

CHANGE WE CAN BELIEVE IN: COMPARATIVE PERSPECTIVES ON THE CRIMINALIZATION OF CORPORATE NEGLIGENCE

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I. INTRODUCTION

This paper comparatively explores the wisdom of America’s enforcement of federal corporate laws through the disproportionate assignment of criminal penalties at the entity-level. Although federal criminal statutes have long been enforced against individual violators, the vigor with which they are applied pales in comparison to the frequency of entity-level enforcement.¹ This state of affairs has been undoubtedly spurred by the elevated state of mind requirements appended to federal securities statutes, the considerable difficulty of proving individual criminal intent within a fragmented corporate structure, and the availability of entity-level liability doctrine to prosecutors. This has resulted in countless individual violators evading punishment, while shareholders bear the cost of the penalties incurred by and extracted from the corporation at the organizational level.

II. STATEMENT OF LAW

To successfully defend entity-level corporate liability “in deterrence terms”—which is precisely what those highlighting the doctrine’s advantages emphasize—it must be shown to actually deter corporate managers and employees more effectively than direct individual liability.² Entity liability’s staunchest defenders cite the “frequency of corporate misconduct, the extraordinarily serious consequences of such conduct, and the difficulty of proving many

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¹ Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1444 (2007) (observing that from 1992 to 2002—the ten years during which non-prosecution agreements in the corporate criminal context were first allowed—an “average of fewer than two [of such agreements] a year” were struck, while a “staggering” forty three non-prosecution agreements—or average of fourteen per year—were entered into from the beginning of 2003 to the end of 2006).

² Vikramaditya Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1494-95 (1996) (emphasis added).

corporate and white collar offenses” as central justifications for their reluctance to curb use of the doctrine.³

In so doing, the doctrine’s defenders fail to grasp the degree to which corporate fraud has intensified, all the while prosecutorial reliance⁴ on entity-level liability has grown and the number of individual criminal prosecutions—except for the most egregious of frauds⁵—has correspondingly shrunk.⁶ Thus, rather than fear “restricting”⁷ a mode of enforcement whose effectiveness and equity have continually been called into question, we ought to instead acknowledge the entity-level mode’s *raison d’être*—i.e., the difficulty of proving individual intent—and craft comprehensive reforms that directly address and surmount this inadequacy.

III. ENTITY-LEVEL CORPORATE CRIMINAL LIABILITY – ORIGINS AND MECHANICS

Federal courts developed and established the preconditions for entity-level criminal liability more than a century ago.⁸ Premised on the notion that the mental state of agents is imputed to the entity and immediately becomes an “ingredient”⁹ of the corporation, entity-level attribution merely requires proof of the following three elements: that a corporate agent (i) was responsible for the criminal violation’s *actus reus*; (ii) acted within the scope of his employment; and (iii) intended—through the act and however subordinate to his own self-enrichment motive—to confer a benefit on the corporation.¹⁰

Most crucially, although the entity’s criminal liability is derived from the misconduct of the corporation’s agents, “it is not necessary” under the entity liability doctrine “to identify the specific agents who committed the offense.”¹¹ Instead, it is “sufficient to establish that *some* agent or agents of the enterprise *must have* committed” the crime, a doctrinal feature which thereby liberates prosecutors from the cumbersome need of having

³ Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1505-06 (2007).

⁴ ANDREW WEISSMANN, RICHARD ZIEGLER, LUKE MCLOUGHLIN & JOSEPH MCFADDEN, REFORMING CORPORATE CRIMINAL LIABILITY TO PROMOTE RESPONSIBLE CORPORATE BEHAVIOR (Oct. 2008), available at http://www.instituteforlegalreform.com/get_ilr_doc.php?id=1218 (underscoring the degree to which entity-level enforcement is the “prevailing legal rule”).

⁵ Robert Frank & Amir Efrati, *‘Evil’ Madoff Gets 150 Years in Epic Fraud*, WALL ST. J., June 30, 2009, at A1.

⁶ John S. Baker, *Corporations Aren’t Criminals*, WALL ST. J., Apr. 22, 2002, at A18.

⁷ Beale, *supra* note 3, at 1505-06.

⁸ See *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494 (1909).

⁹ *United States v. Hayes Int’l Corp.*, 786 F.2d 1499 (11th Cir. 1986).

¹⁰ Beale, *supra* note 3, at 1505.

¹¹ Bernd Schünemann, *The Sarbanes-Oxley Act of 2002: A German Perspective*, 8 BUFF. CRIM. L. REV. 35, 39 (2005).

to prove, as a precondition for securing an entity's conviction, that a specific individual agent actually perpetrated the underlying statutory offense.¹²

Proponents of entity liability assert that it “deters corporate managers [and] employees better than . . . direct individual liability.”¹³ By decreasing the corporation's net value through the imposition of exorbitant post-conviction penalties, the doctrine leaves it to the corporation's shareholders “who bear the brunt of such a decrease . . . to encourage managers not to commit undesirable acts.”¹⁴ Furthermore, because entity liability makes securing *some* penalty for corporate misconduct more likely (irrespective of whether it is achieved through the enforcement mode most likely to deter recurrence), the doctrine remedies the difficulties associated with securing an individual agent's conviction and circumvents the prospect of a judgment proof corporate agent.¹⁵

Despite these professed virtues, the conceptual and practical contradictions inherent in the entity liability doctrine persist. First, the capacity of shareholders to serve as an impetus for effective oversight is “tempered” by the collective difficulty shareholders face in “monitoring the activities of the corporation's managers and employees.”¹⁶ All too often, such scrutiny is “prohibitively costly,” and managers' activities are themselves “imperfectly observable.”¹⁷ Additionally, the economic benefit an individual corporate agent stands to reap from misconduct will almost always outweigh the dispersed costs that any single shareholder will incur if large fines follow conviction at the entity-level—especially when, as now, highly diversified portfolios are the norm across investor subsets.¹⁸ When these realities are considered alongside state corporate law's doctrinal resistance¹⁹ to greater shareholder involvement in corporate supervision and direction, the patent “unfair[ness]” of penalizing “innocent” shareholders for failing to prevent conduct for which they are arguably the poorest positioned and least incentivized to detect becomes apparent.²⁰

¹² *Id.* (emphasis added).

¹³ Khanna, *supra* note 2, at 1494-95.

¹⁴ *Id.* at 1495.

¹⁵ *Id.* at 1495-96.

¹⁶ *Id.* at 1495.

¹⁷ *Id.*

¹⁸ Robert C. Pozen, Betsy Palmer & Natalie Shapiro, *Asset Allocation by Institutional Investors After the Recent Financial Crisis* (December 2010), available at <http://pa-paers.org/documents/spring2011-MFSpaperforlibrary.pdf>.

¹⁹ D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 279 (1998) (observing that express legal barriers have contributed to making the shareholder primacy norm “nearly irrelevant to the ordinary business decisions of modern corporations”).

²⁰ WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY 7 (2002); see also Elizabeth A. Plimpton & Danielle Walsh, *Corporate Criminal Liability*, 47 AM. CRIM. L. REV. 331, 332 (2010) (noting that punishing the corporation “in effect punishes innocent shareholders”).

Beyond the burdens it places on a corporation's shareholders, entity liability's devastating effect on the most blameless and detached corporate stakeholders cannot be overlooked. With conviction amounting to a veritable "death sentence" to business firms that practice in federally regulated industries requiring active certification statuses, entity-level liability more often than not strips a convicted firm of its eligibility to conduct business and thereby results in its being required to "let go of tens of thousands of employees," despite the fact that nearly all of them had absolutely "no connection to the wrongdoing."²¹

At an even more basic level, entity liability also "[runs] contrary to an aim of criminal law—punishment of the morally [culpable]—because it relie[s] upon vicarious guilt rather than personal fault."²² Indeed, if imparting reputational stigma to a criminal offender is one of the law's central objectives, then entity liability cannot—given the untenability²³ of assigning blame to juristic constructs such as corporations—communicate society's distaste for the misconduct nearly as effectively as an individual person's conviction, which undercuts the wisdom of using organizational punishment.²⁴ Furthermore, the presence of an altogether distinct entity-level liability route exacerbates the "massive uncertainty" already prevalent within the fiduciary duty universe without actually producing meaningful gains at the level of deterrence.²⁵ Finally, the doctrine's judge-made derivation undermines its legitimacy even among those who most aggressively advocate for corporate criminal law's reorientation away from individual liability.²⁶

In light of these shortcomings, it is unsurprising that entity liability is historically disfavored as a mode for punishing corporate crime abroad, with most advanced economies "[h]old[ing] fast in refusing to punish criminally corporations for the acts of their individual directors or employees."²⁷ Europe's recent gestures towards greater incorporation of entity-level liability are better explained by the European Union's desire to achieve pan-Continental

²¹ Robert J. Sussman & Gregory S. Saikin, *Corporate Crimes: The Penalties and the Pendulum*, 43 THE ADVOC. (TEXAS) 39, 39 (2008).

²² Khanna, *supra* note 2, at 1484-85.

²³ Ved P. Nanda, *Corporate Criminal Liability in the United States: Is a New Approach Warranted?*, 58 AM. J. COMP. L. 605, 607, 628 (2010) (concluding that "because corporations cannot act on their own or form criminal intent" penalizing corporations "makes no sense and serves no useful function").

²⁴ SALLY SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL 20 (2002) (noting that non-incarceratory penalties, such as entity criminal liability, are per se "nonstigmatic and conciliatory"); Cf. Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POLY 833, 835-36 (2000).

²⁵ *Wall Street and Fiduciary Duties: Can Jail Time Serve as an Adequate Deterrent for Willful Violations: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 2 (2010), (statement of Larry E. Ribstein).

²⁶ Weissmann, Ziegler, McLoughlin & McFadden, *supra* note 4, at 2 (attributing much of the entity-level doctrine's illegitimacy to the fact that it has never been "commanded by Congress").

²⁷ Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 129 (2008).

integration within a U.S.-led global financial system than by Europe's faith in entity-level liability's superior capacity to deter corporate criminality.²⁸

IV. INDIVIDUAL CORPORATE CRIMINAL LIABILITY

Unlike entity liability, which attempts to deter indirectly, "direct liability . . . directly influences."²⁹ Beyond the qualitative advantages of deterrence regimes that directly seek to dissuade certain conduct, the individual deterrence model remains preferable, if for no other reason than because entity liability's very emergence was propelled by American corporate law's self-imposed "difficulty" identifying an individual offender within a "complex and decentralized structure,"³⁰ as opposed to emerging in response to any fundamental deficiencies within the individual liability model.³¹

Furthermore, individually imposed corporate criminal penalties are better justified in light of the substantial financial benefits and economic liability limitations that individual corporate agents enjoy as a result of the corporation's status.³² Decentralized corporate form does profitably enable the entity's "more prompt[] [reaction] to market . . . fluctuations and technological change,"³³ rendering criminal statutes incapable of "adjust[ing] to and permeat[ing] dynamic business organizations."³⁴ Indeed, it is "because" of the decentralized corporate form that the fairness of allowing individual corporate agents to doubly benefit from the corporate structure's conferral of windfalls and safe harbors, without concurrently bearing greater individual penalties for deviance, is called into question.³⁵

Critics proffer two primary theoretical objections to reliance on elevated individual corporate criminal penalties. First, that the prosecution of corporate agents will under-compensate victims and under-deter culprits in light of the individual offender's judgment proof propensity.³⁶ Second, that corporate agents will simply demand a higher risk-premium as a condition for accepting employment.³⁷ Neither, however, represents a compelling case against the individual enforcement model.³⁸ Rather, the first criticism completely overlooks the fact that individual criminal prosecution can just as readily result in incarceration as it can

²⁸ See Henry J. Jacek, *The Influence of Organized American Business on Public Policy in the European Union: The Transition from Outsider to Insider* (1996), http://aei.pitt.edu/6948/1/jacek_henry_j.pdf.

²⁹ Khanna, *supra* note 2, at 1495.

³⁰ Cristina de Maglie, *Models of Corporate Criminal Liability in Comparative Law*, 4 WASH. U. GLOB. STUD. L. REV. 547, 557 (2005).

³¹ *Id.* at 551-52.

³² See generally *id.*

³³ *Id.* at 560.

³⁴ Simpson, *supra* note 24, at 5.

³⁵ See generally *id.*

³⁶ Khanna, *supra* note 2, at 1496.

³⁷ *Id.*

³⁸ See generally *id.*

result in monetary fines.³⁹ Likewise, the latter critique merely describes a consequence of increased resort to individual punishment without explaining why a world in which corporate employees demand much higher risk-premiums up front—which might in turn help sharpen and more accurately reflect the societal costs that corporate fraud actually imposes—would necessarily be undesirable.⁴⁰

V. INDIVIDUAL CRIMINAL LIABILITY FOR SECURITIES FRAUD IN THE U.S. – GENERALLY

The Securities Act of 1933 (“1933 Act”) regulates the offering of securities to public investors and prohibits individuals from “willfully” making any false or misleading statements in a registration statement.⁴¹ Violations of the 1933 Act trigger a fine of up to \$10,000 and imprisonment for up to five years.⁴² The Securities Exchange Act of 1934, which increased the existing fine ceiling, preserved the 1933 Act’s willful⁴³ intent standard.⁴⁴

During the interim between the Great Depression and the financial crisis in 2008 (“2008 Financial Crisis”), little corporate criminal statutory reform occurred. Unsurprisingly, the growing complexity of financial transactions and corporate configurations made establishing an individual’s intent to defraud progressively more difficult under the scienter standards enshrined in antiquated legislation.

The Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”), enacted with overwhelming bi-partisan support to address numerous accounting frauds, criminalized the “knowing” execution of a fraudulent scheme in connection with a public company’s securities and exposed violators to imprisonment for up to 25 years.⁴⁵ However, like its predecessors, Sarbanes-Oxley required that prosecutors prove the defendant’s knowledge of the conduct’s unlawfulness in addition to demonstrating the defendant’s awareness of the conduct’s wrongfulness.⁴⁶

Given the burden of showing that an agent’s conduct stemmed from “knowing[],” as opposed to negligent[] or even reckless[]” behavior, it was apparent that prosecutors

³⁹ Thus creating a qualitatively distinct form of deterrence and constituting a penalty from which no defendant can hide by claiming personal insolvency.

⁴⁰ See generally Khanna, *supra* note 2.

⁴¹ Securities Act of 1933, ch. 38, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. § 77).

⁴² 15 U.S.C. § 77x.

⁴³ While proving willfulness does not require demonstrating that the defendant knew of the conduct’s *unlawfulness* at the time of commission, it demands a functionally analogous showing that the defendant knew it was *wrongful*.

⁴⁴ Securities Exchange Act of 1934, ch. 404, 48 Stat. 904 (1934) (codified as amended at 15 U.S.C. § 78).

⁴⁵ See 18 U.S.C. § 1348 (2006).

⁴⁶ *Id.*

would encounter “difficulty in enforcing” Sarbanes-Oxley.⁴⁷ Furthermore, although Sarbanes-Oxley’s criminal provisions “sound[ed] significant” and “appear[ed]” to create “new or broader federal crimes,” much of the conduct proscribed had been “at least theoretically” prohibited before the legislation’s passage.⁴⁸

Illustrative of the degree to which federal statutes, even post-Sarbanes-Oxley, persist in erecting near insurmountable proof of intent barriers is the government’s own acknowledgement that for a defendant to violate applicable securities fraud provisions, “[h]e must not only *know* that the periodic report contains materially false information, he must falsely certify...that the report is materially accurate, he must do so *knowing* that such a false certification is forbidden by law, *and* he must do so with the *specific intent* to violate the law.”⁴⁹

Beyond the hard-to-satisfy proof standards contained within these criminal statutes, enforcement hurdles are heightened within the securities fraud context where cases (i) frequently involve the most complex factual predicates; (ii) require jurors to master and apply extremely nuanced understandings of guilt; and (iii) are likely to pit prosecutors against particularly skilled defense counsel.⁵⁰

Further complicating this is the fact that the substantive legal impediments to the assignment of individual culpability in cases of corporate fraud have helped nourish a belief among corporate agents that “[o]ver time, and with an increasing number of successes to [their] credit,” they can become “impervious to risk.”⁵¹ The entrenchment of this “psychology” has in turn “encourage[d] . . . ever-increasingly dangerous risk-taking,” a reality no doubt exacerbated by the “distance” that separates the corporate decision-maker from the “flesh-and-blood persons” left disproportionately vulnerable to, and impacted by, the decision’s consequences.⁵²

At an even deeper level, this psychology has—in a manner that further complicates the individual enforcement of U.S. corporate criminal laws—actually tended to obscure the misconduct of corporate agents who, unlike more boastful criminals, “will normally take pains to avoid the stigma of criminality,” opt to pressure their subordinates while simultaneously “disassociat[ing] themselves from any offence that might be committed,” and, despite “expressing allegiance” to such policies, refrain from implementing superficially stringent but deficient internal compliance policies that enable them to disclaim

⁴⁷ Larry Bumgardner, *Reforming Corporate America: How Does the Sarbanes-Oxley Act Impact American Business?*, 6 GRAZIADIO BUS. REV. (2003), <http://gbr.pepperdine.edu/2010/08/reforming-corporate-america/>.

⁴⁸ *Id.* at 3-4.

⁴⁹ *U.S. v. Scrushy*, No. CR-03-BE-0530-S, 2004 WL 2713262, at *5 (N.D. Ala. Nov. 23, 2004) (emphasis added).

⁵⁰ See generally KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985); Diskant, *supra* note 27, at 131, 151.

⁵¹ JAMES GOBERT & MAURICE PUNCH, *RETHINKING CORPORATE CRIME* 20 (2003).

⁵² *Id.* at 20-21.

“responsibility for . . . illegal activities.”⁵³ In fact, empirical evidence drawn from studies of the financial services industry suggests that, perhaps more than any other corporate sphere, “segmentation of moral views by rank, status, or hierarchy within the organization”—i.e., the very preconditions needed for the phenomena referenced above to take root—is the order of the day.⁵⁴ Consequently, over time a widespread belief has emerged that there is “only a remote chance” that corporate misconduct will be individually prosecuted and result in conviction.⁵⁵

VI. INDIVIDUAL CRIMINAL LIABILITY FOR SECURITIES FRAUD IN THE U.S. — 2008 FINANCIAL CRISIS

At the time of Sarbanes-Oxley’s passage, critics warned that the deterrence effect of the new penalties would prove to be “minimal” if the “corporate officers considered to be the prime culprits in the scandals . . . serve little or no prison time.”⁵⁶ The infrequency with which the 1933 Act, the 1934 Act, and the Sarbanes-Oxley Act’s criminal provisions have been enforced against individuals since the 2008 Financial Crisis confirms the extent to which such prescience went—and continues to go—unheeded.⁵⁷

Relative to the national scale of the misrepresentation, the paucity of individual criminal prosecutions in the 2008 Financial Crisis’ wake has been glaring: “there has not been a single criminal prosecution of . . . any individual senior financial executive—literally zero.”⁵⁸ Moreover, while reasonable people can debate the extent to which securities fraud caused the crisis, “the answer clearly is not zero.”⁵⁹ Similarly perplexed, an outraged public has pressed investigators on the lack of prosecutions of top Wall Street executives in the wake of the most severe financial crisis since the Great Depression.⁶⁰

However, the SEC’s inability to prosecute suspected violators has not resulted from want of effort.⁶¹ Rather, the SEC’s Division of Enforcement has “struggled to build cases proving fraudulent behavior or other criminal misconduct” against even those persons whose conduct rested at the heart of the financial crisis.⁶² Most notably, the SEC dropped

⁵³ *Id.* at 22; *see also* Laufer, *supra* note 20, at 126.

⁵⁴ Laufer, *supra* note 20, at 126; *see* PETER CLEARY YEAGER, MANAGEMENT, MORALITY, AND LAW: ORGANIZATIONAL FORMS AND ETHICAL DELIBERATIONS IN CORPORATE CRIME 147 (1995).

⁵⁵ Brian R. Cheffins & Bernard S. Black, *Outside Director Liability Across Countries*, 84 TEX. L. REV. 1385, 1391 (2006).

⁵⁶ Bumgardner, *supra* note 47.

⁵⁷ *Id.*

⁵⁸ Charles Ferguson, *Barack Obama: The Oligarch’s President*, SALON.COM (Oct. 27, 2010 8:30 AM), http://www.salon.com/2010/10/27/barack_obama_wall_street/.

⁵⁹ *Id.*

⁶⁰ Joe Rauch, *Senators Question the Lack of Wall Street Prosecutions*, REUTERS, Sept. 22, 2010, <http://www.reuters.com/article/2010/09/22/us-banks-enforcement-idUSTRE68L4WG20100922>.

⁶¹ *Id.*

⁶² *Id.*

criminal charges against former AIG executive Joseph Cassano and resorted to civil settlement with former Countrywide chief Angelo Mozilo—each of whose actions were disproportionately responsible for wreaking economic havoc, and for which the latter earned the moniker “godfather of subprime mortgages.”⁶³

Moreover, if, as many have insisted, federal prosecutorial unwillingness to pursue criminal enforcement actions against individual corporate agents was primarily motivated by a desire to avoid crushing the financial services industry, shortly after dedicating nearly a trillion tax-payer dollars to its resuscitation, then parallel concerns would be expected to have prevented the federal government from mounting criminal enforcement actions at the entity-level.⁶⁴ Instead, organizational investigations, both during and since the 2008 Financial Crisis, have proceeded uninterrupted, leaving only the nature of U.S. corporate criminal laws and the availability of entity-level enforcement to explain many of the observed trends.⁶⁵

Accepting the argument advanced herein—that applicable individual corporate criminal laws currently impose, what are in most instances, near insurmountable proof-of-intent obstacles—might have led to the expectation that the recent flurry of financial reform legislation, which culminated in the Dodd-Frank Act’s passage, would rectify this deficiency head-on. Instead, through the Dodd-Frank Act,⁶⁶ Congress passed legislation focused almost entirely on financial regulation and which, “unlike many systemic reform statutes . . . does not do much with the criminal law.”⁶⁷ Astonishingly, only two of the Dodd-Frank Act’s provisions even allude to the corporate criminal law. One of Dodd-Frank’s provisions “tries to nudge” the U.S. Sentencing Commission towards increasing recommended sentences for individuals convicted of securities and mortgage fraud by “ask[ing]” the Commission to ensure that the federal sentencing guidelines reflect Congress’ intent that penalties appropriately account for both the actual and potential harm posed by these offenses.⁶⁸ In so doing, Congress declined⁶⁹ to provide leadership on an issue where the need for additional guidance was greatest, and instead prodded an independent agency—

⁶³ Frank Rich, Op-Ed., *What Happened to Change We Can Believe In*, N.Y. TIMES, Oct. 24, 2010, at WK10, http://www.nytimes.com/2010/10/24/opinion/24rich.html?_r=0.

⁶⁴ See Gretchen Morgenson & Louise Story, *Wall St. Polices Itself, Prosecutors Use Softer Approach*, N.Y. TIMES, Jul. 8, 2011, at A1, http://www.nytimes.com/2011/07/08/business/in-shift-federal-prosecutors-are-lenient-as-companies-break-the-law.html?pagewanted=all&_r=0.

⁶⁵ *Id.*

⁶⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

⁶⁷ Peter J. Henning, *A New World Begins for Wall Street Oversight*, N.Y. TIMES DEALBOOK, (July 19, 2010), <http://dealbook.nytimes.com/2010/07/19/a-new-world-begins-for-wall-street-oversight/>.

⁶⁸ *Id.*

⁶⁹ Laufer, *supra* note 20, at 119 (describing prior instances where Congress had essentially asked the U.S. Sentencing Commission to “cover for [its] failures of substantive law reform with guidelines . . . that are no substitute”).

whose very authority to promulgate criminal penalties had recently been undercut⁷⁰—to substitute its recommendations for Congress’ considered judgment.⁷¹

With no less timidity, a second Dodd-Frank provision lengthened the statute of limitations applicable to securities and mortgage fraud from five to six years, giving prosecutors “a little more breathing room” to investigate these complex crimes.⁷² Thus, rather than acting to remove the substantive and procedural obstacles which have continually impeded corporate criminal prosecutions, Congress opted to give prosecutors some more time to maneuver a maze that Congress had made un-navigable. For these reasons, the Dodd-Frank Act cannot be mistaken for a serious attempt at meaningful reform of U.S. corporate criminal law.

VII. INDIVIDUAL CORPORATE CRIMINAL LIABILITY IN EUROPE

A stark contrast exists between Europe’s record of enforcing corporate criminal laws against individuals and the “literally zero” U.S. prosecutions of those who “profited from a bubble they deliberately helped inflate and walked away with their wealth [and liberty] largely intact.”⁷³ For example, the financial crisis transgressions of Jerome Kerviel—a “fairly junior” French trader at Societe Generale, yielded a three-year prison sentence and an order to pay \$6.7 billion dollars in restitution.⁷⁴ Tellingly, the comparison suggests that Kerviel was “unlucky” not to have perpetrated his misconduct in the United States where it is “unlikely” he would have been punished severely.⁷⁵ Closer inspection sheds further light on the defining characteristics of corporate criminal law’s enforcement in Europe where, “[a]cross countries,” there is a shared recognition that individual criminal liability can help motivate compliance through “fear”⁷⁶ of adverse consequences, and criminal penalties are imposed for “various contraventions of corporate legislation and for infringements of a range of other statutes.”⁷⁷

Unlike their counterparts in the U.S. Congress, legislators throughout Europe have actively spent the past two decades bolstering and modifying their respective corporate

⁷⁰ U.S. v. Booker, 543 U.S. 220, 268 (2005) (holding that sentencing guidelines carry no more than advisory force).

⁷¹ *Id.*

⁷² Henning, *supra* note 67.

⁷³ Greg Keller, *Rogue French Trader, Sentenced to Jail, Hit With \$6.7 Billion Fine*, HUFFINGTON POST (Oct. 5, 2010, 7:53 PM), http://www.huffingtonpost.com/2010/10/05/jerome-kerviel-rogue-fren_n_750464.html.

⁷⁴ *Id.*

⁷⁵ Tracy Corrigan, *Does Kerviel Deserve to do Time for SocGen Rogue Trading?*, DAILY TELEGRAPH (Oct. 5, 2010), <http://blogs.telegraph.co.uk/finance/tracycorrigan/100007993/what-does-kerviels-jail-sentence-tell-us-about-financial-crime/>.

⁷⁶ Cheffins and Black, *supra* note 55, at 1387.

⁷⁷ *Id.* at 1470.

criminal law regimes.⁷⁸ In the process, Europe has adopted a more individual-centric deterrent approach reflective of “the traditional concept of crime being . . . individual conduct dominated” and more closely bound to the “concept of personal culpability.”⁷⁹

The individual crime of omission, violated whenever non-disclosure is material and irrespective of the presence of a specific intent to deceive, has in recent years emerged as the “most important instrument of criminal justice” deployed against corporate crime on the European Continent.⁸⁰ Europe’s success in deterring corporate crime through its reliance on individual enforcement became all the more apparent after several nations experimented with entity-level enforcement of antitrust laws.⁸¹ Although corporate convictions during this phase resulted in several hundred million dollars in fines being meted out, enforcement “never led to the sacking of [any of] the responsible members of the board,” let alone to any corporate agent’s criminal prosecution, realities which convinced many Europeans that reliance on entity-level enforcement “leads to a weakening of the deterrent effect on an individual level.”⁸²

Perhaps nowhere are the disparities between American and European attitudes toward corporate criminal law more pronounced than in Germany, where individual liability is “based more on penal principles than civil [principles].”⁸³ Spurred by a societal belief that a penal approach serves as a “better deterrent,” there is “very little—quite possibly zero—real personal civil liability”⁸⁴ for German corporate fraud.⁸⁵ Moreover, since Germans tend to view the punishment of individual corporate wrongdoers “as a more satisfying response to white-collar crime than entity liability,”⁸⁶ Germany infrequently employs entity-level liability to enforce its corporate criminal laws.

Equally noteworthy, however, is the fact that Germany’s rules governing individual criminal liability “are more adaptable to the corporate context.”⁸⁷ Specifically, the German judicial system has adopted a “wider conception of *mens rea*” that is “more suitable” to the

⁷⁸ *Id.* at 1470-75 (observing that England has created “some 250 offenses,” Germany “undertake[s] a lot of [crime legislation in] the field of Company Law, Australia has enacted “numerous offenses for which corporate officials may be held criminally liable,” and that France has passed “a substantial number of provisions in [corporate] [] legislation where breach can create criminal liability and pursuant to which the “number of prosecutions of those managing French companies has grown considerably over the past two decades) (emphasis added).

⁷⁹ Schünemann, *supra* note 11, at 35.

⁸⁰ *Id.*

⁸¹ *Id.* at 41.

⁸² *Id.* (emphasis added).

⁸³ Patrick Ryan, *Understanding Director & Officer Liability in Germany for Dissemination of False Information: Perspectives From an Outsider*, 4 Ger. L.J. 439, 440 (2003).

⁸⁴ *Id.* at 439.

⁸⁵ *Id.*

⁸⁶ Diskant, *supra* note 27, at 146.

⁸⁷ de Maglie, *supra* note 30, at 561.

emerging and evolving economic order within which Germany's corporate personnel operate.⁸⁸ Indeed, by criminalizing areas "preliminary" to the actual harm, and supplementing corporate crimes such as fraud with a "ring" of offenses," Germany has transformed violations previously requiring a showing of "concrete harm" into offenses now triggered by the "abstract endangerment" of some right.⁸⁹

Consistent with its more individual-centric penal philosophy, Germany also punishes corporate officers "harshly," especially within the context of a legal regime "often considered lenient in comparison to the American system."⁹⁰ Germany has even begun resorting to corporate criminal law "for the enforcement of administrative duties."⁹¹

In addition to making individual conviction substantively easier, Germany has also defined offenses like "invest[or] fraud" and "business situation fraudulent misrepresentation" with great precision, thus running counter to U.S. statutes which impart a "level of uncertainty [that] is by far higher."⁹² Consequently, German law has been able to provide greater *ex ante* guidance to corporate agents and to impose greater constraints on prosecutorial overreach *ex post*. It is therefore unsurprising that Germany's white-collar criminal law reforms have been criticized as "overextended" and too "far reaching"⁹³—a charge diametrically opposed to the one most commonly leveled against U.S. corporate criminal law reforms and undoubtedly inspired by the relative effectiveness⁹⁴ of Germany's approach in achieving deterrence.⁹⁵

VIII. MIXED ENTITY-LEVEL & INDIVIDUAL CORPORATE CRIMINAL LIABILITY SYSTEMS

The deterrent success Germany witnessed after "rapidly" expanding the reach of its white-collar criminal laws and "increas[ing]" maximum penalties has been aided by Germany's simultaneous "reduc[tion] [of] certain evidentiary burdens need[ed] for conviction."⁹⁶ In many respects, the fact that "complicated tactical procedures"—which rest

⁸⁸ *Id.*

⁸⁹ Schünemann, *supra* note 11, at 45-47.

⁹⁰ Diskant, *supra* note 27, at 142.

⁹¹ Schünemann, *supra* note 11, at 45.

⁹² *Id.* at 45-46.

⁹³ Diskant, *supra* note 27, at 143.

⁹⁴ Matthew Allen, *KPMG Fraud Barometer 2008*, SWISSINFO.CH, (Feb. 3, 2009, 9:09 AM), http://www.swissinfo.ch/eng/business/White-collar_crime_flourishes_as_economy_dips.html?cid=7192084 (placing Germany [500 million euros] last in a list of major European economies with the largest corporate fraud related losses, behind Spain [2.8 billion euros], England [1.4 billion euros], and Switzerland [800 million euros]).

⁹⁵ Ryan, *supra* note 82, at 440 (noting that while individual corporate criminal prosecutions have become less common over time, resort to criminal action in each instance of violation has become "more likely").

⁹⁶ Diskant, *supra* note 27, at 143.

at the heart of U.S. federal prosecutorial power *vis-à-vis* the corporate entity—“are impossible in Germany”⁹⁷ merely underscores the degree to which European⁹⁸ laws facilitate individual criminal enforcement.⁹⁹ On the other hand, U.S. corporate criminal laws, notwithstanding their substantive deficiencies, are saddled with procedural requirements that make entity-level enforcement’s predominance inevitable and susceptible to abuse.¹⁰⁰

It is the very existence of a bifurcated enforcement system in the United States which, in attempting to compensate for the inadequacies of American corporate criminal statutes, exacerbates the inequities associated with entity-level enforcement.¹⁰¹ Given the substance of America’s corporate criminal statutes and the robust constitutional protections the United States affords criminal defendants, the availability of an altogether alternate route to conviction—here, at the entity-level—tempts prosecutors to leverage the weighty threat of organizational criminal liability in order to circumvent nettlesome individual rights.¹⁰²

As a consequence of the fact that U.S. criminal defendants “enjoy significant procedural protections that are . . . unavailable”¹⁰³ in most foreign nations, U.S. corporate criminal law—through its provision of entity-level recourse and conferral of immense prosecutorial discretion—virtually guarantees that American procedure’s “unique aspects” will be “manipulated”¹⁰⁴ by a government able to threaten corporations with the prospect of a “potentially lethal” entity-level prosecution in order to induce their cooperation in the inherently and exceedingly difficult prosecution of individual corporate employees.¹⁰⁵

For this reason, the proliferation of non-prosecution agreements between the U.S. government and American corporations and the steady increase in government demands that—as a condition for avoiding prosecution—corporations waive their attorney-client privilege, produce all requested documents, and terminate indemnification agreements with individual corporate agents (so as to impair the defense-mounting ability of those agents) are

⁹⁷ Ryan, *supra* note 82, at 446.

⁹⁸ William T. Pizzi & Luca Marafioti, *New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT’L L. 1, 6 (1992) (describing how the Italian system achieves “efficiency by avoiding a full adversarial trial” and is unconstrained by “many of the most time-consuming features of the U.S. trial system”).

⁹⁹ See Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 859 (1984) (discussing the prevalence of entity level enforcement).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (“In practice, however, much of this dual structure collapses.”).

¹⁰² *Id.* at 862.

¹⁰³ Diskant, *supra* note 27, at 131, 152 (noting that, in addition to the fact that foreign jurisdictions afford fewer individual criminal procedural protections, the plea bargaining process is also “very limited” abroad and that in many jurisdictions prosecutors are “required to bring charges if the facts support doing so”).

¹⁰⁴ *Id.* at 132, 161.

¹⁰⁵ Diskant, *supra* note 27, at 128-29; see Andrew Weissman & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 414 (2007); see also George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 987 (2005).

far less “reflection[s] of principled criminal theory” than they are prosecutorial “tool[s].”¹⁰⁶ The U.S. Department of Justice’s “increased use” of such constitutionally problematic leveraging tactics and resort to ever vacillating entity-level prosecution policy memoranda which—despite the fact that federal law already “generously” provides for entity-level corporate liability—are often overzealously “depart[ed]” from has led the private criminal bar to go so far as to question whether this state of affairs “undermin[es] the adversary system” at its very core.¹⁰⁷

In many instances, such prosecutorial posturing “rather artificially”¹⁰⁸ generates sharp conflicts between the interests of individual corporate defendants and those of their still-unindicted former colleagues, who have strong incentive to hasten investigative closure by complying with the government’s sweeping demands.¹⁰⁹ This incentive remains if for no other reason than to draw attention away from their own conduct, even if doing so damages the procedural protections on which their now-indicted former colleagues had come to rely.¹¹⁰

Not surprisingly, this system produces grave doubts in light of the fact that— notwithstanding the existence of codified prosecutorial guidelines—“many” entity-level prosecutions still proceed on the basis of idiosyncratic calculations driven by a host of non-legal considerations.¹¹¹ Given such doubts about the “fairness of trading corporate cooperation for government-granted favors”¹¹² when a cooperation implicates subordinate employees, , the wisdom of preserving America’s dual corporate criminal enforcement regime, which at its best is ineffectual and at its worst actually undermines valued constitutional guarantees, must be questioned.¹¹³

Therefore, entity-level enforcement’s misuse ought to be understood as a direct result of the paradox Congress has created for the Executive Branch. Because Congress has been unwilling to directly enact significant statutory reform that realistically enables individual prosecution, the Department of Justice is left to indirectly accomplish reform through the organizational liability route.¹¹⁴ In so doing, Congress has left the Executive’s

¹⁰⁶ Diskant, *supra* note 27, at 169.

¹⁰⁷ Sussman & Saikin, *supra* note 21, at 40, 42.

¹⁰⁸ Diskant, *supra* note 27, at 141.

¹⁰⁹ Plimpton & Walsh, *supra* note 20, at 344 (describing the mechanics of “cooperation credit” and detailing the extent to which it hinges on the entity’s swift and unquestioning acceptance of the government’s settlement terms).

¹¹⁰ *Id.*

¹¹¹ Laufer, *supra* note 20, at 40 (contending that this process reveals the “selective vigilance of federal law enforcement”).

¹¹² William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 647 (2002).

¹¹³ Plimpton & Walsh, *supra* note 20, at 344.

¹¹⁴ Rauch, *supra* note 60.

hands bound precisely when public demand for a definitive reduction in corporate fraud has become greatest.¹¹⁵

Maximal deterrence of securities fraud will remain elusive until, both doctrinally and with respect to modes of enforcement, U.S. corporate criminal law is reoriented away from the entity and toward the individual. Now more than ever, it is essential for Congress to step up and repair the framework it has habitually neglected.

IX. SUGGESTED POLICY PRESCRIPTIONS

After surveying the existing legal landscape and exploring the benefits and pitfalls associated with entity-level and individual corporate criminal liability, it is apparent that a central part of any truly effective U.S. corporate criminal law reform will necessarily entail making *criminal negligence* the statutory scienter standard which governs the securities sphere. Unlike knowledge or willfulness, criminal negligence “does not involve an inquiry into the state of mind of the accused.”¹¹⁶ As a result, liability flows from the fact that the accused has “failed to adhere to the standard of conduct expected of a reasonable person under similar circumstances,” making culpability contingent on the breach of “an objective or external standard.”¹¹⁷ Conviction is therefore grounded in a belief that the accused *should have known* that their actions carried a substantial and unjustifiable risk of harm.¹¹⁸ While effective statutory reform could arguably be achieved through a downward redefinition of the materiality of a fact whose omission triggers a criminal violation or through a reduction in the degree of involvement needed to constitute entry into a corporate conspiracy, emphasis on scienter reduction helps focus the inquiry by proposing an alternate path which has already been tried and tested throughout Europe as well as within certain U.S. corporate sectors.¹¹⁹

Construing the corporate criminal statutes in existence, the United State Supreme Court in *Ernst & Ernst v. Hochfelder* concluded that “merely negligent conduct does not give rise to liability for securities fraud.”¹²⁰ Since that time, “surprisingly technical and complicated” scienter requirements have saddled securities fraud prosecutions.¹²¹

¹¹⁵ *Id.*

¹¹⁶ Dan W. Morkel, *On the Distinction Between Recklessness and Conscious Negligence*, 30 AM. J. COMP. L. 325, 326 (1982) (footnote omitted).

¹¹⁷ *Id.*

¹¹⁸ Gerald H. Gordon, *Subjective and Objective Mens Rea*, 17 CRIM. L.Q. 355, 357-58 (1975).

¹¹⁹ William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 648, 699-706 (1994) (discussing the application of criminal negligence to corporate law).

¹²⁰ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976). See also Michael B. Dunn, *Pleading Scienter After the Private Securities Litigation Reform Act: Or, A Textualist Revenge*, 84 CORNELL L. REV. 193, 204 (1998).

¹²¹ *Dunn*, *supra* note 122, at 203.

Nonetheless, given the “extreme[] difficult[y]”¹²² in establishing the requisite criminal intent in these cases and the societal harm that such misconduct has caused, concerns regarding the need to balance rigorous statutory modifications “against the need not to unnecessarily burden normal business activities” have never been more misplaced.¹²³ Reducing the criminal proof-of-intent standard in order to better deter individuals from engaging in securities fraud will, in light of the securities domain’s susceptibility to fraud’s recurrence, only serve to strengthen the “disclosure process that has made our markets a model for other nations,” and help protect investors by “exposing fraudulent schemes that might withstand scrutiny under” the “defense-oriented” legal rules presently in place.¹²⁴

Moreover, and so as to avoid over-inclusively sweeping insignificant financial transactions into the modified statutory fold, legislative revisions ought to confine the criminal negligence standard’s application to those transactions whose magnitude and complexity risks systemic destabilization.¹²⁵ For all other transactions, adopting a criminal recklessness standard—itsself more forceful and logistically feasible to enforce than the prevailing ‘knowing’ and ‘willful’ requirement—should prove sufficient to achieve effective individual deterrence.¹²⁶

In many respects, the call to apply a criminal negligence scienter standard to the securities industry arises from recognition that the devastating effects of securities fraud are no longer localized.¹²⁷ Rather, in an era of immense financial institution interdependence, and within which the defrauded investor is far more likely to be a large institutional investor or even a sovereign country,¹²⁸ the growing improbability of effective harm containment has made continued reliance on the status quo dangerously unreasonable.¹²⁹

¹²² *Id.* at 247.

¹²³ William H. Kuehnle, *On Scienter, Knowledge, and Recklessness Under the Federal Securities Laws*, 34 HOUS. L. REV. 121, 176 (1997).

¹²⁴ Matthew Roskoski, Note, *A Case-by-Case Approach to Pleading Scienter Under the Private Securities Litigation Reform Act of 1995*, 97 MICH. L. REV. 2265, 2284 (1999).

¹²⁵ See, e.g., Complaint, SEC v. Goldman Sachs & Co. and Fabrice Tourre, 790 F.Supp.2d 147 (S.D.N.Y. 2010) (No. 1:10 Civ. 03229), available at www.sec.gov/litigation/complaints/2010/comp-pr2010-59.pdf (highlighting Goldman Sachs’ failure to disclose the role that a third-party with adverse economic interests played in a portfolio selection transaction which resulted in a \$4 billion loss to its client).

¹²⁶ See generally Ann Morales Olazábal, *Defining Recklessness: A Doctrinal approach To Deterrence of Secondary Market Securities Fraud*, 2010 WIS. L. REV. 1415, 1459 (2010) (discussing the merits of applying a recklessness standard in securities cases).

¹²⁷ See Genevieve Beyea, *Transnational Securities Fraud and the Extraterritorial Application of U.S. Securities Laws: Challenges and Opportunities*, 1 GLOBAL BUS. L. REV. 139, 139 (2011) (“With globalization, securities markets have become progressively more interconnected, and securities fraud has increasingly crossed borders, creating problems for national regulators seeking to deter and punish fraud.”).

¹²⁸ See, e.g., Georg Brynjarsson, *Origins of the Current Economic Downturn in Iceland*, ICENEWS (Jan. 9, 2009), <http://www.icenews.is/index.php/2009/01/09/origins-of-the-current-economic-downturn->

Powerful justification for adopting the proposed statutory reforms is the clear precedent for such reform in American corporate criminal law.¹³⁰ Indeed, as reflected in the many instances where individual agents have been found criminally liable for their negligent failure to affirmatively act or make necessary corporate disclosures, the assignment of criminal penalties as a result of negligent conduct is conceptually well-established.¹³¹

Although derived from instances of corporate misconduct that more viscerally endangered the public health,¹³² the “conventional requirement” of demonstrating some deliberate individual wrongdoing has since been subordinated within certain realms of corporate activity.¹³³ In those realms, criminal liability has instead been assigned based on a “defendant’s position in the corporation,” theoretical capacity to have either prevented or promptly corrected the misconduct, and negligent failure for having failed to undertake remedial measures.¹³⁴

This Responsible Corporate Officer Doctrine effectively introduces an additional layer of deterrence by assigning criminal liability to the corporate agent whose “‘reasonable relation’ to the situation is enough to establish his criminal liability,” even in the absence “of criminal intent or . . . knowledge of the specific wrongdoing.”¹³⁵ Although courts typically invoke the doctrine for strict liability public welfare offenses, some federal courts have

in-iceland; Gudjon Helgason & Paisley Dodds, *Geir Haarde, Iceland Ex-PM, Indicted for Role in Financial Crisis*, HUFFINGTON POST (Sept. 28, 2010, 7:35 PM), http://www.huffingtonpost.com/2010/09/28/geir-haarde-indicted-iceland-financial-crisis_n_742800.html (describing how Iceland’s banking sector had been lured into heavy investment in U.S. subprime mortgage securities and the Icelandic legislature’s decision to criminally indict the former prime minister who presided over and authorized such profound levels of risk exposure); Sebastian Dellepiane & Niamh Hardiman, *Governing the Irish Economy: From Boom to Bust 8* (June 17-19, 2010) (unpublished working paper), *available at* regulation.upf.edu/Dublin-10-papers/2A2.pdf (observing that, despite being “relatively untouched by US sub-prime lending,” the international crisis nevertheless managed to “exacerbate[]” Ireland’s underlying banking crisis).

¹²⁹ See DEP’T OF TREASURY, *FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 2* (2009) (“We must act now to restore confidence in the integrity of our financial system. The lasting economic damage to ordinary families and businesses is a constant reminder of the urgent need to act to reform our financial regulatory system and put our economy on track to a sustainable recovery.”).

¹³⁰ See 1 CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 49 (15th ed.) (discussing the maturation of the corporate criminal common law).

¹³¹ Martin Petrin, *Circumscribing the ‘Prosecutor’s Ticket to Tag the Elite’—A Critique of the Responsible Corporate Officer Doctrine*, 84 *TEMPLE L. REV.* 283, 288-89 n.29 (2012).

¹³² See, e.g., *United States v. Park*, 421 U.S. 658, 670-73 (1975) (describing the individual criminal prosecutions resulting from violations of the federal Food, Drug, and Cosmetic Act).

¹³³ 10 WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 4944 (2012) (“Congress may, in certain areas, in the so-called public welfare crimes . . . impose criminal liability on a corporation for merely doing the prescribed act, wholly unrelated to knowledge, actual or constructive.”).

¹³⁴ 3A WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 1349 (2012).

¹³⁵ 2 JOHN VILLA, *CORPORATE COUNSEL GUIDELINES* § 5:6 (2011).

actually extended it to settings where the “statute defining the offense contains a knowledge or intent requirement.”¹³⁶ Consequently, and notwithstanding the fact that this doctrine has “rarely” been employed as a basis for prosecution, prudential and precedential grounds exist for broadening its application to the securities domain.¹³⁷ Even so, supervisory culpability under the Responsible Corporate Officer Doctrine remains predicated on the independent establishment of the underlying corporate agent’s securities law violation.¹³⁸ For this reason, and given the impediments that inhere to current securities laws, resort to the doctrine would complement—as opposed to substituting—outright statutory modification.¹³⁹

Statutory criminalization of corporate negligence already “span[s] a range of behaviors.”¹⁴⁰ Rather than “dispensing with the requirement of proving *mens rea*,” as a strict liability regime would entail, “reasonable inferences” can effectively serve as bases for doling out individual fault pursuant to a corporate criminal negligence standard.¹⁴¹ Indeed, in those U.S. corporate contexts where a criminal negligence standard has already been adopted, modification was spurred by the realization that the offenses in question were “more costly, both in terms of human lives and economically,” than had previously been believed.¹⁴²

Data drawn from nearly 200 corporate offenders sentenced in federal court during the mid-1980s, which showed that the average monetary harm per offense was \$565,000, while the average loss attributed to each burglary during this same period was \$1,000, helped crystallize the view that—at least within certain industries—corporate crime was “perhaps the most dangerous . . . kind of crime that occurs in our society.”¹⁴³

Guided by the effect that the “special significance”¹⁴⁴ of public health and environmental considerations has had in motivating the reduction of scienter requirements in certain corporate domains, cursory consideration of the disastrous—yet frequently overlooked—harms proximately caused by the 2008 Financial Crisis dramatically narrows any perceived disparity between the detriment which flows from an unsupervised torrent of toxic red sludge and that which results from a fraudulently marketed synthetic collateralized debt obligation.¹⁴⁵

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Petrin, *supra* note 127, at 289 n.35.

¹³⁹ *Id.* at 288-89 n.29.

¹⁴⁰ Laufer, *supra* note 20, at 83.

¹⁴¹ *Id.* at 87.

¹⁴² Simpson, *supra* note 24, at 13.

¹⁴³ *Id.* at 13-14.

¹⁴⁴ Fletcher, *supra* note 130, § 1349.

¹⁴⁵ Laura Bassett, *Study: Long Term Unemployment Has Disastrous Effects on Health and Longevity*, HUFFINGTON POST (Nov. 5, 2010, 6:23 PM), http://www.huffingtonpost.com/2010/11/05/study-longterm-unemployme_n_779743.html (summarizing recent clinical studies which have concluded that, with 17% of the U.S. workforce either unemployed or underemployed, the “scarring

The global financial crisis has indirectly exposed more than 40% of U.S. households to unemployment, negative home equity, arrears on their mortgage payments, or foreclosure, and has also left many expectant retirees grappling with “substantial losses” that forestalled retirement plans and swaths of younger workers unable to “reach their expected level of lifetime earnings.”¹⁴⁶ Accordingly, the “previously barely conceivable extent of damage . . . that could be wrought” by securities fraud is now on full display, making the notion that corporate criminal negligence somehow represents a qualitatively inappropriate legal benchmark in all but a handful of industries simply untenable.¹⁴⁷ Even those ordinarily opposed to greater governmental oversight of U.S. corporate activity, and who insist that criminal law ought to be “reserved for conduct that society finds so repugnant as to warrant the severest sanction,” will be hard-pressed to deny that the corporate misconduct which produced the societal suffering endured since the 2008 Financial Crisis’ onset qualifies as sufficiently repugnant.¹⁴⁸

In short, appreciating the manifest resemblance that systemic securities fraud’s harms bear to the more visceral damage other types of corporate crime leave behind only strengthens the case for pursuing reform through the modification of statutory proof-of-intent requirements. Absent such reconceptualization—through which the financial industry’s destructive potential is most accurately reflected—further conventional legislation,¹⁴⁹ aimed at what is already the “most heavily regulated and monitored area of corporate activity,”¹⁵⁰ likely will do little more than deepen and repeat the false sense of security which has cyclically followed each post-crisis regulatory intervention.

X. OBSTACLES TO IMPLEMENTING THE POLICIES PRESCRIBED AND THE CONSEQUENCES OF INACTION

Robustly enhancing corporate criminal statutes is more easily prescribed than implemented. The effort must, despite its appeal, overcome an array of uniquely structural obstacles; namely, the reality that corporate political contributions—now more easily dispensed than ever before¹⁵¹—“influence outcomes in ways that no private citizen can,” and the fact that “[m]any convicted corporations are the most generous [political]

consequences of the recession . . . will be far-reaching and severe,” with “notably increase[d] risks of strokes, heart attacks, and catastrophic illness” already being registered).

¹⁴⁶ Michael D. Hurd & Susann Rohwedder, *Effects of the Financial Crisis and Great Recession on American Households* 21 (Nat’l Bureau of Econ. Research, Working Paper No. 16407, 2010), available at <http://www.nber.org/papers/w16407>.

¹⁴⁷ Gobert & Punch, *supra* note 51, at 7.

¹⁴⁸ Weissmann, Ziegler, McLoughlin, & McFadden, *supra* note 4, at 6.

¹⁴⁹ See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745; see also Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

¹⁵⁰ Laufer, *supra* note 20, at 109.

¹⁵¹ See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

donors.”¹⁵² Even though curtailment of entity-level enforcement would accompany the proposed criminalization of corporate negligence and presumably increase a corporation’s discretionary funds, the fact that corporate contribution decisions will still be made by individual agents who will increasingly find themselves in prosecutorial cross-hairs suggests that any stringent corporate criminal reform proposal is likely to further embolden the financial services industry’s already well-financed opposition.¹⁵³

Aside from such predictable resistance, mobilizing Congress to revisit and make discrete modifications to recently enacted legislation is often as necessary as it is difficult. Essentially, because Dodd-Frank, much like Sarbanes-Oxley, can be described as an emergency law¹⁵⁴ enacted during a period of immense political and financial turmoil, it raises doubt as to whether the “healthy ventilation of issues” needed in order to guarantee this regulatory initiative’s effectiveness indeed took place prior to its passage.¹⁵⁵

While the obstacles to the enactment of more stringent corporate criminal laws remain considerable, the risks associated with continued inaction—both socially and legally—are even more profound. Much like its predecessors, Dodd-Frank’s failure to adopt proof-of-intent requirements, which would better enable regulators to investigate and prosecute corporate crimes at the individual level, illustrates the latest in a long line of instances where the federal government has deliberately refrained from employing the most powerful deterrent in its legal arsenal—meaningful scienter reform—to combat what are, by now, undeniable patterns of fraud that, as a result of the U.S. financial sector’s unprecedented dominance and interdependence, continue to plunge the United States into deeper periods of crisis.¹⁵⁶

Additionally, if more vigorous corporate criminal law reform than Dodd-Frank fails to yield either a perceived or actual reduction in fraud, then U.S. corporations and their agents may find themselves regulated by as many as 50 different jurisdictions, each of which will more aggressively seek to punish and deter corporate misconduct as “state attorneys

¹⁵² Laufer, *supra* note 20, at 55-56.

¹⁵³ *Lobbying Database*, CTR. FOR RESPONSIVE POLITICS (Aug. 14, 2012), <http://www.opensecrets.org/lobby/index.php> (noting that during the year leading up to the Dodd-Frank Act’s enactment (i.e., 2009), total lobbying expenditures exceeded the cumulative amounts spent during 2001 and 2002).

¹⁵⁴ See Ivy Xiyang Zhang, *Economic Consequences of the Sarbanes-Oxley Act of 2002*, 44 J. ACCT. & ECON. 74 (2007) (calculating the five-year costs of complying with the hastily enacted Sarbanes-Oxley Act to have exceeded \$1.4 trillion and suggesting that, in addition to being more economical, more targeted reforms might have also been more effective).

¹⁵⁵ Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1528 (2005).

¹⁵⁶ See generally Sally S. Simpson, *Cycles of Illegality: Antitrust Violations in Corporate America*, 65 SOC. FORCES 943, 956-57 (1987) (observing that corporate misconduct in the U.S. recurs with remarkable predictability and that the history of misfeasance is one where the dust has not settled after a corporate scandal before another wave arrives).

general on the warpath . . . pursuing the crimes Washington [will] not.”¹⁵⁷ Not only will the proliferation of numerous and potentially divergent state corporate criminal law regimes prove immensely disruptive to the uniformity that corporations depend on to structure their internal affairs, but widespread legal reform at the state level may bring with it the chilling over-deterrence that tends to accompany the passage of legislation less interested in preventing future harm than in placating a public appetite for retribution and settling political scores.¹⁵⁸

XI. CONCLUSION

A thorough understanding of the prevailing mechanisms through which U.S. corporate criminal laws are enforced underscores many of the reasons for their repeated failure to prevent fraud-induced economic crises. Far from embodying a panacea for all that ails the substance and enforcement of existing securities laws, meaningful scienter reform which incorporates—and consistently incarcerates upon violations of—a criminal negligence standard is a long overdue and much needed advance.

¹⁵⁷ Rich, *supra* note 63; see Laufer, *supra* note 20, at 40 (noting that in their comparatively “aggressive use” of state criminal law, numerous state attorneys general and district attorneys have “made most of their federal counterparts look like lapdogs”); see also Nelson D. Schwartz & Shaila Dewan, *Political Push Moves a Deal on Mortgages Inches Closer*, N.Y. TIMES, Jan. 24, 2012, at B1 (describing the “incensed” reaction of state attorneys general to federal inaction).

¹⁵⁸ See Joan MacLeod Heminway, *Hell Hath No Fury Like an Investor Scorned: Retribution, Deterrence, Restoration, and the Criminalization of Securities Fraud under Rule 10b-5*, 2 J. BUS. & TECH. L. 3, 3-4 (2007) (discussing society’s need to see criminal offenders—specifically corporate criminal offenders—“punished for their wrongful conduct”).