Making Sure "The Buck Stops Here": Barring Executives for Corporate Violations

Peter J. Henning
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When the sentence for a crime is not quickly carried out, the hearts of the people are filled with schemes to do wrong.

Ecclesiastes 8:11

INTRODUCTION

The movement called "Occupy Wall Street" has sought to take over locations in New York City and elsewhere to protest what it sees as corporate greed and corruption that have led to a growing inequality between powerful moneyed interests and "the other 99 percent." The protests in some ways harken back to the 1960s, with large numbers arrested amidst accusations of police brutality, although unlike earlier efforts to stop the Vietnam War, it is not clear what the protesters hope to accomplish beyond voicing their objection to the status quo. A prominent target of their ire is bankers, with one protester quoted as saying, "I think a good deal of the bankers should be in jail"—although no particular crime was identified. The protests seem to be a reaction, at least in part, to reports in the media vilifying leading financial firms for their role in the subprime mortgage crisis, which triggered the highest home foreclosure rates since the Great Depression as well as persistent unemployment. A commonly expressed complaint has been about the absence of any signature criminal prosecutions of corporate chieftains, who many believe were responsible for the losses suffered by so many.

The Department of Justice (DOJ) and the Securities and Ex-

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1 Andrew Ross Sorkin, On Wall Street, a Protest Matures, NY Times B1 (Oct 4, 2011).

change Commission (SEC) have been derided for their failure to pursue those who are presumed to have engaged in wrongdoing. In short, the question often asked is, "Why hasn't anyone been sent to jail for the financial meltdown?".

A quite different criticism of the criminal justice system, particularly from academics, is that the United States suffers from "overcriminalization," a term used to encapsulate much that ails the American criminal justice system. Unlike the lament that no financial leader has been prosecuted, overcriminalization has been identified as the cause—or the product—of too many crimes, too long sentences, too many prisoners, too broad interpretations of statutes, too much invasion of state sovereignty by the federal government, and too expansive prosecutorial discretion, along with too few resources for defendants to fight this onslaught and too little public attention paid to the problem. As Professor Darryl Brown noted,

Few topics find more unanimity across the ideological spectrum of criminal law scholars and Washington policy advocates interested in the criminal law than the conclusion that the United States suffers from too much criminal law—although the sentiment seems to be shared by a much smaller portion of legislators, prosecutors and—most worrisomely or tellingly—the public. ³

There is an interesting juxtaposition in assessing how the criminal justice system should deal with large business organizations. While the public has no problem when a company is prosecuted to the same extent as an individual, ⁴ those who consider the theoretical foundations for the criminal law express serious reservations with corporate prosecutions. Some scholars have even called for an end to corporate criminal liability altogether. ⁵


⁴ See Bertram F. Malle, The Social and Moral Cognition of Group Agents, 19 J. L. & Pol 95, 136 (2010) ("Humans have no trouble reasoning about the actions and minds of groups and have the desire to blame and punish them when they act immorally."); Steven J. Sherman and Elise J. Percy, The Psychology of Collective Responsibility: When and Why Collective Entities Are Likely to Be Held Responsible for the Misdeeds of Individual Members, 19 J. L. & Pol 137, 139 (2010) ("[A] high level of coherence in collective entities, such as corporations, can lead to judgments of collective intentionality and responsibility; in such cases, it therefore makes legal sense to treat corporations as individuals.").

⁵ See John Hasnas, The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability, 46 Am. Crim. L. Rev 1329, 1329 (2009) (arguing that "there is no theoretical justification for corporate criminal liability.").
or at least a significant curtailment of the application of criminal laws to organizations. They see the use of criminal laws to prosecute corporations as an improper expansion of principles of moral responsibility. The primary focus of the criminal law is on an individual’s conduct, and extending it to entities that cannot form the intent necessary to commit a crime can only be accomplished through the operation of the legal fiction of vicarious liability. For example, Professor John Hasnas wrote, “Corporate punishment is vicarious collective punishment. Collective punishment is inherently unjust. Hence, to the extent that assigning moral responsibility to corporations authorizes corporate punishment, corporate moral responsibility is unjust.”

The public perception of corporations is that they are responsible for the actions of those who work for them. In this view, not only should the organization be held accountable, but those in positions of authority should be liable for a company’s actions, even if they might not have been directly involved in the misconduct. Stories in the mainstream media about the financial meltdown that culminated with the collapse of Lehman Brothers in September 2008 operate on the assumption that criminal con-

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6 See Albert W. Alschuler, Two Ways to Think about the Punishment of Corporations, 46 Am Crim L Rev 1359, 1367 (2009) (“The embarrassment of corporate criminal liability is that it punishes the innocent along with the guilty.”); Andrew Weissmann, A New Approach to Corporate Criminal Liability, 44 Am Crim L Rev 1319, 1341–42 (2007) (arguing that corporate criminal liability should require the government to prove that a corporation did not have an effective compliance program in place at the time of the offense).


9 See, for example, Restatement (Third) of Agency § 7.04 (2006). Section 7.04 provides:

A principal is subject to liability to a third party harmed by an agent's conduct when the agent's conduct is within the scope of the agent's actual authority or ratified by the principal; and (1) the agent's conduct is tortious, or (2) the agent’s conduct, if that of the principal, would subject the principal to tort liability.

Id. In the criminal law, the Supreme Court has applied the tort doctrine of respondeat superior to make the corporation liable for the acts of its agents. In New York Central the Court stated:

Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

212 US at 494.
duct by corporations, particularly Wall Street and other financial firms, contributed significantly to the losses suffered by investors and the broader economy. That leads to the common complaint about the absence of any criminal prosecutions of leaders of the large financial firms that collapsed, such as Lehman Brothers or Bear Stearns; that were bailed out by the federal government, like American International Group; or even ones that ultimately thrived, like Goldman Sachs. Because no high-profile chief executives have been charged with a crime, or even sued by the SEC in a civil fraud enforcement action, the conclusion is that Wall Street will not be held accountable for the harms it inflicted through reckless investment strategies exacerbated by disastrous financial engineering.

This presents a sharp contrast to the accounting disasters that came to light in 2002, leading to the convictions of chief executives like Jeffrey Skilling of Enron, Bernie Ebbers of WorldCom, and John Rigas of Adelphia Communications, for a range of crimes related to the collapse of their companies. One can dismiss the accusations of the mainstream media as a product of ignorance or, perhaps worse, pandering from desperate conglomerates afflicted with a shrinking subscriber base who simply want to generate “heat” in the public perception. One could also conclude that the federal government is partially responsible for building public expectations that prosecutions will take place in response to highly public events. Attorney General Eric H. Holder Jr testified before the Financial Crisis Inquiry Commission in January 2010:

[T]he Justice Department is using every tool at our disposal—including new resources, advanced technologies and communications capabilities, and the very best talent we have—to prevent, prosecute and punish these crimes. And by taking dramatic action, our goal is not just to hold accountable those whose conduct may have contributed to the last meltdown, but to deter such future conduct as well.11

10 See Jean Eaglesham, The Shadow of Enron Still Lingers, Wall St J C1 (Oct 17, 2011) (quoting a former FBI agent, who stated that “[t]here simply has not been the all-out, focused effort the Justice Department mounted to address the savings-and-loan crisis and corporate-fraud epidemic led by Enron, WorldCom and the hundreds of cases that followed”).

11 DOJ, Attorney General Eric Holder Testifies before the Financial Crisis Inquiry Commission (Jan 14, 2010), online at http://www.justice.gov/ag/testimony/2010/ag-
This type of rhetoric has not been limited to issues arising from the financial crisis. Just a few months later, on June 1, 2010, the Attorney General issued a statement regarding the Gulf oil spill asserting that the DOJ “will make certain that those responsible clean up the mess they have made and restore or replace the natural resources lost or injured in this tragedy. And we will prosecute to the full extent any violations of the law.”\(^\text{12}\) Not surprisingly, neither academic complaints about unstoppable overcriminalization, especially regarding the use of the criminal law against corporations, nor a pervasive perception that executives have avoided accountability for corporate crimes appears to be entirely correct. Professor Brown pointed out that “[a]n overlooked story in the history of American criminal law is the ongoing process of decriminalization.”\(^\text{13}\) On the enforcement side, there have been a number of prosecutions of mortgage fraud involving brokers, bank officers, and buyers, although, as is typical of that offense, the cases are local in nature and do not involve large financial institutions. In a case with national implications, Lee Farkas, the former chief executive of private mortgage lender Taylor, Bean & Whitaker, was convicted in April 2011 on charges related to what prosecutors described as a $2.9 billion fraud scheme involving thousands of home loans, and he received a thirty-year prison term.\(^\text{14}\) While these steps can be assailed as mere blips that pale in comparison with the assumption that there were many crimes but not enough prosecutions of corporate


\(^{13}\) Darryl K. Brown, Democracy and Decriminalization, 86 Tex L Rev 223, 225 (2007) (emphasis omitted). For example, there is a growing trend toward decriminalization of marijuana, albeit in fits and starts, but at the least there is a push to de-emphasize use of the criminal law to punish possession of small amounts, along with growing tolerance for personal use and cultivation. A bill called the “Ending Federal Marijuana Prohibition Act of 2011” has been sponsored by Representatives Barney Frank and Ron Paul—one could hardly identify two more ideologically diverse members of Congress—to limit the federal government’s role in prosecuting possession of marijuana, which can be seen as an effort to stem the tide of criminalization. See HR 2306, 112th Cong, 1st Sess (June 23, 2011), in 157 Cong Rec H4526 (June 23, 2011). See also Ekow N. Yankah, A Paradox in Overcriminalization, 14 New Crim L Rev 1, 3 (2011) (“Despite what otherwise seems like the relentless creep of criminal law, important American jurisdictions are currently conducting a very public reexamination and, in many cases, recession of state drug laws surrounding the use of marijuana.”).

executives, they do show that there has been some effort made by prosecutors, even if it has not satisfied the public thirst for vengeance.

The question of executive accountability is a vexing one that leads to public mistrust of government and financial firms, engendering the perception that the system is rigged so that those with great wealth can easily avoid meaningful enforcement of the law. In addition, recurrent complaints about excessive compensation of CEOs appear to go largely unheeded, and even those corporate chieftains fired from their jobs for not meeting shareholder or board expectations walk away with multimillion-dollar severance packages. This corporate generosity comes in the face of persistent unemployment that has led to declining pay and home ownership for the middle class. It is not a crime to make a lot of money, and corporate boards eagerly lavish lucrative contracts on executives that pay far above what the average American will ever see in a lifetime of work. So calls for putting a few executives in jail may be more a complaint about the lack of effective means to hold those who wield corporate power responsible when a company engages in persistent misconduct or operates in a way that costs shareholders and employees their investments. Unlike shareholders, corporate officers are largely insulated from the impact of their decisions, and even keep the outsized gains reaped before a corporate decline. Unfortunately, the criminal law is at best an imperfect tool for policing corporate executives. Establishing an individual's guilt requires proof of the person's intent to violate the law, or at least recklessness, unless the mens rea requirement for criminal liability is lowered to such a degree that occupying a corporate office can result in being punished criminally for the misconduct of others. While

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15 See, for example, Lawrence A. Cunningham, A New Legal Theory to Test Executive Pay: Contractual Unconscionability, 96 Iowa L. Rev 1177, 1179 (2011).

Executive pay has skyrocketed in recent decades, stoked by stock-based components extolled under a three-pronged theoretical logic that proved problematic in practice. … Law fueled the engine: federal tax law encouraged stock-based pay; federal securities-disclosure law stimulated a ratcheting up as executives sought raises to beat their peers; and Delaware, free of competition from other states in setting the nation's corporate laws, looked the other way.

Id.

16 See James B. Stewart, Rewarding C.E.O.'s Who Fail, NY Times B1 (Oct 1, 2011) (“Just three years after the financial crisis generated widespread public outrage that Wall Street chief executives walked away with hundreds of millions in bonuses and other compensation after driving their companies into insolvency and plunging the nation's economy into crisis, multimillion-dollar pay for failure is flourishing like never before.”).
that approach has been employed in limited circumstances, primarily for environmental violations and food and drug safety cases, it is an approach that radically changes how the penal law traditionally uses the intent requirement to separate innocent conduct from criminal violations. Demand to police Wall Street by just sending a few executives to jail risk making questionable corporate decision making into a crime.

Because the criminal law is not well equipped to impose wider individual responsibility for corporate criminal acts, it is worth considering whether there are means to enhance the accountability of executives for organizational misconduct through civil enforcement mechanisms. Banking regulators can remove an officer or director from a corporate position if the person's conduct jeopardizes the safety and soundness of a financial institution. A provision of the Social Security Act gives the Department of Health and Human Services the authority to exclude from federal health care programs an officer or managing employee of a company that has been convicted of specified healthcare offenses.

Using those types of approaches, one modest means to police management of public companies would be to enhance the authority of the SEC to seek the removal of executives from companies that violate the law to ensure that senior managers are held responsible for corporate misconduct, even if they are not directly implicated in the violation. Managers who oversee the operations of a corporation should bear at least some responsibility for serious or persistent wrongdoing by the organization, even if they cannot be prosecuted for a particular violation. The SEC already has the power to bar an executive from future service as an officer or director of a publicly traded company for individual violations of the securities laws. Authorizing the agency to seek a bar for an individual executive based on corporate misconduct

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18 See 12 USC § 1818(e).

19 See 42 USC § 1320a-7(b)(15).

20 See 15 USC §§ 77H-1(f), 78u(d).
would enhance management’s incentives to ensure the corporation complies with the law and does not push its employees to operate at the edges of legality in the hope that they will avoid detection or, if necessary, pay the cost of any settlement with little fear that senior executives will bear direct responsibility for organizational misconduct.

Such an approach would be a step toward lessening the moral hazard problem that cropped up so prominently in 2008 when the “too big to fail” policy led to the bailout of a number of financial companies. This authority would in all likelihood be used sparingly because any exclusion should require proof that the corporation engaged in significant or persistent misconduct that was more than an isolated violation or the result of a rogue employee.

One criterion for holding executives responsible for corporate misconduct would be to determine whether they effectively tolerated the actions by turning a blind eye to them or exerted inappropriate pressure on employees to produce favorable results regardless of the potential illegality of the conduct. Among the considerations that would go into this assessment are the frequency of violations, the level within an organization at which wrongdoing occurred, and whether management allowed profit goals to trump internal controls or compliance programs.

Part I of this Article looks at the claim that the lack of criminal prosecutions from the financial meltdown can be attributed to a failure by the DOJ to aggressively pursue evidence of wrongdoing, a view that may not be correct because proving that an executive committed a crime is much more difficult than is often perceived.

Part II considers the overcriminalization criticism that application of the criminal law to corporations and their executives has proven problematic, which counsels against expanding the

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Moral hazard arises when an actor does not bear all of the consequences of his actions. It is particularly acute when he can profit by taking risks that he does not fully bear. Asset managers who profit from the gains earned using other people’s money face a moral hazard. Since they do not bear the full cost of a loss of capital and since higher returns are correlated with higher risk, an asset manager has the incentive to take additional risk in order to earn additional returns.

Id.
criminal law just to make it easier to pursue the prosecution of corporate executives.

Part III considers an administrative alternative to using the criminal law as the primary means to police corporate executives, focusing on how the power to exclude corporate executives from holding a position of authority with public corporations might be one means to address the frustration over the perceived lack of accountability for corporate misconduct. While it does not carry the stigma of a criminal prosecution, an administrative remedy can be a more effective way to police corporate management by avoiding having to denigrate the intent requirement for criminal liability while enhancing the power of the government to seek some accountability from managers for the conduct of the organization—putting into effect the old adage that “the buck stops here.”

I. THE “FAILURE” TO PROSECUTE CORPORATE WRONGDOING

According to the Bureau of Justice Statistics, in 2008 there were almost 4.9 million crimes of violence, and over 16.3 million property-related offenses. The most common crime in the United States is theft, and in 2010 there were three times as many property crimes as violent offenses. The number of property crimes has been decreasing since the late 1970s, while the rate of serious violent crimes has dropped since 1990. The overall prosecution rate is much lower, and less than half of all crimes committed are being reported to the police. Professor Alexandra Natapoff discussed underenforcement of the criminal law, pointing out that “in some neighborhoods, street crime is officially accepted as a fact of life.” Another author posited that “[u]nderenforcement results not in direct, cognizable harm to individuals, but rather in indirect harm deriving from accepted lawlessness.”


24 Id at 2–3.

25 Id at 1 (“About 50% of all violent victimizations and nearly 40% of property crimes were reported to the police in 2010. These percentages have remained stable over the past 10 years.”).


27 Christopher Angevine, Amnesty and the “Legality” of Illegal Immigration: How
Not all failures to prosecute are necessarily bad, of course, and an argument has even been made that underenforcement of vice laws may be "the most effective strategy for deterring consensual conduct that violates a widely shared moral norm." In the area of corporate crime, the perception of rampant lawlessness in the upper strata of society certainly appears to have firmly taken hold. In the book *Tangled Webs: How False Statements Are Undermining America: From Martha Stewart to Bernie Madoff*, James Stewart wrote that "prosecutors have told me repeatedly that a surge of concerted, deliberate lying by a different class of criminal—sophisticated, educated, affluent, and represented in many cases by the best lawyers—threatens to swamp the legal system and undermine the prosecution of white-collar crime." One can dismiss such claims as reflective of the prosecutorial point of view, which sees lying everywhere. Indeed, ask any trial lawyer and he or she will say that opponents lie all the time, but his or her own clients never do, nor would the lawyer continue to represent someone of that ilk. And Stewart acknowledged the perception of pervasive lying was not subject to any empirical testing, so that, "[b]ecause there are no statistics, it's impossible to know for certain how much lying afflicts the judicial process, and whether it's worse now than in previous decades." One can argue that high-profile perjury (and false statement) cases in recent years, from "Scooter" Libby to Roger Clemens, are just the tip of the iceberg, but there is no way to know the size of the iceberg, or whether it has melted due to global warming.

The perception that the perpetrators have gotten away with something pervades the public discussion of the financial crisis. A front-page *New York Times* article in April 2011 carried the title "In Financial Crisis, No Prosecutions of Top Figures," noting at one point that "several years after the financial crisis, which was caused in large part by reckless lending and excessive risk taking by major financial institutions, no senior executives have been charged or imprisoned, and a collective government effort

*Reliance and Underenforcement Inform the Immigration Debate, 50 S Tex L Rev 235, 243 (2008).*


30 Id.
has not emerged.” A Wall Street Journal article in June 2011, “Challenges in Chasing Fraud,” described the position of unnamed “legal experts” that the relative dearth of SEC cases against executives “reflect[s] the difficulty of going after specific individuals and companies when so many more made decisions that backfired into catastrophic losses during the financial crisis.” Likewise, Pulitzer Prize-winning writer Jesse Eisinger of ProPublica lamented in December 2010 that “[n]obody from Lehman, Merrill Lynch or Citigroup has been charged criminally with anything. No top executives at Bear Stearns have been indicted. All former American International Group executives are running free. No big mortgage company executive has had to face the law.” In his acceptance speech upon winning Best Documentary at the 2011 Academy Awards for Inside Job, Charles Ferguson said, “[T]hree years after a horrific financial crisis caused by massive fraud, not a single financial executive has gone to jail and that’s wrong.” The vilification of Wall Street included this famous description of Goldman Sachs, one of Wall Street’s leading firms: “The world’s most powerful investment bank is a great vampire squid wrapped around the face of humanity, relentlessly jamming its blood funnel into anything that smells like money.”

31 Gretchen Morgenson and Louise Story, In Financial Crisis, No Prosecutions of Top Figures, NY Times A1 (Apr 14, 2011). For a list of the financial meltdown cases filed, see Louise Story and Meghan Louttit, Tracking Financial Crisis Cases, (NY Times Feb 2, 2012) online at http://www.nytimes.com/interactive/business/financial-crisis-cases.html?rc=tptw (visited Sept 10, 2012). Another front-page article by Morgenson and Story discussed how the DOJ has become less aggressive in pursuing criminal cases as it works more closely with companies that conduct internal investigations of wrongdoing, noting that “some veterans of government prosecutions question such collaboration in financial crisis cases, and contend they should have been pursued more aggressively.” Gretchen Morgenson and Louise Story, Behind the Gentler Approach to Banks by US, NY Times A1 (July 8, 2011).

32 Jean Eaglesham, Challenges in Chasing Fraud, Wall St J C1 (June 23, 2011).

33 Jesse Eisinger, Prosecutors Stage a Sideshow, While the Big Tent Is Empty, NY Times B5 (Dec 9, 2010). In another article, he wrote, “No major investment banker has been brought up on criminal charges stemming from the financial crisis. To understand why that is so pathetic and—worse—corrupting, we need to briefly review what went on in C.D.O.’s in the years before the crisis.” Jesse Eisinger, In Fight Against Securities Fraud, SEC Sends Wrong Signal, NY Times DealBook Blog (NY Times Oct 26, 2011), online at http://dealbook.nytimes.com/2011/10/26/in-fight-against-securities-fraud-s-e-c-sends-wrong-signal/ (visited Sept 10, 2012).


35 Matt Taibbi, The Great American Bubble Machine, Rolling Stone 52, 52 (July 9–23, 2009). The author proceeded to describe how Goldman Sachs makes money in this way: The bank’s unprecedented reach and power have enabled it to turn all of America into a giant pump-and-dump scam, manipulating whole economic sectors for
Perhaps it is a measure of America's suspicion of class distinctions that the absence of prosecutions of senior corporate executives has fueled perceptions that vast wrongdoing has gone unpunished, sometimes accompanied by conspiracy theories to explain the lack of criminal enforcement. The entertainment industry frequently portrays financial firms as powerful black boxes capable of controlling markets and manipulating industries to enhance the wealth of a favored few, leading some to view financial troubles as the product of a grand—yet secret—design to profit from the misery of others. The financial meltdown in 2008 has largely passed, but unlike the savings and loan crisis in the late 1980s or the accounting scandals that hit in 2002, there have been no signature prosecutions involving high-level corporate officers, stoking the fires of conspiracy theorists and Hollywood. Even the SEC, which faces a lower burden of proof because its enforcement actions are civil rather than criminal, has brought only a handful of cases naming senior executives at financial firms that were at the center of the economic maelstrom. It filed fraud charges against the former CEO of Countrywide Credit, the largest mortgage firm before it was bought by Bank of America in 2008, but a good portion of the $67.5 million settlement paid to resolve the case was reimbursed under an indemnification provision in the corporate bylaws. No one from Lehman Brothers has been accused of violating the securities laws, despite an extensive report by a bankruptcy examiner accusing the firm's executives of engaging in accounting gimmickry to move billions of dollars of debt temporarily off of its books at the end of years at a time, moving the dice game as this or that market collapses, and all the time gorging itself on the unseen costs that are breaking families everywhere—high gas prices, rising consumer-credit rates, half-eaten pension funds, mass layoffs, future taxes to pay off bailouts. All that money that you're losing, it's going somewhere, and in both a literal and a figurative sense, Goldman Sachs is where it's going: The bank is a huge, highly sophisticated engine for converting the useful, deployed wealth of society into the least useful, most wasteful and insoluble substance on Earth—pure profit for rich individuals.

Id at 54.


each quarter to make the firm appear healthier than it was.\textsuperscript{38} American International Group needed billions of dollars from the federal government because of toxic derivatives it wrote for clients,\textsuperscript{39} yet no one—not even the company—was accused of any legal violations. How can so much money have been lost, yet no one has been accused of doing anything illegal?

The presumption that criminal conduct explains a goodly amount of the financial pain in 2008 means that someone should be blamed for the “failure” to prosecute, which may even be traceable to the President himself. In a New York Magazine article, Frank Rich wrote, “What haunts the Obama administration is what still haunts the country: the stunning lack of accountability for the greed and misdeeds that brought America to its gravest financial crisis since the Great Depression. There has been no legal, moral, or financial reckoning for the most powerful wrongdoers.”\textsuperscript{40} The existence of perceived victims proves that there were crimes, such that “[a]s the ghost of Hamlet’s father might have it, America will be stalked by its foul and unresolved crimes until they ‘are burnt and purged away.’”\textsuperscript{41} Political commentator James Carville went a step further, urging President Obama to fire Attorney General Holder if he does not receive satisfactory answers about why no one connected to Wall Street has been indicted.\textsuperscript{42}


\textsuperscript{39} See Andrew J. Ceresney, Gordon Eng, and Sean R. Nuttall, Regulatory Investigations and the Credit Crisis: The Search for Villains, 46 Am Crim L Rev 225, 233–34 (2009). The authors explain:

Faced with massive losses in a unit of insurance giant American Insurance Group (“AIG”) that had sold credit default swap (“CDS”) protection on mortgage-backed CDOs, the Federal Reserve Bank of New York provided $85 billion emergency funding to the company in exchange for nearly 80% of its stock, after deciding that its disorderly failure would have created too much disruption to the nation’s economy.

\textsuperscript{40} Frank Rich, Obama’s Original Sin, New York Magazine 14, 16 (July 11, 2011).

\textsuperscript{41} Id.


There are certain people in American finance who haven’t been held responsible for utterly ruining the economic fabric of our country. Demand from the attorney general a clear status of the state of investigation concerning these extraordinary injustices imposed upon the American people. I know Attorney General
The absence of prosecutions related to the financial crisis also serves as a handy touchstone when other cases do result in prosecutions, evoking the "Why haven't real criminals been charged yet?" complaint. In a New York Times commentary about the government's investigation of Lance Armstrong for using performance-enhancing drugs, the writer lamented: "Now here we are, well into the second year of the Armstrong investigation, and we are still waiting for criminal charges to be brought against top executives at many of the firms that left our economy in tatters."43 We have a combination of overcriminalization and underenforcement based on a claim that it is unfair to pursue charges against "[fill in the blank]" when those rapacious Wall Street bankers have gotten away with obvious crimes. It is easy to proclaim that the quickest way to reform Wall Street is to hoist the heads of a few CEOs on the proverbial petard by throwing them in jail. The criminal law has come to be seen by many, including legislators, as just another tool to police business practices that were usually not subject to the scrutiny of law enforcement, and the logical result is to look for a few scapegoats to be thrown in jail. In December 2009, at a Senate Judiciary Committee hearing, Senator Edward Kaufman stated, "If we want to restore the public's faith in our financial markets and the rule of law, we must identify, prosecute, and send to prison the participants in those markets who broke the law. Their fraudulent conduct has severely damaged our economy and harmed countless hardworking Americans."44

The problem with this view is that merely asserting that corporate executives should be put in jail is far easier than actually proving a criminal charge consistent with the requirements of due process. Crimes typically prosecuted in financial cases, like fraud or false statements to the SEC, require the government to prove a defendant's specific intent beyond a reasonable

Eric Holder is a close friend of yours, but if his explanations aren't good, fire him too. Demand answers to why no one has been indicted. Id.

Jonathan Mahler, Why Clemens and Armstrong Aren't Worth Pursuing Anymore, NY Times D1 (July 2, 2011). The author also noted that the United States Attorney's Office in Los Angeles, which is pursuing the investigation of Armstrong, dropped its grand jury inquiry into Angelo Mozilo, former CEO of Countrywide Mortgage, whose firm wrote billions of dollars in toxic subprime mortgages—further proof, apparently, of those who truly committed crimes having gotten away with them. See id.

doubt. Unlike civil securities claims that can be established by showing recklessness or, under some provisions, just negligence, proof of intent to defraud can be quite daunting. Preet Bharara, the United States Attorney for the Southern District of New York, described the hurdles faced when trying to prove a financial fraud even when it appears to everyone that there must have been some illegal activity:

Maybe there’s a lot of smoke—now comes the proof. This guy’s going to testify, “My accountant’s a smart guy—I just relied on my accountant.” The accountant’s going to say, “I just relied on what he gave me,” and everyone has plausible deniability. That’s a simple example of a way in which people can get away with even criminal activity when they’re making false certifications to the government.

Pursuing criminal cases against corporate executives is difficult for other reasons, not the least of which is that the defendants often have very deep pockets to fight the government because of their personal wealth—Raj Rajaratnam was reported to have spent $40 million defending insider trading charges—or because their company is required to foot the legal bill under broad indemnification provisions found in most corporate charters. Add to that the difficulty in finding evidence to show an executive had the requisite intent for a criminal offense. Voicing the demand for retribution for perceived corporate malfeasance overlooks just how difficult it can be to obtain a criminal conviction.

One of the grounds for the claimed overcriminalization is the broad discretion given to unaccountable prosecutors to decide whether to file criminal charges, often without any transparency about the reasons for that decision. At the same time, the oft-heard criticism of the DOJ that it has not pursued any signature cases against Wall Street chieftains may be rationalized as an

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45 See In re Winship, 397 US 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").


47 See Michael Rothfeld and Chad Bray, Loss Raises Questions over Defense Strategy, Wall St J Cl (May 13, 2011) ("Mr. Rajaratnam is estimated to have paid as much as $40 million for his defense, according to people familiar with the matter and some lawyers not affiliated with the case, about two-thirds of the amount prosecutors said Galleon made from the insider trading addressed in the charges.").
exercise of that discretion. It could be that prosecutors do not have enough to establish that statements were misleading or false, and have chosen not to pursue cases based on what may be equivocal evidence of intent even if false information was disseminated. The problem with this explanation, of course, is that it conflicts with the conclusion in the media that crimes must have taken place for that much money to have been lost, and that the perpetrators have escaped being called to account for their misdeeds. So there is a search for deeper reasons, which helps foster theories claiming that Wall Street actually controls the government and prevents cases from being pursued. The Financial Crisis Inquiry Commission, charged with writing the historical record about the causes of the financial crisis in 2008, could not even issue a single report; instead, the Commission issued multiple reports, which together pointed to a wide range of causes, from financial derivatives to insufficient regulatory oversight by the federal government. A majority of the Commission "concluded that this crisis was avoidable. It found widespread failures in financial regulation; dramatic breakdowns in corporate governance; excessive borrowing and risk-taking by households and Wall Street; policy makers who were ill-prepared for the crisis; and systemic breaches in accountability and ethics at all levels."\(^4\) Three dissenting members "identified ten causes that are essential to explaining the crisis."\(^5\) When everyone is responsible for the problem, then no one is, which makes pursuing a criminal case for conduct that fed the financial crisis all the more difficult.

Will we see the type of prosecution that would make someone the "face" of the financial crisis, in much the way that Ivan


\(^{5}\) Id at 413. The dissent stated:

Not everything that went wrong during the financial crisis caused the crisis, and while some causes were essential, others had only a minor impact. Not every regulatory change related to housing or the financial system prior to the crisis was a cause. The majority's almost 550-page report is more an account of bad events than a focused explanation of what happened and why. When everything is important, nothing is.

As an example, non-credit derivatives did not in any meaningful way cause or contribute to the financial crisis. Neither the Community Reinvestment Act nor removal of the Glass-Steagall firewall was a significant cause. The crisis can be explained without resorting to these factors.

We also reject as too simplistic the hypothesis that too little regulation caused the crisis, as well as its opposite, that too much regulation caused the crisis.

Id.
Boesky came to symbolize insider trading in the 1980s and CEOs like Jeffrey Skilling and Bernie Ebbers represented the corporate accounting gimmicks used to inflate earnings that helped feed the market bubble at the turn of the century? The problem with any such symbol is that the person was not truly responsible for all that can be assailed as wrong at a particular point in time. Beyond that, though, is the perception that so many different causes have been identified for the financial meltdown that anyone charged with a crime can plausibly claim any financial difficulties experienced by a company were largely attributable to outside market forces. I think it is unlikely that any corporate executives will be charged for crimes related to how they managed (or mismanaged) companies and dealt with investors in the months leading up to the financial crisis. The reason for the absence of any high-profile prosecutions of Wall Street executives should not reflexively be attributed to investigators and prosecutors failing to do their jobs diligently. The better answer could well be that they did their jobs, and decided the evidence was insufficient to prove a criminal violation. While an acquittal vindicates a defendant, the cost from a prosecution goes far beyond just the verdict. So the absence of criminal prosecutions targeting Wall Street executives may well show that prosecutors are doing their jobs, and even supports the proposition that the malady of overcriminalization may be recognized by prosecutors in the DOJ through their apparent decision to hold off on pursuing the types of "show trials" that can be viewed as pandering to the public thirst for what Secretary of the Treasury Timothy Geithner called "Old Testament justice."  

II. OVERCRIMINALIZATION AND THE PROBLEM OF CORPORATE PROSECUTION

While "overcriminalization" is often used as the explanation for what is wrong in the American criminal justice system, it is clear that it is not a term of art defining any one manifestation of the ills that afflict the criminal law. Professor Brown described it as "the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes." The critique that there is overcriminalization appears to be used more as a placeholder to describe how

50 See Joshua Green, Inside Man, The Atlantic 36, 48 (Apr 2010).
51 Brown, 7 J L Econ & Pol at 657 (cited in note 3).
the criminal law has expanded so that there are too many defendants being prosecuted and incarcerated, sometimes for significant periods of time. The determination of what constitutes the “over” part of the term seems to be the driver of the analysis that the criminalization of more conduct has moved beyond the norm, whatever that might be. One definition of “over” is “in excess of,” but when the excess point was reached appears to be more of a visceral reaction that whatever was once enough is now too much, hence overcriminalization. What might be an acceptable level of criminalization, however, usually is not described, although perhaps there was once an idyllic period when the criminal law was in equipoise. Despite the imprecision of the term, or perhaps because of it, the issue has been described in almost apocalyptic language. Professor Sanford Kadish’s 1967 article *The Crisis of Overcriminalization* discussed “rampant overcriminalization,”52 while the Heritage Foundation today maintains a website named Overcriminalized.com. Professor Douglas Husak’s book *Overcriminalization* begins with the proposition that “the most pressing problem with the criminal law today is that we have too much of it.”53 Others assert that “[t]here is broad agreement in the legal community that the justice system is already severely overcriminalized.”54

There are a range of reasons offered for the continuing trend of overcriminalization, with much of the blame placed on legislatures and prosecutors. Professor William Stuntz noted, “for the past generation, virtually everyone who has written about feder-


al criminal law has bemoaned its expansion. But the expansion has continued apace, under very different sorts of Congresses and Presidents." He argued that the reason for increased enactment of criminal provisions is more than just the political gain to legislators from adopting more and broader criminal laws, that "the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broad ones."

A quasi-conspiracy theory perhaps, at least at the federal level, is offered to explain why the clamor about overcriminalization has been ignored, further demonstrated by the addition of approximately 450 new criminal laws in just the last decade. Some commentators have directed attention to the broad discretion held by prosecutors, who determine what offenses to charge and, at least in the view of some, effectively establish the likely punishment through those decisions. Professor Donald A. Dripps noted that one method to constrain prosecutorial discretion would look "to administrative law, where agencies entrusted with vast discretion are checked by procedural requirements of transparency and accountability."

Incremental strategies have been offered to make it more difficult to convict defendants, thereby retarding overcriminalization as a byproduct, although the current level of criminal laws would not be diminished. These proposals include a suggestion that legislatures incorporate in all criminal statutes an express mens rea element to eliminate strict liability offenses—or their functional equivalent like "responsible corporate officer" liability—and implement a corporate compliance defense for business organizations accused of wrongdoing. If it is more difficult to convict a defendant, particularly a corporation, then perhaps the tide of overcriminalization will be slowed.

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56 Id at 510.
These are not necessarily significant impediments to the expansion of the criminal law, because a legislature can easily enact a statute with a very low intent level, such as negligence, and a corporate compliance defense will only affect a very small number of cases, even though they garner significant attention from the financial press. Criticism of corporate criminal liability has been particularly acute of late, focusing on the broad authority of prosecutors to almost coerce companies into agreeing to terms to conclude an investigation. Corporations are held responsible for criminal violations under the respondeat superior theory, so that any misconduct by a corporate employee during the course of the person's actions on behalf of the organization can be attributed to it so long as there is at least some theoretical benefit to the company. Corporations are risk-averse in this area and are perceived as willing—perhaps too much so—to concede violations in order to resolve an investigation through payment of a fine and, perhaps, accepting an outside monitor.

Professor Miriam Baer pointed out that, because prosecutors wield enormous power over the decision whether to pursue criminal charges since corporate criminal liability is so easy to establish, they may care little for the costs that will be imposed on a company's shareholders when it must undertake remedial measures as part of a plea agreement or deferred prosecution agreement. Similarly, Professor Albert Alschuler explained that

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So if a company does not want to fight the case and potentially suffer an Arthur Andersen demise, what does it do? The former head of the Enron Task Force stated that because of what happened to Arthur Andersen, companies are far more inclined to seek deferred prosecution agreements and non-prosecution agreements. The examples of such agreements are now more and more common, but at what cost?

Id. See also John Hasnas, The Significant Meaninglessness of Arthur Andersen LLP v. United States, 2004-2005 Cato S Ct Rev 187, 211 (2004) ("[T]he courts have created an inescapably strict form of corporate criminal liability in order to permit the resource-effective prosecution of white collar offenses. But in doing so, they have invested federal prosecutors with vast powers to coerce desired behavior from corporations with the threat of criminal indictment.").

60 See Pamela H. Bucy, Corporate Criminal Liability: When Does It Make Sense?, 46 Am Crim L Rev 1437, 1441 (2009) ("[A] corporation may effectively be held criminally liable whenever one of its agents (or an independent contractor in some instances) commits a crime related in almost any way to the agent's employment.").

61 Miriam H. Baer, Organizational Liability and the Tension between Corporate and Criminal Law, 19 J L & Pol 1, 11 (2010). Baer explained that respondeat superior liability "leaves corporations entirely dependent on unaccountable, highly powerful govern-
executives may want to have the company take the blame for misconduct in order to shield themselves, so that corporate criminal liability "creates acute conflicts of interest for corporate managers while affording enormous bargaining power to the government." Preet Bharara, before he became the United States Attorney for the Southern District of New York, questioned the scope of corporate criminal liability, stating that "courts, commentators, and practitioners should more seriously consider the connection between the overbroad corporate criminal liability rule and the risk of overreaching by prosecutors who use their legally-conferred blank check to ferret out corporate crime." Prosecution of individual corporate employees for the acts of others under responsible corporate officer provisions has also been questioned. The Supreme Court first recognized the propriety of holding a corporate executive responsible for the acts of the company in United States v Dotterweich when it reasoned that "[h]ardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting." In United States v Park, the Court confirmed the scope of Dotterweich as imposing liability on corporate officials without regard to their intent, explaining:

The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

Dotterweich and Park involved violations of the Federal Food, Drug, and Cosmetics Act, which prohibits the sale of "adulterated or misbranded" products in interstate commerce. Both

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62 Alschuler, 46 Am Crim L Rev at 1372 (cited in note 6).
64 320 US 277 (1943).
65 Id at 284.
67 Id at 670.
68 Id at 672.
69 See 21 USC § 331(k). This section states:
the Clean Water Act and the Clean Air Act include "any responsible corporate officer" within the definition of "persons" whose conduct can violate the laws for failing to prevent violations.\textsuperscript{70} In United States v Iverson,\textsuperscript{71} the Ninth Circuit explained that a responsible corporate officer is "any corporate officer' who is 'answerable' or 'accountable' for the unlawful discharge" in violation of the Clean Water Act.\textsuperscript{72} Importantly, officials can be prosecuted solely for the conduct of others, with no need to establish that they undertook to violate the law of their own accord but only failed to prevent or correct a violation.\textsuperscript{73} One author suggested that imposing liability on an individual through the responsible corporate officer doctrine "is often unfair and counterproductive."\textsuperscript{74}

The concern with prosecutorial discretion is clearly a legitimate one, especially in the context of plea bargaining, in which the power of the prosecutor to pile on charges carrying substantial penalties makes it almost impossible for an individual to resist an offer in the face of a significant term of incarceration. The Supreme Court has placed few real limits on how the government can threaten a defendant with additional charges, effectively creating a "free-fire zone" for plea bargaining.\textsuperscript{75} For corpora-

The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

\textsuperscript{70} See 33 USC § 1319(c)(6) ("For the purpose of this subsection, the term 'person' means, in addition to the definition contained in section 1362 (5) of this title, any responsible corporate officer."). For identical language, see also 42 USC § 7413(c)(6). The government must prove a defendant's knowledge for a violation, but there is no need to establish any additional conduct by the person charged as the "responsible corporate officer" beyond that required for a violation.

\textsuperscript{71} 162 F3d 1015 (9th Cir 1998).

\textsuperscript{72} Id at 1023.

\textsuperscript{73} See Lisa Litwiller, From Exxon to Engle: The Futility of Assessing Punitive Damages As Against Corporate Entities, 57 Rutgers L Rev 301, 337 (2004).

What is so controversial and intriguing about the RCO (Responsible Corporate Officer doctrine) is the fact that criminal liability for an act may be imposed on a corporate officer despite the fact that the officer himself did not commit the act directly. Even more surprising is that, for liability to be imposed, the officer need not have intended that the act actually be committed.

\textsuperscript{74} David C. Fortney, Note, Thinking Outside the "Black Box": Tailored Enforcement in Environmental Criminal Law, 81 Tex L Rev 1609, 1631 (2003).

\textsuperscript{75} In Bordenkircher v Hayes, 434 US 357 (1978), the Supreme Court stated that "in
tions, bargaining is viewed as even more one-sided than for many individual defendants because an organization can be convicted based solely on its vicarious liability for the act of any employee that constitutes a violation. The impact of a conviction can be significant for companies operating in certain industries or sectors, with the oft-cited example of Arthur Andersen's demise after its conviction as proof that no corporation dare fight charges. Although the picture of the overwhelmed corporation cowering in the prosecutor's wake is not nearly as one-sided as it is sometimes portrayed, a criminal conviction can have substantial consequences for an organization that reverberate far beyond those directly responsible for the misconduct. In response, prosecutors today resort to deferred and non-prosecution agreements

the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." Id at 363. The power of prosecutors to "negotiate" plea agreements by threatening additional charges if a defendant sought to exercise the right to trial was not a problem according to the Court because, "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." Id at 364. The likelihood of reforming the system of plea bargaining, when such agreements resolve around 80 to 90 percent of criminal cases in most jurisdictions, appears to be quite low. See Alexandra W. Reimelt, Note, An Unjust Bargain: Plea Bargains and Waiver of Right to Appeal, 51 BC L Rev 871, 873 (2010) ("The U.S. Supreme Court has estimated that at least ninety percent of criminal convictions are based on guilty pleas.").

As with recommendations for how the legislatures should draft laws, most proposals regarding plea bargaining offer rather modest incremental changes. Yet some scholars have expressed a need to regulate plea bargaining. See, for example, Stephanos Bibas, Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection, 99 Cal L Rev 1117, 1120-21 (2011) ("Since the criminal process is far too complicated and opaque to leave defendants at the mercy of caveat emptor, it is time to consider regulations modeled on consumer protection law."); Welsh S. White, A Proposal for Reform of the Plea Bargaining Process, 119 U Pa L Rev 439, 441 (1971) ("Accepting the premise that prosecutorial encouragement of guilty pleas is a necessary feature of our present system of justice, it is important to formulate guidelines which retain the advantages yet minimize the undesirable consequences of plea bargaining.").

Calls for more radical reformation of the system to provide defendants with the resources to fully defend a case and have courts to conduct trials in most prosecutions run into the rather persistent problem of inadequate resources to fund such an agenda.

The view that corporations will never go to trial is not entirely accurate, but has become the accepted wisdom. See Peter J. Henning, Corporate Criminal Liability and the Potential for Rehabilitation, 46 Am Crim L Rev 1417, 1418-19 (2009).

The demise of Arthur Andersen after its conviction in 2002 for obstruction of justice is often used to "prove" the purported overwhelming power of prosecutors and the trembling fear of corporations who dare not risk going to trial under any circumstances lest they face near-certain destruction. However, there have been no other instances of a large firm suffering the same fate since then, even though other companies that have been charged with crimes and appear to have survived the ordeal, albeit quite a bit worse for wear.

Id.
with companies to resolve criminal cases in order to mitigate some of the collateral consequences of a prosecution, using them more as a type of administrative remedy than a criminal punishment.\footnote{See Peter Spivack and Sujit Raman, \textit{Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements}, 45 Am Crim L Rev 159, 161 (2008) ("By focusing more on prospective questions of corporate governance and compliance, and less on the retrospective question of the entity's criminal liability, federal prosecutors have fashioned a new role for themselves in policing, and supervising, corporate America. They have become the New Regulators.").} This avoids some of the collateral consequences of a conviction, which is one of the points of the overcriminalization critique regarding the application of penal sanctions to organizations.\footnote{James W. Harlow, \textit{Corporate Criminal Liability for Homicide: A Statutory Framework}, 61 Duke L J 123, 142 (2011) ("A more forceful critique of corporate criminal liability is that convicted corporations may face collateral debarment or delicensing proceedings that jeopardize the corporate existence, even if the criminal sanctions themselves are minimal.").} The focus on overcriminalization shows that further expansion of the criminal law should be a last resort rather than the first option in responding to a financial crisis. That does not mean the legislatures should not enact new laws, but it raises the question of whether there is a legitimate need for additional penal provisions to address what is perceived as the misconduct that led to the financial crisis in 2008. There are already broad antifraud provisions\footnote{See, for example, 15 USCA § 78j(b) (making it unlawful for any person "to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance").} and financial and accounting reporting laws in place\footnote{See, for example, 15 USC § 78m(b)(2)(A) (requiring corporations with securities registered with the SEC to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer").} that do not focus on the content of a business decision but its transparency and the communication of truthful information. Identifying specific business judgments as criminal, based on their riskiness or potential impact on the broader economy, risks dragging the government into the sphere of private decision making regarding the proper allocation of corporate resources and investments.

It may be possible to craft new provisions that make it a crime for a corporation and its executives to engage in risky financial activities, but it is difficult to imagine how those laws would not be so broad that almost any poor business decision
could be the subject of a criminal prosecution. As academic critics of the criminal law have argued, simply enacting more laws with the goal of making it easier to punish executives for perceived misconduct at their companies would be a problematic expansion of the criminal law because the net effect would be to create a crime for engaging in questionable business practices or tolerating a corporate culture that encourages overly risky behavior—in other words, stupidity would become a federal offense. And if such new criminal provisions were enacted, questions could be raised regarding whether it would be fair to limit them to corporate executives because many individuals made poor choices regarding the level of debt they could manage that also contributed to the financial problems suffered.

While there has been a broad, visceral reaction to the financial meltdown in 2008, to have someone held accountable for the severe disruptions to the housing and job markets, using the criminal law as the means to impose accountability on executives, is not tenable absent proof that individuals had the requisite mens rea to violate already broad federal statutes. If asked whether there is a need for new criminal laws to permit prosecutors to pursue cases against executives for the type of conduct they engaged in during the financial meltdown, a fair response would ask what areas prone to corporate misconduct are not already addressed. It is unclear that laws on the books are not effective in dealing with the alleged frauds on the road to the financial meltdown, and simply asserting that the lack of prosecutions shows the inadequacy of the criminal law ignores the real possibility that mismanagement, not criminal designs, was the primary factor in the financial maelstrom in 2008.

III. CREATING THE POWER TO REMOVE EXECUTIVES FOR CORPORATE MISCONDUCT

In light of the discussion regarding overcriminalization, administrative remedies may be a more efficacious way to address the issue of executive accountability for corporate misconduct. Using the regulatory system has the benefit of allowing for a much broader range of conduct to be subjected to remedial measures because liability would not depend on meeting the due process requirement of proof beyond a reasonable doubt otherwise necessary for a criminal conviction. Civil enforcement would not require an expansive description of the actus reus of an offense or the elimination of the mens rea element that could re-
result in the imposition of criminal punishment based on mere negligence, or even strict liability.

Yet, an administrative action does not have the same stigmatizing effect of a criminal conviction, nor is it an expression of communal moral outrage at a defendant’s conduct that is reflected in the factual determination that a defendant is a “criminal.” For those who want to see an executive carted off to jail, the civil route may be unsatisfying, and perhaps could even enhance the view of inequality between the rich and powerful and the other 99 percent. But if the goal is to find a means to enhance the accountability of executives for corporate misconduct, then it seems clear that expanding criminal liability by lowering the mens rea element should not be used because it would debase the basic principles of criminal responsibility that limit a person's liability to his own intentional conduct. As Professor Brown noted, “[t]he fundamentally instrumental goals of regulation can be overwhelmingly achieved with civil and administrative mechanisms, thereby holding criminal law in reserve for culpable, substantially harmful wrongdoing.”

As is true in any large business, there are layers of subordinate managers directly responsible for day-to-day operations who are more likely to engage in the wide variety of conduct that can trigger corporate criminal liability—ranging from environmental discharges to false reporting of business transactions to authorizing payments to foreign officials. Lower-level employees may feel pressure to reach the corporation’s sales or profit goals by any means available, to dispose of waste in the least expensive way, or to secure completion of an overseas project by obtaining the cooperation of foreign ministry officials, but senior executives can truthfully proclaim both their ignorance and abhorrence of misconduct. The oft-voiced complaint about the difficulty in holding senior executives accountable is that they are largely insulated from day-to-day wrongdoing within the organization. Pursuing a criminal prosecution against them is nearly impossible because of their lack of direct involvement in any corporate violations. While a chief executive may proclaim his or her responsibility for everything that happens in the company—“the buck stops here” being the catchphrase of choice in most instances—simply holding a leadership position does not make one liable for crimes committed by others within an organization.

81 Brown, 7 J E on & Pol at 681 (cited in note 3).
82 Professors Claire Hill and Richard Painter have suggested that senior executives
Even when apparent misconduct occurs that would seem to come within the purview of senior management, executives may be able to assert their reliance on others and claim they did not pay attention to the mundane financial details that are so crucial to proving fraud. For example, prior to its collapse into the largest bankruptcy in American history, Lehman Brothers engaged in a series of repurchase transactions, called "Repo 105," at the end of each quarter to temporarily move debt away from the company so that it appeared to have much less leverage on its balance sheet, an important metric to Wall Street. The transactions were then reversed shortly after the new quarter began, but they complied with the technical requirements of the accounting rules then in effect, although the firm had to get a London-based law firm to bless the transaction because apparently no United States lawyers would give an opinion approving them. In its last quarter before declaring bankruptcy, the Repo

at financial firms who engage in risky investment strategies should be required to personally guarantee the firm's debt in order to enhance their accountability. They explained:

We cannot bring back the old investment banking partnerships, and most investment banks will continue to be public companies. We can, however, require the most highly paid executives in these firms to personally guarantee the debts of their firms in return for their high salaries and bonuses, or pay them with stock that is subject to a cash assessment if the firm gets into trouble and becomes insolvent.

Bank boards of directors—perhaps at the urging of shareholders and creditors—should require this. If not, bank regulators should consider imposing some measure of personal liability on the most highly paid executives of banks that fail.


When Lehman first designed Repo 105 in 2001, however, there was one catch. The firm couldn't get any American law firms to sign off on the aggressive accounting, namely that those transactions were true sales instead of what amounted to the parking of assets... Enter Linklaters, which grounded its legal brief in English, rather than American, law.

Id.
105 transactions moved upwards of fifty billion dollars off of Lehman’s balance sheet, a sizeable amount for any company.\(^8\)

A bankruptcy examiner concluded that the Repo 105 trades were potentially misleading to investors, but Richard S. Fuld Jr, the firm’s former CEO, proclaimed his ignorance of the entire set of financial machinations, asserting that he relied on others to deal with such things.\(^8\) Neither the DOJ nor the SEC has filed charges against any former Lehman officers for the Repo 105 transactions—or anything else for that matter—and the firm’s bankruptcy means the government will not pursue an action against it because to do so would be fruitless.

The SEC can seek to have an executive barred from serving as an officer or director of a company that has issued publicly traded securities, although this remedy is only available when a defendant has been found to have violated the antifraud provisions of the federal securities laws, most prominently § 17(a) of the Securities Act of 1933 and § 10(b) of the Securities Exchange Act of 1934.\(^8\) Thus, the bar is limited to those instances in which the executive personally engaged in serious misconduct, and it is an adjunct to the range of remedies available, such as disgorgement of ill-gotten gains and civil penalties that can range as high as $500,000 for each violation.\(^8\) To seek a bar on Lehman executives or any Wall Street firm for actions taken during the finan-

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\(^8\) See Kristin N. Johnson, Things Fall Apart: Regulating the Credit Default Swap Commons, 82 U Colo L Rev 167, 170 n 5 (2011) ("Lehman Brothers' filing noted that the firm had, at the time of its filing, debts in the amount of approximately $613 billion.").


\(^8\) Section 10(b) provides:

[T]he court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78f of this title or that is required to file reports pursuant to section 78o(d) of this title if the person’s conduct demonstrates unfitness to serve as an officer or director of any such issuer.

15 USC § 78u(d)(2). The Securities Act of 1933 has an identical provision for violations of § 17(a). See 15 USC § 77t(e). A violation of § 17(a)(2) and (3) only requires proof of negligence, while violations of § 17(a)(1) and § 10(b) of the Securities Exchange Act require proof of scienter. Compare 15 USC § 77t(e), with 15 USC § 78u(d)(2).

\(^8\) See 15 USC § 78u-2(b). Civil monetary penalties can be imposed from $5,000 per violation up to $500,000 if it involved “fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement” and caused a substantial risk of loss or pecuniary gain. 15 USC § 78u-2(b)(1)–(3).
cial meltdown, the SEC would have to prove fraud, something it has thus far only attempted once. While the bar could be a means to police corporate executives by removing them from office and precluding future appointments, it requires a substantial showing of personal misconduct by the officer, which is not often seen.

The director and officer bar is not the only means available to the SEC to hold executives responsible for corporate misconduct. Section 304 of the Sarbanes-Oxley Act authorizes the SEC to claw back a portion of the incentive-based or equity compensation paid out to the chief executive and chief financial officer if the company “is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws.”

In *SEC v Jenkins*, a district court rejected the argument of the former CEO of a company, which had restated its financials due to accounting fraud in which he had no involvement, that the SEC could not seek to reclaim his compensation because he did not personally engage in the violations. The court held that “the text and structure of Section 304 require only the misconduct of the issuer, but do not necessarily require the specific misconduct of the issuer’s CEO or CFO.” Similarly,

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88 The SEC filed a civil fraud action against Goldman Sachs related to its actions in constructing and marketing a collateralized debt obligation in 2007 that resulted in an almost complete loss to the investors, and the firm paid a $550 million penalty, although it disclaimed having violated the antifraud laws while admitting it made “mistakes” in how it marketed the security. The only individual defendant sued was Fabrice Tourre, a low-level employee who was unlikely to ever rise to a position of any prominence in the firm. See *SEC v Goldman Sachs & Co*, 790 F Supp 2d 147, 149–50 (SDNY 2011).

89 15 USC § 7243(a). The amount that can be recovered is limited to the compensation received in the year before the financial restatement. See id. The Dodd-Frank Act requires public companies to claw back from their executives up to three years of incentive-based compensation if there is a restatement of its financial statements as a result of “material noncompliance” with accounting requirements. See 15 USC § 78j-4(b). This would be a private action by the corporation against its executives rather than a public enforcement action by a federal agency.

90 718 F Supp 2d 1070 (D Ariz 2010).

91 Id at 1075.

92 Id at 1074. The former CEO settled the SEC’s claim by agreeing to repay to the company approximately $2.8 million in bonus compensation and stock profits that he received while the accounting fraud occurred. See SEC, Press Release, *Former CEO to Return $2.8 Million in Bonuses and Stock Profits Received during CSK Auto Accounting Fraud* (Nov 15, 2011), online at http://www.sec.gov/news/press/2011/2011-243.htm (visited Sept 10, 2012). The SEC also settled a clawback claim for approximately $1.4 million with the former chief financial officer of Beazer Homes USA, Inc, who was in charge while the company engaged in an accounting fraud, although he was not accused of being involved in it. See *SEC v James O’Leary*, Litigation Release No 22074 (SEC Aug 30, 2011), online at http://www.sec.gov/litigation/litreleases/2011/lr22074.htm (visited Sept 10,
the Second Circuit rejected a settlement agreement in a shareholder derivative action alleging fraud by a company that contained a provision requiring the corporation to reimburse its CEO and CFO for any payments that might be ordered, finding that after the enactment of § 304, indemnifying those costs "[flies] in the face of Congress's efforts to make high ranking corporate officers of public companies directly responsible for their actions that have caused material noncompliance with financial reporting requirements."93

Like the SEC's authority to bar directors and officers, the executive compensation clawback provision applies to a limited range of cases. The trigger for a clawback is a restatement of a company's financial statements, which will only arise when there is a material misstatement of a company's books and records. In 2010, there were 735 restatements, and not every one involved misconduct that would trigger a clawback.94 A wide array of corporate misconduct, such as environmental violations, does not necessarily implicate a company's financial statements, and so would not trigger a clawback.

Despite its narrow trigger for liability, § 304 is a worthwhile provision that puts the pocketbooks of executives on the line, even though it may not be viewed as significantly enhancing the accountability of corporate management. The provision shows that personal involvement in corporate misconduct is not a necessary prerequisite to penalizing senior executives, imposing managerial accountability for the violations of others based on the person's position in the organization.95

Other federal agencies can hold executives responsible for corporate misconduct without requiring direct involvement. The Federal Deposit Insurance Corporation (FDIC) has the authority to seek to suspend or remove a director or officer of a bank if the person "engaged or participated in any unsafe or unsound practice" or breached a fiduciary duty that meant the bank "has suffered or will probably suffer financial loss or other damage" and

93 Cohen v Viray, 622 F3d 188, 195 (2d Cir 2010).
95 See SEC v Microtune, Inc, 783 F Supp 2d 867, 887 (ND Tex 2011) ("Section 304 requires reimbursement of all stock profits and bonuses received within a twelve-month period after specified filings. This absence of a link between the amount of reimbursement and the actual harm caused by the defendant weighs in favor of characterizing Section 304's reimbursement remedy as a penalty.") (emphasis in original).
the executive or director's conduct involves dishonesty or shows a "willful or continuing disregard" for the bank's safety and soundness. Any person subject to such an order receives an industry-wide bar on participating in the affairs of any other bank or credit union, so an executive or director cannot move on to a new institution if there is a removal or suspension order in place. Conduct that could jeopardize a bank's safety and soundness includes transactions that create an abnormal risk of loss, or decisions that may lead to a bank's insolvency or significant dissipation of its assets. For example, courts have found that conduct jeopardized a bank's safety and soundness based on paying excessive salaries, making loans to a controlling shareholder or to borrowers who would simply relend the money to an entity unable to secure additional credit from the bank, and releasing a borrower's guaranties with no substantial benefit to the bank.

Banks are subject to substantial federal and state oversight regarding every facet of their operations, from decisions on where to open branches to capitalization and corporate structure to extraordinary transactions. Deposit insurance provided

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96 12 USC § 1818(e)(1).
97 12 USC § 1818(e)(1). An order operates "to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution."

[T]he term "unsafe or unsound practices" has a central meaning which can and must be applied to constantly changing factual circumstances. Generally speaking, an "unsafe or unsound practice" embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance fund.

Horne Memorandum, 89th Cong, 2d Sess at 50.
99 See First National Bank of Eden, SD v Department of the Treasury, 568 F2d 610, 611 (8th Cir 1978).
100 See Groos National Bank v Comptroller of the Currency, 573 F2d 889, 897 (5th Cir 1978).
103 See Michael P. Malloy, Banking Law and Regulation § 1.1 at 1.3–1.4 (Aspen 2d ed 2011). According to Malloy:
through the FDIC gives the federal government a particularly strong interest in how banks are operated, so the safety and soundness requirement goes beyond just focusing on illegal conduct. Issues of safety and soundness include decisions that create substantial risks to the organization, its depositors, and the government insurance fund that would otherwise fall under the business judgment rule employed in corporate law to insulate day-to-day decisions of a corporate board from judicial review absent gross negligence.\textsuperscript{104} So governmental interference with internal corporate governance, unknown in other industries, is more nearly the standard for banks and related financial institutions, which at this point include leading Wall Street firms like Goldman Sachs and Morgan Stanley that converted their status in 2008 in order to receive federal bailout money through the Troubled Asset Relief Program.\textsuperscript{105}

In the healthcare arena, the federal government uses exclusion from further participation in the Medicare and Medicaid programs as an important tool to deter fraud. A provision adopted in 1996 as part of the Health Insurance Portability and Accountability Act permits the Department of Health and Human Services to exclude an “officer or managing employee” of a company found to have violated certain provisions of the healthcare laws from further participation with the federal programs.\textsuperscript{106}

The degree of state and federal regulation is pervasive and thorough. To establish a corporation intended to enter the industry, to expand into other geographic or product markets, to merge with or acquire an existing entity within the industry, to recapitalize or otherwise reorganize the entity—each of these actions, and virtually every other action undertaken by an entity within the industry, is subject to regulatory oversight and often express approval of one or more of the regulators, in considerable substantive detail. From birth to death, each step in the corporate life of these entities is subject to regulation.

\textsuperscript{104} See In re Citigroup Shareholder Derivative Litigation, 964 A2d 106, 122 (Del Ch 2009) (“[D]irector action is analyzed under the business judgment rule, which prevents judicial second guessing of the decision if the directors employed a rational process and considered all material information reasonably available—a standard measured by concepts of gross negligence.”).


\textsuperscript{106} 42 USC § 1320a-7(b)(15). The section provides that “[t]he Secretary may exclude the following individuals and entities from participation in any Federal health care program” for a violation. 42 USC § 1320a-7(b). The term “managing employee” has a very broad definition, covering “an individual, including a general manager, business manager, administrator, and director, who exercises operational or managerial control over the entity, or who directly or indirectly conducts the day-to-day operations of the entity.” 42
There is no requirement that the employee be shown to have played a role in the misconduct to trigger an action by the Department. Exclusion means the person must be removed from any role at the company because it would also be subject to exclusion from the programs for retaining a violator. An exclusion order would effectively destroy any hospital, drug manufacturer, or equipment supplier because of the large amount of federal funding, used to purchase products and services, that would no longer be available. The statute also allows for the exclusion of anyone with a direct or indirect controlling interest in the company, but that requires proof that the person knew or should have known about the conduct underlying the violation, a requirement that is not imposed on actions against corporate executives. The House Report on the statute states that it was adopted because “[t]he Committee felt that greater deterrence against fraud and abuse was needed in the Medicare program.”

The Department of Health and Human Services has not yet used this provision, and in only one instance did it notify a corporate executive that it was considering seeking his exclusion based on the company’s prior violations. The company’s response was—not surprisingly—quite negative, asserting that “[i]t would be completely unwarranted to exclude a senior executive against whom there has never been any allegation of wrongdoing whatsoever.” A few months later, the government backed down, notifying the executive that it would not pursue his exclusion any further. The claimed unfairness of potentially excluding an executive for conduct by the company with which he was not directly involved does not reflect the scope of the statute, which authorizes actions against corporate officers without re-

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 USC § 1320a-5(b). The violations by the company include any “criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.” 42 USC § 1320a-7(a)(3). Those violations result in mandatory exclusion from federal healthcare programs. 42 USC § 1320a-7(a).

107 42 USC § 1320a-7(b)(5).


110 Id.

gard to their connection to illegal conduct. While a controlling shareholder can only be excluded based on proof of the person’s knowledge or willful blindness, executives can be excluded from federal healthcare programs without regard to any involvement or knowledge of the misconduct.

If there is a risk of exclusion from a corporate position for an executive who fails to put in place measures to prevent violations or who tolerates risky conduct that can lead to violations by lower-level employees, then deterrence can be served. It is clear that Congress wants to see corporate executives in the banking and healthcare areas subject to the threat of removal based on conduct of the company for which they have oversight responsibility. The standard applied requires proof of a significant legal violation by the organization, but is not necessarily based on personal involvement in the misconduct. A CEO and other senior executives have the ultimate responsibility for ensuring that the company complies with the law, and they set the tone for the corporate culture. So while minor transgressions or conduct by a rogue employee should not be attributed to the organization’s leadership, misconduct over a period of time or serious legal violations that involve at least the implicit approval or willful blindness of the top levels of management, ought to result in holding senior executives responsible for tolerating a culture that allows—and perhaps even encourages—corporate misconduct. While the executive would not be directly involved in the corporate misconduct, the government should have to show that the person was at least negligent in managing the company in order to be held responsible for its conduct. Accountability requires that an executive fail the company in some manner, not through active misconduct but by failing to ensure it took steps necessary to prevent persistent or significant misconduct and put in place the type of corporate culture that minimizes the likelihood of violations.

The authority to remove executives in the banking and healthcare areas provides a structure for expanding the SEC’s power to remove executives from companies in other industries, such as investment banking and hedge funds. The FDIC and the Department of Health and Human Services must show that the

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112 The statute explains that “[t]he term ‘should know’ means that a person, with respect to information (A) acts in deliberate ignorance of the truth or falsity of the information; or (B) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.” 42 USC § 1320a-7(a)(i)(7).
company engaged in significant misconduct as a prerequisite to any action against an individual executive. So while "safety and soundness" for banking and fraud for healthcare are the primary types of misconduct for removal of executives, a broader approach that cuts across industries would require proof of significant corporate misconduct without specifying the particular laws violated. For some companies, environmental laws might be the most directly applicable, while for others, public health and safety provisions would apply. And there are a number of statutes that are not specific to a particular line of business, such as the Foreign Corrupt Practices Act,113 which prohibits bribery of foreign officials to obtain or retain business, the Occupational Safety and Health Act,114 and tax and securities laws.

The SEC already has the authority to bar officers and directors from serving in those positions in a publicly traded company based on their violations of an antifraud provision, so that is the logical place to add this authority. The Commission can pursue this remedy in a federal district court injunctive action or by instituting an administrative proceeding. In either forum, the burden of proof is on the SEC to establish the significance of the corporate violations that would trigger the bar, and standards for why certain types of misconduct would be sufficient can be adopted by rule to provide minimum criteria for invocation of the bar. The current authority to bar executives requires proof of scienter or negligence for specified fraud violations, and the SEC should at least be required to show that the executive was negligent in managing the company by allowing, or not preventing, such misconduct within the organization.115 The process for administrative and judicial review is already in place, so due pro-

113 15 USC § 78dd-1 et seq.
114 29 USC § 651 et seq.
115 The standard proposed here bears some similarities to the fiduciary duty to monitor imposed on corporate directors under In re Caremark International Inc Derivative Litigation, 698 A2d 959 (Del Ch 1996).

[A] director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.

Id at 970. The proposed ground to bar an executive is broader than the Caremark duty, however, because it focuses on how the violations occurred within the corporation and whether they were systematic, and not just whether there were monitoring systems in place to inform the board. Caremark deals with a director's duty, while an executive has responsibility for a company's day-to-day operations, so the issue should be whether that authority was properly exercised to prevent or redress wrongdoing in the first instance.
cess would be ensured as part of a proceeding requiring some evidence that an executive did not act reasonably in leading the company, despite not being directly involved in any violations.116

The SEC's power to bar an executive only applies to corporations that have issued securities traded on the public markets, which encompasses the vast majority of the larger companies operating in the United States. For privately held firms that could engage in significant misconduct, the SEC can be given authority to bar executives of larger organizations based on the value of the firm's assets and liabilities. The Financial Stability Oversight Council, created by the Dodd-Frank Act, has proposed a rule that would give the Federal Reserve oversight authority over nonbank financial institutions that have over $50 billion in assets and $20 billion in debt.117 Thus, even if the firm did not issue publicly traded securities, such as a hedge fund, it would still be subject to regulation, and so would be of sufficient importance that its executives should also be made subject to potential removal if the organization engages in significant misconduct.

One problem with expanding the SEC's power to bar executives from serving in companies is that this interferes with internal corporate governance, under which shareholders and directors determine who should be responsible for the management and oversight of the company. Enhancing federal power to dictate who can lead a company means the right of a corporation to determine its best interests will be diminished because a government agency may be able to decide what is best for the business by dictating who is permitted to lead it.

This proposal would clearly enhance federal authority over private enterprises, although it does not give the SEC authority

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116 See 12 USC § 5382. Most cases involving a bar from serving as an officer or director of a publicly traded company are the result of a settlement rather than a trial or administrative proceeding. See, for example, SEC Settles Options Backdating Charges With Former Apple General Counsel for $2.2 Million, Litigation Release No 20683 (SEC Aug 14 2008), online at http://www.sec.gov/litigation/litreleases/2008/lr20683.htm (visited Sept 10, 2012) (describing the settlement agreement, which included two executives agreeing to be barred from serving as an officer or a director); Frederick P. Garbriel Jr and Brude Kelly, Reverse Spin: MFS Not Too Proud to Settle with SEC, Investment News 4 (Feb 9, 2004) (describing the settlement agreement which included two high-level MPS executives barred from serving as officers or directors of a fund management company for three years). By expanding the SEC's authority to seek this remedy, it is likely that it will be a facet of settlements in a wider range of enforcement actions, such as Foreign Corrupt Practices Act cases involving overseas bribery.

to interfere with corporate policies or otherwise influence the operation of a company. A corporation’s board has the ultimate responsibility to ensure that officers and directors are acting properly, which engenders an obligation to ensure the company has in place sufficient internal controls to prevent and redress wrongdoing. If a board chose to retain an executive despite significant or persistent misconduct by the organization, or decided to nominate a director who served at another company engaged in such violations, that may show that the officers and directors have become entrenched and are not putting the best interests of the corporation first. The SEC’s authority to bar an officer and director is a last resort, and a means to empower a corporate board to take action in the first instance, so the threat of removal is not even raised. Without the possibility of governmental action to bar an officer or director for corporate misconduct, it will be that much more difficult for a company to put in place new leadership that can address how misconduct occurred and enhance the likelihood it will not happen again.

IV. CONCLUSION

Using an administrative remedy against a corporate executive will not satisfy those who want to see a “perp walk,” in which individuals are paraded in handcuffs as they walk to court for the first time to face criminal charges. The filing of a civil injunctive action or administrative order does not provide the kind of visceral relief that criminal charges can, but that is hardly a reason to change the criminal law to allow for more prosecutions of corporate executives because of questionable or risky business decisions.

The catchphrase “the buck stops here” is a favorite of leaders everywhere, an acknowledgement of their position at or near the top of an organization that permits them to acknowledge wrongdoing or failures while deflecting any direct personal responsibility for it. If the buck truly does stop with the chief executive and senior managers, then there should be a means to hold them accountable for corporate violations by giving the government the authority to remove them from office and prohibit them from again sitting atop an organization when there was significant or persistent wrongdoing on their watch.

The proposal to expand the SEC’s authority to bar corporate executives when there has been significant or persistent misconduct during their tenure will not necessarily strike fear in the hearts of corporate executives, but then it is not intended to. This
authority would allow the government to police corporate management that tolerates or turns a blind eye to misconduct, all the while mouthing the usual platitudes that compliance is a priority for the business. It is a modest step in enhancing oversight of management that does not interfere with the conduct of a business while allowing for executives to be held accountable when the corporation engages in significant misconduct that cannot be traced directly to them as long as it occurred on their watch.