RESPONSIBLE SHARES AND SHARED RESPONSIBILITY: IN DEFENSE OF RESPONSIBLE CORPORATE OFFICER LIABILITY
Amy J. Sepinwall, J.D., Ph.D.
Assistant Professor
Department of Legal Studies and Business Ethics
Rm 642, Huntsman Hall
The Wharton School
University of Pennsylvania
3730 Walnut St, 19104
Email: sepin@wharton.upenn.edu
Tel: 215-898-7691

Dear Law and Humanities Workshop Participant,

What follows is an early draft of a paper that seeks to defend the responsible corporate officer doctrine, a doctrine that imposes criminal liability upon corporate executives for crimes of their corporation that they neither committed nor culpably failed to prevent. The paper cobbles together various strands of prior research and aims to extend them to this new context.

The paper proceeds in four parts, the first two of which engage with the existing literature, while the latter two advance the paper’s positive account. While I welcome comments on all parts of the paper, I will be especially grateful for comments on the paper’s positive account. More specifically, I am especially concerned about an attempt to justify the responsible corporate officer doctrine by way of an extended analogy to the project of joint parenting. I think I can make good on the claim that shared responsibility is appropriate for those who parent together (i.e., parents bear joint and several liability for the ways in which either of them screws up their kid), though you will let me know if/why you remain unconvinced. The (greater) problem arises in seeking to transpose the insights from the joint parenting context to the context of the corporation. I vaguely attempt to acknowledge the difficulties in the transposition, and adapt the account accordingly, but I still worry that the two contexts are so dissimilar as to make the argument – which is intended to do a good deal of work – positively bizarre.

A second concern goes to my focus on the RCO doctrine altogether. That doctrine is a relatively minor one – not all that frequently applied, and nowhere near as prominently discussed in the literature as is, say, the prosecution and punishment of corporations. At the same time, the paper contains a good deal of theoretical work, and I fear that embedding that theoretical work within the context of a minor doctrine may cause the theoretical contributions here to be largely overlooked. So I would be grateful for suggestions about reframing or repackaging with an eye to bolstering wider interest in the project.

I will end my outpouring of anxiety there and leave you to discover the paper’s remaining deficiencies ©. I very much look forward to your comments and suggestions.

All best,
Amy
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ABSTRACT

When a corporation commits a crime, whom may we hold criminally liable? One obvious set of defendants consists of the individuals who perpetrated the crime on the corporation’s behalf. But according to the responsible corporate officer (RCO) doctrine – a doctrine that is growing more widespread – the state may also prosecute and punish those corporate executives who, although perhaps lacking “consciousness of wrongdoing,” nonetheless have “a responsible share in the furtherance of the transaction which the statute outlaws.” In other words, the RCO doctrine imposes criminal liability on the executive who need not have participated in her corporation’s crime; nor need she even have known about it at the time of its occurrence. Just so long as the executive in question had the authority to prevent the crime and failed to do so, she may be targeted in a criminal suit.

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

I shall contend that existing justifications of the RCO doctrine do not help, as they seek to defend the doctrine on the basis of its deterrent value, or its ability to ensnare corporate executives against whom there is insufficient evidence to convict on a direct liability offense. In this way, these justifications fail to establish that the officers whom the RCO was designed to target – i.e., those who did not participate in the offense -- in fact deserve prosecution and punishment. A burgeoning philosophical literature on shared responsibility, while promising in spirit, is ultimately unavailing too, I shall argue. What is needed is a novel defense of the doctrine – one that elucidates the blameworthy features of the corporate officer that ground her criminal liability – and that is what this paper aims to provide.