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JUST FINANCIAL MARKETS?

Finance in a Just Society

EDITED BY LISA HERZOG

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Punishment in the executive suite: Moral responsibility, causal responsibility, and financial crime

Mark R. Reiff

6.1 INTRODUCTION

In 2014, the US Justice Department collected a record $24.7 billion in fines and penalties from banks and other financial institutions for fraud and misconduct in connection with the 2008 financial crisis, and this was on top of the $21 billion it had already collected from 2012 through 2013 (Reuters 2014). During the same period, other federal and state law enforcement agencies also collected eye-popping amounts, and from many of the same institutions (Silver-Greenberg and Eavis 2013, 2014). The fines kept coming in 2015 (Protess 2015a and b; Protess and Ewing 2015), and by October the grand total collected by US federal and state authorities since the financial crisis began had risen to a whopping $204 billion (Cox 2015). And this does not include the fines imposed by various European regulators, which have also been substantial (see Sterngold 2014). Even now, early in 2016, the grand total continues to grow by leaps and bounds, with huge new fines being assessed against or agreed to by Goldman Sachs, Wells Fargo, and Morgan Stanley (Goldstein 2016, Koren 2016, Popper 2016a). Obviously, the fallout from the financial crisis is not over yet.

What the enormity of these fines and penalties reflects—as if it were not already obvious—is both the extent of the losses flowing from the financial crisis and the widespread nature of the misconduct that surrounded it. Yet despite the undeniable seriousness of what occurred in our financial institutions, no high-ranking corporate executive has been criminally prosecuted for any of this misconduct, much less actually gone to prison (Eisinger 2014a and c, Stewart 2015a and b, Morgenson and Story 2011). Very few mid- to low-level employees

have been criminally prosecuted either.[1] Much criticism has been directed at the relevant authorities for this, and I think it is fair to say that many members of the public are incredulous about what seems to be the authorities' reluctance to prosecute senior executives for passively allowing if not actively encouraging globally significant acts of financial wrongdoing—that is, conduct that should be treated as legally criminal and not merely morally wrong if it is not (and this is debatable) technically a crime already (see generally Eisinger 2014b, Morgenson 2014a, Office of Inspector General 2014).[2]

There has been some indication recently that this criticism may be leading the relevant authorities to confess that they have not been using the legal tools currently available to them as fully as they could, and to profess a change in attitude and approach (Apuzzo and Protess 2015, Cohen 2015, Henning 2015c, Morgenson 2015b). But there is also reason to worry that real change is unlikely (Protess and Apuzzo 2015, Henning 2015a).[3] Although the current lack of criminal prosecutions has been particularly disappointing, hesitance on the part of the relevant authorities to prosecute those engaged in financial crimes is nothing new. Revelations of widespread financial fraud by leading financial institutions seem to occur periodically, but senior corporate officers often escape prosecution in these cases, as they have done now. And while there are always calls to prosecute those involved more vigorously whenever this occurs (see e.g. Fisse and Braithewaite 1994), these prior calls have obviously failed to have the desired effect.

Indeed, if anything we seem to be going backwards. Over 1,000 bankers were convicted by the US Justice Department following the Savings and Loan (S&L) crisis in the 1980s, and even so, many people felt that too many bankers got away then too lightly (Breslow 2013, The New York Times 2011).[4] True,

[1] There have, however, been a few exceptions at this level. See Bray (2016c and 2015a, b, c, and d) and Smith (2015).

[2] To cite just one example, no criminal charges have yet been brought against senior executives at Deutsche Bank despite a finding by the German bank regulator that then co-CEO Anshu Jain had "ignored signs of misconduct by traders and failed to investigate thoroughly when allegations of wrongdoing came to light," and "had created a corporate culture that allowed the wrongdoing to take place" (Ewing 2015). See also *In the Matter of Deutsch Bank* 2015. For similar findings (or agreed statements of fact) against other financial institutions, see Dealbook 2015.

[3] See also Protess and Eavis 2015 (SEC abandons litigation against former Freddie Mac executives despite a promise that "all individuals, regardless of their rank or position, will be held accountable for perpetuating half-truths or misrepresentations"); Morgenson 2015e (criticizing the settlement between the SEC and Citigroup that holds no one at the bank accountable for behavior that caused investors to lose an estimated $2 billion); Eisinger 2016 (criticizing the SEC for going easy on senior executives at Goldman Sachs and Paulson and Company because these were just "good people who had done one bad thing").

[4] Indeed, as one US senator put it in the course of voting for tougher provisions that he thought would ensure that future prosecutors would bring more cases and be able to convict more of those who committed fraud at insured financial institutions, "the American people have made it very clear that if they are being asked to foot the bill for the S&L crisis, at the

the institutions involved in that crisis were both more numerous and far smaller, none was systemically significant, and many of the bankers charged were principal owners or otherwise had effective control of their respective institutions.[5] Given what was often the brazen looting of these institutions, perhaps prosecutors had fewer obstacles to overcome in going after these senior executives.[6] But even so, the reaction to the S&L crisis shows that senior executives can be and sometimes are actually held accountable.

Indeed, what we are experiencing now is even worse than what happened after the Great Depression of the 1930s. Then, as now, virtually no bankers were convicted of wrongdoing. But in reaction to this, Congress produced a tidal wave of prophylactic legislation. Unfortunately, many of the key provisions of this legislation were eliminated in the run up to the S&L crisis, and even more in the run up to the 2008 financial collapse. And while a good argument can be made that this is what allowed if not encouraged the rate of institutional misconduct to rise again, the re-regulation triggered by the 2008 collapse has been rather modest, and the safeguards reinstituted strictly limited (see generally Reiff 2013, 253–4, 256 n. 188, Morgenson 2015a, Weisman and Lipton 2015).[7] This makes it doubly important that we take steps to ensure that senior executives face the possibility of criminal prosecution if we are to have any hope they will be more proactive in their efforts to ensure that widespread misconduct in their institutions does not happen yet again. At the very least, this is an objective upon which all those interested in promoting justice in the financial markets should be able to agree.

The purpose of this chapter is to provide an explanation of why the attitudes of the public and the public prosecutor about what justice requires here have gotten so out of sync, and offer some new suggestions on how to think about the responsibilities of senior corporate executives that make it easier to say why their conduct should be seen as both morally wrong and legally criminal regardless of its allegedly more ambiguous legal status now. In Section 6.2, I put the current dearth of criminal prosecutions in its proper context and discuss what seems to be at the root of this problem—the perceived difficulty in proving that senior officers had the requisite knowledge and criminal intent that is supposedly required to support an imposition of criminal liability as

very minimum the Government owes them swift and tough action to put those responsible in jail" (Sanford 1990).

[5] Consider, for example Charles Keating of Lincoln Savings & Loan, which Keating used as if it were "his own personal cash machine" (McFadden 2014).

[6] But see Heath (2011), suggesting that the absence of prosecutions is the result of law enforcement's recent practice of not investigating financial misconduct in large institutions unless the institution has affirmatively "turned itself in."

[7] See also Kashkari (2016): "While significant progress has been made to strengthen our financial system, I believe the [Dodd-Frank] Act did not go far enough. I believe the biggest banks are still too big to fail and continue to pose a significant, ongoing risk to our economy."

either a legal or a moral matter. In Section 6.3, I argue that the imposition of criminal liability is indeed appropriate in these cases as a prima facie matter even in the absence of the usual proof of knowledge and intent because the underlying rights at issue here would otherwise be rendered unenforceable, and it is enforceability, not morality, that determines the scope of sanctions available in the first instance. In Section 6.4, I argue that even in the absence of the usual proof of knowledge and intent, as long as there is sufficient proof to establish *causal* responsibility on the part of the individuals involved we have done all we need to do to establish their *moral* responsibility for these offenses as well, and as long as the relevant individuals are morally responsible there is no moral impediment—and under existing law there is no legal impediment either, although things could be more clear—to imposing criminal sanctions upon them. Finally, in Section 6.5, I discuss how causal responsibility in these cases is to be assessed, and how we might amend existing law to make the applicable standard in these cases clearer. My hope is that once the correct standard is identified we can see how a wide variety of past financial misdeeds can be punished and therefore future financial misdeeds deterred with the threat of criminal sanctions.

6.2 WHY PROSECUTING FINANCIAL CRIME CAN BE PROBLEMATIC

Senior managers of major financial institutions are not the only ones to have escaped charges of criminal liability for their role in the 2008 financial crisis: criminal prosecutions against financial institutions themselves have also been pretty thin on the ground.[8] Not because the legal tools do not exist to charge an institution with a crime even though it is not an independent moral agent in the way a person is: the legal tools for prosecuting corporate entities for crimes are well established. Of course, establishing what a corporate entity "knew" and what it "intended" and sometimes even what "it" did—all pre-requisites for proving criminal conduct in most cases—can sometimes pose difficulties given that groups do not possess a single mind that has knowledge, intentions, and makes decisions in the way individuals do (see Reiff 2008, 220–3). But the reluctance to prosecute financial institutions for their latest round of crimes has not been driven by concern about these difficulties. Instead, it has been driven by the fear of upsetting a fragile economic recovery by throwing some of our most systemically important financial institutions

[8] For one of the few exceptions, see Eavis (2015) and *Federal Housing Finance Agency v. Nomura Holding*, 2015 WL 2183875 (S.D.N.Y.).

into turmoil, for criminal conviction can result in the revocation of the licenses required for these companies to do business.[9]

But I do not intend to discuss whether this fear is justified—that is, whether it represents a correct application of the relevant consequentialist concerns. Because even if it does, this is beside the point. After all, we do not usually relieve *people* of criminal responsibility just because punishing them will have bad consequences for others, which it often does, especially for their families.[10] And even if there is something to be said in favor of caution when it comes to criminal prosecution of systemically important financial institutions, this does not explain the reluctance to prosecute high-ranking *individuals* at those institutions. On the contrary, such prosecutions would signal a seriousness about ensuring the rule of law that could only strengthen trust in these financial institutions and therefore in the market as whole, and this is good for everybody (see Morgenson 2016b). Mere fines, unfortunately, cannot do this. Corporations can act only through agents, and there is substantial evidence that despite the imposition of even enormous fines, a large number of these agents are still inclined to engage in criminal behavior (Sorkin 2015). Indeed, according to one recent survey of the financial industry completed after a good portion of these fines had already been imposed, "more than one third of those earning $500,000 or more [report that they] have witnessed or have first-hand knowledge of wrongdoing in the workplace" (Tenbrunsel and Thomas 2015, 3). Not only does such wrongdoing continue to be widespread despite the imposition of substantial fines, those with knowledge of this wrongdoing also remain unwilling to report it: internally due to fear of retaliation; externally because they have signed confidentiality agreements with their employers that prohibit them from doing so (ibid.). Clearly, whether we focus on deterring future misconduct or punishing past misconduct, the use of fines alone has not been enough.

There are no doubt a variety of factors contributing to this failure to impose more serious sanctions, but in this chapter I intend to focus on just one: when it comes to prosecuting management for massive frauds committed by

[9] For numerous examples of how this fear discourages criminal prosecutions of financial institutions, see Garrett (2014). For an individual case study (in this instance HSBC), see Morgenson 2016d. Note also that even when a financial institution is prosecuted, the target is usually small and insignificant or a holding company or subsidiary that can be convicted with minimal collateral consequences for the principal business entity. (See Editorial 2015a, Protess and Corkery 2015, Henning 2015b, and Morgenson 2015d (noting that the only mortgage-fraud related prosecution brought by Manhattan DA Cyrus Vance was against a small minority-owned bank based in NYC's Chinatown), and Finkle 2016 (noting that only executives at small institutions ever seem to go to jail.)

[10] The argument that we should consider such "collateral consequences" when contemplating criminal prosecution of corporations, at least in recent times, is usually attributed to a memo written by former Attorney General Eric J. Holder in June 1999 when he was Deputy Attorney General of the United States. See Holder (1999, sec. 9).

otherwise legitimate business organizations in which no one seems to have played a central "mastermind" role but large numbers of people (including those ostensibly "in charge") have played necessary and therefore not insignificant contributory parts, it seems wrong—that is, both morally and legally questionable—to subject individuals to criminal charges and penalties unless it can be proved that they individually harbored the requisite knowledge and intent to defraud. This, however, can be very difficult to prove, especially when the fraud requires the passive (if not active) cooperation of large numbers of people, all of whom have varying responsibilities and none of whom has complete information (see Wang 2011, Reckard 2011, Taibbi 2012). For example, in a September 2015 report examining the difficulties prosecutors face in these kinds of cases, US Deputy Attorney General Sally Quilliam Yates (2015) stated:

> There [are] many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs.

Now some of those most familiar with how these cases are put together and tried have expressed skepticism that intent would really be as difficult to prove as those currently in charge of doing so claim (Rakoff 2014, Steinzor 2015, esp. 217–19). Knowledge and intent can be proved indirectly, inferred from other evidence, meaning there is no need to produce a "smoking gun" that establishes exactly what a particular executive knew and when.[11] Smoking guns are rarely available in other kinds of criminal prosecutions and yet this does not deter prosecutors from stepping up in those cases. And in the cases we are examining here, there is a substantial degree of evidentiary material suggesting that senior executives did indeed know what was going on. Even some outsiders who had no access to inside information knew. Indeed, with regard to most of the misconduct relating to the 2008 financial collapse, especially the mispricing of risks associated with mortgage-backed securities and credit default swaps, the problems were apparent enough to some outsiders that they took huge positions betting the whole enterprise would collapse, just as it eventually did (see Lewis 2010). While the number of short sellers here was relatively small, their positions were large, and one of the principal justifications for allowing this kind of short selling is that it is

[11] But see the very recent and heavily criticized decision in *United States v. Countrywide*, Docket Nos. 15–496 and 15–499 (2d Cir, May 23, 2016), which held that there can be no fraud if at the time a promise is made there is no intent to defraud even though intent to defraud is present when the promise is performed. For a discussion of this decision, see Hiltzik 2016.

supposed to provide an early warning of fraud, a justification that is rendered meaningless if the warning bells this generates can be ignored with impunity by senior management. The fact that some outside investors were betting the farm on such a collapse should have led company insiders to at least engage in some introspection and internal re-evaluation of the risks involved within their own institutions, but it did not.

That they failed to do so is not surprising, perhaps, given the amount of profit that questionable transactions were generating for their institutions as well as for the senior officers themselves. But this does not excuse them. Indeed, there is a legal doctrine already in place to deal with exactly this kind of conduct. This is the doctrine of "willful blindness" (sometimes called "willful ignorance"), the idea that those who deliberately avoid investigating suspicious activity occurring right in front of their faces can be charged with knowledge of what they would have found out if they had been more careful, and can thereby be found to have constructive knowledge of the wrongdoing and have effectively intended it to occur even if they did not actually know what was going on.

Not that willful blindness is itself always easy to prove. According to the Model Penal Code § 2.02(7), willful blindness is "almost knowledge" and certainly more than negligence. Beyond that, exactly what constitutes willful blindness can be controversial (see Charlow 1992, Husak 2010, Lynch 2015). But it is still easier to prove than intent, so the willful blindness doctrine should have given prosecutors all they needed to charge senior executives with criminal wrongdoing even if the available amount of direct or inferential evidence of criminal intent was less than ideal.

Why prosecutors have been so reluctant to use this tool is not entirely clear. The most cynical explanation is that prosecutors think that making out a case of willful blindness is still too difficult, and they are reluctant to bring high-profile cases against well-funded defendants when the case might be lost, for losing makes promotion and an eventual move to higher office more problematic. We could, of course, try to encourage prosecutors to be less risk averse, but risk aversion is a common feature of human nature and is difficult to change (see Tversky and Kahneman 1991). So even though there is good reason to believe that it would have been nowhere near as difficult to prove willful blindness if not intent in these cases as the relevant prosecutors' offices seem to have feared (but cf. Bray 2016a and b), we need to give prosecutors tools they can employ with greater confidence if we want to ensure that senior executives are held accountable for what seem like obvious cases of criminal wrongdoing.

Before we can see what kinds of additional tools prosecutors need in these cases, however, we need to get clear on how the moral and legal aspects of these cases interrelate. For what I intend to argue is that the failure to prosecute senior executives in these cases stems not just from a lack of

adequate legal tools but from a misunderstanding of how the moral and legal responsibility of these executives should be assessed. And I will begin my exploration of this issue by examining whether the decision to make criminal sanctions available to deter and punish a particular kind of conduct is, in the first instance, even a moral matter.

6.3 ENFORCEABILITY AND CRIMINALIZATION

There are many ways of characterizing the issue that is facing us when we ask whether senior executives can be held criminally responsible for the financial crimes committed by those within their organization or by the organization as a whole. One might even contend that phrasing the issue in this way amounts to begging the question, for what we should be asking is whether what the entity has done should be treated as a "crime" or not; we cannot simply assume that a crime has been committed, especially if no individual or entity has been convicted of criminal conduct or at least admitted that criminal conduct has occurred. And unless knowledge and intent or at least willful blindness can be ascribed to certain individuals and through them to the entity as whole, one of the traditional elements of criminal conduct seems to be missing. With regard to the liability of senior executives, then, shouldn't the issue be whether something less than willful blindness can be deemed criminal?

This latter way of phrasing the question is what we might call "the conventional view or criminalization." This view holds that wrongs should be divided into two categories: the civil and the criminal. Civil wrongs are to be compensated; only criminal wrongs are to be punished. True, there is some disagreement on how to decide whether a wrong should be placed in one category or the other. Some argue that this depends on whether the wrong in question is sufficiently serious in terms of its broader societal effects to be the public's business; others argue that instead of focusing on the societal effects of a particular class of conduct, we ought to focus on the intrinsic nature of the wrong itself. But the same factors seem to come into play under either approach so the difference between them may be merely semantic. In any case, under the conventional view, determining what sanctions are available for any particular alleged wrong depends on how that wrong (if it even is a wrong) is categorized, for determining what kind of sanctions are available naturally flows from this (see generally Duff 2010, Husak 2008).

But I think this is a mistake. The question should never be whether such and such conduct constitutes a criminal wrong or a civil wrong or no wrong at all. This way of phrasing the issue begs the question in another way: it assumes

that there are different kinds of wrongs—civil and criminal—and that some higher standard is required in order to characterize something as a criminal rather than merely a civil wrong, when this is the very question that is at stake. Indeed, the whole enterprise of thinking about categorizing wrongs is misplaced, for wrongs are derivative of rights, and it is the nature and scope of the rights at issue on which our attention should be focused. And there are not two kinds of rights—civil sanctions and criminal sanctions are different kinds of *remedies* for the violation of any right, not different kinds of *wrongs*. In the first instance the only question is whether the remedy of criminal sanctions is required to make whatever underlying right is at issue enforceable. I say in the first instance for it may be the case that even if criminal sanctions are necessary for a certain right to be enforceable, there are moral limits that apply to how we may punish people, and it may be that in this particular case those moral limits will be transgressed if we impose criminal sanctions, especially if we are talking about terms of imprisonment. But I will treat this as a separate issue, to be decided after we consider the question of enforceability. For if we conflate these questions now, we effectively assume that a higher degree of scienter—that is, the mental state accompanying whatever conduct is being treated as a potential wrong—is required for criminal sanctions to apply, and that is the very notion I want to challenge. This does not mean I will be assuming that a stringent scienter requirement does not apply, merely that the question of what level of intent is required should arise in a different place in our moral reasoning (and therefore in our legal reasoning too) than we tend to place it now. So for the time being, I will consider only the question of enforceability—we will get to the moral question that may be raised when we seek to impose criminal sanctions later.

Of course to even get to the question of enforceability, we have to have a right in mind that we are seeking to enforce. Is there a moral and a legal right not to be injured in the way that those who were injured by financial institutions leading up to and coming out of the financial crisis claim? Was it a wrong to issue loans to borrowers with no proof of income or ability to pay? Was it a wrong to construct mortgage-backed securities using exclusively or largely sub-prime loans yet claim the upper trenches of these securities were no riskier than US Treasury securities, which are as risk free as one can get? Was it a wrong to sell these mortgage-backed securities as AAA, yet bet that they would fail and not disclose these bets to the clients who were buying them? Was it a wrong for rating agencies to rate these securities AAA without examining the underlying loans of which they were composed? Was it a wrong to foreclose on many of these loans even though proper documentation that they were in default did not exist? Was it a wrong for firms to manipulate the rate for Libor, the London Interbank Offered Rate upon which so many interest rates are based? I could go on, but I hope I do not have to. The evidence is overwhelming that all these acts occurred, and the firms involved have by and large

admitted that they occurred, although not always that they were illegal (see Financial Crisis Inquiry Commission 2011, Dealbook 2015). Nevertheless, given the size of the fines agreed to by these firms, it would be the height of obstinacy to insist that without an admission of guilt or prosecution and conviction we cannot conclude that something illegal happened here. And the immorality of these acts is self-evident. I will therefore take it as given that the kind of conduct at issue in these cases, conduct that in total (that is, taken together as a whole rather than just individual actor by individual actor) has caused serious and substantial class-wide economic injury (as opposed to merely individual economic injury, no matter how large) violates something we could safely call both a moral and legal right, even though it may still be unclear at this point whether individual executives as well as the institution as a whole is legally and morally responsible. The only other option is to argue that the enormous fines and settlement payments being extracted here are in fact a massive injustice, and I know of no one worthy of being taken seriously who argues this. The question, then, is what kind of sanctions should be available in order to ensure that this underlying moral and legal right is actually enforceable.

Drawing on my work in *Punishment, Compensation, and Law: A Theory of Enforceability* (Reiff 2005), I contend that criminal sanctions against senior executives and officers are indeed necessary in these cases to make this underlying right enforceable. The test I articulate in that work is twofold: one for the previolation state of affairs, and one for the postviolation state of affairs. The threatened amount of punishment that must be available in order to a make a right enforceable in the previolation sense is an amount sufficient to make the beneficiaries of that right rationally believe that potential violators will prefer to remain in the previolation state of affairs (ibid., 87–8). The test for determining enforceability in the postviolation sense, however, is somewhat different: the amount of punishment that must be available to make a right enforceable once a violation has occurred is the amount necessary to make the violator's suffering equivalent to the uncompensated suffering of the right's beneficiary (ibid., 133). Interestingly, this amount—the amount of retributive punishment enforceability requires—is not the same amount that rights beneficiary might have expected to be available when they were in the previolation state of affairs—it merely has to be enough to maintain their expectations, and for a variety of reasons these measures turn out to be very different. What these reasons are, why they lead to different tests for the previolation and the postviolation state of affairs, and how these different tests interrelate and support one another are important issues, but they are far too involved to discuss further here.[12] Given these tests, however, I think it is

[12] For a full discussion of these issues, see Reiff (2005).

obvious that the availability of civil sanctions and fines—even in the staggering amounts we are talking about here—is insufficient to make the rights at issue enforceable in either the pre- or the postviolation sense. What is necessary, if we are to make these rights enforceable, is that senior executives have to face a realistic threat of—and on occasion must actually go to—jail.

First, it is not even clear these fines, enormous as they are, actually exceed the profits generated by the relevant wrongdoing. Analysis of this is rarely made in the course of determining the amount of these fines or otherwise settling the cases from which they arise and when it is it is not made public (see Protess 2014). This allows and perhaps even encourages potential future violators to believe that even if they are caught they can still end up profiting from their wrongdoing. For no matter how big the fines imposed or settlements extracted are, if they are not bigger than the amount of profit generated by this activity they are neither sufficient to deter similar misconduct in the future nor likely to be sufficient to satisfy the demands of retribution—they are simply one more cost of doing business, of no more significance than any other (see Becker 1968, Coffee 1980).[13] This is especially true when these costs can be deducted from the corporation's taxes and therefore subsidized by the taxpayer, as is often the case (see Baxandall and Surka 2015, Moyer 2015), or the fines levied are subject to various credits for "good behavior" the corporation can claim to reduce the amount it actually pays, which is often the case too (see Popper 2016b). In any event, to the extent these fines are *actually* paid by the corporation involved, they are *effectively* paid by the corporation's shareholders, and not the actual wrongdoers themselves. And while there could be collateral consequences for these wrongdoers, in most cases there are none. Indeed, avoiding such collateral consequences seems to be the major impetus for the corporation to agree to these fines in the first place, and so far, the relevant authorities have largely gone along with this on the grounds they would rather have an agreed fine than an imposed one which could be challenged in the courts (see Morgenson 2016a).

Second, even if the fines levied and settlement amounts agreed did exceed the profits generated by this activity, it seems unlikely that they could equal the *harm* caused by this activity, which is the traditional measure of damage for moral wrongs. This measure would almost certainly be far greater than the disgorgement of profits given the potential of consequential damage to those that have been injured. The problem here is that the harm caused is likely to be so great that many of the financial institutions involved would not have sufficient resources to fully compensate those injured by their conduct and remain in business. Yet their failure to survive as viable parts of the economic

[13] Indeed, in order to have a sufficient deterrent effect they would have to be substantially bigger than the profit generated by the wrongdoing, in order to account for the possibility that the misconduct would not be identified and punished.

system would only serve to exacerbate the consequential financial injury already inflicted by their wrongdoing. This is why it is so difficult to achieve justice if we are having to rely on monetary sanctions alone to keep financial wrongdoing under control: we cannot compensate people for their injuries because attempting to do so would only make their injuries worse. Which means that we have to prevent such injuries from occurring, and when they do occur, we have to impose real punishment on the bad actors involved if we are going to make the relevant rights enforceable (see Reiff 2005).

Third, even if fines were levied on the individuals involved, as some suggest they should be (see e.g. Hill and Painter 2015), payment of these fines is often covered by insurance or the individual involved is otherwise directly or indirectly indemnified by the corporation, thereby effectively making the payment no different than if it had been made by the corporation itself (see Morgenson 2015c and 2016c). Even when this is not the case, the individuals involved are extremely high-income earners, so fines may simply act as another cost of doing business for them just as they do for the corporation, to be offset by even larger amounts of future compensation. In this case, why should we expect fines to have any greater effect on their behavior than on that of their corporate employers? Indeed, shareholders have long been able to bring civil suits for damages against senior executives for their misconduct and yet such misconduct has continued to flourish. And bringing such suits has recently been made significantly more difficult, so corporate executives are even less likely to be subjected to these suits than they used to be.[14] Which means that substituting individual fines for corporate fines would at best serve to maintain the status quo. If we are going to make the underlying right against being subject to such financial injury from corporate misconduct enforceable, we are accordingly going to have to do so by using a sanction other than the payment of money (see Rakoff 2015). Only if those in the upper echelons of the corporation face personal criminal conviction and imprisonment can the relevant rights be enforceable in the previolation sense, and only if they sometimes go to prison when they are not deterred can we support these previolation expectations, deliver the requisite amount of retribution, and make these rights enforceable in the postviolation sense.

In some sense the law already recognizes this through what is called the "responsible corporate officer" (RCO) doctrine.[15] Under that doctrine, an individual may be convicted of a regulatory offense even if he had no direct knowledge of the relevant facts and did not intend that the offense occur as long as he or she is a "responsible corporate officer." Exactly what it takes to be a "responsible corporate officer," however, remains vague. Is only the most

[14] Shareholders who sue top executives for misconduct and do not prevail now have to pay the defendants' attorneys' fees, making shareholder suits much riskier (see Morgenson 2014b).

[15] For a recent discussion of the RCO doctrine, see Sepinwall (2014).

immediate supervisor of those with the requisite knowledge and intent the "responsible corporate officer," or can liability flow all the way up to the most senior executives and even the corporate boardroom? And the question of the level of scienter required for conviction under the doctrine is also unclear: some think that proof of individual negligence on the part of the officer is required (in other words, even if the officer did not know what was going on he should have); others claim that the doctrine effectively creates a strict liability offense, although some think that the underlying bad actor must at least be shown to have acted with the requisite intent, while others think strict liability is possible all the way down. Some of those in each camp, in turn, think that whatever standard the RCO doctrine creates it is unjust, for only knowledge and intent can support criminal liability as a moral rather than a legal matter.[16]

Regardless of how one thinks the RCO doctrine should be cashed out, however, and regardless of whether this can be done in a way that satisfies the demands of justice, the doctrine has rarely been applied since it was formulated some fifty years ago. When it is applied, moreover, its violation only leads to criminal liability for a misdemeanor. This is a serious defect, for given the enormous profits that such misconduct can generate, a very small chance of a misdemeanor conviction hardly seems sufficient to deter the kind of misconduct we are trying to suppress. Nor does a misdemeanor conviction seem sufficient to impose the requisite amount of retributive punishment given the severity and scope of the injury this misconduct has caused, even if a misdemeanor conviction were to have collateral consequences such as the loss of one's job or disbarment from the industry, which unfortunately it rarely does (see Havian 2015). And even if it did—even if it meant the individual involved could never work in the industry again—the individuals involved are almost always rich enough already to continue to live comfortably for the rest of their lives. Which means the personal upside of doing nothing to stop the misdeeds at issue here would remain substantial and consequences of not doing so marginal. In any event, the long-standing existence of the RCO doctrine obviously did nothing to ensure that those with supervisory responsibility would make themselves aware of what their underlings were doing and stop any wronging going on below them in the run up to the financial crisis. So still more needs to be done to make the underlying right here enforceable in

[16] For recent criticism of the RCO doctrine along these lines, see e.g. Copeland (2014); Petrin (2012). Note that Congress is currently considering a proposal put forward by the National Association of Criminal Defense Lawyers and Koch Industries, the conglomerate owned by David and Charles Koch, that would restrict the RCO doctrine by requiring proof of knowledge of wrongfulness before any individual could be criminally convicted under it (see Editorial 2015b; Taub 2015). Of course if this proposal were to become law, the RCO doctrine would become mere surplusage, for proof of this level of knowledge and intent already subjects one to aiding and abetting liability. See Securities Act of 1933, 15 U.S.C. § 77*o*(b).

either the pre- or the postviolation sense. Prison is what those in a position to prevent this kind of misconduct fear, and given the enormity of the financial injury that can result from this kind of misconduct, only prison can put the scales of justice back in balance.[17]

6.4 MORAL RESPONSIBILITY AND CAUSAL RESPONSIBILITY

Now that we have decided that criminal sanctions against individual corporate employees are necessary to make the rights at issue here enforceable and therefore genuine rather than merely nominal (again, see generally Reiff 2005), we need to consider whether criminal sanctions such as imprisonment are morally permissible. This is because morality places limits on who we can punish and what kind of punishments we can impose even if such punishments are necessary to make a particular right enforceable. No matter what, we cannot impose certain kinds of punishments, we cannot impose an amount of punishment that is out of proportion to the wrong, and we cannot punish people who are not in some way morally responsible for the wrong itself (see Reiff 2005, esp. 133–4). This is the second problem we must overcome if we are to punish executives at corporations that have (or whose employees have) committed serious financial crimes. While we can (indeed we often must) prove intent to defraud by the corporation as a whole by aggregating what its individual employees knew and intended, if we cannot prove that the particular senior executive in question had the requisite knowledge and intent to defraud—even when willful blindness can be considered tantamount to intent—we may be forced to leave these executives both legally and morally off the hook. After all, no less an esteemed figure than H. L. A. Hart argued that there can be no moral responsibility without fault (Hart 1994, 173).[18] And imposing criminal sanctions on corporate officers without proof of individual fault looks uncomfortably like employing a doctrine of collective responsibility, triggering many familiar objections.[19] To make things even more difficult, many people think that proof of intent, not simply negligence—in other words,

[17] For a similar sentiment from a federal district judge who has tried a lot of these cases, see Scheindlin (2015): "Frankly, these people do not want to go to jail . . . and that's what they care about. The money part is the cost of doing business—it's trivial!" See also Tillman and Pontell (2016).

[18] And there are many other scholars who take a similar position. See e.g. Alexander 1990. Of course, there are also others who argue against this and assert that there can be moral responsibility without fault. See e.g. Kramer (2005, esp. 328–31).

[19] For a discussion of these, see Reiff (2008). Nevertheless, there are still some theorists who advocate the imposition of collective responsibility here. See e.g. Sepinwall (2015); Miller (2014).

a particularly serious degree of fault—is required for the just imposition of criminal (as opposed to merely civil) sanctions, especially imprisonment.

But there are so many exceptions to such a requirement (if it even is one) in the law already that it is hard to see how this could really represent a correct statement of our moral beliefs. We accept transferred intent (intent to kill A suffices as intent to kill B), temporally shifted intent (intent to drive drunk suffices as intent to injure someone later while driving drunk), inferred intent (intent to sell is inferred from the quantity possessed), willful ignorance as intent (the failure to investigate highly suspicious circumstances is deemed intent to further the conduct that one would have known about if one had investigated), shared intent (intent to join a conspiracy is deemed intent to commit any acts done in furtherance of the conspiracy even if done without knowledge or even hypothetical approval by other members of the conspiracy), and so on. We also believe that ignorance of the law (or of the requirements of morality) is no excuse (in other words, you do not have to intend to do wrong, just to intend to do what you did to trigger either legal or moral liability). True, some people raise moral objections to all these legal fictions for discovering intent, and along the edges of some of these cases there may indeed be good reason for concern. But look at the number of them—our legal practice suggests we do not take straightforward proof of intent as morally required and it seems likely that if we did, we would almost never be able to justifiably imprison anybody for anything, at least with regard to white-collar crimes, and *that* would be contrary to most people's moral intuitions. So unless we are willing to claim that morality simply prohibits the imposition of imprisonment in the absence of direct proof of actual intent to commit an act or omission the defendant knew was a crime—and I do not think many people's moral intuitions run this way—we should stop inconsistently paying lip service to the idea that only direct proof of intent will morally suffice to trigger criminal liability.

More importantly, while we often do require proof of fault in order to subject a rights violator to criminal sanctions, we find negligence sufficient for this on enough occasions in the law already that it seems far too late in the day to argue that as a moral matter negligence will not do. Even the traditionally conservative Model Penal Code accepts that negligence alone (and not just intent, recklessness, and *gross* negligence) can lead to criminal liability (see American Law Institute § 2.02(2)(d)).[20] True, most cases that lead to criminal liability for negligence involve serious *physical* injury. But the financial injuries inflicted by the conduct at issue here are also serious and they affect such a large number of people that treating these as morally different merely because

[20] While some scholars continue to claim that the imposition of criminal liability for negligence is unjust, I will not re-argue the issue here, for there is enough material on this elsewhere (see e.g. Huigens 1998).

they are not *initially* physical makes little sense. Those who lose their homes, their jobs, and their savings are obviously going to suffer greatly, as much if not more than many of those who sustain serious physical injuries, and many will suffer consequential physical injuries such as strokes or heart attacks or may even commit suicide as a result of the stress arising from these situations. In any event, negligence clearly is a form of moral wrongdoing, so there seems to be no moral impediment to holding senior executives criminally liable if they can be found to have been negligent in exercising their supervisory duties in this class of cases even if this has left them with no actual knowledge of the wrongdoing of their underlings and they did not specifically intend that this wrongdoing occur.

Note that this is effectively what we do already when we find senior executives *civilly* liable as "control persons" under Section 15 of the Securities Act of 1933, 15 U.S. § 77*o*(a).[21] Our reluctance to apply the same standard when it comes to imposing terms of imprisonment instead of the payment of money is simply a side-effect of addressing the question of the morality of criminal sanctions incorrectly. Rather than ask whether negligence in this context is an independent criminal wrong we should be asking whether the threat of imprisonment is necessary to make the underlying right against negligent injury enforceable and if so, whether morality permits this, for this leads to a result that is more in line with our moral intuitions. If the underlying right of people not to be injured by acts of class-wide corporate fraud requires holding senior executives criminally liable in order to make these rights enforceable—and we have already established that it does—and we hold them liable only if they are found to have exercised their supervisory duties negligently—something which would have to be proved beyond a reasonable doubt for criminal conviction to occur—there seems to be no basis for asserting a moral objection here.

The evidence of negligence among senior executives in these cases actually seems overwhelming—after all, do we really think that the global financial system could collapse because of the nature of the investments made without *anyone* in a senior position failing to exercise reasonable care? More likely, this was only possible because *everyone*, or at least a great many people, failed to exercise reasonable care. The widespread nature of this misconduct, however, is not a reason to let anyone off the hook. Nevertheless, I do not want to rest my argument here, for as I have already made clear, the legal tools to bring prosecution on these grounds were already arguably in place yet prosecutors did not use them. Apparently, even the burden of proving negligence is seen by prosecutors as too difficult to meet when they are concerned about bringing cases that might adversely affect their conviction rate and therefore their

[21] See *Federal Housing Finance Agency v. Nomura Holding*, 2015 WL 2183875 (S.D.N.Y.), 102–10.

chances for promotion. If we are going to overcome their reluctance to bring high-profile cases in financial cases against well-funded defendants, we are going to have to make the requirements even more manageable than this.

Whether something *less* than standard negligence could ever morally justify the imposition of criminal sanctions, however, is a much more difficult question. We sometimes do impose criminal liability for what we call strict liability offenses, of course, so our practice does suggest that criminal sanctions can sometimes be imposed even without proof of negligence. But the morality of doing so is sufficiently controversial that I do not intend to rely on the argument that our current practice settles the matter.[22] Instead, my argument is this: there is *always* moral fault whenever we find a senior executive causally responsible for widespread and severe class-wide financial injury. Whether the law currently recognizes this or not (and under the RCO doctrine it might), it should do—the current fear that this would somehow transgress applicable moral limits is misplaced. Accordingly, instead of separately considering what level of fault is present in any particular case, all we need to consider is whether the executive in question is causally responsible for the loss, at least in part. His level of what we might call "traditional" fault (knowledge, intent, or negligence) is a *factor* in determining his causal responsibility, for our sense of causal responsibility tends to expand and contract with the degree of wrongfulness we attribute to an actor. But traditional wrongfulness is neither a necessary nor a sufficient factor for a finding of causal responsibility.[23] In other words, causal responsibility is not simply a metaphysical determination—it is also a moral determination, and so anyone found causally responsible is necessarily morally responsible too, and as long as there is moral responsibility the imposition of a term of imprisonment is not unjust.

I realize this is a controversial claim, and so much needs to be said to defend it. Much of this has been said in my "No Such Thing as Accident: Rethinking the Relation between Causal and Moral Responsibility" (Reiff 2015), which focused on the relation between moral and causal responsibility in cases of serious physical injury. I now extend the claims made there to cases of serious class-wide economic injury—that is, injury that is suffered by a large number of similarly situated clients, customers, creditors, debtors, shareholders, counterparties, investors, or depositors, as opposed to injury to just one individual or entity or a few. The essence of these claims is as follows. Causal responsibility is not some junior, broader inquiry that identifies a pool of candidates among whom a more senior concept of moral responsibility allows

[22] For some relatively recent discussions of this issue, however, see Thomas (2012), Hamdani (2007).

[23] For further discussion of how we are willing to treat more remote causes as responsible causes when the seriousness of the conduct is particularly high, albeit in a slightly different context, see Reiff (2005, 135–6).

us to pick and choose when deciding who will be assigned to the category of wrongdoer, be it civil or criminal.[24] Rather, causal responsibility is itself a moral inquiry. And not merely because there are moral elements to any causal inquiry, both at the actual or cause-in-fact level and the legal or proximate or cause-in-law level, something that I think it fair to say is no longer subject to reasonable dispute.[25] It is a moral inquiry because causal responsibility is itself a moral determination, at least when we are looking for the cause of the serious class-wide economic injuries at issue here. Someone found causally responsible for these injuries (as opposed to being a mere causal condition, a distinction I shall say more about in a moment) is therefore *necessarily* morally responsible too even in the absence of proof of traditional fault. In these cases, fault is effectively an *output* of our causal determination rather than an input.[26]

Note that I am not arguing that criminal sanctions may be imposed even in the absence of fault. What I am arguing is that whenever we find someone causally responsible, at least in this particular class of cases, *fault is always present,* for this is built into our conception of causal responsibility itself. If we then subject those found causally responsible to criminal sanctions only when we also find them guilty of traditional moral fault, we have engaged in a moral double-counting, and we risk allowing some of those who are morally responsible to escape punishment merely because their moral responsibility has not been proven twice. From the victim's point of view this would obviously work an injustice, as great an injustice as prosecuting those who are not in any way morally responsible for a wrong. To prevent this former type of injustice from arising out of financial cases we accordingly need to reorient our examination of the conduct at issue so that we focus on what I call *comprehensive* causal responsibility—a kind of causal responsibility that includes moral responsibility but is not subservient to it—rather than afford those already found causally (and therefore morally) responsible an escape from liability unless we are also able to show they took a second and even larger bite out of the moral apple. If we have found a particular senior executive causally responsible for a particular wrong (such as fraud in the creation or sale of a mortgage-backed security), then we have already done all we need to do to find him morally responsible too.

[24] For an example of how the hierarchical ordering of inquiries I am challenging here is often simply assumed to be self-evidently appropriate, even by those who argue for more vigorous prosecution of corporate wrongdoing, see Pettit (2007, 173): "holding someone responsible, then, is different from the mere assignment of causal responsibility."

[25] For a discussion of these moral elements, see Reiff (2015, 380–3).

[26] Not only is a finding of traditional fault not a necessary element of causal responsibility, it is not a sufficient one either, for someone may be at fault yet not causally responsible if there was someone much closer down the chain of causation to the actual injury who was a supervening or overwhelming cause (see Reiff 2015).

6.5 ESTABLISHING CAUSAL RESPONSIBILITY

What factors besides those relevant to a finding of traditional fault are relevant to an assignment of causal responsibility to senior executives for the acts or omissions of their employees? Merely because the particular senior executive we are investigating happens to be higher up in the chain of command is not enough to establish this. After all, it is necessarily true that all those in a supervisory role failed to prevent the wrongdoing of all those beneath them. So lack of action on behalf of a supervisor is always a causal condition of every wrong. But identifying a causal condition is a different enterprise than identifying causal responsibility. There are potentially an infinite number of causal conditions for every act of misconduct but only a few of them are ultimately assigned causal responsibility. Deciding which causal conditions will be assigned causal responsibility is a comparative process, involving consideration of a wide range of factors, including the degree of remove between the factor under consideration and the harm, the extent to which the contribution of that particular factor to the ultimate harm is especially significant in comparison to other causal conditions, and the ease at which those at a supervisory level could have intervened and prevented the wrong from occurring. The comparative scienter of the various actors involved up and down the causal chain is relevant too, for a particularly high degree of scienter can turn a causal condition further down the chain into an intervening cause and relieve those higher up the chain of causal responsibility if this intentional wrongdoing was not foreseeable. Other considerations may also be relevant. Unfortunately, there is no strict formula for making this comparative calculation; it is an all-thing-considered inquiry, just like the assignment of moral responsibility is said to be. But a useful way of thinking about what we seem to be doing here is this: when we are seeking to assign causal responsibility we are trying to identify the place or places in the chain of causation where human intervention is most likely to significantly reduce the chances of a similar injury happening again (Reiff 2015, 391–2).

One obvious factor in these cases is the degree to which the senior executives had reason to pay attention to the activity of a subordinate. As part of a traditional moral inquiry, what we would be looking for here is whether the executive acted reasonably in discharging his or her supervisory responsibilities. But this would require consideration of the standard of care, and if supervisory personnel in the financial industry typically do not exercise the kind of supervision that those unfamiliar with the industry might expect, this mitigates against a finding of actual negligence, even though we could impose a standard of care that exceeded the actual standard. This, however, is not a problem when it comes to assigning causal responsibility. While negligence presents an objective standard, the comparative causal standard assesses responsibility on the facts as it finds them. And if we find causal responsibility then this means that this particular actor's causal contribution to the injury

was unreasonable *by definition*. So, for example, a subordinate's prior acts of wrongdoing would not only trigger a heightened expectation that the relevant supervisor would have done more to ensure there was no wrongdoing currently going on, these prior bad acts also make it clear that the supervisor's failure to intervene was causally responsible for the wrong and not merely a causal condition.

Factors that indicate the employee's performance was outside the norm, *in either direction*, have a similar effect. Indeed, one common quip within the financial world is that "when someone is doing well, give them a bonus, but when they are doing extraordinarily well, fire them, for the only reason this could be happening is that something illegal is going on." This is meant to be a joke, of course, but there is a kernel of truth in the principle it reflects. When an activity is generating huge amounts of profits (or losses, but we needn't worry about heightened supervisory scrutiny when losses are occurring—this always seems to get people's attention), those higher up in the chain of command are supposed to be aware of this, and the degree of supervisory activity we expect from them increases. The failure to pay close attention to those generating what appear to be "cowboy capitalist" profits may not amount to willful blindness, but it certainly is a factor in deciding whether a particular supervisor was at least in part causally responsible for any resulting avoidable injury to others. And if we are willing to assign causal responsibility, a sufficient degree of moral responsibility has been found to justify the imposition of criminal sanctions.

The degree of remove, a traditional factor for causal responsibility, is also relevant here. We are not trying to hold chief executives criminally responsible for determining whether some entry-level administrative assistant is cheating on his or her expense reports. But the activities at issue here were such a huge part of the economic activity of these companies that we should naturally expect all those in the supervisory chain to exercise much greater control over these activities than they otherwise might. More direct supervisors might have more responsibility, of course, but given the amount of money at stake and the potential that more direct supervisors will have their judgment clouded by the personal financial benefits these activities typically generate, it is not unreasonable to expect even those at the highest corporate level to pay close attention to what is going on.

Also relevant is whether the particular individual signed any document found to have contained misrepresentations. Corporate agents should not be able to lend their name to a statement and then deny that they had sufficient knowledge to know that it was false. When one makes a representation, one also makes an implied representation that one has made a reasonable investigation to ensure the representation is correct.[27] The greater the potential

[27] A principle now expressly codified by section 302 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7241(a).

harm that might result if that representation is untrue, the greater the amount of investigation required to ensure that it is true. Even when an executive relies on underlings to do this investigation for him, he has no more protection than he would had he done the investigation himself. And if the potential harm of the representation is serious enough, the only amount of investigation that is reasonable is enough to determine whether the representation is in fact true. Or, to put it in causal terms, when one sends a misrepresentation out into the world that foreseeably causes widespread and severe financial harm one is morally responsible for the injury this misrepresentation creates.

The nature of the financial product itself may also make supervision by those further up the chain of command more essential. When these products are especially dangerous—as were the mortgage-backed securities and credit default swaps that led to the 2008 financial collapse—it is not unreasonable to expect more extensive supervisory scrutiny and control.[28] We are therefore much more likely to place causal responsibility on senior executives in these cases than we might with respect to the handling of some more conservative financial product. After all, if financial services and products can cause widespread and severe financial injury just like non-financial products can cause widespread and severe physical injury, why should we not treat the provision of these financial products as sufficiently causally important that we place responsibility for the injuries those products cause squarely on those who provide them, just as we do in the case of non-financial products?[29] Changing the law to provide for this would not only make the law accord better with our current moral notions, it would also make it clear to senior executives that a great deal more is going to be required of them in the future if they want to avoid criminal liability for this kind of wrongdoing.

Another factor is the corporate culture those at the top establish. A corporate culture that puts enormous pressure on underlings to bring good news to their supervisors and punishes them if they bring bad news is another factor that goes to whether we should charge those at the top with causal responsibility for a wrong they could have prevented or stopped had a different corporate culture been in place.[30] "Firms with a strong ethical culture and senior leaders who set the right tone, lead by example and impose

[28] See Buffet (2002), referring to these derivatives as "financial weapons of mass destruction."

[29] Note that even though the responsibility placed on manufacturers of non-financial products is commonly referred to as "strict liability," this does not mean there is no moral component to it. While recovering for injuries caused by defective consumer products does not require proof of traditional fault, it does require proof that the product was defective, and proof of this does indeed require proof of a kind of unreasonable conduct, and therefore moral fault nonetheless. For further discussion of this point, see Reiff (2014, 245).

[30] For a discussion of the relation of corporate culture to bank performance, see McNulty and Akhigbe (2015). For an example of how corporate culture facilitated misconduct at one bank (Citibank), see Waytz (2015).

consequences on anyone who violates the firm's cultural norms are essential to restoring investor confidence and trust in the securities industry," says the chairman of the Financial Industry Regulatory Authority (Morgenson 2016a).[31] And an ethical corporate culture is something that is very difficult to impose from the outside—only if firm leadership adopts this approach are things likely to change, making their causal responsibility for any losses that result from a less-than-ethical culture and their corresponding moral responsibility for these losses abundantly clear.

There are a myriad of other factors that could also be relevant. Did the senior executives in question profit personally from the wrongful activity, directly, or indirectly? The more they did, the more they are causally responsible for that activity if they did not look into how these profits were being generated. Were the corporate controls in place sufficient for senior executives to rely on them to bring any misconduct to their attention? If not, and the particular senior executive was in a position to have improved these controls, this also supports a finding of causal responsibility. Were any other "red flags" present in this case that should have led those in charge to subject the conduct of their underlings to greater scrutiny, making their failure to do so an even more significant causal factor in the injury the misconduct of those underlings ultimately inflicted?

I do not mean to suggest that this brief list is exhaustive. I am merely trying to make the point that we can easily find those in charge causally responsible even without a finding of traditional fault. And once this is done, our concern that there may be additional limits morality places on our ability to impose criminal liability in these cases is misplaced. The problem is not that we are going beyond what morality allows and holding people criminally liable when this is unjust, as some seem to contend (e.g. Husak 2009).[32] The problem is that we are not following morality and holding people criminally liable when the *failure* to do so is unjust. This is why the public is so outraged by the failure to prosecute in these cases.

So how do we fix this? Prosecutors can already allege willful ignorance even when they cannot prove intent, and legal tools such as the RCO doctrine already exist to allow them to prosecute senior executives even when they cannot prove willful ignorance. Nevertheless, it is obvious that the current state of the law regarding both these doctrines is more ambiguous than it

[31] See also Moyer (2016).

[32] Note that Husak does not address the example of financial crimes, but he does suggest that something important may be lost by holding people criminally liable without an adequate showing of criminal intent. I agree that intent is always relevant to determining criminal liability; I just contend that its absence is not determinative of either the legal or the moral question of whether such liability should attach.

should be. It is also obvious that the misdemeanor liability available under the RCO doctrine is not sufficient to deter the kind of misconduct that is occurring here given that it has clearly failed to do so to date. And while there is no reason why the RCO doctrine could not be interpreted to lead to felony liability when the underlying violation is serious enough, no one has ventured to argue for this so far. If we want to ensure that prosecutors are not so reluctant to use the tools available to them in the future, we must accordingly try to correct this by providing additional tools through legislative action. Whether we do so by enacting and then more aggressively using a more expansive version of the RCO doctrine[33] or by enacting something like a financial products safety law that parallels the provisions of consumer products safety law but provides criminal as well as civil sanctions, is not important.[34] What is important is that we act quickly if we do not want financial history to repeat itself yet again, and that we recognize there are no moral impediments to such action in the way.

I am under no illusion that proving the causal responsibility of senior executives in these cases will always be an easy task, although it will be an easier task than proving intent or willful blindness. Whenever we are talking about financial fraud, the activities in question often exhibit what we might call "causal complexity" (see generally Fisch 2009). This complexity, in turn, can express itself in a variety of ways. No single actor may be a "but for" cause, while many may be significant contributing causal factors. Deciding which causal factors should be assigned causal responsibility is ultimately a judgment call.[35] But I do not see this as a bad thing—on the contrary, it is this complexity, this requirement to consider a myriad of factors and to balance what actually happened against various counterfactual scenarios, that makes the ultimate determination of causal responsibility a moral determination and gives the assignment of causal responsibility its moral force. In any event, easy or not, this is simply what justice requires if we are to address the moral and legal breakdown that the 2008 financial crisis has brought to light.[36]

[33] Note that the argument often made against the RCO doctrine—that it is unjust to hold responsible officers "strictly liable" (if this is what the RCO doctrine does) when the underlying regulatory offense does not itself require knowledge and intent or even negligence—simply has no force under my analysis because causal responsibility satisfies the requirement of moral responsibility at all levels. As long as the underlying wrong requires proof of causal responsibility, it contains enough of an element of moral responsibility to justify criminal sanctions, and therefore the causal responsibility of supervisory personnel does as well.

[34] For an argument that it is the RCO doctrine that should be expanded, see Schuck (2010).

[35] For a discussion of some of these causal complexities and how we might deal with them, see Reiff (2015).

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