigm.⁷⁰

It is easy to understand the impulse to assimilate the responsible corporate officer doctrine to the prevailing paradigm of criminal responsibility. Punishing someone who is blameless is a disquieting prospect, to say the least. Where the existing rationales go wrong, however, is in presupposing that blame is warranted only in the face of personal guilt. What is needed is not a rationale that explains how the RCO doctrine is really a species of

Sepinwall, *Citizen Responsibility and the Reactive Attitudes: Blaming Americans for War Crimes in Iraq*, in ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 231, 236 (Tracy Isaacs & Richard Vernon eds., 2011) (discussing moral responsibility for actions one did not freely undertake).

⁷⁰ Cf. Samuel Scheffler, *Relationships and Responsibilities*, 26 PHIL. & PUB. AFF. 189, 191–92 (1997) (“In order to [owe a special] responsibility, one must have performed some voluntary act that constitutes the ground of the responsibility.”).

culpability as conventionally understood, but instead an account that elucidates the reasons for which one may be blameworthy even if one does not meet the hallmarks of guilt on the individualist paradigm. Part IV briefly describes what such an account might look like. Part V then turns to the purported parade of horrors allegedly caused by the RCO doctrine and argues that none of these results is inevitable, and thus need not give us pause.

IV. DEFENDING RCO LIABILITY

While jurists and commentators have attempted to defend the doctrine by situating it within the individual culpability paradigm, we have seen that these defenses ultimately fail to persuade. Yet, these tenacious efforts to defend the doctrine might reflect a sense that crime committed in the corporate setting is different from street crime. Once there is a license to impute the criminal act to the corporation as a whole, we might well wonder why the only individuals who deserve to be blamed for it are those who participated in it or culpably failed to prevent it. Might it not be the case that those who are especially implicated in the corporation itself ought to incur some blame for its misdeeds, even if they have not contributed culpably to its misdeeds? In other words, might the doctrine's supporters have intuited that corporate executives are on the hook even if they haven't participated in the corporate crime?

Participation is of course the *sine qua non* of culpability in the garden-variety criminal case. But crime committed by an institutional group is relevantly different from the garden-variety criminal case. Part IV.A seeks to establish this by focusing in particular on the relationship between the executive and her corporation.⁷¹

⁷¹ For a somewhat different and more elaborate argument for shared executive responsibility, see generally Amy J. Sepinwall, *Crossing the Fault Line in Corporate Criminal Law* (2014) (unpublished manuscript) (on file with author) (advocating a novel theory of shared responsibility that urges individual liability in certain circumstances independent of whether that person is actually fault).

A. Rewarding and Punishing Executives

The public frequently denounces what it views as outsized bonuses for corporate executives.⁷² While the size of these bonuses might well warrant consternation, the grounds upon which they are awarded are instructive for the purposes of this Article.

As a matter of common sense, one might expect an executive to receive a bonus where, and only where, she has discernibly contributed to her company's success. In fact, however, it is notoriously difficult to identify a causal relationship between a firm's improved performance and anything the executive in question did or did not do.⁷³ It is partly for this reason that most corporate executives are

⁷² See Heather Landy, *Growing Sense Of Outrage Over Executive Pay*, WASH. POST, Nov. 15, 2008, at A8.

⁷³ See Renee B. Adams et al., *Powerful CEOs and Their Impact on Corporate Performance*, 18 REV. FIN. STUD. 1403, 1429–30 (2005); Joel M. Podolny et al., *Revisiting the Meaning of Leadership*, 26 RES. ORGANIZATIONAL BEHAVIOR 1, 2 (2005); SYDNEY FINKELSTEIN & DONALD C. HAMBRICK, *STRATEGIC LEADERSHIP: TOP EXECUTIVES AND THEIR EFFECTS ON ORGANIZATIONS* (1996). More worryingly, perhaps, a study for the period from 1993 to 2012 revealed that “[a]bout 40 percent of the highest-paid CEOs in the United States over the past 20 years eventually ended up being fired, paying fraud-related fines or settlements, or accepting government bailout money.” Nadia Damouni, *Highest-Paid U.S. CEOs Are Often Fired or Fined: Study*, REUTERS, Aug. 28, 2013, available at <http://www.reuters.com/article/2013/08/28/us-companies-pay-idUSBRE97R10C20130828> (describing a 2013 report by the Institute for Policy Studies). But see *Knowledge at Wharton: Outrage Over Outsized Executive Compensation: Who Should Fix It and How?*, WHARTON SCH. OF U. PA. (Feb. 4, 2009), available at <http://knowledge.wharton.upenn.edu/Article.cfm?Articleid=2151> (referencing a study by Alex Edmans arguing that pay correlates well with performance); Alex Edmans & Xavier Gabaix, *Is CEO Pay Really Inefficient? A Survey of New Optional Contracting Theories*, 15 EUROPEAN FIN. MGMT 486, 494 (2009) (“A number of features of observed compensation schemes appear to be inconsistent with optimal contracting, and are thus frequently interpreted as evidence of rent extraction. . . . [But] a number of recent theories . . . reach a different conclusion. By incorporating complex, but realistic, aspects of the employment relationship, these above features can be reconciled with efficient pay-setting.”).

awarded bonuses so long as the corporation does well, without regard for the executive's role in the corporation's performance.⁷⁴ Of course, the executive who has made a discernible positive difference might receive a greater bonus still; the point for our purposes is that making a positive difference is not necessary for the bonus to accrue.

The rationale for rewarding an executive any time her corporation does well, independent of her role in the corporation's success, is understandable not just on the basis of the difficulty in tracing causal connections between executive input and firm output. There is a principled reason for this distribution of bonuses. The executive is expected to proceed in her role in a way that recognizes that her welfare and that of the corporation are intertwined; the fates of both should rise and fall together. Providing the executive with a bonus any time the corporation does well honors this expectation, and rewards its fulfillment. Put differently, society's treatment of the executive is distinct from the way in which it assesses merit or desert in most other contexts. Typically, an individual is rewarded for a job well done, i.e., a job that *she* did well. It would frustrate our commitment to meritocracy if we were to reward one individual for the stellar performance of another absent a connection between the two. The relevant connection—indeed, the only one that we take to warrant departure from the individualist mode of assessment with which we typically proceed—is that both are members of the same team.

Consider the way we treat members of a four-person team in a relay race. Suppose that the first of the four runners has a bad day and runs considerably slower than usual—so

⁷⁴ See, e.g., Symantec, FY13 Executive Annual Incentive Plan 2 (Mar. 31, 2012) (stipulating that the two performance metrics used to calculate CEO's annual incentive bonus payment will be (1) corporate revenue and (2) corporate earnings per share); PepsiCo, Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 17 (Mar. 24, 2006) ("For the fiscal year 2005, [the CEO's] base salary continued to be capped at \$1,000,000. He was eligible for a 2005 annual incentive award because PepsiCo achieved its pre-approved earnings target which was set to achieve third quartile performance relative to peer companies.").

much so that at the end of her portion, her team is in last place. The other three members of her team more than make up for her slow speed and the team as a whole finishes first. If medals are the token prize for the team's victory, each of the four members of the team will receive a medal. It would be odd—unseemly even—to deny the slow member a winners' medal. Why is this?

Again, as with the case of the executive, the contribution of any one member to the team's success is uncertain. To be sure, we know how fast each member ran on race day, so we can assess how each performed on that day. But there is much that goes on leading up to, and affecting the outcome, on race day. For all we know, the first runner might have devised the team's training strategy, been the most potent source of encouragement for the others, formed the team in the first place, or kept the peace between the otherwise fractious teammates. So, she may deserve a reward even if her team won the relay race in spite of, rather than because of, her race speed.

But again, as with the case of the executive, it is not mere uncertainty about her role more broadly conceived that justifies our treating her as just as much of a winner as her teammates. We treat each member equally because that is the right way to respond to members of a team. We expect each one, and each of the team members expects the others, to put the team first. This entails, among other things, that each one of them conceives of the team's performance as a joint output, for which all deserve equal credit.

The analogy to teams is more than merely felicitous. Corporations have elsewhere been conceived of as teams,⁷⁵ in recognition of both the ways in which the contributions of the members of the corporation intertwine so as to problematize individual assessments, and the ways in which we expect members of the corporation to see themselves as united in a whole that is greater than the sum of its parts. We reward the executive whose contribution to the firm's success is

⁷⁵ See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 263–65 (1999).

difficult to tease out, then, because even if she occupies a place analogous to that of the slow member of the relay team, she is still a part of the team and each member of the team deserves credit when it does well.⁷⁶

In sum, praise and reward are bestowed in the team context—whether athletic or corporate—on the basis of the performance of the team, not merely the performance of the individual member. But this collective mode of assessment should, and sometimes does, have implications for our judgments of blame and sanction when the team transgresses. If we subsequently learn that some, but not all, members of the relay team were using illicit enhancement drugs, all will be stripped of their victory and their medals, and not just the drug users. This will be true even if the members who were drug-free did not know, and had no reason to know, of their teammates' use of the performance enhancers. And it will remain true even if we can be fairly certain that the team would have won even if some of its members hadn't used performance enhancing drugs—say, because its time was so much greater than the next fastest team, and the time required to beat the next fastest team would have been within the reach of the doping team even if the latter's members hadn't used performance enhancing drugs. In other words, even if the doping wasn't necessary for the victory, all of the members are stripped of their medals, not just those who engaged in doping.

Of greater relevance here, the practice of rewarding executives when the corporation does well should have as its corollary a practice of sanctioning the executive when the

⁷⁶ See Blair & Stout, *supra* note 75, at 249–50. There is, of course, one notable distinction between the relay and corporate team examples. Each relay team member receives a medal, and each medal is, presumably, qualitatively identical. Not so, quite obviously, with bonuses, which will typically vary considerably in magnitude depending on the recipient's corporate rank. The disparity arises because of the hierarchical organization of the corporation, in contrast to the egalitarian structure of the team. But the important point for our purposes is the *fact* of the bonus—whether or not it gets bestowed depends on the corporation's performance, and not in any direct way on the extent of the executive's contributions to that performance.

corporation does wrong. It will not do for the executive to disclaim responsibility by insisting that she did not participate in, or even know about the wrong, at the time of its occurrence. If the wrong is a wrong of her corporation—and the next part underscores the necessity of an antecedent *corporate* wrong⁷⁷—then she must, as a matter of fulfilling the obligations of team-spiritedness that her role demands of her, accept blame for it, and whatever consequences blame entails.

To be clear, the executive is on the hook not because she accepted bonuses when the firm did well. If that were the case, then she must, as a matter of consistency or reciprocity, accept sanctions when it transgresses. That justification for blame rests on a suspicion that the bonuses were not deserved in the first place, and yet the executive didn't complain about their bestowal, so she may not complain about the bestowal of punishment either. If the reward really was unwarranted, matters will not be remedied by issuing a sanction that is no more warranted. Two wrongs will not make the situation right.

Instead, I have been seeking to argue that there is a sense in which the executive does deserve her bonus independent of whether she (or anyone) can claim that she is causally responsible for the firm's success. And the ground of desert there entails as well that she deserves her punishment independent of whether she (or anyone) can claim that she is causally responsible for the firm's failing. In particular, she deserves to bear responsibility for the corporation's acts because in the corporate context, as is true of all team contexts, desert need not turn on one's individual contribution to success or failure, or laudable or reproachable corporate conduct. Instead, it is sufficient that one was a team member at the time of the conduct.

To be sure, we can think of lots of situations where it would be unfair to punish the executive for a corporate wrong in which she was not involved. The next part surveys these situations and attempts to offer guidelines for avoiding

⁷⁷ See *infra* Part V.A.2.

them. The point for now is that it is appropriate to have the executive's fate track that of the corporation—she is expected to harbor an attachment to the corporation that causes her to see her fate as entwined with that of the corporation—and we are licensed in treating her in accordance with the corporation's performance. Institutions like the corporation (and the athletic team) have been organized as settings where individualized assessment is both ill-suited and unseemly because norms of solidarity are expected to govern. Executives deserve to bear responsibility for corporate acts because that is the way desert works in the team setting.

V. PROBLEMATIC RCO CASES AND GUIDELINES FOR AVOIDING THEM

This Article has been focusing on what the executive deserves just in virtue of her membership on the "team." It has already allowed that while membership may often provide a license for assigning the executive responsibility for corporate wrongs, it does not always do so—sometimes blaming and sanctioning the executive for a corporate wrong in which she was not involved would result in too great an unfairness. At this point one might ask, what is so special about executives? Why do they, but not, say, janitors, receive bonuses when the corporation does well, and why should they, but not janitors, be eligible for punishment when the corporation does wrong? And when should executives be subject to blame and sanction in the first place? Finally, assuming the executive is blameworthy, why should her blameworthiness result in punishment? Why wouldn't it be enough to subject the executive to the social sanctions involved in rituals of reproach, without involving the state's punitive machinery?

Part V.A seeks to answer these questions by surveying a series of problematic RCO cases, and identifying where and why each one goes wrong. That effort enables us, in Part V.B, to formulate principles or guidelines for the proper application of the RCO doctrine.

A. Misapplications of the RCO Doctrine

1. Buckyballs and Abuse

Buckyballs, small magnetic balls that can be stacked or strung to create whatever shapes the user desires, were the brainchild of two thirty-something New York entrepreneurs, Craig Zucker and Jake Bronstein.⁷⁸ They invented and produced the office toy in 2009. By 2011, *People* magazine had named it one of the five hottest trends of the year. It was sold in over 5000 stores, including Brookstone and Urban Outfitters and, by 2012, sales had reached ten million dollars a year.⁷⁹ Then, in July 2012, the Consumer Product Safety Commission ("CPSC") ordered Zucker and Bronstein to develop a corrective action plan, and requested that stores carrying Buckyballs remove the product from their shelves.⁸⁰ The problem? The CPSC contended that the toys "pose a risk of magnet ingestion by children below the age of fourteen, who may . . . place single or numerous magnets in their mouth."⁸¹ Ingested magnets can adhere to one another across organ walls, like the intestines, and cause blockages and tears,⁸² resulting in serious injury or even death. Buckyballs had been marketed to adults, and the packaging indicated that they were intended for individuals thirteen and up. Zucker concedes the possibility that young children could misuse Buckyballs and suffer potential adverse health consequences. But, he contends, the same is true for many standard household items, like knives and staircases, as well as goods commonly used by, if not also intended for, kids,

⁷⁸ See Sohrab Ahmari, *Craig Zucker: What Happens When a Man Takes on the Feds*, WALL ST. J. (Aug. 30, 2013, 6:52 PM), <http://online.wsj.com/news/articles/SB10001424127887324108204579023143974408428>.

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ *Id.*

⁸² Andrew Martin, *Safety Worry Leads to End of a Popular Toy Magnet*, N.Y. TIMES, Dec. 18, 2012, at B3.

like hot dogs and balloons, both of which pose choking hazards.⁸³

Zucker and Bronstein initially refused to comply with the CPSC's request that they voluntarily recall their product. By the end of 2012, retailers no longer wanted to carry Buckyballs and the legal battle with the CPSC had grown too expensive to continue fighting. Zucker was done. He dissolved the corporation he had formed to manufacture and distribute Buckyballs.⁸⁴ But the CPSC wasn't done with Zucker. In February 2013, it claimed that, if Buckyballs were determined to be defective, it would hold Zucker personally liable for the cost of the recall, which the CPSC put at \$57 million.⁸⁵ The legal ground for Zucker's (alleged) liability? The RCO doctrine.⁸⁶ Importantly, this is an invocation of the civil RCO doctrine; there is no allegation that Zucker or the Buckyball distributing corporation violated a criminal law. Nonetheless, the CPSC contends that because Zucker, as CEO, was in a position of authority, he had a responsibility to undertake the recall on his own.⁸⁷

Zucker's lawyers contend that the RCO suit is sheer reprisal for a public relations campaign that sought to embarrass the CPSC for what Zucker saw as its baseless war against his product.⁸⁸ But even if the CPSC's motives are innocuous, its rationale is not. The lack of an alleged criminal violation here is not in itself problematic; the RCO doctrine has been widely used to hold executives liable in civil suits for corporate violations of environmental or clean

⁸³ See Ahmari, *supra* note 78.

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ See Mark Chenoweth, *CPSC's Attack on Corporate CEO More Dangerous Than Rare Earth Magnets?*, FORBES (Aug. 28, 2013, 4:05 PM), <http://www.forbes.com/sites/wlf/2013/08/28/cpsc-attack-on-corporate-ceo-more-dangerous-than-rare-earth-magnets/>.

⁸⁷ See *id.*

⁸⁸ See *id.*

water statutes.⁸⁹ The problem is that there is no finding of a violation at all. The CPSC never established that Buckyballs constitute a “substantial product hazard,” as the statute requires, before instituting a mandatory recall.⁹⁰ And if the recall was not required, Zucker should not be held responsible for paying for the CPSC’s decision to pursue it nonetheless.

Zucker’s case highlights two potential dangers with the RCO doctrine—that government officials would wield it in an effort to: (1) retaliate against those who challenge the government’s authority; or (2) coerce compliance with standards that the government desires, but is without legal authority to enforce.⁹¹

As distressing as these uses of the doctrine may be, they should not be taken to impugn the doctrine as a whole, or even to suggest that there may be reasons for abandoning it altogether. Because the government wields considerable discretion when it comes to filing civil or criminal complaints in the face of alleged legal violations, there is always the possibility that it will engage in abuse. The RCO doctrine does not provide unusual or excessively damaging opportunities for abuse relative to other statutory or doctrinal bases for governmental legal action. Furthermore, while the RCO doctrine—because it targets individuals rather than corporations—threatens to have more devastating effects,⁹² the benefits of its use nonetheless

⁸⁹ See Clean Water Act, 33 U.S.C. § 1319(c)(6) (2012) (expressly providing that “responsible corporate officers” are among the “persons” who can be prosecuted for any violations).

⁹⁰ Chenoweth, *supra* note 86.

⁹¹ *Id.* (“If CPSC is given the power to threaten such a result in every recall case, no recall will ever again be truly voluntary. The agency would be able to coerce CEOs into conducting recalls in cases that could not be proven ‘substantial product hazards’ in court because the CEOs would not be willing to take a chance on incurring personal liability.”).

⁹² Among the concerns that the dissent in *Park* noted was the fact that although *Park* was convicted of a misdemeanor, and punished with a meager \$250 fine, a subsequent conviction for the same offense would have carried a prison sentence of up to three years. See *United States v. Park*, 421 U.S. 658, 660, 666, 682–83 (1975) (Stewart, J., dissenting).

outweigh the costs of its potential abuse. If the last Part sought to argue that it is not unfair to hold executives criminally liable, the Introduction and review of *Dotterweich* sought to present reasons for which it might also be desirable to do so. In particular, the impressive deterrent power of RCO liability, especially in those corporations that are too big to jail or too big to nail, suggests that we could be tremendously well served by a vigorous and vibrant RCO doctrine. Of course, if abuse were inevitable and its consequences as devastating as an unwarranted criminal conviction, that would suffice to persuade us that we should abandon the doctrine. But such abuse is not inevitable. We should, at the very least, hold our judgment until we consider whether guidelines constraining the doctrine's use might avoid the purported abuse. Part V.B seeks to advance these guidelines.

2. No Corporate Crime

If the unfairness in the Buckyballs case resides in the fact that there was no statutory violation whatsoever, the unfairness in the cases contemplated in this section resides in the fact that the violation in question was committed by an employee of the corporation, but is not attributable to the corporation as a whole. And, if there is no corporate violation, then there is no reason to hold a corporate officer who played no role in the violation responsible.

Scholars have widely criticized the criteria under federal law for imputing an employee's criminal act to the corporation.⁹³ According to these criteria, the corporation

⁹³ See ANDREW WEISSMANN ET AL., U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, REFORMING CORPORATE CRIMINAL LIABILITY TO PROMOTE RESPONSIBLE CORPORATE BEHAVIOR 3 (2008), available at <http://ilr.iwssites.com/uploads/sites/1/WeissmannPaper.pdf>; H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279, 288 (1995); Brent Fisse, *Restructuring Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1183 (1983) (referring to the confused jurisprudence around corporate criminal liability as "the blackest hole in the theory of corporate criminal law."); John Hasnas, *The*

may be held criminally liable for any criminal act undertaken by an employee within the scope of her employment for the benefit of the corporation.⁹⁴ The corporation can then be prosecuted or punished—even if it neither authorized nor even knew about the employee's crime, and even if the criminal act violated express corporate policy and instructions⁹⁵—because the employee's knowledge can be imputed to the corporation.⁹⁶

Suppose that these critics are right that, in at least some cases, the DOJ commits a grave injustice where it prosecutes and punishes corporations for the criminal acts of rogue employees. Better standards for attributing criminal liability to the corporation exist,⁹⁷ and the preservation of

Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability, 46 AM. CRIM. L. REV. 1329, 1329 (2009). See generally Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 57 (2007) (“[T]he basic rule of corporate criminal liability has few friends.”).

⁹⁴ The seminal case here is *New York Cent. & H.R.R. Co. v. United States*, 212 U.S. 481, 491–94 (1909). See generally *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247–51 (1979).

⁹⁵ See *United States v. Hilton Hotels*, 467 F.2d 1000, 1004, 1008 (9th Cir. 1972); *United States v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204–05 (3d Cir. 1970); *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) (“[A] corporation may be held criminally responsible for antitrust violations committed by its employees . . . even if, as in *Hilton Hotels* and *American Radiator*, such acts were against corporate policy or express instructions.”).

⁹⁶ See *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987).

⁹⁷ One alternative can be found in the Model Penal Code's standard for corporate criminal liability, which requires that “the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.” MODEL PENAL CODE § 2.07(1)(c) (1985). Commentators have arrived at other standards. See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1121–47 (1991); WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY* 58–60 (2006).

the current standards violates compelling norms of justice and desert, or so we may argue. As such, in a case where the crime was committed by a “bad apple” in a setting where the corporation did everything it reasonably could to ensure employees’ compliance with the law, we should resist construing the bad apple’s crime as a crime of the corporation. But if that is so, then we should be especially loath to prosecute and punish a corporation’s corporate officer for the bad apple’s crime.

Albert Alschuler successfully lampoons the injustice of holding a corporate officer responsible for the crime of an employee *where the employee’s crime is not attributable to the corporation*.⁹⁸ Alschuler likens the practice to the primitive doctrine of frankpledge, in which all of the members of a group could be subject to punishment for the wrongdoing of any one of them if the wrongdoer escaped before being apprehended. He goes on to contend that the modern-day version of corporate criminal liability is even more regressive than frankpledge, since it permits punishment of the group even when the wrongdoer has already been convicted.⁹⁹

Alschuler’s objection is captivating in no small part because it echoes the wrong inherent in racism or terrorism, where an entire group is made to suffer because of the (alleged) wrongdoing of one or a few of its members. But the objection also fails to recognize a key distinction: the wrong of racism or terrorism (and perhaps frankpledge, too) arises because the wrongdoer might not have sought to act on behalf of the group and, even if she did, she was not authorized to do so. Put differently, the wrongdoer’s act is not an act of the group, and so its members should not be made to suffer for it. But the situation is different where the crime *is* a crime of the group, even if it was carried out by only a subset of the group’s members.

Much of the resistance to the RCO doctrine arises where and because the critic contemplates a case in which it is

⁹⁸ See Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1359 (2009).

⁹⁹ See *id.* at 1380.

doubtful that the crime should have been attributed to the corporation in the first place. Where this is so, punishing executives is like frankpledge—they are punished only because they share membership in the same entity, not because the entity itself is blameworthy. A proper transmission of responsibility from employee-offender to the corporate officer must go through the corporation. The employee's offense must first be one that is properly attributed to the corporation; from there, we may be licensed in holding the corporate officer responsible for it. But where the employee's offense ought not to be attributed to the corporation, because it is hers and hers alone, we are no more licensed in holding an executive responsible for it than we are in holding responsible a fellow member of the offender's ethnic group, or church, or golf club, or alumni society, and so on. Mere shared membership in the same entity is not a ground of shared responsibility, as the frankpledge worry rightly reflects. But shared membership in the *transgressing* entity can be a ground of shared responsibility, for the reasons adduced in Part IV.

3. Officers in Name Only

Helen Florence Weber was a housewife in Honolulu, HI, when she found herself convicted of seventeen counts of violating a statute prohibiting open fires.¹⁰⁰ Mrs. Weber was nominally the president and treasurer of her husband's car wrecking business, Kailua Auto Wreckers, Inc. ("KAW"). In 1976, the year in which the offenses occurred, KAW openly burned between 10,000 and 15,000 cars, as captured on film by neighbors, notwithstanding repeated oral and written warnings from the Hawaii Public Health agency.¹⁰¹ Mrs. Weber's role in the company was merely titular. In some years, she attended the annual directors' meeting, in other

¹⁰⁰ State v. Kailua Auto Wreckers, Inc., 615 P.2d 730, 733 n.1 (Haw. 1980). ("PHR Ch. 43, Sec. 7(a) states, in relevant part, 'no person shall ignite, cause to be ignited, permit to be ignited or maintain any open fire.'").

¹⁰¹ See *id.*

years she did not; on rare occasions, she ran errands for the company. Mrs. Weber did not take an active part in the business, she did not issue orders regarding business operations, and she never set company policy.¹⁰²

Mrs. Weber's conviction was based on the RCO doctrine, and her plight exemplifies another way in which it can go awry in practice—namely, by subjecting individuals with no meaningful connection to the corporation's crime to prosecution and punishment. Proper application of the RCO doctrine requires, then, that it is restricted to those who do bear a meaningful connection to the corporation's crime.

To be clear, that connection need not involve participation in or foreknowledge of the crime. As I argued in Part IV, the executive is on the hook under a proper understanding of the RCO doctrine not because she authorized, contributed to, or even tolerated the crime. She is instead on the hook because she is expected to occupy her role in a way that causes her to see herself, and licenses others in seeing her, as implicated in the crime. But the predicate for her responsibility then becomes the normative expectation that she commit herself to the corporation in this way. The Hawaii Supreme Court was wrong to affirm Weber's conviction because she did not harbor, and was not expected to harbor, the kind of commitment to the corporation that grounds the account of RCO liability advanced here. As with the other concerns about the RCO doctrine, though, the remedy is not to dispense with the doctrine altogether, but instead to articulate principles restricting its application to those corporate officers who deserve to bear responsibility.

4. Dilution and Desert

Of course, even if an intuition about shared responsibility justifies blaming the corporate officer and supports the application of the RCO doctrine, the question of when, and why, executives' blameworthiness licenses *criminal* liability remains. Elsewhere, it has been argued that the special moral meaning of the criminal law makes it appropriate to

¹⁰² *Kailua Auto Wreckers*, 615 P.2d at 737.

subject the blameworthy executive to criminal, rather than merely civil, liability.¹⁰³ Here, a rubric has also been developed to determine the magnitude of blame.¹⁰⁴ This rubric demonstrates that the executive is far less blameworthy than the crime's perpetrator.¹⁰⁵ Finally, relatively light sanctions have been proposed that correspond to the quantum of blame the executive warrants.¹⁰⁶

If the executive prosecuted under the RCO doctrine really does bear far less blame than the crime's perpetrator, one might wonder whether wielding the RCO doctrine under these circumstances does violence to the criminal law. The worry is that holding corporate officers criminally liable risks diluting the criminal law's moral force. This concern, however, represents an unsubstantiated empirical claim. We prosecute and punish misdemeanors as innocuous as bringing a foreign-grown piece of fruit into the United States,¹⁰⁷ as well as felonies as egregious as brutal rape-murders or serial killings. There is no evidence that we are incapable of distinguishing between these crimes on the basis of their relative blameworthiness, or that criminalizing the former in some way lessens our outrage in the face of the latter. Furthermore, the dilution worry has traction only if we subject individuals who are not blameworthy to criminal liability. Part IV demonstrates that the executive, in light of her expected commitment, *is* blameworthy. As long as sanctions for the executive convicted under the RCO doctrine are thoughtfully crafted and only punish the executive to the extent that she bears blame, we need not worry about the legitimacy or force of the criminal law. Again, the next section points the way.

¹⁰³ See Sepinwall, *supra* note 71, at 42.

¹⁰⁴ See *id.* at 45-47.

¹⁰⁵ *Id.* at 27, 32.

¹⁰⁶ *Id.* at 42.

¹⁰⁷ See Alfred Borcover, *Sparky Sniffs Out Agricultural Crime at O'Hare*, CHI. TRIB., Feb. 26, 1989, at M2.

B. Principles for Application

The purpose of the prior section was to establish that concerns about the RCO doctrine are not endemic to the doctrine itself; instead, they arise when it is applied in contexts for which it was not intended, or which exceed its justification as articulated in Part IV. This section formalizes the lessons from the problematic cases surveyed above in an effort to arrive at guidelines ensuring that the government restricts RCO liability to those cases where corporate officers genuinely deserve blame.

1. Guideline #1: There Must Have Been a Crime, and It Must Be Properly Attributable to the Corporation

This guideline seeks to combine the lessons from both the Buckyball case and the frankpledge worry. Again, the Buckyball case looks unfair because the government proceeded against the company's CEO without having established that there was any statutory violation, and in the face of facts that appeared not to involve any statutory violation.¹⁰⁸ In the case of frankpledge, we have a criminal act, but it is not an act of the group; instead, the guilt appropriately borne by one individual gets transmitted to another individual who is innocent of the crime, merely because they are members of the same group.¹⁰⁹ To protect against these concerns, we should insist that there be a criminal violation, and that it be properly attributable to the corporation.

With that said, we need not insist upon a corporate conviction as a predicate for RCO liability. Indeed, in *Dotterweich* itself, Buffalo Pharmacal, the corporate entity, was acquitted at trial.¹¹⁰ The Court noted that the company's legal innocence did not entail its factual innocence. For example, discomfort with corporate criminal

¹⁰⁸ See Chenoweth, *supra* note 86.

¹⁰⁹ See *supra* notes 98–100 and accompanying text.

¹¹⁰ *United States v. Dotterweich*, 320 U.S. 277, 279 (1943).

liability might have led the jury to acquit the corporate defendant even though there was ample evidence from which to conclude that it had violated the statutory provisions at issue. However, even if the corporation escapes criminal liability, we should insist upon evidence sufficient to have convinced a reasonable jury of the corporation's guilt.

To be sure, knowing when and why some employee's (or employees') criminal acts ought to be imputed to the corporation is an incredibly vexing matter. By way of illustration, consider that the prevailing state standard for corporate criminal liability is radically different from the federal standard,¹¹¹ and commentators have proposed different standards still.¹¹² This paper does not seek to intervene in this debate. Instead, it simply insists that RCO liability is appropriate only where we have evidence that would be sufficient to persuade a reasonable jury that there is a corporate crime under *whatever the governing standard is*. Where that is so, it is appropriate to prosecute and punish the corporation officer, subject to Guidelines 2 and 3.

2. Guideline #2: The Executive Prosecuted Under the RCO Doctrine Must Be One Whom We Would Think It Appropriate to Credit When the Corporation Does Well, and Blame When the Corporation Does Wrong

The *Dotterweich* Court recognized that

[i]t would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. To attempt a formula . . . would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted.¹¹³

¹¹¹ See MODEL PENAL CODE § 2.07(1)(c) (1985).

¹¹² See Bucy, *supra* note 97, 1121–46; William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 677–83 (2006).

¹¹³ *Dotterweich*, 320 U.S. at 285.

The Court was concerned about proceeding in an overly formalistic manner by holding that title alone could be a basis for RCO liability.¹¹⁴ The Hawaii Supreme Court, in affirming Helen Weber's conviction, seems to have ignored the Court's guidance by failing to look beyond Weber's title.

If title is neither necessary nor sufficient, how should we define the appropriate set of executives to target for RCO liability? Much federal case law identifies the relevant factor as the power of the corporate officer to control the conduct in question, whether or not she sought to exercise this power. Thus, a jury may find the corporate officer liable so long as she "had 'authority with respect to the conditions that formed the basis of the alleged violations,'" even if she did not actually "exercise any authority over the activity" in question.¹¹⁵ That formulation is appealing in theory and avoids imposing RCO liability on someone like Helen Weber. But, it might nonetheless extend too far in practice. The notion of authority can be capacious, leading to implausible claims like the one in *Park*, where the president of Acme Supermarkets was convicted for the company's rodent infestation on the claim that he had the authority, and thus, responsibility, to prevent or remedy the infestation. Park should have been found responsible, but not because he had the power to go to the Baltimore warehouse and lay rat traps himself. The account advanced in Part IV provides a far more convincing ground for holding someone like Park responsible: an executive should recognize that, by virtue of her position, the buck stops with her, and accept the consequences that accompany that recognition. Thus, Park is licensed in accepting kudos where his company does well, even if it does well as a result of initiatives to which he bears only the most tenuous of connections. Similarly, he must

¹¹⁴ See also *United States v. Ming Hong*, 242 F.3d 528, 531 (4th Cir. 2001) ("The gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof . . .").

¹¹⁵ *United States v. Iverson*, 162 F.3d 1015, 1024 (9th Cir. 1998) (internal quotations omitted) (upholding conviction of responsible corporate officer, who was President and Chairman of the Board, under the Clean Water Act).

accept blame and sanctions where his company does wrong, even if it does wrong in light of acts to which, again, he bears only the most tenuous of connections.

More generally, we can delineate the set of corporate officers properly held responsible by thinking about which of them we would think appropriate objects of praise for a laudable company performance. Correspondingly, these same officers may be subject to prosecution and punishment for the company's crime. As with Guideline #1, this guideline does not seek to provide determinate criteria. The Supreme Court's position in *Dotterweich*, allowing for a situationist or particularist approach to the question of who should count, is correct.¹¹⁶ Prosecutors should have to establish, on a case-by-case basis, whether the executive charged under the RCO doctrine occupies the kind of role that makes her a member of the team, as it were. Judges and juries will be best placed to evaluate whether a prosecutor has met her burden in this regard.

3. Guideline #3: The Severity of the Sanctions the Executive Convicted Under the RCO doctrine Incurs Should Correspond to the Magnitude of the Blame It Is Appropriate to Assign to Her

If the executive who neither participated in, nor culpably failed to prevent, her corporation's crime is treated no less harshly than those who carried out the crime on the corporation's behalf, we will have done violence to the institution of criminal law. We can secure the legitimacy of deploying the criminal law here, then, only if we retain a meaningful distinction between the magnitude of blame that the executive and the perpetrator of the corporate crime come to bear, and a corresponding distinction between the severity of the sanctions each incurs.

¹¹⁶ See *Dotterweich*, 320 U.S. at 284 ("Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance.").

Elsewhere, a means of calculating relative blameworthiness between various crimes has been established,¹¹⁷ as well as the kinds of sanctions that should attend a finding of RCO liability (such as, for example, disgorgement, compelled public apologies, and the like).¹¹⁸ This Article will not rehearse the full panoply. The point is that the maximum amount of blame properly assigned to the defendant in an RCO case should be relatively minimal, and the sanctions attending conviction correspondingly modest.

In significant part, we can understand the value of RCO liability in light of its expressive dimension. By assuming responsibility, the corporate officer recognizes not only that she acts on the corporation's behalf, but also that it acts on hers as well. This is part and parcel of the intertwining of fates described in Part IV. Furthermore, by holding corporate officers responsible, the public can express and direct its outrage in the face of a corporate crime to the corporation's human members. This will be especially important in cases where there are no individuals who are culpable of the corporate crime because, for example, it resulted from the unforeseen confluence of multiple actions, none of which were criminal in their own right, or where those actions that were criminal pale in severity to the overall corporate crime.¹¹⁹

At the same time, while executives can serve as ready targets for public indignation over corporate crime, we must not risk treating them as scapegoats. It is for this reason that maximum penalties for the responsible corporate officer should be relatively modest, involving fines and symbolic sanctions, but never incarceration.¹²⁰ Restricting sanctions in this way significantly undercuts the concern that executives who have not contributed to their corporation's

¹¹⁷ See Sepinwall, *supra* note 71, at 45–47.

¹¹⁸ See *id.* at 46.

¹¹⁹ In fact, this might well have been the case in the BP explosion. See NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING* 89–128 (2011).

¹²⁰ See Sepinwall, *supra* note 71, at 42.

crime would be treated more harshly than they deserve. Moreover, if the sanctions correspond to the magnitude of the executive's blame, it mitigates the concern that RCO liability threatens to dilute the force of the criminal law.

VI. CONCLUSION

Our criminal law, at least as practiced, leaves us woefully unable to respond appropriately to corporate crime. Prosecuting and punishing the corporation (even assuming it is not too big to fail or too big to nail) entails imposing upon it mere fines for the violation. As such, corporate prosecutions risk treating the corporate crime as no more than a cost of doing business, as the Court noted in *Dotterweich*.¹²¹ Prosecuting and punishing only the crime's perpetrators, who are typically mid- or low-level employees, risks treating the crime as if it were not the corporation's at all. There is a meaningful sense in which the crime of a corporation is the crime of the corporate officer, just as the success of a corporation is the success of the corporate officer. Our criminal law should recognize and sanction the responsibility for corporate crime that corporate officers bear.

At its inception, the RCO doctrine understood the relationship between the executive and a crime of her corporation in just this way. It was no embarrassment then, and it ought not to be construed as an embarrassment now. To be sure, if the doctrine were to be applied to cases where it does not belong, an injustice would result. The RCO doctrine, however, is not unique in this regard. Moreover, a proper understanding of its rationale and appropriate scope, which is provided here, should greatly reduce opportunities for its misapplication.

Corporations should not be permitted to transgress with impunity to the financial benefit of their executives and the detriment of the rest of us. Corporate crime is the crime of the corporation's officers. Our criminal law should

¹²¹ *Dotterweich*, 320 U.S. at 283.

unabashedly acknowledge as much, and respond to it as such.