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Article 1

The Information Shortfalls of Prosecuting Irresponsible Executives

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THE INFORMATION SHORTFALLS OF PROSECUTING IRRESPONSIBLE EXECUTIVES

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INTRODUCTION

May 10, 2007 was a momentous day for John Brownlee, the United States Attorney for the Western District of Virginia. On that day, Brownlee announced that he had successfully negotiated guilty pleas with Purdue Pharma, the pharmaceutical manufacturer of Oxycontin, and three of its top executive officers.[2] Although Purdue Pharma itself would be spared, its subsidiary, Purdue Frederick, would enter a guilty plea[3] to a felony charge of misbranding with intent to defraud or mis-

1. Professor of Law, Brooklyn Law School. I thank Stephen Landsman for inviting me to participate in the 26th Annual Clifford Symposium on Tort Law and Social Policy, for which this paper was written. I am equally grateful for his insightful comments on this piece, as well as the comments I received from Adam Zimmerman, Jacob Elberg, the participants in the Clifford Symposium, and in the Brooklyn Law School 10/10 Workshop. I am further grateful for the research assistance I received from Samuel Coffin, Patrick Lin, and Timothy Snyder and for the editing provided by the DePaul Law Review editorial staff.

2. News Release, John L. Brownlee, The Purdue Frederick Company, Inc. and Top Executives Plead Guilty to Misbranding OxyContin; Will Pay Over $600 Million, U.S. ATT'YS OFF. W.D. VA. (May 20, 2007), https://media.defense.gov/2007/May/10/2001711223/-1/-1/1/purdue_frederick_1.pdf [hereinafter Brownlee News Release]. Brownlee's office had initiated its investigation of Purdue during the fall of 2001. *See* Friedman v. Sebelius, 755 F. Supp. 2d 98, 100–01 (D.D.C. 2010), *rev'd on other grounds*, 686 F.3d 813, 816 (D.C. Cir. 2012). *See also Evaluating the Propriety and Adequacy of the OxyContin Criminal Settlement: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 82–93 (2007) (statement of John L. Brownlee United States Attorney for the Western District of Virginia United States Department of Justice) (describing investigation's scope as of 2001) [hereinafter Brownlee Testimony]. *See* Barry Meier, *In Guilty Plea, OxyContin Maker to Pay $600 Million*, N.Y. TIMES (May 10, 2007), https://www.nytimes.com/2007/05/10/business/11drug-web.html.

3. The district court accepted Purdue Frederick's plea a month later. *See* United States v. Purdue Frederick Co., Inc., 495 F. Supp. 2d 569, 576 (W.D. Va. 2007). Except as otherwise noted, the relevant charging documents described throughout this essay refer to: Information at 1, 16, United States v. Purdue Frederick Co., Inc., No. 1:07-cr-00029 (W.D. Va. May 10, 2007) (charging both Purdue Frederick and the three officer defendants); Agreed Statement of Facts, United States v. Purdue Frederick Co., Inc., No. 1:07-cr-00029 (W.D. Va. May 10, 2007); Plea Agreement [with Purdue Frederick], United States v. Purdue Frederick Co., Inc., No. 1:07-cr-00029 (W.D. Va. May 10, 2007); Settlement Agreement [between Purdue Frederick and civil agencies], United States v. Purdue Frederick Co., Inc., No. 1:07-cr-00029 (W.D. Va. May 10, 2007); Plea Agreement [Friedman], United States v. Friedman, No. 1:07-cr-00029 (W.D. Va. May 10, 2007); Plea Agreement [Udell], United States v. Friedman, No. 1:07-cr-00029 (W.D. Va. May 10, 2007); Plea Agreement [Goldenheim], United States v. Friedman, No. 1:07-cr-00029 (W.D. Va. May 10, 2007).

lead under the Federal Food, Drug, and Cosmetic Act, and agree to pay over $600 million in compensation and penalties for falsely portraying Oxycontin as "less addictive, less subject to abuse, and less likely to cause withdrawal symptoms than other pain medications."[4] The amount would later be described as "one of the largest in the history of the pharmaceutical industry."[5]

The charging documents that Brownlee released to the public advised that Purdue Frederick would be excluded from federal healthcare programs but that its parent, Purdue Pharma, would continue operations pursuant to a Corporate Integrity Agreement under the watchful eye of an independent monitor.[6]

The U.S. Attorney's announcement was additionally notable because three of Purdue's high-level executive officers agreed to plead guilty to charges of misdemeanor misbranding and personally disgorge payments totaling nearly $35 million.[7] On May 10, Michael Friedman (Purdue Frederick's President and Chief Executive Officer), Howard Udell (Purdue's Chief Legal Officer), and Paul Goldenheim (Purdue's Medical Director from 1985–2004), each entered guilty pleas before a West Virginia federal district court judge and then reportedly flew home on a corporate jet to Connecticut, where Purdue Pharma's headquarters are located.[8]

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4. Brownlee News Release, *supra* note 2.

5. *Purdue Frederick*, 495 F. Supp. 2d. at 572.

6. Plea Agreement [with Purdue Frederick], *supra* note 3 (describing the parent company's obligation to monitor itself and abide by the terms of the Corporate Integrity Agreement). Purdue Frederick's separate Settlement Agreement with the DOJ's Civil Division explicitly provides: (a) that in consideration for Purdue Frederick's guilty plea, the federal government will forego seeking Purdue Pharma L.P.'s debarment or exclusion from federal healthcare and other programs, but (b) that Purdue Frederick agrees not to contest a 25-year exclusion from all health care programs and federal procurement programs, and a debarment of the same time period from federal employee health benefit plans. *See id. See also Administrative Law Judge Upholds HHS-OIG Exclusions Imposed Against Responsible Corporate Officers in OxyContin Case*, HHS OFF. INSPECTOR GEN. (Jan. 23, 2009), https://oig.hhs.gov/newsroom/news-releases-articles/administrative-law-judge-upholds-hhs-oig-exclusions-imposed-against-responsible-corporate-officers-oxycontin-case/ (referring in final paragraph to the implementation of Purdue Frederick's twenty-five-year exclusion). For more on exclusion, see George B. Breen & Jonah D. Retzinger, *The Resurgence of the Park Doctrine and the Collateral Consequences of Exclusion*, 6 J. HEALTH & LIFE SCI. L. 90, 94 (2013).

7. Under Section 333(a)(2), the introduction or delivery into interstate commerce of a misbranded drug is punishable as felony when the person committing that violation does so with the specific intent to defraud or mislead. Section 333(a)(1) provides misdemeanor liability for misbranding violations that take place without knowledge of the facts establishing the drug's misleading or false label. *See* 21 U.S.C. § 333(a)(1)–(2).

8. *See* Barry Meier, *Every Time I Thought the Purdue Pharma OxyContin Story Was Over, I Was Wrong*, N.Y. TIMES (June 8, 2018), https://www.nytimes.com/2018/06/08/insider/i-thought-the-purdue-pharma-oxycontin-story-was-over-i-was-wrong.html (reporting that Brownlee asked

The plea agreements contemplated that prosecutors would not request prison sentences for the three executives; incarceration would have been unusual in any event, as the defendants were pleading guilty to strict liability misdemeanors.[9] Still, a short term of imprisonment would have been available had the district court desired it. Labeling the question a "close one," the court declined to impose any term of imprisonment when it announced its final sentence one month later, in part because the Information[10] and the associated Agreement of Facts framed the offenses as strict liability crimes arising solely out of the executives' positions within the company.[11]

These formal charging documents have become artifacts of a much broader account of addiction, public health failure, and corporate greed. In the waning days of 2020, the Department of Justice negotiated a new plea agreement pertaining to OxyContin and its manufacturer's abusive practices.[12] This time, the government's criminal case focused squarely on Purdue Pharma, and *this* time (a mere thirteen years later), the weight of the government's might would force Purdue Pharma and its affiliates to effectively cease operations.[13] However one feels about the 2020 disposition, it seems quite clear that the 2007 prosecution failed miserably in fulfilling its self-prescribed goals of

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him to "wait [to publicize their pleas] until the executives had left a federal courthouse . . . and were on a corporate jet back to Connecticut . . .").

9. *See* Plea Agreement [Friedman], *supra* note 3; Plea Agreement [Udell], *supra* note 3; Plea Agreement [Goldenheim], *supra* note 3 (indicating that the parties "agree to ask the Court to impose a non-incarcerative sentence"). As Brownlee himself later testified, "a sentence of incarceration based on a strict liability offense for defendants with no criminal history would have been unusual." Brownlee Testimony, *supra* note 2.

10. An "information" is the formal document the government files in lieu of seeking an indictment from a grand jury when a defendant has decided to waive his grand jury right and proceed by guilty plea. *See* FED. R. CRIM. P. 7(b). "Procedure by information in felony cases . . . was designed for the benefit of offenders who, having no defense, wish to plead guilty and start service of sentence without wasting time . . ." United States v. Maher, 89 F. Supp. 289, 294 (D. Me. 1950).

11. United States v. Purdue Frederick Co., Inc., 495 F. Supp. 2d 569, 576 (W.D. Va. 2007).

12. *See* Press Release, Office of Public Affairs, Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family, U.S. DEP'T OF JUST. (Oct. 21, 2020), https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid; Press Release, Office of Public Affairs, Opioid Manufacturer Purdue Pharma Pleads Guilty to Fraud and Kickback Conspiracies, U.S. DEP'T OF JUST. (Nov. 24, 2020), https://www.justice.gov/opa/pr/opioid-manufacturer-purdue-pharma-pleads-guilty-fraud-and-kickback-conspiracies.

13. *See* Meryl Kornfield et al., *Purdue Pharma agrees to plead guilty to federal criminal charges in settlement over opioid crisis*, WASH. POST (Oct. 21, 2020, 6:57 PM), https://www.washingtonpost.com/national-security/2020/10/21/purdue-pharma-charges/ (describing deal, criticisms by state attorneys general, and interaction with Purdue Pharma's bankruptcy case).

teaching pharmaceutical executives their lesson, much less deterring further wrongdoing.

More importantly, the 2007 case illuminates the ways in which even well-intentioned enforcement decisions can aggravate a crisis by depriving the public of relevant information. Civil procedure scholars have long bemoaned the ways in which civil litigation's settlement process commodifies and walls off important information.[14] Criminal justice scholars have just as cogently demonstrated the ways in which criminal law's plea-bargaining process suppresses discovery from defense attorneys[15] and more generally the general public.[16] Less attention has been paid, however, to the ways in which criminal law's charging documents additionally deprive the public of much needed information. This is as ironic as it is concerning. Charging documents are publicly filed documents that initiate the criminal justice machinery; they are purportedly designed to *reveal* information.[17] At bottom, they are supposed to denominate the crime the government contends an individual or entity committed.[18]

Usually, we fear an accusatory charging instrument that overclaims, one that embarrasses and effectively disables a defendant from protecting herself in the courts of law and public opinion. In other cases, however, we have reason to fear the opposite effect. Sometimes, the criminal charging instrument itself functions as a shield, enabling the government and pleading defendant to reveal one set of facts, while

14. *See, e.g.*, Alexandra D. Lahav & Elizabeth Chamblee Burch, *Information for the Common Good in Mass Torts*, 70 DEPAUL L. REV. (forthcoming 2021); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 653–62 (2005); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L. REV. 1073, 1085 (1984). For more recent manifestations of concern over information-dampening agreements, see David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 165 (2019) (addressing enforceability of nondisclosure contracts in cases of sexual misconduct). *See also* Jeffrey Steven Gordon, *Silence for Sale*, 71 ALA. L. REV. 1109, 1112 (2020). *But see* Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 313 (2018) (reasoning that "the higher price a party pays for secrecy might deter misbehavior").

15. *See, e.g.*, Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2174–75 (2014).

16. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 34 (2002) (describing information costs of plea-bargaining process).

17. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 19.2(a) (4th ed. 2015) (citing Hamling v. United States, 418 U.S. 87, 117 (1974)) (stating that the indictment's dual functions are to provide adequate notice and protect against double jeopardy).

18. FED. R. CRIM P. 7(c). *See* LAFAVE ET AL., *supra* note 17, § 19.1(a) (describing Rule 7(c)'s history). For felony cases, the government must proceed by securing an indictment from a grand jury unless the defendant waives that right. For misdemeanors, the prosecution can proceed by way of indictment or information. *See, e.g.*, United States v. Brewer, 681 F.2d 973, 974 (5th Cir. 1982) ("Although an indictment may be used in the case of a misdemeanor, the prosecution may also proceed by an information.").

holding back many others. This dampening effect grows more acute when the criminal charge itself requires the government to prove fairly little.

Critics deride plea bargaining because it imposes unfair pressures on defendants, occurs outside the courtroom, and restricts the flow of information to criminal defendants and their attorneys.[19] But far less attention has been paid to the ways in which a formal charging instrument—which is filed in court and freely accessible to the public—contributes to criminal law's opacity. The aim of this Essay is to remedy this gap and focus attention on the public record, where charging documents openly and deliberately paint an incomplete portrait of wrongdoing. This Essay's secondary contribution is to highlight the ways in which this information-dampening dynamic poses greatest risks for the so-called "public welfare offense," a category of crimes that arise in highly regulated settings.[20] Relying on strict theories of liability, the public welfare offense purports to deter and incapacitate actors whose conduct profoundly threatens the general public's safety and welfare. In precisely these cases, information-generation ought to be the government's strongest priority. The public cannot protect itself from diffuse harms if it misunderstands their severity or scope; nor can it adequately oversee the public officials tasked with redressing these harms. However, the very feature that enables the government to charge public welfare offenses—strict responsibility for wrongdoing on account of one's position of power within a company—also allows the government to produce opaque charging documents that decline to specify what exactly the offenders did in relation to a given offense. That is the paradox of executive criminal liability: doctrines and laws designed to ease the government's prosecutorial burden *also* weaken its information-producing function. As a result, the public learns too little, and too late, about practices that threaten its long-term health and welfare.

As Part I of this Essay argues, a publicly filed "information" such as the one the government filed in the 2007 Purdue case is at best a misnomer. It conveys a curated description of the offense that ultimately

19. *See* Wright & Miller, *supra* note 16, at 34 (delineating the information costs of the plea-bargaining process). For an overview of sensible plea-bargaining reforms borrowed from the consumer protection and contracting literatures, see Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1156–59 (2011). For a more recent argument in favor of incorporating civil concepts such as summary judgment, see Russell M. Gold et al., *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1624–28 (2017) (describing defendant's informational disadvantages within the standard plea-bargaining system).

20. For a discussion of the public welfare offense, see *infra* Part II.

robs the public of relevant information. To some degree, this is a universal problem. *All* charging documents omit *some* information, either to protect the privacy of uncharged individuals, or to safeguard the integrity of ongoing investigations.[21] And to be sure, these are laudable concerns, as is the desire to strike a viable resolution with a corporate offender and its officers. The government cannot and should not mechanically cut and paste the contents of its investigatory file into its criminal charging documents. But an overreliance on these prosecutorial intuitions of reticence and institutional preservation threatens criminal law's information-generation function, and *that* in turn, undermines criminal law's well-accepted expressive function, as well as its mission of protecting the public from harm.[22]

Ideally, the announcement of a plea agreement in a case involving a public welfare offense will convey three types of information. First, it should tell us something about the underlying *offense,* including the relevant actors who participated in the charged misconduct, the means and methods they employed, the degree of harm they caused, and a realistic approximation of the punishment they face upon conviction. Second, the resolution ought to convey *strategic enforcement* information. That is, it ought to tell the world something about the agencies who prosecuted the case, their assessment of the seriousness of the matter, their willingness to pursue it to a conviction, and their stance on pursuing similarly situated cases. Finally, the resolution ought to convey accurate and helpful information regarding the underlying *harm and risk* of engaging in future activity.[23]

As the Purdue Frederick episode demonstrates, prosecutions premised on strict liability offenses fall short of these goals. The case that proceeds by guilty plea provides limited *offense* information, soft-pedals its *strategic enforcement* information, and offers a far rosier version of future *harm and risk* than is actually warranted. As a result, the public suffers.

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21. *See generally* U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-27.300 (2018) [hereinafter Justice Manual]; *id.* § 9-27.760 (discouraging naming of uncharged third parties). *See also* FED. R. CRIM P. 6(e)(2) (pertaining to grand jury secrecy); FED. R. CRIM P. 7(c) (regarding the content of the criminal indictment and information, which should be "plain [and] concise").

22. For more on the criminal law's expressive function, see John Rappaport, *Criminal Justice, Inc.*, 118 COLUM. L. REV. 2251, 2304–05 (2018) (citing Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958)).

23. Sunshine-in-litigation statutes reflect these sentiments but appear to apply only in civil cases and do not bind the federal government. *See, e.g.*, FLA. STAT. § 69.081(8)(c) (2020) (Limitation does not apply to "information that is confidential under state or federal law."). For scholarly commentary, see Levmore & Fagan, *supra* note 14; Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1298 (2020) (describing analogous proposed federal legislation that has languished).

We might be more tolerant of these deficits were we assured that prosecution secured some reasonable facsimile of deterrence or proportional retribution. But, as the Purdue case demonstrates, deterrence and retribution depend heavily on how well the system communicates pertinent information. Corporate behavior does not magically change; it depends in part on the reputational shame that attaches to documented instances of wrongdoing.[24]

In the years following the 2008 financial crisis, numerous commentators asked, "[w]here were the prosecutions?"[25] In the opioid context, there is an easy answer: there were at least four.[26] Sadly, the 2007 prosecution did little to bring Purdue Pharma to heel[27] or prevent its owners from continuing to benefit financially from OxyContin.[28] From that perspective, the prosecution was clearly a failure.

Failures nevertheless present useful learning opportunities. The 2007 prosecution serves as an excellent case study in the information-based drawbacks of settling for and charging certain types of offenses, particularly those based in strict liability. The offense that requires so little in terms of proof enables the prosecutor to reveal shockingly little information in formal charging documents. For white-collar offenses whose deterrent effects are so dependent on public shame, the power to say so little undermines the case for criminalization. Simply put, if our aim is to embarrass corporate wrongdoers into behaving, we ought to rethink our reliance on a category of offenses that undermines the public's welfare more than it protects it.

The remainder of this piece develops as follows: Part I summarizes the 2007 prosecutions and their epilogue. Part II analyzes the evolving

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24. "It is clearly the view of the DOJ, as well as many who think about white collar crime, that the business sector is fertile ground for the criminal law to send messages." Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C. L. REV. 823, 848 (2018). *See also* Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 907, 931–32 (2018); Dustin B. Benham, *Tangled Incentives: Proportionality and the Market for Reputation Harm*, 90 TEMP. L. REV. 427, 429 (2018) ("[A] driving force behind some discovery is its power to embarrass an adversary."); Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Providing Information*, 91 WASH. L. REV. 1193 (2016).

25. *See, e.g.*, Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. (Jan. 9, 2014), http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/.

26. Many doctors have in fact been federally prosecuted for their opioid prescribing practices or have at least lost their licenses to practice medicine. *See generally* Adam M. Gershowitz, *Punishing Pill Mill Doctors: Sentencing Disparities in the Opioid Epidemic*, 54 U.C. DAVIS L. REV. 1053 (2020); Adam M. Gershowitz, *The Opioid Doctors: Is Losing Your License a Sufficient Penalty for Dealing Drugs?*, 72 HASTINGS L.J. 871 (2021).

27. *See supra* notes 12–13 and accompanying text.

28. *See* Meryl Kornfield, *Members of family that led maker of OxyContin deny responsibility for opioid crisis in congressional hearing*, WASH. POST (Dec. 17, 2020, 3:00 PM), https://www.washingtonpost.com/health/2020/12/17/sackler-family-hearing-opioids/.

treatment of executive criminal liability. Part III introduces criminal law's information-generation function in the public welfare context and explains how strict liability undermines that function. Part IV briefly surveys three plausible responses to this problem, and Part V concludes.

I. Purdue's Three Responsible Officers

Purdue Frederick and Purdue Pharma's three executives entered their guilty pleas on May 10, 2007.[29] As the district court observed in its opinion accepting the guilty pleas, the three executives pleaded guilty "solely as responsible corporate officers."[30] They were neither charged with "personal knowledge of misbranding" nor with any "intent to defraud."[31] Months later, at least one executive still held his position with the parent company and the other was still receiving company payments,[32] although that would soon change once the Department of Health and Human Services moved, under its own authority, to exclude the three executives from their industry for twenty years.[33]

The formal documents that charged Purdue's subsidiary company and its three executives laid out a fairly antiseptic narrative of what had occurred within Purdue's midst.[34] The Information filed against Purdue Pharma and its three executives conveniently anthropomorphizes "Purdue" and its unnamed "supervisors and employees" as the villains who intentionally and falsely misbranded OxyContin.[35] For example, the Information advises:

- In 1995, certain "Purdue supervisors and employees" were aware that physicians were concerned with OxyContin's potential for addiction and abuse;[36]

29. *See supra* notes 2–3.

30. United States v. Purdue Frederick Co., Inc., 495 F. Supp. 2d 569, 570 (W.D. Va. 2007).

31. *Id.* at 571.

32. First Amended Complaint and Jury Demand at 68, 74, 83, Commonwealth v. Purdue Pharma, L.P., C.A. No. 1884-cv-01808 (BLS2) (Mass. Super. Ct. 2019). Compared to the criminal charging documents filed in 2007, the Massachusetts Attorney General's complaint alleges many more details regarding Purdue Pharma, its owners and executives, and the ways in which it marketed its drug, maximized sales, and avoided valid criticisms of OxyContin's addictive qualities. *See* Mariano-Florentino Cuéllar & Keith Humphreys, *The Political Economy of the Opioid Epidemic*, 38 Yale L. & Pol'y Rev. 1, 58–59 (2019) (describing and commenting on the AG's complaint).

33. The exclusion period eventually was reduced to twelve years. *See* Friedman v. Sebelius, 755 F. Supp. 2d 98, 104 (D.D.C. 2010).

34. *See* Information, *supra* note 3; Agreed Statement of Facts, *supra* note 3.

35. Information, *supra* note 3.

36. *Id.*

- Between 1995 and 2001, certain "Purdue supervisors and employees" intentionally and fraudulently marketed OxyContin as less addictive and less subject to abuse than they knew it to be;[37]
- hat although "certain Purdue sales representatives" had advised that OxyContin was less prone to abuse and could even be used to "weed out" drug users, by March 2000, "supervisors and employees in different parts of the company" had in fact received reports of "abuse and diversion" in different communities.[38]

Taken at a high level of abstraction, the Information is helpful. It provides a detailed blueprint of the ways in which unnamed "supervisors and employees" intentionally and knowingly downplayed the addictive qualities of OxyContin and misled their own sales representatives and prescribing physicians. On a more concrete level, it offers us fairly little insight on the internal dynamics that fueled such misconduct. Generic supervisors directed lower-level employees to understate OxyContin's addictive qualities; beyond that, we learn fairly little about the culture or operating structures that fueled and countenanced such pressure,[39] much less how much or how little its board members were aware of the misconduct.[40] With so little information provided, the charging document provides little opportunity to test the parties' claims that the guilty plea meaningfully resolves the dynamics that produced OxyContin's misbranding.

And what about the three top executives? Organizational theorists often urge corporate reformers to start with an organization's "tone at the top."[41] Were the three charged executives responsible for setting a winner-take-all atmosphere that fueled criminal misconduct? Did they

37. *Id.*

38. *Id.*

39. On the correlations between corporate crime and culture (as well as the difficulties of diagnosing and remediating such cultures), see generally Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933 (2017). For more on the relationship between corporate crime and the firm's internal operating structure, see Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 253–55 (2020).

40. Later reports alleged that a number of Purdue Pharma's top executives and board members *were* in fact aware of OxyContin's addictive qualities and vulnerability to abuse, as well as the inaccuracy of the company's marketing claims. *See* Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused*, N.Y. TIMES (May 29, 2018), https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html. These allegations, along with a 2006 internal prosecution memo describing Purdue Pharma's behavior, were further discussed and amplified in the New York Times' series, *The Weekly*.

41. For recent scholarship, see Alfredo Contreras et al., *"Tone at the Top" and the Communication of Corporate Values: Lost in Translation?*, 43 SEATTLE U. L. REV. 497, 498 (2020) (hypothesizing that corporate ethics programs may be undercut by the "'tone at the top'—the top being the chief executive officer (CEO) and other senior management—that somehow dilutes or countermands the corporation's code of ethics . . ."). *See also* Gary R. Weaver et al., *Corporate Ethics Programs as Control Systems: Influences of Executive Commitment and Environmental*

purposely look the other way—or engage in what criminal prosecutors often describe as willful blindness[42]—as lower-level personnel peddled a dangerously addictive drug? If they did, the Information certainly did not say so, and neither did the supplemental Agreed Statement of Facts.[43]

Instead, the paragraphs of the 2007 Information that pertain to the three executives disclose only the dates of the executives' employment and their positions at Purdue Pharma.[44] The Agreed Statement of Facts adds that the three officer defendants "do not agree that they had personal knowledge" of the misbranding activities that were the basis of the company's felony charge.[45] The individual plea agreements, meanwhile, characterize their charged crime as a "strict liability misdemeanor offense."[46]

In sum, Friedman, Udell, and Goldenheim, who were represented by seasoned and sophisticated defense attorneys,[47] agreed to disgorge millions of dollars for misconduct they claimed they neither approved nor even knew about.[48] Either the government was making an example of three hapless officers, or it was instead granting them an undeserved gift of plausible deniability.[49] Without reading the prosecutor's

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Factors, 42 ACAD. MGMT. J. 41 (1999) ("[M]uch of the guidance for how [compliance] programs are implemented comes from a firm's top managers and their commitment to ethics.").

42. "Willful blindness refers to situations where a person is aware of a high probability that a fact is true and deliberately avoids confirming it." Mihailis E. Diamantis, *Functional Corporate Knowledge*, 61 WM. & MARY L. REV. 319, 336 (2019) (explaining how the doctrine imputes knowledge to a person who lacks actual knowledge of a pertinent fact). *See also* Global-Tech Appliances, Inc. v. SEB S. A., 563 U.S. 754, 769 (2011) (explaining doctrine).

43. Agreed Statement of Facts, *supra* note 3.

44. Information, *supra* note 3.

45. Agreed Statement of Facts, *supra* note 3.

46. Plea Agreement [Friedman], *supra* note 3; Plea Agreement [Udell], *supra* note 3; Plea Agreement [Goldenheim], *supra* note 3.

47. Friedman was represented by Mark F. Pomerantz, a top criminal defense attorney who now practices at Paul Weiss; Udell by Mary Jo White, the former United States Attorney for the Southern District of New York and eventual Chair of the Securities and Exchange Commission; and Goldenheim by Andrew Good, a Boston attorney and named partner of his own firm.

48. Indeed, all three would later claim they lacked the requisite power and ability to prevent the underlying misconduct. *See* Friedman v. Sebelius, 755 F. Supp. 2d 98, 111 n.19 (concluding that defendants' reply briefs raised a powerlessness defense that they had previously waived), *rev'd on other grounds*, 686 F.3d 813 (D.C. Cir. 2012).

49. A 2006 internal memo prepared by career prosecutors suggests that the three executives might have been charged with felony crimes had career prosecutors been allowed to proceed as they preferred. *See The Weekly: A Secret Opioid Memo That Could Have Slowed an Epidemic*, N.Y. TIMES (Aug. 16, 2019), https://www.nytimes.com/2019/08/16/the-weekly/opioid-crisis-epidemic.html. As of this writing, the text of this memo has not been publicly released, although it has been discussed by journalists who have reviewed it. *See, e.g.*, Edward Helmore, *Purdue Pharma escaped serious charges over opioid in 2006, memo shows*, THE GUARDIAN (Aug. 19, 2020, 5:00 AM), https://www.theguardian.com/us-news/2020/aug/19/purdue-pharma-oxycontin-justice-department-memo-opioid.

internal notes or reviewing the underlying evidence, it is impossible to know which of these two narratives is closer to the truth.

Subsequently in 2008, the Inspector General of the Department of Health and Human Services ("IG") issued exclusion notices to the three executives, initially barring them from participating in any federal healthcare program for a term of twenty years.[50] The executives aggressively litigated the decision in administrative proceedings and in federal court, which eventually resulted in the reduction of their respective exclusions from twenty to twelve years.[51] Nevertheless, the IG's action effectively truncated their pharmaceutical careers.[52] More importantly, although it remanded on other grounds, the D.C. Circuit upheld the IG's power to exclude health-care executives whose behavior was "factually related to fraud[,]" regardless of their individual crime of conviction.[53]

Reaction to the IG's exclusion decision was mixed. Several commentators questioned the propriety of excluding convicted misdemeanants from their chosen industries for such long periods of time, particularly where the government had failed to demonstrate their direct participation in any fraud.[54] Professor Copeland, for example, wrote that exclusion was questionable, not just because of its unprecedented length, but also because:

> [T]he connection between their conduct and the sanction was so attenuated. There was no evidence put forth that the executives knew about the misbranding of OxyContin. Indeed, their convictions did not require any showing of *mens rea* because misdemeanor misbranding was a strict liability offense. Their exclusion was based

50. *Friedman*, 686 F.3d at 817. On exclusion generally, see Breen & Retzinger, *supra* note 6, at 94. For a helpful recounting of the exclusion litigation that followed the Purdue executives' guilty pleas, see Katrice Bridges Copeland, *The Crime of Being in Charge: Executive Culpability and Collateral Consequences*, 51 Am. Crim. L. Rev. 799, 816–25 (2014).

51. *Friedman*, 686 F.3d at 816–18 (describing case's criminal and administrative history). The D.C. Circuit concluded that the IG could exclude because the misdemeanor charges were still "factually related" to fraud but nevertheless remanded the case on the grounds the Agency had insufficiently explained its basis for imposing such lengthy exclusion. *Id.* at 828.

52. "[T]he practical effect of the exclusion of an individual is that the person is virtually unemployable by a health care provider." Copeland, *supra* note 50, at 818–19.

53. *Friedman*, 686 F.3d at 823–24. The IG was not obligated to prove actual fraud by the executives. Rather, it was sufficient that they had pleaded guilty as responsible officers and that their company, Purdue Frederick, had entered a guilty plea for felony misbranding. *Id.*

54. *See* Copeland, *supra* note 50, at 818–21; Sasha Ivanov, *When the Punishment Does Not Fit the Crime: Exclusions from Federal Health Care Programs Following Convictions Under the Responsible Corporate Officer Doctrine*, 84 Geo. Wash. L. Rev. 776, 802 (2016) ("[S]trict criminal liability combined with career-ending penalties goes beyond what the Supreme Court could have imagined the responsible corporate officer doctrine would be used for at its inception.").

> solely on the notion that their misdemeanor convictions were convictions "relating to" fraud.[55]

Other commentators argued just as forcefully the executives were actually quite lucky. They had already reaped a massive benefit simply by being allowed to plead guilty to a single misdemeanor misbranding charge, thereby avoiding "even a single day behind bars."[56]

Without reviewing a prosecutor's underlying work file, it is difficult to resolve this debate. Nevertheless, based on what we now know, it seems clear that the 2007 settlement ultimately kept relevant information from the public and that this information gap likely obscured the executives' responsibility for what had occurred in their midst. Moreover, the mechanism that helped create this information vacuum is the very doctrine prosecutors relied on to secure guilty pleas and convictions of the three officers, a doctrine that ironically purports to protect public welfare.

II. Protecting the Public through Executive Criminal Liability

For decades, commentators have decried the phenomenon of corporate executives who appear to violate the law with impunity.[57] These critiques reached their apex in the wake of the 2008 financial crisis.[58] Financial institutions and their leaders drove their employees to create dangerous and unstable financial products; speculated in those

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55. Copeland, *supra* note 50, at 826.

56. "If the executives had trafficked $3,000 worth of heroin, they would have faced a mandatory five-year federal prison sentence, but their role in generating an estimated $30 billion in revenue from OxyContin did not result in them spending even a single day behind bars." *See* Cuéllar & Humphreys, *supra* note 32, at 57.

57. For an insightful analysis of the dilemmas posed by executive lawbreaking, see generally Daniel C. Richman, *Corporate Headhunting*, 8 Harv. L. & Pol'y Rev. 265 (2014). The concern with executive impunity has a long pedigree. Edwin Sutherland, the sociologist who coined the "white-collar crime" term, first spoke of the problem in his address to the American Sociological Association in December 1939. *See* Aleksandra Jordanoska & Isabel Schoultz, *The "Discovery" of White-Collar Crime: The Legacy of Edwin Sutherland*, in The Handbook of White-Collar Crime 5–7 (Melissa L. Rorie ed., 2020).

58. *See, e.g.*, Rigged Justice: 2016: How Weak Enforcement Lets Corporate Offenders Off Easy, Off. of Senator Elizabeth Warren (Jan. 2016), http://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf; Ben Protess & Jessica Silver-Greenberg, *Two Giant Banks, Seen as Immune, Become Targets*, N.Y. Times (Apr. 29, 2014, 8:40 PM), http://dealbook.nytimes.com/2014/04/29/u-s-close-to-bringing-criminal-charges-against-big-banks; William D. Cohan, *How Wall Street's Bankers Stayed Out of Jail*, The Atlantic (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/. *See also* Joseph W. Yockey, *Beyond Yates: From Engagement to Accountability in Corporate Crime*, 12 N.Y.U. J.L. & Bus. 409, 411 (2016) (citing surveys indicating that, "fifty-three percent of respondents believe that not enough was done to prosecute bankers" responsible for the 2008 financial crisis).

products with abandon; wreaked havoc on markets, caused widespread unemployment; sought government bailouts, and—this is the stinger—somehow escaped accountability for the mess they caused.[59]

The fear that corporate executives have effectively shielded themselves from punishment extends beyond the financial crisis. In recent years, commentators have additionally questioned the government's softer stance toward corporate crime and the executives who propagate it.[60] To address this problem, reformers have proposed a series of legal and policy-driven reforms. Although some of these revolve around the government's treatment of corporate entities, others have set their sights on executive officers, either by calling for enhanced enforcement[61] or for expanding criminal law's reach.[62] *If only those executives were truly subject to criminal liability*, the standard argument goes, *they would finally take the law seriously and work toward making their companies law-abiding and compliant*.[63]

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59. *See, e.g.*, Katrice Bridges Copeland, *The Yates Memo: Looking for "Individual Accountability" in All the Wrong Places*, 102 IOWA L. REV. 1897, 1898–99 (2017) ("[T]here has been a public outcry over the fact that, while the financial system collapsed in 2008 due to fraudulent practices, the government has failed to hold individuals criminally accountable for the misconduct."); STEVEN A. RAMIREZ, LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW (2013). As Professors Bratton and Levitin have observed, the government *eventually* extracted substantial civil penalties from financial institutions. *See* William W. Bratton & Adam J. Levitin, *A Tale of Two Markets: Regulation and Innovation in Post-Crisis Mortgage and Structured Finance Markets*, 2020 ILL. L. REV. 47, 77 (2020) (citing "civil enforcement initiatives of unprecedented magnitude" that eventually arose in response to the financial crisis). For explanations why these penalties failed to include criminal prosecutions of corporate executives, see *id.* at 77–78 (citing David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1437–48 (2014)). Finally, on the ways in which an early, failed prosecution of two Bear Stearns executives may have influenced prosecutors to forego future prosecutions, see JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 20–23 (2020).

60. *See generally* JENNIFER TAUB, BIG DIRTY MONEY: THE SHOCKING INJUSTICE AND UNSEEN COST OF WHITE COLLAR CRIME (2020); BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 1–2 (2014).

61. Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions*, 9 VA. L. & BUS. REV. 153, 167 (2015).

62. Copeland, *supra* note 50, at 1925 (proposing legislation codifying responsible corporate officer treatment). Whereas most of these reforms have envisioned expansions of strict liability or negligence-based laws, some have focused either on the expansion of fraud prosecutions using the willful blindness doctrine or have argued for the expansion of liability via tools such as the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *See, e.g.*, Eugene McCarthy, *A Call to Prosecute Drug Company Fraud as Organized Crime*, 69 SYRACUSE L. REV. 439, 441 (2019) (insisting that prosecutors should apply RICO liability to pharmaceutical companies); J.S. Nelson, *Disclosure-Driven Crime*, 52 U.C. DAVIS L. REV. 1487, 1559 (2019) (touting the benefits of the willful blindness doctrine in pursuing fraud prosecutions of higher-level corporate executives).

63. One senses the sentiment in an NPR report of recent civil (and criminal) cases brought against pharmaceutical executives. Brian Mann, *As Drugmakers Face Opioid Suits, Some Ask:*

The above mantra sidesteps the fact that many executives *already* bear some degree of exposure to criminal liability. First, if they have engaged in, or have agreed to engage in, a scheme of serious wrongdoing that can be proven beyond a reasonable doubt, they may well be charged with serious offenses such as wire fraud or obstruction of justice. Second, and more relevant to this Essay, throughout various industries, a common law theory of criminal liability known as the responsible corporate officer doctrine holds the high-level executive *strictly* responsible for crimes that occur on her watch. It is a powerful doctrine, relieving the government of having to demonstrate a faulty state of mind or any meeting of minds between the corporate executive and her subordinate. Nevertheless, as the following sections demonstrate, this remarkably has failed to deliver the deterrent and retributive outcomes that criminal punishment has long promised.

A. The Responsible Corporate Officer (RCO) Doctrine

The RCO doctrine is an old chestnut that was first announced by the Supreme Court in the 1940s.[64] It holds an executive officer "responsible in relation to" the crimes that occur within her corporation, specifically without regard to her direct knowledge or participation in an underlying crime.[65] For that reason, it has often been described as a form of strict vicarious liability.[66] The officer is held responsible for the crimes that occur in her midst, provided they involve a matter over which she had direct or indirect authority. In its broadest iteration, the RCO prosecution arises from the officer's *ability* to control the situa-

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Why Not Criminal Charges Too?, NPR (Sept. 19, 2019, 6:37 PM), https://www.npr.org/2019/09/19/762455218/as-drugmakers-face-opioid-lawsuits-some-ask-why-not-criminal-charges-too.

64. United States v. Dotterweich, 320 U.S. 277, 281 (1943). *See also* Copeland, *supra* note 50, at 806–11.

65. *Dotterweich*, 320 U.S. at 284 ("The offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs."). Years later, the Court wrote: "It was enough in such cases that, by virtue of the relationship he bore to the corporation, the agent had the power to prevent the act complained of." United States v. Park, 421 U.S. 658, 671 (1975) (tracing doctrine's history). The responsible corporate officer doctrine has, at times, been called the "responsible relation" doctrine. "The responsible relation doctrine holds individuals criminally liable for failing to prevent or correct violations that occur within their area of responsibility and control in a business organization." Todd S. Aagaard, *A Fresh Look at the Responsible Relation Doctrine*, 96 J. CRIM. L. & CRIMINOLOGY 1245, 1246 (2006).

66. "[U]nder the [responsible corporate officer doctrine], a corporate executive may be found liable even if the corporate executive acts in a reasonably diligent manner but remains ignorant of the misconduct at hand. The executive is strictly liable, as any employee's violation of the FDCA necessarily entails that the executive failed to prevent the violation." Breen & Retzinger, *supra* note 6, at 100. *But see* Aagaard, *supra* note 65, at 1281–85; Kimberly Kessler Ferzan, *Probing the Depths of the Responsible Corporate Officer's Duty*, 12 CRIM. L. & PHIL. 455 (2018) (arguing that doctrine is better understood as a form of omission liability).

tion and her *failure* to prevent it from arising, but not necessarily from her knowledge of, or purpose to cause, the underlying offense.[67]

The doctrine applies to a modest set of federal criminal offenses, often referred to as public welfare offenses, which arise most prominently in the healthcare and environmental law contexts.[68] If the officer is in command of the company or unit that committed the crime, the officer can be held "responsible" in relation to the crimes that occur within the confines of the company, assuming those crimes fall within the officer's delineated "responsibility."[69]

Once applied, the doctrine permits few defenses. Lack of knowledge is not a defense. Neither is delegation of the matter to someone else within the company.[70] The only known defense to a responsible corporate officer claim is that the officer lacked the requisite "power"

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67. "[I]ndividuals who 'by reason of [their] position in the corporation [have the] responsibility and authority' to take necessary measures to prevent or remedy violations of the FDCA and fail to do so, may be held criminally liable as 'responsible corporate agents,' regardless of whether they were aware of or intended to cause the violation." United States v. DeCoster, 828 F.3d 626, 632 (8th Cir. 2016).

68. A public welfare offense is one that criminalizes conduct relating to the regulation of "dangerous or deleterious devices or products or obnoxious waste materials" or activities that similarly threaten public welfare and safety. United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 565 (1971). *See also* Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933) (coining term); *Dotterweich*, 320 U.S. at 280 ("The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection."). For a contemporary discussion of the subject, *compare* Martin Petrin, *Circumscribing the "Prosecutor's Ticket to Tag the Elite"—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283, 297 (2012) (critiquing doctrine's potential deleterious effect on businesses) *with* Aagaard, *supra* note 65, at 1286 (arguing that the doctrine can and should be broadened beyond regulatory offenses).

69. Although courts do not require prosecutors to establish a direct reporting line between the officer and the lower-level employee who has violated a given law, they do require the government to do more than simply allege the officer's executive employment. *See, e.g.*, Rooney v. Commonwealth, 500 S.E.2d 830, 833 (Va. Ct. App. 1998) ("The Commonwealth produced no evidence describing Rooney's duties, powers, and responsibilities as president of the corporation, or that he had an accounting responsibility or direct corporate responsibility for withholding or depositing the funds in trust.") (citing United States v. New England Grocers Supply Co., 488 F. Supp. 230, 233–34 (D. Mass. 1980)).

70. *See* United States v. Park, 421 U.S. 658, 670 (1975). Some state courts have taken a more cautious approach. *See, e.g.*, *Rooney*, 500 S.E.2d at 833 (1998) (contending that "[a]lthough a corporate president has . . . the responsibility to ensure compliance with legal requirements, the responsible corporate officer doctrine imposes criminal responsibility only upon the officer or officers who are directly responsible or accountable for the corporation's compliance"). *Rooney* does not appear to be in accord with most federal court applications of the doctrine. *See also* Michael E. Clark, *The Responsible Corporate Officer Doctrine: A Re-emergent Threat to General Counsel and Corporate Officers*, 14 J. HEALTH CARE COMPLIANCE 5, 6–7 (2012) ("[C]ourts have rejected arguments by corporate officers and executives that they delegated to subordinates the responsibility to stop such misconduct.").

to compel compliance with the law.[71] Few have successfully employed the powerlessness defense, but it clearly requires something more than the officer's protestations that she tried, delegated the task to someone else, or labored under the misconception that her company had a good compliance program.[72]

A creature of common law, the doctrine's outer boundaries remain murky. Most agree it is limited to statutory crimes that are themselves negligence or strict liability offenses.[73] The doctrine ordinarily does not apply where the underlying offense requires an exacting *mens rea* of purpose or knowledge.[74] Federal prosecutors appear to have internalized this lesson as well, as one rarely observes applications of the theory beyond the usual regulatory cases.[75]

The doctrine's earliest proponents framed it in purely utilitarian terms. Consider the Supreme Court's explanation in *United States v. Dotterweich*, wherein it first affirmed the doctrine: "In the interest of the larger good [the officer's prosecution] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[76] *Dotterweich* encapsulates the RCO doctrine's original rationale: an otherwise *innocent* officer shoulders the burden of criminal liability because he voluntarily occupies a position responsible in relation to a public danger. Liability is not predicated on a theory of moral blame so much as it is predicated on the standard economic argument of internalizing costs.[77]

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71. "A corporate officer may avoid liability under this doctrine by showing that he was 'powerless to prevent or correct the violation.'" *DeCoster*, 828 F.3d at 632 (citing *Park*, 421 U.S. at 673).

72. *See* Petrin, *supra* note 68, at 297 (citing courts who were "unsympathetic" to claims that the defendant believed he had reasonably delegated responsibility to one or more employees).

73. *Cf. Park*, 421 U.S. at 670 (observing that Food and Drug Act prosecutions "reflec[t] the view both that knowledge or intent were not required to be proved in prosecutions under its criminal provisions, and that responsible corporate agents could be subjected to the liability thereby imposed").

74. *See, e.g.*, United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 53 (1st Cir. 1991). Ferzan, *supra* note 66, at 459 (observing that "[m]any courts have recognized that when the underlying statute is *not* strict liability, then the [responsible corporate officer] doctrine does not supplant the underlying *mens rea* requirement").

75. "While prosecutors might have attempted in the past to use the [responsible corporate officer] doctrine as an aid in felony prosecutions believing that it would eliminate their burden of proving knowledge, courts have generally rejected these attempts to apply a strict liability scheme where the text of the statute expressly requires knowledge." Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 LOY. U. CHI. L.J. 169, 197 (1994).

76. United States v. Dotterweich, 320 U.S. 277, 281 (1943).

77. Rachel Barkow helpfully summarizes the approach: "So-called strict liability laws targe[t] outcomes instead of intent. If an actor put[s] an adulterated or misbranded drug in commerce . . . [that is sufficient] to trigger criminal penalties, without any requirement that the government

Curiously, although some theorists still hew to the sterile theory of cost-internalization, courts have increasingly injected the doctrine with moral meaning. Prosecutors are partially responsible for this subtle shift. Instead of treating the doctrine as solely a cost-shifting mechanism, prosecutors instead have used it to pursue high-level actors in cases where intentional wrongdoing has occurred, but where a more serious charge appears too risky.[78] That is, they have used the doctrine to exact retribution and send a message, even if the message is a bit fuzzy.

For example, in *United States v. DeCoster*, federal prosecutors pursued the father and son owner and executives of Quality Egg, LLC, an egg producer whose unsanitary (and revolting) practices produced a nationwide salmonella outbreak.[79] The evidence showed, among other things, that Quality Egg maintained egregiously unsanitary practices at its hen farm in Iowa[80] and that the DeCosters played an active role in covering up Quality Egg's practices and misleading consumers.[81]

Under a different set of circumstances, prosecutors might have sought felony convictions of the DeCosters for crimes such as obstruction of justice and bribery, and perhaps for felony misbranding under conventional theories of complicity or conspiracy. Instead, the *company* pleaded guilty to two serious felonies (bribery and felony misbranding) while the DeCosters each pleaded guilty to counts of misdemeanor misbranding under the Food, Drug, and Cosmetic Act under a responsible corporate officer theory.[82]

Similar to the 2007 Purdue prosecution, the DeCosters' guilty pleas offered fairly little information regarding the officers' behavior, other than the sanitized narrative they no doubt preferred:

> In their plea agreements, the DeCosters stated that they had not known that the eggs were contaminated at the time of shipment, but

show that the actor did anything wrong or had any culpability at all." RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 29 (2019).

78. Hustis & Gotanda, *supra* note 75, at 197 (observing that "in all of the environmental cases raising the RCO doctrine, there has been considerable direct and circumstantial evidence of knowledge on the part of the corporate officers").

79. United States v. DeCoster, 828 F.3d 626, 630 (8th Cir. 2016).

80. "The [FDA] also discovered that the company's eggs tested positive for salmonella at a rate of contamination approximately 39 times higher than the current national rate, and that the contamination had spread throughout all of the Quality Egg facilities." *Id.*

81. "The parties additionally stipulated that one Quality Egg employee was prepared to testify at trial that Jack DeCoster had once reprimanded him because he had not moved a pallet of eggs in time to avoid inspection by the USDA. The investigation also revealed that in 2008 Peter DeCoster had made inaccurate statements to Walmart about Quality Egg's food safety and sanitation practices." *Id.* at 631.

82. In addition to the offenses described above, the company also pled guilty to a misdemeanor count for introducing adulterated eggs into interstate commerce. *Id.*

> stipulated that they were in positions of sufficient authority to detect, prevent, and correct the sale of contaminated eggs had they known about the contamination.[83]

After the DeCosters entered their guilty pleas, they sought to appeal the court's modest sentence of three months' imprisonment.[84] Citing the Supreme Court's dicta in *Dotterweich*, the DeCosters argued that strict liability crimes could not constitutionally produce sentences of imprisonment. The Eighth Circuit disagreed. In affirming the sentence, it cited the district court's reasoning and the record below:

> [A]lthough nothing in the record indicated that [the DeCosters] had actual knowledge that the eggs they sold were infected with salmonella, the record demonstrated that their safety and sanitation procedures were "egregious," . . . and that they knew that their employees had deceived and bribed USDA inspectors. [Moreover, the] record *supported the inference* that the DeCosters had "created a work environment where employees not only felt comfortable disregarding regulations and bribing USDA officials, but may have even felt pressure to do so." The district court accordingly concluded that this was not a case involving "a mere unaware corporate executive."[85]

In other words, despite a guilty plea premised on their position of responsibility, the DeCosters' *punishment* reflected moral condemnation of the toxic work environment they created and fostered. Note, however, that under *Dotterweich*, the DeCosters would have been criminally liable *regardless* of their "actual" knowledge of Quality Egg's "egregious" conditions or the toxicity of Quality Egg's work environment.[86] That is, they would have been criminally liable regardless of whether they were actually deserving of moral condemnation or not. Readers accordingly would be justified in finding this outcome confusing: the court sentenced the DeCosters for creating a culture that encouraged dangerous and deplorable conditions, but the criminal charges that were the focus of their guilty pleas were strict liability misdemeanor offenses.

It is difficult to muster much sympathy for the DeCosters. Despite their short prison sentences, they apparently reaped the benefit of a very good deal. If they really *did* know or encourage their employees to maintain unsanitary conditions or bribe USDA inspectors, their behavior merited more severe punishment and the collateral shame that accompanies it. Accordingly, one cannot help but wonder how much the prosecution short-changed the public. True, the court's modest

83. *Id.*
84. *Id.* at 632.
85. United States v. DeCoster, 828 F.3d 626, 631 (8th Cir. 2016)(emphasis supplied).
86. *See supra* notes 76–77 and accompanying text.

prison sentence implied a greater degree of culpability than a sentence of probation or home-confinement. But from an information signaling perspective, the public still might well have been better off with a full-blown felony prosecution even if such a prosecution risked a hung jury or acquittal.

Consider the difference between a charging document that describes a strict liability misdemeanor offense ("Officer X was the CEO of Company Y and responsible for these outcomes") and one that charges difficult-to-prove offenses such as bribery or wire fraud. Had the government sought to prove the more serious offense, what additional information would the public have learned about the DeCosters' behavior, the government's view of that behavior, and their attendant risks associated with such behavior? What marginal increase in attention might this additional publicity have brought to other egg producers or to the USDA's inspection practices? By choosing the easier to prove but weaker information-producing offense, the government did far more than trade off the possibility of extra punishment for a certain conviction. It gave up the opportunity to formally allege and prove additional facts that would have been of importance to the public. That is, it overlooked criminal law's information-production function and thereby threatened the public's safety, despite the fact that the very purpose of the RCO prosecution is to protect the public from particularly dangerous, diffuse harms.

B. Landing Spots and Insincere Rules

Cases like *DeCoster* present two interrelated puzzles: why go to the trouble of criminalizing regulatory misconduct only to water down its meaning by denominating it a misdemeanor and insisting, as the Court did in *Dotterweich*, that it has little to do with moral culpability? In a related vein, why would a prosecutor employ an admittedly weak tool such as the responsible corporate officer doctrine to pursue individuals who appear to have engaged in far more eggregious conduct?

The answer to the first question—why extend criminal liability to a non-culpable regulatory offense—might be that lawmakers perceive a gap in deterrence. If civil and regulatory liability, for example, prove themselves too weak to secure compliance with law, criminal prosecution viably fills this gap, particularly if criminal prosecutors possess stronger investigative tools than civil regulators.[87] It may also be the

87. *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in HANDBOOK L. & ECON. 405, 406 (2007). For a thorough exploration of the prosecutor's comparative advantages in regard to corporate crimes, see Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 401–17 (2008).

case that criminal prosecutors enjoy greater resources than their civil counterparts, or are effectively insulated from retaliatory budget cuts.[88] Accordingly, prosecutors may feel more comfortable than their regulatory counterparts pursuing charges against otherwise powerful figures.

Criminal law also carries an expressive punch that civil and regulatory law are often said to lack.[89] Criminal law "prohibits" whereas regulatory law "prices" socially undesirable behavior.[90] The problem with this final explanation—that criminal law sends a unique and important compound message of condemnation and prohibition—is that a prosecution's moral message is inextricably intertwined with its punishment. If a "strict liability offense" carries little punishment, it is difficult to perceive its message of condemnation and prohibition.

The more persuasive explanation for the RCO is found in two different theories of lawmaking. The first, introduced by Ronald Wright and Rodney Engen's study of pleading practice under North Carolina's penal codes, is what the authors refer to as "landing spots."[91] According to Wright and Engen, when a legislature constructs a criminal code by defining a series of more and less serious offenses within the same category (*e.g.*, creating sufficient "depth"), the existence of an available lesser crime facilitates agreement between prosecutor and defense attorney.[92] When defense attorneys and prosecutors prefer the certainty of conviction over the cost of proceeding to trial, they will choose one of the code's landing spots in order to settle a case.

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88. *See* Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 607–08 (2012) (explaining how a punitive disposition enhances an enforcement agency's access to financial resources); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 793–99 (1999) (identifying the resource protective benefits of a broad criminal enforcement portfolio).

89. Because it expresses the community's condemnation, "criminal punishment inflicts some form of suffering upon the offender, but it does so while conveying a certain kind of meaning." Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. IRVINE L. REV. 855, 888 (2020) (expounding on the expressive theory of punishment).

90. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 194 (1991). *See also* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1524–25 (1984).

91. Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9, 10 (2007) [hereinafter Wright & Engen, *Charge Movement*] (explaining connection between a criminal code's "depth" and plea bargaining); Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1940 (2006) [hereinafter Wright & Engen, *Depth and Distance*].

92. Wright & Engen, *Depth and Distance*, *supra* note 91, at 1953–54.

The more landing spots embedded in a code, the greater the prosecutor's ability to tailor an adequate resolution.[93]

The landing spot concept is useful because it partially explains why legislatures embed criminal codes with multiple variations of the same crime. Even if gradation itself reflects morally meaningful differences between more and less serious variations of a given offense,[94] they enjoy additional, instrumental value because they enable the prosecutor and defense attorney to locate a mutually acceptable charge to dispose of a case.

The landing spot theory takes us only so far, however, because although it explains why a prosecutor might *settle* for a misdemeanor charge premised on the responsible corporate officer doctrine, it does not explain why a prosecutor would unilaterally *select* such a charge early in the life of a case. For example, imagine a prosecutor possessed substantial evidence that certain high and mid-level executives engaged in a course of felonious conduct. Let's refer to this group as the "culpable executives" because they possess a culpable state of mind that could be proven under some set of circumstances. A federal prosecutor could either choose to pursue all culpable executives by charging them with a serious crime; select some subgroup of culpable executives to be charged with a serious crime; or leave the bulk of any government response to regulators, private actors, and state attorneys general.

Why might a federal prosecutor choose the feeblest of responses, namely the filing of a lesser charge that carries little punishment and conveys almost no information to the general public? Agency costs[95] suggests one answer: prosecutors embrace suboptimal charges because *any* charge (particularly one that leads to a definite conviction)

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93. On the flip side, landing spots and depth may encourage prosecutors to "overcharge" an offense initially in order to induce a defendant to plead guilty to a lesser offense. *See, e.g.*, Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 704 (2014) (describing instances in which "the prosecutor originally alleges a charge or charges that she subjectively does not want to pursue to conviction").

94. *See generally* Miriam H. Baer, *Sorting Out White-Collar Crime*, 97 TEX. L. REV. 225, 245 (2018).

95. When an agent's interests fail to align with those of her principal, economists refer to that gap as an agency cost. On the application of agency cost theory to prosecutors, see Russell D. Covey, *Plea Bargaining and Price Theory*, 84 GEO. WASH. L. REV. 920, 958 (2016) ("Prosecutors' interest in resolving cases do not neatly align with those of the 'general public,' and are influenced by a wide variety of factors, including political considerations, professional advancement, and the desire to minimize workload."). *See also* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 980–82 (2009) (introducing concept and explaining how it illuminates divide between prosecutor's personal interest and that of the parties she purportedly serves).

looks better than nothing, or even worse, an acquittal.[96] Accordingly, the prosecutor chooses the avenue that allows her to look like she's doing *something*, while sparing her the stress of a possible acquittal or the political backlash that might arise in pursuing criminal charges against a political patron (especially if those charges fall apart at trial). From that perspective, landing spots are dangerous and are the equivalent of an attractive nuisance. They may offer prosecutors a convenient resolution of the case, but they undermine social welfare insofar as there might exist a more information-forcing alternative such as civil or administrative liability on the one hand, or a full-blown felony prosecution on the other.

Another theory yields a different conclusion. The prosecutor is not a poor agent so much as the relevant law is, by the legislature's design, "insincere."[97] In his recent discussion of insincere laws, Michael Gilbert offers an explanation and defense of this dynamic, whereby lawmakers purposely implement insincere rules that only *appear* to impose overly harsh obligations on regulated actors.[98] The classic example is the fifty-five mile per hour speed limit on a busy highway whose drivers frequently drive ten miles per hour faster. The state doesn't *really* want its drivers to adhere to the published rule, but it implements it anyway with the expectation that it will ultimately cause drivers to adjust their behavior (albeit with some slippage), thereby achieving an on-the-ground speed of, say, sixty-five miles per hour.[99]

In a follow-up piece, Professor Gilbert and his co-author, Sean Sullivan, explain why insincere rules enjoy an evidentiary advantage over their true-rule cousins.[100] Deviations from published rules are difficult to prove; enforcement is costly and its outcome uncertain.[101] An enforcer who aims to increase deterrence can more successfully prevail against someone whose deviations from the published rule appear extreme as compared with someone whose deviations appear slight.[102] If the driver is clocked at seventy miles per hour, it will be easier to

96. "Self-interest and risk aversion motivate most line attorneys to safeguard their reputations, win-loss records, and egos by not risking losses at trial." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2541 (2004).

97. "Rules are insincere when they mandate behavior that differs from what the rule-maker prefers." Michael D. Gilbert, *Insincere Rules*, 101 VA. L. REV. 2185, 2186 (2015).

98. *Id.*

99. *Id.* at 2186–87 (posing a slightly different traffic hypothetical).

100. *See generally* Michael D. Gilbert & Sean P. Sullivan, *Insincere Evidence*, 105 VA. L. REV. 1115 (2019).

101. When the burdens of prosecuting a difficult-to-prove case grow too large, underdeterrence results. "[U]nderdeterrence is inevitable when proof is costly." *Id.* at 1135.

102. "As the burden of persuasion rises, the band of marginal violations that the state will not enforce also expands." *Id.*

secure a speeding conviction above a published speed of fifty-five miles per hour rather than sixty-five miles per hour.[103] Thus the insincere rule not only alters *ex ante* behavior, but it also improves the government's ability to prove violations *ex post*.

The theory of insincere lawmaking teaches us several lessons about criminal lawmaking: When, for example, a high culpable mental state such as knowledge or purpose is difficult to prove, the legislature can improve deterrence by "insincerely" diluting the statute's *mens rea* element to recklessness or negligence.[104] Notice, this is different from simply punishing someone for *being* reckless or negligent. Under the insincere law theory, the impetus for reducing (or even eliminating) the statutorily required mental state[105] is *not* to expand law's reach to those acting negligently or innocently. Rather, it is to more effectively punish the morally culpable individuals whose states of mind might otherwise be too difficult to prove.[106] From this perspective, strict criminal liability looks radically instrumental. The aim is not to internalize costs among responsible but faultless actors. Nor is it to facilitate agreement between prosecutors and defense attorneys. Rather the point of the insincere law is to lighten the prosecutor's burden in convicting and punishing *culpable* offenders.[107]

Whatever insincerity's value in civil or regulatory contexts, it generates profound problems in criminal law particularly when one considers the world of charging documents and their effect on the flow of information.[108] Because formal charging documents hew to the elements of the stated offense, the insincere statute that punishes someone "just" because of his position skews the information generated by a criminal prosecution. Even if the government suggests otherwise in

103. *Id.* at 1136–37.

104. *Id.* at 1135–36. *See also* Doron Teichman, *Convicting with Reasonable Doubt: An Evidentiary Theory of Criminal Law*, 93 NOTRE DAME L. REV. 757, 758 (2017) (arguing that graded statutes distribute sanctions according to the "degree of certainty" of wrongdoing).

105. A criminal statute typically describes the prohibited conduct (the *actus reus*) and mental state (the *mens rea*) that triggers criminal liability. A reduced or "low" mental state crime denotes a mental state of negligence or strict liability (which technically requires nothing more than a voluntary act), whereas a "high" mental state crime requires evidence of the offender's purpose or knowledge. *See generally* Benjamin Levin, *Mens Rea Reform and its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 493 (2019) (explaining *mens rea* as "the requirement that criminal conduct be accompanied by a 'bad mind' or guilty mental state").

106. "The state can lower the cost of proof, and thereby improve compliance, by redefining the content of a wrong." Gilbert & Sullivan, *supra* note 100, at 1136.

107. "By reducing the cost of proof, the insincere rule gives the state a credible threat of punishment against some infractions for which it was previously helpless." *Id.* at 1138.

108. Gilbert himself acknowledges sincerity's value: "Sincere rules have benefits. They make clear to regulated parties exactly what is expected of them, and they signal to a broader audience the preferences of the rule-maker." Gilbert, *supra* note 97, at 2193.

its press releases or sentencing briefs, the insincere crime misleads the public. Within the four corners of the charging document, the government fails to convey the true circumstances of the offense (*i.e.*, that the corporate officer acted culpably). And because it excludes allegations of a culpable mental state, it presents an incomplete and misleading portrayal of both the government's view of the offense, and of the degree of risk or harm underlying that offense.[109] Finally, because *some* citizens and government actors take the responsible corporate officer doctrine at face value, it enables charged offenders and their attorneys to plausibly deny culpable misconduct in subsequent media appearances and civil proceedings. These issues may not arise in all contexts, but in at least some, the insincere law threatens to sow confusion and undermine the public's ability to protect itself from pernicious harms and activities.[110] We might be willing to put up with these tradeoffs in some instances, but it is shocking we would welcome them in contexts where preserving the public safety is the paramount concern.

III. Charging: Where Information Gets Lost

Parts I and II recounted the federal government's prosecution of three of Purdue's top executives under the responsible corporate officer doctrine. Part II analyzed prior cases and explored competing explanations for the proliferation of criminal strict liability. Although the superficial justification might be the government's desire to expand criminal law's purview, the more plausible explanation appears to arise out of the "landing spot" and "insincere rule" theories. Prosecutors rely on crimes featuring reduced mental states[111] to punish those who have in fact engaged in more culpable behavior. These easy-to-prove crimes additionally provide convenient landing spots through which prosecutors can strike deals with defendants and their counsel.

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109. Gilbert also acknowledges some of insincerity's costs, in that he agrees they "send inaccurate signals . . . about the rule-makers' preferences." *Id.* at 2194. But insincere prosecutions do more than that. They send skewed signals not just about the rule or rule-maker, but also about the *enforcer's* preferences. And, as the Purdue case itself demonstrates, they may enable supervisory prosecutors (more likely political appointees) to suppress information gathered by investigators and line prosecutors (civil servants).

110. Although Gilbert and Sullivan cite several ways in which insincere laws can backfire (by for example, fueling overcompliance or overenforcement), they do not discuss the information effects of criminally charging a defendant under an insincere statute. For their discussion of insincerity's weaknesses, see Gilbert & Sullivan, *supra* note 100, at 1147–51.

111. On the differences between high and low mental state offenses, see *supra* note 105 and accompanying text.

Landing spots and insincere laws may be useful in some contexts, but they generate mixed signals. They confuse the public and weaken the public's oversight of its enforcement institutions. Moreover, criminal law's charging rules amplify these problems, encouraging the prosecutor to say *less* in the defendant's charging documents and to keep information that might otherwise inform the public firmly under wraps.

A. Charging and Grand Jury Secrecy Rules[112]

When the government charges a defendant criminally, those charges theoretically can communicate three categories of information to multiple audiences.[113] As discussed in the Introduction, the charges the government files should reveal pertinent *offense* information, and they can also reveal *strategic case* information and indirectly inform the public of information pertaining to the degree of *risk and potential harm* from certain activities.[114]

The charging document itself conveys information about who the offender is and the acts she is alleged to have committed. One might refer to this as *offense* information. The degree and specificity of offense information contained in the charging document hinge on two factors: the nature of the crime charged and whether the parties have reached agreement.

As both a practical and legal matter, federal prosecutors cannot mechanically disclose every aspect of their investigation in their charging documents or in the supplemental information they convey to the public. Rule 6(e) of the Federal Rules of Criminal Procedure prohibits federal prosecutors from indiscriminately revealing any "matter" before the grand jury.[115] Grand jury "matter" includes any materials

112. The account I lay out here assumes a simple criminal prosecution. In reality, white-collar prosecutions often take place against a backdrop of private lawsuits and regulatory enforcement proceedings. *See* Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. Rev. 1483, 1511 (2017) ("A wide range of federal administrative agencies settle the vast majority of their enforcement actions using civil consent decrees."). For additional discussion on concurrent proceedings and their effect on information flows, see Anthony O'Rourke, *Parallel Enforcement and Agency Interdependence*, 77 Md. L. Rev. 985, 991 (2018) ("From a due process standpoint, parallel enforcement deepens information asymmetries between defendants and prosecutors, and can generate new asymmetries between defendants and civil enforcers.").

113. On criminal law's multiple audiences, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625, 625 (1984).

114. For initial discussion of these concepts, see *supra* Introduction. There are, of course, other types of information we might want to communicate to the general public. For example, Stephanos Bibas has argued that improvements in aggregate statistical information can improve and empower the public's oversight of local prosecutors and their offices. *See* Bibas, *supra* note 95, at 989–90.

115. *See* Fed R. Crim. P. 6(e).

prosecutors have presented to the grand jury, as well as additional materials prosecutors have obtained pursuant to a grand jury's subpoena power.[116] Some of these materials may be unsealed or released to the public by court order once a case proceeds to trial; for the case that quickly settles, however, many of the materials designated "grand jury matter" will likely remain secret, except for the allegations included in the information and statement of facts included in or attached to a plea agreement.[117]

In many respects, the Federal Rules of Criminal Procedure encourage a degree of parsimony at the pleading stage. Rule 7(c) requires an information or indictment to be a "plain, concise, and definite written statement of the essential facts constituting the offense charged . . ."[118] If a charging document contains prejudicial information, the defendant may ask the court to "strike surplusage from the indictment or information."[119] On the other hand, if it fails to communicate the particulars of the offense, the court "may direct the government to file a bill of particulars."[120] Defendants who seek additional information prior to trial may seek a bill of particulars; offenders who quickly negotiate a desirable guilty plea will seek just the opposite, namely a concise information that reveals as little embarrassing misconduct as possible.

The Department's Justice Manual further narrows the scope of the prosecutor's public revelations. For example, the Manual provides that the prosecutor should not "include in an information [or indictment] charges that he/she cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient and admissible evidence at

116. Although prosecutors and government investigators are bound by the Rule's secrecy obligation, witnesses and their attorneys are not. *See* FED. R. CRIM. P. 6(e)(2). Although Rule 6(e)(2) neither binds witnesses nor their attorneys, prosecutors have other tools at their disposal to secure their silence. *See generally* R. Michael Cassidy, *Silencing Grand Jury Witnesses*, 91 IND. L.J. 823, 824 (2016).

117. "The Federal Rules of Criminal Procedure bar prosecutors from disclosing matters before a grand jury except in certain enumerated circumstances." O'Rourke, *supra* note 112, at 1033. Rule 6(e)(3)(E)(i) permits the court to authorize disclosure of any grand jury material "preliminarily to or in connection with a judicial proceeding[.]" FED. R. CRIM. P. 6(e)(3)(E)(i). The Rule also contains provisions that allow for the sharing of material with state prosecutors or other sovereigns whose laws may have been violated, or whose help is necessary to assist the government in enforcing federal criminal law. FED. R. CRIM. P. 6(e)(3)(E)(iv). Civil regulators may also receive materials, but only in those instances where they have demonstrated particularized need.

118. FED. R. CRIM. P. 7(c). To be constitutionally sufficient, the indictment or information must apprise the defendant of the crime alleged and be specific enough to protect him from double jeopardy. *See* Russell v. United States, 369 U.S. 749, 765–66 (1962).

119. FED. R. CRIM. P. 7(d).

120. FED. R. CRIM. P. 7(f).

trial."[121] Nor should she name uncharged third parties in the charging documents.[122] These rules reflect a series of norms that are both intertwined with grand jury secrecy and which enjoy a long and venerable history.[123] To protect the grand jury's wide authority to investigate crime, the process clothes it in secrecy.[124] That secrecy is necessary, among other reasons, to secure the integrity of ongoing investigations and proceedings; encourage witnesses to come forward by protecting them from intimidation; prevent the subornation of perjury among witnesses compelled to testify; and protect against prosecutorial abuse and the unfounded destruction of an individual target's reputation.[125]

Apart from these legal constraints, there are numerous policy reasons for saying so little. Aside from protecting witnesses and ongoing investigations, prosecutors rightly wish to avoid creating a "how to" manual for criminal offenders. The information they publicly reveal can unintentionally direct wrongdoing in one or another direction. As Professor Buell has observed, Machiavellian corporate managers "might also use the government's disclosures . . . as a roadmap for unlawful activities designed to evade legal sanction."[126] Thus, the legal constraints and prudential considerations often point in the same direction: when a defendant is willing to take a plea, saying less is a much safer proposition than saying more, and the Rules of Federal Criminal Procedure affirm this inclination.

The flip side of this equation is the long-term consequence of painting an incomplete and sometimes outright misleading portrait of corporate wrongdoing and its enforcement. In hindsight, no reasonable person would conclude that the public was sufficiently educated by the 2007 prosecution of Purdue Frederick and its three responsible officers. The Purdue Information, by design, left blurry multiple as-

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121. JUSTICE MANUAL, *supra* note 21, § 9.27-300 cmt.

122. *Id.* § 9-16.500 cmt.

123. . "'We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings' . . . '[I]f preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution.'" Rehberg v. Paulk, 566 U.S. 356, 374 (2012) (internal citations omitted).

124. It is because of this secrecy that courts have been willing to affirm the government's demand for information. *See, e.g.*, Trump v. Vance, 140 S. Ct. 2412, 2427 (2020) ("[The] longstanding rules of grand jury secrecy aim to prevent the very stigma the President anticipates.").

125. *See generally* United States v. Sells Eng'g, Inc., 463 U.S. 418, 423 (1983) (explaining that one of the grand jury's core functions is "protecting citizens against unfounded criminal prosecutions").

126. Buell, *supra* note 24, at 852.

pects of the "who, what, when, why and how" of the offense.[127] Moreover, the charging documents strongly implied that the *only* reason the three executives were charged was because they happened to be in charge during the relevant window of misbehavior.[128] According to later news reports regarding the preferences of career prosecutors who investigated the case, *that* inference may well have understated the executives' actual involvement and culpability.[129] Thus, the 2007 Information and its related guilty pleas reinforced a troubling information asymmetry: the parties, including the prosecutors, the pleading defendants and their attorneys, knew far more about the offense and its underlying conditions than the general public. And as we now know, this information asymmetry almost certainly contributed to a course of behavior that ultimately rendered society *worse* off.[130]

B. Procedural Postures and Information Gaps

The procedural posture of a case—when and how it pleads, whether the prosecutor seeks an indictment or instead files an information after reaching an agreement with a defendant—greatly affects information flows as well. Consider three different outcomes, each of which releases different amounts of *offense* information, *case* information and *harm and risk* information to the public.

- Option 1: Prosecutor charges the defendant in an indictment with the most serious charges she can prove beyond a reasonable doubt. The charge(s) are alleged in great detail, leading most observers to refer to the charging document as a "speaking indictment."[131] The defendant responds by vigorously challenging the prosecution and by filing motions and defending herself, up through and including a public trial.
- Option 2: Prosecutor charges the defendant in an indictment with the most serious charge she can prove beyond a reasonable doubt and the charges are described in detail. Several months or

127. *See supra* Part I.

128. *Id.*

129. *See supra* notes 40, 49 and accompanying text (citing news accounts of an internal prosecutor's memo which reportedly recommended felony charges).

130. For more on the behavior that occurred following the 2007 settlement, see *supra* note 32 and accompanying text.

131. A speaking indictment is one in which the charging instrument reveals more information than is necessary to place the defendant on notice of the crime with which he has been charged. In other words, it exceeds the "plain [and] concise . . . statement" of essential facts required by Rule 7(c). FED. R. CRIM. P. 7(c)(1). For discussion and criticism of speaking indictments, see Anthony S. Barkow & Beth George, *Prosecuting Political Defendants*, 44 GA. L. REV. 953, 1017 (2010) (observing in regard to speaking indictments that "the potential exists for abusive use of such allegations to send messages about the case to the public and the media").

years after the case has been filed, the prosecutor and defense quietly reach a deal whereby the defendant pleads to a lesser charge or to one of the less serious charges outlined in the indictment.[132]

- Option 3: Prosecutor negotiates a deal with the criminal target before any charges have been filed. After reaching an agreement, the prosecutor files an information setting forth a concise statement of the offense.

One need not be an expert in criminal adjudication to know that Option 1 provides the most information to the general public. A speaking indictment, followed by a robust adversarial process, promotes the dissemination of high-quality information regarding the alleged offense conduct, the government's stance, and its overall strategy in regard to the case. Simply put, hard-fought trials teach us something. The volume of information expands when the parties confront each other publicly and on the record.[133]

Now consider Option 2, the option that frequently features a "charge high, settle-for-less" dynamic, or what some derogatorily call prosecutorial overcharging.[134] Even here, the public receives a relatively robust description of alleged offense conduct, insofar as more serious charges theoretically require more a fulsome description of the facts comprising a given offense. If a defendant has been charged with the specific intent to defraud, for example, the government will need to allege facts indicating the defendant possessed that requisite state of mind. If the prosecutor withholds those facts, the defendant might file a motion to dismiss or seek a bill of particulars. Moreover, to the extent the government wishes to pressure the defendant into pleading guilty, it may decide either to charge the defendant in multiple counts or to include more accusatory detail in its indictment than is legally necessary. And to the extent the defendant challenges these details in court, either through filings that challenge the government's investigative process or the sufficiency of its legal claims, these challenges may shed additional light on the offense conduct, the government's investi-

132. This noisy charge/quiet settlement dynamic mirrors many civil suits, in which "so many lawsuits [begin] with allegations of grievous social harm but [end] with the legal equivalent of 'never mind[.]'" Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 870 (2007).

133. This is true in the civil context as well. *See* Shapira, *supra* note 24, at 1239 ("[T]rials produce more high-quality, publicly available information than disputes that settle early or are resolved in less public ways."). Shapira's observation explains why, in some instances, it might make more sense for a government enforcer to proceed civilly rather than pursuing criminal charges.

134. Wright & Miller, *supra* note 16, at 33 (defining overcharging as "the filing of charges with the expectation that defendants will trade excess charges for a guilty plea").

gation and strategic stance, and whatever underlying harm or risk might be involved.[135] In other words, insofar as "charging high" induces a fight, that fight ultimately conveys information to third party observers.

Still, Option 2 produces less information than Option 1. Once the defendant pleads guilty, the public loses the information-producing benefits of a trial and depends instead on whichever facts the defendant admits to in service of a guilty plea. And if the negotiated resolution leads to a charge that features a weaker and less informative mental state (*e.g.*, negligence instead of purposeful behavior), the facts the judge elicits during the plea proceeding will, by necessity, be a fraction of the information that would have been disclosed in the course of a vigorously fought trial. To put it another way, the scope and precision of the defendant's admission is shaped by the charges the parties select and agree upon. If the defendant pleads guilty to a crime whose *mens rea* element requires only a showing of negligence, he need not admit facts demonstrating he acted purposely, and he has little incentive to disclose those facts during his plea colloquy. By the same token, if he pleads guilty solely to a substantive crime, he needs not admit his membership in a conspiracy, much less identify his co-conspirators during that plea colloquy. The greater the divergence between the offense information collected in the prosecutor's file and the formal offense to which the offender agrees to plead guilty, the wider the information gap grows.[136]

Finally, consider Option 3, the case in which the government reaches agreement before it formally alleges *anything*. If it has opened a grand jury investigation, much of that investigation will remain secret and the evidence the government obtained and reviewed will remain inaccessible to the public. If the crime is a strict liability crime, the public will learn nothing about what the defendants knew or did not know, unless that information somehow finds its way into an agreed upon statement of facts or a witness leaks information to a journalist. Most importantly, the public will have no idea whether the defendant's negotiated disposition represents the parties' sincere and joint perspective of what occurred, or whether the disposition is sim-

135. Even if the intended audience is initially unsure which side to believe, the back and forth process itself conveys valuable information. In a related vein, corporations strategically convey information when they file protective civil suits in response to public criticism. *See* Kishanthi Parella, *Public Relations Litigation*, 72 VAND. L. REV. 1285, 1300 (2019).

136. To put it another way, the resolution of a criminal case can often behave like a confidential settlement term, inducing the defendant to plead while also suppressing information that might be of great value to the public. On confidential settlement terms and their potential externality effects on third parties, see Moss, *supra* note 132, at 872 n.26 (citing authorities).

ply a convenient landing spot. For crimes whose prosecutorial value stems primarily from conveying information to the public, this may be the worst of all outcomes.

C. *Sizing Up the Tradeoffs: The Difference Between Criminal and Civil Litigation*

One response to the foregoing might be to say criminal law's information tradeoffs, although unfortunate, are hardly unique. Those who study civil litigation are well-versed in the ways in which corporate defendants have subverted civil litigation's information-generation function by shunting disputes into confidential arbitration channels and demanding confidentiality agreements of settling plaintiffs.[137] What makes criminal law so different, one might ask?

The topic is too big to take on here, but the disparate baselines across criminal and civil contexts are worth highlighting.[138] First, whereas civil litigation's secrecy arises through contract or mutual agreement, *criminal* secrecy is often the product of a hard and fast legal rule.[139] Where the prosecutor and government investigators are concerned, nearly *everything* before the grand jury is secret, barring an applicable exception or court order.[140] The law itself encourages prosecutors to say far *less* in their initial charging documents than civil

137. *See generally* Moss, *supra* note 132; Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 542–43 (2011) ("Contractual provisions . . . tend to limit the flow of information to actors who would be entitled to receive that information under publicly sponsored rules of civil procedure."); Elizabeth Chamblee Burch, *CAFA's Impact on Litigation As a Public Good*, 29 CARDOZO L. REV. 2517, 2549 (2008) ("More often than not, aggregate settlement agreements include confidentiality provisions . . . [that] withhold information from the public that could be essential to informed decision-making, such as drugs' potential health effects.").

138. For an excellent treatment of some of the notable similarities between class action counsel and prosecutors and the implications of these similarities, see generally Russell M. Gold, *"Clientless" Lawyers*, 92 WASH. L. REV. 87 (2017) and Russell M. Gold, *"Clientless" Prosecutors*, 51 GA. L. REV. 693 (2017).

139. Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1091–92 (2014) (explaining the way in which criminal defendants are effectively precluded from engaging in formal investigation, unlike defendants in civil suits). Concededly, there are exceptions to this default. Criminal *trials* are of course public, as is the evidence they produce. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563 (1980). Nevertheless, given the infrequency of criminal trials, it difficult to see this exception as anything but further support for the claim that secrecy—and not disclosure—is more often the norm in criminal practice.

140. A litigant seeking access to grand jury transcripts ordinarily cannot obtain them unless the litigant establishes a compelling need necessary to avoid an injustice that sufficiently overrides the rule's secrecy default; even then, courts will proceed cautiously, lifting the veil of secrecy only to satisfy a narrowly constructed request. *See* Douglas Oil Co. of Cal. v. Petrol Stops N.W., 441 U.S. 211, 221–22 (1979) (quoting United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958)).

plaintiffs' attorneys are encouraged to say in regard to their filed complaints.[141] Civil plaintiffs who allege too little must worry that their bare bones complaint will be dismissed at an early stage of the case.[142] The criminal prosecutor, by contrast, is urged to be reticent, so as to avoid undue pressure on the defendant or embarrassment to an uncharged witnesses.

Finally, because federal criminal practice promotes and embraces secrecy, it plays a less salient role in criminal plea negotiations. In the civil context, the parties are well aware that they are contracting around a "secrecy premium".[143] By contrast, in the criminal context, the tradeoff is framed as one between certainty and punitiveness. The prosecutor gives up the opportunity to seek a more serious charge (and presumably, a harsher punishment) in exchange for the certainty of a conviction. *That* tradeoff is both salient and well-understood.[144] What is far less salient is the third-party information costs that arise out of a given guilty plea. For every criminal resolution it enters, the government agrees to keep certain information private. The less there is to prove, the less there is also to say in public charging documents. And whereas the prosecutor may intuitively grasp the expressive and deterrent costs that inhere in reduced punishment, she is far less likely to comprehend the subtler information costs that arise out of negotiated guilty pleas, much less the externalities these costs impose on a decentralized and ill-informed group of victims.

IV. Potential Remedies

It is beyond debate that settlements (civil or criminal) remove valuable information from the public domain. And it certainly is no secret that criminal plea bargaining is in need of reform.[145] The Purdue case highlights the additional roles charging documents and strict liability crimes play in undermining the government's production of informa-

141. *See supra* notes 118–20.

142. *See* Scott Dodson, *New Pleading, New Discovery*, 109 Mich. L. Rev. 53, 53–54 (2010) (explaining the effect of decisions in *Twombly* and *Iqbal* on the ability of pleadings to survive motions to dismiss for failure to state a claim upon which relief can be granted).

143. *See, e.g.*, Lahav & Burch, *supra* note 14; Resnik, *supra* note 14; Fiss, *supra* note 14; Hoffman & Lampmann, *supra* note 14; Gordon, *supra* note 14; Levmore & Fagan, *supra* note 14.

144. "Plea bargaining involves exchanging a calculated risk of conviction at trial for a sure but less severe conviction and sentence after plea." Bibas, *supra* note 96, at 2531. *See also* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1909 (1992) (describing standard tradeoff).

145. *See, e.g.*, Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 New Crim. L. Rev. 434 (2019); Bibas, *supra* note 19, at 1156–59; Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 Am. J. Crim. L. 223, 227 (2006).

tion. Legal limitations on what can and cannot be alleged in criminal charging documents, paired with crimes that function primarily as landing spots or insincere laws, generate dangerous deficits in knowledge. The public does not learn the specific details underlying an offense, and as a result, is in no position to exercise oversight over government prosecutors or the regulators we rely on to hold business entities and their executives in check. All of these harms reflect plea bargaining's drawbacks generally, but they pose remarkable dangers for a category of offenses that have been created and justified in the name of protecting *public welfare*.

Accordingly, it is useful to consider how we might ameliorate the information costs that arise in the prosecution of public welfare offenses. The following three options best reflect the concerns voiced throughout this Essay even though two of them are almost certainly non-starters.

A. Radical Transparency

One way to address the information deficits described in Parts II and III would be to radically increase criminal law's transparency for this singular category of cases, particularly in regard to charging decisions, grand jury investigations, and plea bargaining.

For example, instead of merely mandating "open file" discovery (the type of discovery process in which the prosecutor opens the contents of her "file" to the defense attorney), we might move to a "public open file" discovery system for public welfare cases. This would enable the public to view nearly everything in the prosecutor's files, from a Federal Bureau of Investigation (FBI) agent's interview memos to a prosecutor's charging discussions with her supervisors. In fact, were we in the mood for radical reform, we might roll back portions of Rule 6(e) of the Federal Rules of Criminal Procedure for public welfare cases, thereby removing the bar on releasing certain "grand jury matters" to the general public after cases have settled and investigations have concluded. The names of grand jurors and witnesses, as well as the grand jury deliberations themselves could still be kept secret, but transcripts, physical evidence, and documents would no longer be shrouded in secrecy.

I have no delusions that these suggestions would prevail, but it is an interesting thought experiment to imagine a federal criminal process that was radically more transparent and therefore more amenable to informed public inquiry. If these reforms were circumscribed and limited to misdemeanor strict liability offenses, they might cause some

prosecutors to shy away from charging them. But as I explain below, that might be more of a feature rather than a bug.

B. Incorporating Information Costs Into Prosecutorial Decision-Making

The second suggestion is more easily implemented and takes account of the ways in which public welfare offenses often straddle criminal and civil law systems. For the category of offenses where criminal punishment and civil litigation provide equally plausible responses, enforcers should explicitly consider the information-based costs of proceeding by way of a negotiated criminal disposition. If the information costs appear too high, prosecutors should consider shifting their enforcement power—and their resources—in the direction of federal or state civil enforcement agencies. In other words, if a civil response would result in the production and transmission of more high-quality information, the criminal prosecutor should yield to the civil enforcer.

For example, it would not be too difficult for a future Department of Justice to implement a policy within its Justice Manual, directing prosecutors on filing strict liability misdemeanor charges in certain types of cases to write a memo seeking approval and sign-off from the United States Attorney and to lay out the information costs of committing to such a course of action. The Justice Manual's guidance could go further, advising that if a proposed criminal misdemeanor settlement communicates *less* information to the public than a civil lawsuit or regulatory enforcement proceeding otherwise would, the government should strongly consider declining criminal charges and shift its remaining resources to civil enforcers.

The problem with this proposal is that it would not bind prosecutors to any course of action. They would write internal memos and seek multiple levels of approval, but there would be no guarantee that those memos or approvals would induce behavior that made the public better off. Nor would it ensure that civil enforcers were committed to ensuring the adequate production of valuable information.[146] Nevertheless, the mere fact that a prosecutor and her supervisors might be forced to grapple with information trade-offs and to document those discussions in writing would be valuable insofar as it reminded the Department of criminal law's information-production function.

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146. For more on the information costs that have accrued within DOJ *civil* settlements, see Jacob Elberg, *Health Care Fraud Means Never Having to Say You're Sorry*, 96 WASH. L. REV. (forthcoming 2021).

C. Eliminating the Responsible Corporate Officer Doctrine

Elimination is admittedly the most radical of the three possibilities discussed here and will almost certainly be dismissed out of hand by most readers.[147] Nevertheless, it *is* worth asking what utility we gain from a strict-liability misdemeanor offense that transmits muted, if not outright inaccurate, signals.[148] What did the public learn from the prosecutions of Purdue's three executive officers? Could the government have obtained the same fine under a civil lawsuit that disclosed substantially more information but rendered the same degree of incapacitation? More broadly, might we be better off if we removed or at least limited the number of insincere laws within our criminal codes? Would the disappearance of particularly convenient landing spots force prosecutors to say, one way or another, whether they intend to pursue serious charges against serious offenders? More importantly, might we then place greater emphasis on (and develop greater support for) our civil enforcement mechanisms?[149]

Even if one is loath to eliminate the RCO, the analysis described in this Essay demonstrates good reasons hitting the pause button on its expansion. Over the years, commentators have agitated for broader criminal liability for high-level corporate executives.[150] Several of these arguments take account of the real difficulties prosecutors encounter in proving intentional misconduct.[151] Other proposals appear to be fueled by cultural and political concerns with runaway executive

147. Indeed, some may view this proposal as benefitting corporate executives. My intention, however, is exactly the opposite. The insincere rules and landing spots described in this Essay benefit corporate executives as much they benefit line prosecutors.

148. The concerns I raise here are distinct from the overcriminalization arguments some have lodged in recent years. *See* Levin, *supra* note 105, at 498–504 (summarizing conventional arguments against overcriminalization and strict criminal liability).

149. *Cf.* Samuel W. Buell, *The Responsibility Gap in Corporate Crime*, 12 CRIM. L. & PHIL. 471, 483 (2018) (observing that the earlier recitations of the doctrine "have a closer analogue in civil actions of the modern regulatory state, such as Securities and Exchange Commission enforcement proceedings, than in present-day criminal prosecutions").

150. *See, e.g.*, Nelson, *supra* note 62, at 1502–03 (describing ways in which high-level executives elude responsibility); Rena Steinzor, *White-Collar Reset: The DOJ's Yates Memo and Its Potential to Protect Health, Safety, and the Environment*, 7 WAKE FOREST J. L. & POL'Y 39, 42 (2017).

151. "The strongest rationale for the doctrine does not lie in the *activity* sought to be regulated, but in the elusiveness of the *defendant* sought to be prosecuted." Amiad Kushner, *Applying the Responsible Corporate Officer Doctrine Outside the Public Welfare Context*, 93 J. CRIM. L. & CRIMINOLOGY 681, 683 (2003) (emphasis in original). *See also* Levin, *supra* note 105, at 524–25 (citing arguments against reforms that would heighten *mens rea* requirements and effectively shield corporate executives from accountability).

compensation and growing social inequality.[152] Whatever the impetus, consensus has formed in some quarters that society would be better off if Congress expanded executive criminal liability and did so by eliminating apparently insuperable mental state requirements. Whether the basis for this "new" liability is vicarious strict liability or some watered-down theory of negligence is largely irrelevant; the idea is to expand criminal law's reach and to ensure that a sufficient number of executives find themselves in hot water the next time a scandal occurs.[153]

Criminal philosophers have long warned against the panic-driven use of criminal law to punish offenders whose individual culpability has been unproven.[154] When we punish people solely because of their position, we deprive criminal law of its moral message. This much has already been articulated, and on multiple occasions.[155] But the RCO doctrine threatens even greater, and more intractable consequences if untethered from its current constraints. Instead of expanding liability to those who failed to prevent wrongdoing, it risks becoming a convenient mechanism for prosecutors to nominally punish those actually engaged in conventional forms of wrongdoing. Moreover, because of criminal law's structural preference for secrecy, the strict liability resolution ironically bars the public from learning whether an executive has been punished because of her position or because her culpable misconduct.[156] Writ large, once can see how the expansion of RCO-style liability may do more far more harm than good. Employed as a substitute for conventional felony offenses, the skews signals and

152. *See* Zachary Henderson, *Harnessing Law and Economics to Disincentivize Corporate Misbehavior*, 105 CORNELL L. REV. ONLINE 141, 143 (2020); Levin, *supra* note 105, at 526–27 (citing strict liability's redistributive justification).

153. Levin, *supra* note 105, at 547–48 (describing and critiquing this "levelling up" instinct).

154. "The [responsible corporate officer] doctrine is very difficult to justify if one believes that retributive desert is at least a necessary condition of criminal punishment." Kenneth W. Simons, *Can Strict Criminal Liability for Responsible Corporate Officers be Justified by the Duty to Use Extraordinary Care?*, 12 CRIM. L. & PHIL. 439, 454 (2018). *See also* Buell, *supra* note 149, at 485–88 (arguing that a more extensive theory of executive officer liability would require rule-makers to devise a theory of "reckless or negligent management" that is too generalized to define in a way that accords with familiar notions of fault and corporate risk-taking).

155. *See generally* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453, 458 (1997) (arguing that criminal law's credibility and effectiveness "is undermined by a distribution of liability that deviates from community perceptions of just desert").

156. To that end, RCO prosecutions fail to promote the healthy norm-building messages Professors Robinson and Darley envision for the criminal justice system. For example, writing of pollution, Robinson and Darley contend that "[t]he publicity surrounding an adjudication can teach all people about the consequences of certain kinds of polluting and, therefore, that it ought to be avoided." *Id.* at 474. If the polluter is punished in a manner that reflects his culpability, Robinson and Darley's assertion withstands inquiry. If the polluter instead enters a guilty plea that deprives the public of relevant information the this norm-building exercise falls short.

swallows information. The public learns less about a given offense and its representation of underlying harm; when the bad facts finally surface several years later, the public's trust in government institutions erodes just a bit more. Thus, at its worst, the RCO contributes to the public's waning faith in the government's ability to combat white-collar crime. Given its predictable outcome, it is puzzling that society remains so attracted to a device almost certain to produce suboptimal results.

V. Conclusion

Criminal prosecution generates incomplete and sometimes misleading information. Remedying criminal law's information deficits is no easy task. As the Purdue prosecution itself demonstrates, information gaps are embedded in a complex system that features interdependent substantive and procedural components. There is no simple fix here and certainly no easy way to unravel rules that do more than suppress information. Nevertheless, prosecutors *can* recognize criminal law's information costs and consider those costs when cases straddle the line between criminal and civil liability. Some behaviors merit criminal prosecution regardless of a prosecution's attendant information costs. More importantly, the more serious the allegation, the more detailed the prosecutor's charging instrument *should* be. The government cannot easily demonstrate complex, intentional frauds or quid quo pro briberies in a single-page information or indictment.

The responsible corporate officer doctrine presents a unique dilemma. Its offenses are easy to prove but the prosecutor's reliance on it is likely to suppress relevant information. Unless the government uses its remaining power and discretion to say more than it needs to, it is impossible to know from the face of a charging instrument whether a responsible corporate officer has been charged solely because she occupies a position of responsibility, or because the evidence suggests more serious wrongdoing that prosecutors disinclined to test at trial. In a world in which prosecutorial discretion has increasingly come under question, it is difficult to defend a system that generates so much ambiguity, particularly for a category of crimes that were specifically designed to protect public welfare. Accordingly, when the next Purdue surfaces (and it most certainly will), prosecutors would do well to learn from this episode. They can take a more punitive turn if the evidence warrants it, or they can cede enforcement to civil prosecutors, regulators and private attorneys. But they should think carefully before they offer another executive a sanitized misdemeanor guilty plea that is simply too good to be true.