

The Responsible Corporate Officer, the DeCosters, and the Opioid Epidemic: Why Prison Sentences Based on the RCO Doctrine Do Not Violate Due Process

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I. INTRODUCTION

The opioid epidemic catapulted corporate criminal wrongdoing to the forefront of public consciousness in an unprecedented way. Now, as society pleads for opioid manufacturers and distributors to recognize how they have caused a public health emergency, prosecutors and the court systems are left to work with the Responsible Corporate Officer (RCO) doctrine—a doctrine on unsteady ground.

This Note explores the legal arguments raised by opponents of the RCO doctrine and why those arguments are not grounded in law. This Note explains how a recent 8th Circuit

case, *United States v. DeCoster*,¹ addressed the due process issues within the RCO and how the 8th Circuit has made the underpinnings of the doctrine clear. Because of *DeCoster*, future prosecutors should be able to move forward without threat of the doctrine falling out from underneath of them. Part II lays out how the opioid crisis arose and outlines the first court cases in the early 2000s against Purdue Pharma executives. Part III discusses the doctrine and how the 8th Circuit analyzed due process concerns raised by the defendants. Part III also considers the erroneous arguments the defendants raised and makes the case for the prosecutions of Big Pharma. Finally, Part IV recommends prosecutors move forward with these cases, the Supreme Court uphold the doctrine if challenged, and Congress codify the responsible corporate officer doctrine.

II. BACKGROUND

A. The Opioid Epidemic

According to the American Society of Addiction Medicine (ASAM), opioids are “a class of drugs that . . . interact with opioid receptors on nerve cells in the brain and nervous system to produce pleasurable effects and relieve pain.”² While pain management may be a central tenant of wellness in the modern era, it has not always been a primary goal of medicine. Until recently, the medical field has treated pain as an “existential experience” and a side effect of aging.³ In the first parts of the 20th century, healthcare providers used opioids sparingly.⁴ Still, in the 1970s and 1980s, specialists recognized opioids often brought great relief to dying cancer patients suffering from intense pain.⁵ Starting in the 1980s, there was a push in the medical community to further address the pain itself as a condition worth treating.⁶

Around this time, the World Health Organization (WHO) created guidelines for treating patients with cancer pain, including opioids as a treatment method.⁷ Perhaps more importantly, the WHO recognized pain treatment as a universal human right in these guidelines for the first time.⁸ A groundswell focusing on pain management grew as the American Pain Society (APS) campaigned for healthcare providers to recognize pain as the fifth vital sign.⁹ The campaign gained legitimacy and by the late 1990s, “it was

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

2. *Opioid Addiction 2016 Facts & Figures*, AM. SOC’Y ADDICTION MED., <https://www.asam.org/docs/default-source/advocacy/opioid-addiction-disease-facts-figures.pdf> [https://perma.cc/7TCP-KYEH]. Opioids include heroin, synthetic opioids such as fentanyl, and pain relievers available legally by prescription, such as oxycodone (OxyContin®), hydrocodone (Vicodin®), codeine, morphine, and many others. *Id.* They are all chemically related. *Id.*

3. D. Andrew Tompkins et al., *Providing Chronic Pain Management in the “Fifth Vital Sign” Era: Historical and Treatment Perspectives on a Modern-Day Medical Dilemma*, 173 *DRUG & ALCOHOL DEPENDENCE* S11, S11 (2017).

4. *Id.* at S13.

5. *Id.*

6. Sarah DeWeerd, *Tracing the US Opioid Crisis to Its Roots*, 573 *NATURE* S10, S10 (2019).

7. Tompkins et al., *supra* note 3, at S13.

8. *Id.*

9. *Id.* The other four vital signs are body temperature, pulse rate, respiration rate, and blood pressure. *Vital Signs (Body Temperature, Pulse Rate, Respiration Rate, Blood Pressure)*, *JOHNS HOPKINS MED.*, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/vital-signs-body-temperature-pulse-rate->

generally accepted that all patients are entitled to the assessment and treatment of pain”¹⁰

The medical community’s assumptions about the addictive nature of opioids have fluctuated greatly since the early 20th century.¹¹ At least until the 1980s, healthcare providers hesitantly prescribed opioids because of their addictive nature.¹² That assumption unraveled, albeit incorrectly, over the next two decades.¹³ In 1980, the *New England Journal of Medicine* printed a one-paragraph “Letter to the Editor,” noting less than one percent of patients treated with narcotics subsequently became addicted.¹⁴ The letter read:

Recently, we examined our current files to determine the incidence of narcotic addiction in 39,946 hospitalized medical patients who were monitored consecutively. Although there were 11,882 patients who received at least one narcotic preparation, there were only four cases of reasonably well documented addiction in patients who had no history of addiction. The addiction was considered major in only one instance. The drugs implicated were meperidine in two patients, Percodan in one, and hydromorphone in one. We conclude that despite widespread use of narcotic drugs in hospitals, the development of addiction is rare in medical patients with no history of addiction.¹⁵

That statistic became a widely cited figure in the medical field, and the assumption went without criticism or further review.¹⁶ By 1986, APS concluded opioid maintenance therapy was “safe and humane.”¹⁷ While concerns about opioid addiction lingered, those fears were largely put to rest by two studies, but those studies lacked sufficient evidence to support these claims.¹⁸

The business opportunity to capitalize on opioid treatment for patient pain grew in tandem with the belief opioids were generally nonaddictive. In 1996, Purdue Pharmaceuticals introduced Oxycontin, a now-infamous actor in the opioid crisis.¹⁹ From 1996, when Purdue first introduced the drug, to 2001, Purdue held more than 40 all-expense-paid conferences for more than 5,000 healthcare providers, where executives

respiration-rate-blood-pressure [https://perma.cc/AP7B-63NW].

10. Tompkins et al., *supra* note 3, at S13.

11. *See id.* at S12–14 (describing how medical professionals’ views on the addictive nature of opioids have ebbed and flowed).

12. *Id.* at S13–14.

13. *See* Richard D. deShazo et al., *Backstories on the US Opioid Epidemic. Good Intentions Gone Bad, an Industry Gone Rogue, and Watch Dogs Gone to Sleep*, 131 *AM. J. MED.* 595, 595–98 (2018) (explaining how medical professionals began to treat opioids as less addictive than they are).

14. Letter from Jane Porter & Hershel Jick, *Bos. Collaborative Drug Surveillance Program B.U. Med. Ctr.*, to Ed., *New Eng. J. Med.*, 302 *NEW ENG. J. MED.* 123, 123 (Jan. 10, 1980), <https://www.nejm.org/doi/10.1056/NEJM198001103020221> [https://perma.cc/PMS3-57Y9].

15. *Id.* (footnotes omitted).

16. deShazo et al., *supra* note 13, at 596.

17. *Id.* (citing Russell K. Portenoy & Kathleen M. Foley, *Chronic Use of Opioid Analgesics in Nonmalignant Pain: Report of 38 Cases*, 25 *PAIN* 171 (1986)).

18. Tompkins et al., *supra* note 3, at S14. “It is likely, given the data available, that most patients exposed to opioids do not become drug abusers. Further experience is needed to evaluate this hypothesis.” Portenoy & Foley, *supra* note 17, at 183.

19. Tompkins et al., *supra* note 3, at S14.

trained the healthcare professionals.²⁰ Purdue's efforts were extraordinary; the company created profiles on *individual* physicians, detailing their opioid prescribing habits, so they could target doctors prescribing higher levels of opioids for pain management.²¹ The company aggressively marketed the drug, spending \$200 million in 2001 on these efforts alone.²² A feature of OxyContin's marketing was a "systematic effort to minimize the risk of addiction in the use of opioids for the treatment of chronic non-cancer-related pain."²³ From 1999 to 2014, opioid prescriptions grew almost fourfold.²⁴

The crisis has come in three waves, each individually distinct.²⁵ As the number of opioid prescriptions increased throughout the 1990s, so did the number of deaths related to these prescription overdoses, accounting for the first wave of the crisis.²⁶ Still, opioid producers continued their aggressive marketing techniques as the new millennium began and the number of opioids "exploded throughout the country."²⁷ By 2010, the second wave of the epidemic arrived, this time featuring an increase in heroin overdoses.²⁸

Public consciousness of the problem unfolding in communities around the country grew.²⁹ For instance, in November 2012, the *Los Angeles Times* published a series on prescription drug overdoses.³⁰ The third and final wave began in 2013 with drastic increases in deaths from synthetic opioids, such as fentanyl.³¹ Amid an ongoing crisis, the federal government officially declared the opioid epidemic to be a public health emergency on October 16, 2017.³² Currently, public health officials estimate 128 people die in America every day from opioid overdoses.³³

B. 2007 Purdue Pharma Case

While the opioid epidemic is a public health crisis of an unprecedented scale,³⁴ the associated legal issues began to arise over a decade ago.³⁵ In 2007, Purdue Pharmaceuticals

20. Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 221 (2009).

21. *Id.* at 222.

22. *Id.* at 221.

23. *Id.* at 223.

24. Lisa Esposito, *Opioid Epidemic: What Brought Us Here?*, U.S. NEWS & WORLD REP. (Jan. 24, 2018, 1:54 PM), <https://health.usnews.com/health-care/patient-advice/articles/2018-01-24/opioid-epidemic-what-brought-us-here>.

25. *Opioid Overdose*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 19, 2020), <https://www.cdc.gov/drugoverdose/epidemic/index.html> [<https://perma.cc/TG84-S9E3>].

26. *Id.*

27. Esposito, *supra* note 24.

28. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 25.

29. Esposito, *supra* note 24.

30. Scott Glover et al., *Legal Drugs, Deadly Outcomes*, L.A. TIMES (Nov. 11, 2012), <https://graphics.latimes.com/prescription-drugs-part-one/> [<https://perma.cc/G3LH-D8AV>].

31. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 25.

32. Mark R. Jones et al., *A Brief History of the Opioid Epidemic and Strategies for Pain Medicine*, 7 PAIN & THERAPY 13, 13 (2018).

33. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 25.

34. *Opioid Crisis*, HEALTH RES. & SERVS. ADMIN. (July 2020), <https://www.hrsa.gov/opioids> [<https://perma.cc/6Y8R-KAGF>].

35. 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> [<https://perma.cc/3ZNY-9RSX>].

and three of its executives pled guilty for misleading regulators, doctors, and patients about OxyContin's addictive nature.³⁶ The company agreed to pay roughly \$600 million in fines.³⁷ The three executives involved in the lawsuit agreed to pay more than \$34 million in individual fines after pleading guilty as individuals to misbranding—though they were not implicated on the felony charges.³⁸ Both the company and its executives acknowledged the company frequently downplayed the drug's addictive nature, stating they “accept responsibility for those past misstatements and regret they were made.”³⁹ None of the executives faced jailtime.⁴⁰ One of the prosecutors has since said more serious charges for executives “would [have sent] a message that drug industry officials faced being held to ‘a higher standard,’” though executives never saw those charges.⁴¹

C. Post-2007

It is unclear whether these 2007 fines deterred the conduct fueling the latter half of the opioid crisis. Over the five years following the 2007 settlement,⁴² the number of OxyContin pills sent to West Virginia outnumbered West Virginia's population 433:1.⁴³ Between 2006 and 2012, pharmaceutical companies distributed 76 billion oxycodone and hydrocodone pills throughout the United States.⁴⁴ In places like Floyd County, Kentucky, there were 163 pills per person distributed every year from 2006 to 2014.⁴⁵ In the five years

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Michael Friedman, Paul Goldenheim, and Howard Udell, the three executives found guilty along with the Purdue Corporation, were sentenced to 400 hours of community service, fined \$5000, and placed on probation for three years. Jane Kim, *Staying Responsible Within the Healthcare Industry in the Era of the Responsible Corporate Officer Doctrine*, 14 *IND. HEALTH L. REV.* 129, 147–48 (2017). There was immediate criticism of the Department of Justice's criminal division for seeking what many saw as inadequate consequences. See *Evaluating the Propriety and Adequacy of the OxyContin Criminal Settlement: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 24 (2007) (statement of Dr. Sidney Wolfe, Dir., Health Rsch. Grp. of Pub. Citizen), <https://www.govinfo.gov/content/pkg/CHRG-110shrg40884/html/CHRG-110shrg40884.htm> [<https://perma.cc/L88W-WK63>] (“Why are there no manslaughter charges, no jail sentences, and such relatively low amounts of financial penalties? Is it perhaps because Purdue has the money to hire Rudy Giuliani and the best white-collar criminal defense lawyers to minimize the damage to itself and its executives? If this does not represent a double standard of justice, what does?”). See also 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-oxycotin.html> [<https://perma.cc/3AJJ-MPSQ>] (“It would have been a turning point . . . It would have sent a message to the entire drug industry”).

41. Barry Meier, *Why Drug Company Executives Haven't Really Seen Justice for Their Role in the Opioid Crisis*, *TIME* (June 15, 2018, 2:32 PM), <https://time.com/5311359/purdue-pharma-oxycotin-lawsuit-opioid-crisis/> [<https://perma.cc/GNZ5-EWWJ>].

42. *Statement of United States Attorney John Brownlee on the Guilty Plea of the Purdue Frederick Company and Its Executives for Illegally Misbranding OxyContin*, U.S. ATT'Y W. DIST. VA. (May 10, 2007), <https://www.ctnewsjunkie.com/upload/2016/02/usdoj-purdue-guilty-plea-5-10-2007.pdf> [<https://perma.cc/UPR2-BP98>].

43. Meier, *supra* note 40.

44. Scott Higham et al., *76 Billion Opioid Pills: Newly Released Federal Data Unmasks the Epidemic*, *WASH. POST* (July 16, 2019, 7:19 PM), https://www.washingtonpost.com/investigations/76-billion-opioid-pills-newly-released-federal-data-unmasks-the-epidemic/2019/07/16/5f29fd62-a73e-11e9-86dd-d7f0e60391e9_story.html [<https://perma.cc/DF74-W3N9>].

45. *Drilling into the DEA's Pain Pill Database*, *WASH. POST* (Jan. 17, 2020),

after the Purdue settlement, roughly 100,000 Americans died from opioid overdoses.⁴⁶ Given these statistics, members of the public justifiably wonder whether there will be adequate consequences for the actors responsible for the epidemic's unprecedented growth.⁴⁷ After all, Purdue admitted wrongdoing in 2007 and still continued to fuel the epidemic.

States are currently pursuing a wide variety of civil and criminal charges against the various corporations responsible for such over-distribution.⁴⁸ Three pharmaceutical distribution companies—McKesson, Cardinal Health, and AmerisourceBergan—have announced a \$260 million settlement with two Ohio counties, which allow the companies to avoid a federal trial.⁴⁹ Additionally, Purdue Pharmaceuticals settled a case with Oklahoma in March 2019 for \$270 million.⁵⁰ Purdue Pharma has since filed for bankruptcy.⁵¹ So far, Purdue has avoided a messy public trial.

Of course, the financial penalties Purdue and its peers now face are important for retribution. The victims of the opioid epidemic, in many ways, require substantial financial assistance to remedy the wrongs done by pharmaceutical companies; in 2018 alone, the opioid epidemic is estimated to have cost society a staggering \$179 billion.⁵² Most of those costs are associated with deaths caused by overdose, and experts estimate roughly \$72.6 billion of the \$179 billion accounts for lost potential earnings.⁵³ Healthcare costs for those suffering from the addiction compose the second-largest segment of these costs, amounting to \$60.4 billion.⁵⁴

Perhaps these are the more obvious costs associated with the epidemic, but they are

https://www.washingtonpost.com/graphics/2019/investigations/dea-pain-pill-database/?itid=lk_interstitial_manual_20 [<https://perma.cc/3L93-F45B>].

46. *Overdose Death Rates*, NAT'L INSTS. HEALTH (Mar. 10, 2020), <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates> [<https://perma.cc/J9Q8-R4HP>].

47. *See generally infra* Section II.D (describing some public reaction).

48. *See* German Lopez, *The Thousands of Lawsuits Against Opioid Companies, Explained*, VOX (Oct. 17, 2019, 6:10 PM), <https://www.vox.com/policy-and-politics/2017/6/7/15724054/opioid-epidemic-lawsuits-purdue-oxycotin> (listing examples of the different lawsuits drug manufacturers are currently facing for their roles in the opioid epidemic).

49. Kevin McCoy, *Drug Companies Are Paying Hundreds of Millions of Dollars to Settle Opioid Lawsuits. Spend It to Treat Addiction, Experts Say*, USA TODAY (Oct. 22, 2019, 12:34 PM), <https://www.usatoday.com/story/news/2019/10/22/opioid-settlements-mckesson-teva-could-fund-addiction-treatment/4060147002/> [<https://perma.cc/7R7Z-F6NE>].

50. Wayne Drash & Nadia Kounang, *Purdue Pharma to Pay \$270 Million to Settle Historic Oklahoma Opioid Lawsuit*, CNN (Mar. 26, 2019, 5:30 PM), <https://www.cnn.com/2019/03/26/health/purdue-pharma-oklahoma-opioid-lawsuit-settlement-bn/index.html> [<https://perma.cc/69LS-RFYJ>]. Roughly \$102.5 million is intended to be used to establish a national addiction treatment and research center. *Id.* Some of the settlement will also provide addiction treatment and medications to the center for five years. *Id.*

51. Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, N.Y. TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html> [<https://perma.cc/X4MD-YX2Q>]. The move, an attempt to stay more than 2,600 lawsuits facing the company, is “expected to be fiercely contested.” *Id.* The Sackler family would give up ownership of the company, pay roughly \$3 billion to plaintiffs, and the company would be restricted into a public benefit trust. *Id.*

52. Selena Simmons-Duffin, *The Real Cost of the Opioid Epidemic: An Estimated \$179 Billion in Just 1 Year*, NPR (Oct. 24, 2019, 4:25 PM), <https://www.npr.org/sections/health-shots/2019/10/24/773148861/calculating-the-real-costs-of-the-opioid-epidemic> [<https://perma.cc/HL2H-FX3G>].

53. *Id.*

54. *Id.*

not the sole costs. For instance, society bears the costs of lost productivity (\$26.5 billion), criminal justice intervention (\$10.9 billion), and child and family assistance and education (\$9 billion).⁵⁵ Over a four-year period, the epidemic has cost the U.S. economy at least \$631 billion.⁵⁶ Now, with millions of people in the United States misusing opioids, it will take potentially billions of dollars to provide adequate treatment.⁵⁷

D. Looking for Justice

Still, some are unsatisfied with the financial penalties and settled civil suits.⁵⁸ One issue with civil settlements is, without criminal or civil trials, many of the opportunities for transparency go unseized.⁵⁹ A public trial would allow for states to test legal arguments and evidence in courtrooms, and the public could see pharmaceutical executives be held accountable. As one policy analyst stated:

The persistence of secrecy is one of the most under-discussed and crucial aspects of the opioid crisis. No litigation could ever end the opioid epidemic or make up for the hideous suffering of millions of families—but a public trial could at least expose the nature and extent of the tactics that made this epidemic possible, while pushing the industry toward greater accountability and long-needed fundamental change.⁶⁰

It seems, at least, the public wants more.⁶¹ David Armstrong, a drug industry reporter with ProPublica told *NPR*, “The narrative is clearly shifting on this story . . . People want some sort of reckoning, some sort of accounting.”⁶² Still, many believe there is no reason to be optimistic justice will follow.⁶³ Shortly after new, proposed settlements were announced, Dr. James Hamblin, a staff writer for *The Atlantic*, wrote the following in an article titled, “The Opioid Reckoning Will Not Be Just”:

As in 2007, this new proposed settlement amounts to yet another fine. It is something that future CEOs can factor in as a line item. It is not a criminal prosecution. It is not a moral reckoning.

For the millions of people affected, in every American community, there may be

55. *Id.*

56. Rachel Siegel, *Opioid Crisis Cost U.S. Economy at Least \$631 Billion, Study Finds*, WASH. POST (Oct. 17, 2019, 10:16 AM), <https://www.washingtonpost.com/business/2019/10/17/opioid-crisis-cost-us-economy-least-billion-study-finds/> [https://perma.cc/G7DX-96T5].

57. See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2018 NATIONAL SURVEY ON DRUG USE AND HEALTH 1 (2019) (stating that in 2018, 10.3 million people misused opioids).

58. Megan J. Wolff, *Opioid Settlements Have a Big Downside*, CNN (Oct. 22, 2019, 9:09 AM), <https://www.cnn.com/2019/10/22/opinions/opioid-settlements-purdue-pharma-transparency-matters/index.html> [https://perma.cc/986L-4PZ8].

59. *Id.*

60. *Id.*

61. Brian Mann, *Opioid Litigation Brings Company Secrets into the Public Eye*, NPR (Mar. 13, 2019, 5:01 AM), <https://www.npr.org/sections/health-shots/2019/03/13/702665619/opioid-litigation-brings-company-secrets-into-the-public-eye> [https://perma.cc/3T58-4KQY].

62. *Id.*

63. James Hamblin, *The Opioid Reckoning Will Not Be Just*, ATLANTIC (Aug. 29, 2019), <https://www.theatlantic.com/health/archive/2019/08/opioid-justice/597064/> [https://perma.cc/U9CP-UJZT].

no true sense of justice. The mandate to stem the ongoing disaster is self-evident. The job of the courts and regulatory apparatus is to help prevent future disaster. This will not happen when penalties are meted out such that loss of life is treated as a cost of doing business. The Justice Department could impose a criminal framework on concealing information that led to thousands of deaths. There could be consequences—short of capital punishment, but beyond surrendering profits—that make it clear to current and future sellers of dangerous products that this can never happen again.⁶⁴

That outrage has continued after the DOJ officially announced a \$8.3 billion settlement with Purdue Pharmaceuticals.⁶⁵ It is the largest settlement ever reached with a pharmaceutical company in U.S. history.⁶⁶ As a part of the settlement, the company will admit to defrauding the United States and violating the anti-kickback statute.⁶⁷ Massachusetts Attorney General Maura Healey said the DOJ “failed” with this settlement.⁶⁸ Still, these civil penalties do not preclude criminal charges.⁶⁹

Perhaps no person or group of people draws criticism quite like the Sackler family, the founders of Purdue Pharmaceuticals.⁷⁰ That criticism has largely been based not only on the exorbitant amount of profits Oxycontin made for the family,⁷¹ but just how early on in Oxycontin’s lifespan Purdue Pharmaceuticals knew about its addictive nature.⁷² The company first learned about “significant abuse” of the drug in 1996; the Sacklers themselves received reports detailing of its abuse.⁷³

This time around, however, the public has voiced more outrage. Protesters took to the steps of the Metropolitan Museum of Art in New York City, which has an entire wing named after the family, demanding the museum to reject funding from the Sacklers.⁷⁴ The

64. *Id.*

65. Susannah Luthi, *DOJ Announces \$8B-Plus Settlement with OxyContin Maker*, POLITICO (Oct. 27, 2020, 4:40 PM), <https://www.politico.com/news/2020/10/21/doj-purdue-opioid-settlement-430775> [<https://perma.cc/KV69-FXAZ>].

66. 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> [<https://perma.cc/ZG8F-8SPX>].

67. *Id.*

68. Maura Healey (@MassAGO), TWITTER (Oct. 21, 2020, 10:16 AM), https://twitter.com/MassAGO/status/1318934203443052544?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1318934203443052544%7Ctwgr%5Eshare_3&ref_url=https%3A%2F%2Fwww.bbc.com%2Fnews%2Fbusiness-54636002 (“DOJ failed. Justice in this case requires exposing the truth and holding the perpetrators accountable, not rushing a settlement to beat an election. I am not done with Purdue and the Sacklers, and I will never sell out the families who have been calling for justice for so long.”).

69. Jan Hoffman & Katie Benner, *Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/21/health/purdue-opioids-criminal-charges.html> [<https://perma.cc/3ZFF-XN7G>].

70. Joanna Walters, *Meet the Sacklers: The Family Feuding Over Blame for the Opioid Crisis*, GUARDIAN (Feb. 13, 2018, 11:11 AM), <https://www.theguardian.com/us-news/2018/feb/13/meet-the-sacklers-the-family-feuding-over-blame-for-the-opioid-crisis> [<https://perma.cc/6N3W-FNW8>].

71. Forbes evaluates the Sackler family fortune at \$13 billion. *America’s Richest Families 2016*, FORBES (June 29, 2016), <https://www.forbes.com/profile/sackler/#71b4185f5d63> [<https://perma.cc/QM4V-JEEZ>].

72. See Meier, *supra* note 40.

73. *Id.*

74. Colin Moynihan, *Opioid Protest at Met Museum Targets Donors Connected to OxyContin*, N.Y. TIMES (Mar. 10, 2018), <https://www.nytimes.com/2018/03/10/us/met-museum-sackler-protest.html>

London Portrait Gallery rejected a £1 million grant in the wake of the opioid epidemic.⁷⁵ The Sacklers have become not only a symbol of the opioid epidemic but for greed; among the litigious chaos surrounding the opioid epidemic, the New York Attorney General alleges the Sackler family transferred \$1 billion over a series of transactions involving Swiss bank accounts from Purdue Pharmaceuticals to the family members.⁷⁶

III. ANALYSIS

History suggests financial penalties alone will not sufficiently deter companies like Purdue Pharmaceuticals from engaging in wildly injurious behavior.⁷⁷ The doctrine described below allows courts to hold responsible corporate officers accountable for their failures to prevent violations of statutes like the FDCA.⁷⁸ But, when the doctrine first developed, corporate officers were fined or sentenced to probation as opposed to imprisonment.⁷⁹ Then, one Eighth Circuit case asked, for the first time, if corporate officers could face jailtime.⁸⁰ This Analysis focuses on the development of the doctrine and the constitutionality of prison sentences based on RCO convictions.

A. *Responsible Corporate Officer Doctrine*

The Responsible Corporate Officer (RCO) doctrine is a doctrine unique to white collar crime. It is understood that white collar crime costs society billions of dollars per year.⁸¹ Generally, there are three ways corporate officers and agents are held liable for crimes transpiring during their employment.⁸² First, the person who commits a criminal act can be held personally liable if that person was acting in an official or representative capacity.⁸³ This is perhaps the most obvious way corporate officers or agents are held responsible for crimes. Second, corporate officers or agents may be held accountable under principles of accomplice liability, namely, through the aiding and abetting doctrine.⁸⁴ This Note will focus on the third way corporate agents and officers can be held criminally liable: the RCO doctrine.

The RCO doctrine is defined as follows: “[o]ne who has control over activities that

[<https://perma.cc/J7YJ-9B3B>].

75. Nadeem Badshah & Joanna Walters, *National Portrait Gallery Drops £1m Grant from Sackler Family*, *GUARDIAN* (Mar. 19, 2019, 2:54 PM), <https://www.theguardian.com/artanddesign/2019/mar/19/national-portrait-gallery-turns-down-grant-from-sackler-family-oxycotin> [<https://perma.cc/EVL9-4SVD>].

76. Richard Gonzales, *New York AG Says Sacklers Transferred \$1B from Pharma Accounts to Themselves*, *NPR* (Sept. 13, 2019, 6:10 PM), <https://www.npr.org/2019/09/13/760688886/new-york-ag-says-sacklers-transferred-millions-from-pharma-accounts-to-themselve> [<https://perma.cc/2C6M-TQBG>].

77. *See supra* Section II.C.

78. *See infra* Section III.A.

79. *See infra* Section III.A.

80. *See infra* Section III.B.

81. Susan Deehan, *White-Collar Crime Costs Between \$300 to \$600 Billion a Year*, *ACTIONABLE INTEL. TECH., INC.* (July 9, 2015, 3:37 PM), <https://aitcfis.com/white-collar-crime-costs-between-300-to-600-billion-a-year/> [<https://perma.cc/U63Z-AC8F>]. According to these estimates by the FBI and the American Association of Certified Fraud Examiners, financial losses from white collar crime are estimated to cost society between \$300 and \$600 billion per year. *Id.*

82. JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS* 247 (6th ed. 2016).

83. *Id.*

84. *Id.*

lead to a subordinate's violation of a statute may incur liability for failure to fulfill the duty, commensurate with his position of authority in the corporate hierarchy, to prevent or correct such violations."⁸⁵ This doctrine provides for what some believe is an anomaly in criminal law: responsible corporate officers are criminally sanctioned even if that person did not commit the actus reus of the crime and had no personal knowledge of misconduct committed by subordinates.⁸⁶ For these reasons, critics have penned the RCO doctrine as the "crime of doing nothing."⁸⁷

The doctrine has grown out of two important cases, *United States v. Dotterweich*⁸⁸ and *United States v. Park*.⁸⁹ In *Dotterweich*, which the Supreme Court decided 32 years before *Park*, the president and general manager of Buffalo Pharmacal Company, Inc., were charged with violations of the Federal Food, Drug, and Cosmetic Act (FDCA).⁹⁰ The company, which was also charged with violating the statute, repackaged pharmaceuticals under its own labels before selling them in interstate commerce.⁹¹ The FDCA prohibited companies or their agents from introducing altered or misbranded drugs into interstate commerce, with violators made guilty of misdemeanors.⁹² While the president did not explicitly know the drugs had been shipped in interstate commerce,⁹³ the jury still found the defendant guilty and the Supreme Court upheld this decision.⁹⁴

In *Park*, the president of a large national food chain, Acme Markets, Inc., was charged, alongside the company, with violating the FDCA by allowing food shipments "to be exposed to rodent contamination."⁹⁵ While the president conceded he was responsible for the entire operation of the company, sanitary conditions were one of the responsibilities he assigned to "dependable subordinates."⁹⁶ Violations in both cases constituted misdemeanors.⁹⁷ To support its ruling against the president who did not have direct knowledge of the violations, the Court in *Park* stated:

Dotterweich and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission—and this is by no means necessarily confined to a single corporate agent or employee—the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures

85. Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 VAND. L. REV. 1337, 1342 (1982).

86. O'SULLIVAN, *supra* note 82, at 248.

87. Brent J. Gurney et al., *The Crime of Doing Nothing: Strict Liability for Corporate Officers Under the FDCA*, WILMERHALE (May 1, 2007), <https://www.wilmerhale.com/en/insights/publications/the-crime-of-doing-nothing-strict-liability-for-corporate-officers-under-the-fdca-may-2007> [<https://perma.cc/Q2D6-TXJG>].

88. *See generally* *United States v. Dotterweich*, 320 U.S. 277 (1943) (holding that Section 301 of the Federal Food, Drug, and Cosmetic Act does not require mens rea to be proven at trial).

89. *See generally* *United States v. Park*, 421 U.S. 658 (1975) (holding that a single instruction to a jury may not be judged in isolation but must be viewed in the context of the overall charge).

90. *Dotterweich*, 320 U.S. at 278.

91. *Id.*

92. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 333 (2019).

93. *Dotterweich*, 320 U.S. at 286 (Murphy, J., dissenting).

94. *Id.* at 285.

95. *United States v. Park*, 421 U.S. 658, 658 (1975).

96. *Id.* at 664.

97. *Id.* at 682 (Stewart, J., dissenting); *Dotterweich*, 320 U.S. at 278.

that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.⁹⁸

The Court explains the rationale and scope of the RCO doctrine: Not only do corporate officers have the responsibility to *follow* the law, but they must also *prevent* others' misconduct because the public deserves a certain level of vigilance from those in positions of authority within these companies. Since the Court decided *Dotterweich* and *Park*, the RCO doctrine now extends to various public welfare laws, including laws regulating food and drugs.⁹⁹

B. United States v. DeCoster

While the RCO doctrine has existed since the early 1990s, it was not until 2016 that a case explicitly asked the court to overrule the RCO doctrine, in part, because the court faced a new question about whether it could impose prison sentences based on RCO convictions.¹⁰⁰ *United States v. DeCoster*¹⁰¹ begins in Iowa. Austin “Jack” DeCoster and Peter DeCoster, a father-son pair, managed Quality Egg, LLC.¹⁰² Quality Egg operated six farm sites, spanning 73 barns filled with five million egg-laying hens.¹⁰³ The company held an additional 24 barns with chickens too young to lay eggs and several processing plants, where the company cleaned, packed, and shipped its eggs.¹⁰⁴ Jack DeCoster owned the company; Peter served as the chief operating officer.¹⁰⁵ Jack owned facilities outside the state as well, including egg production companies in Maine.¹⁰⁶

In 2008, the Maine facilities tested positive for salmonella, but the DeCosters later eliminated the infection from the facilities by following their hired consultants' recommendations.¹⁰⁷ The DeCosters also tested the Iowa chickens and facilities for salmonella.¹⁰⁸ Occasionally, the tests came back positive, with the positive results increasing in frequency from 2006 through the fall of 2010.¹⁰⁹ Prior to the United States Department of Agriculture's (USDA) adoption of a new egg safety rule in 2010,¹¹⁰ the

98. *Park*, 421 U.S. at 672.

99. 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 (2012) (quoting Martin Petrin, *Circumscribing the “Prosecutor’s Ticket to Tag the Elite”—A Critique of the Responsible Corporate Officer Doctrine*, TEMP. L. REV. 283, 289–90 (2011)).

100. Jennifer M. Thomas, *Update on the DeCosters’ Case: Here Comes the U.S. Supreme Court (Maybe)*, 28 WESTLAW J. PROD. LIAB. 12, at *2 (2017).

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

102. *Id.* at 629.

103. *Id.*

104. *Id.* at 629–30.

105. *Id.* at 629.

106. *DeCoster*, 828 F.3d at 630.

107. *Id.*

108. *Id.*

109. *Id.*

110. Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation, 74

company was not legally obligated to conduct salmonella tests on eggs, even when the eggs were housed in an environment testing positive for the infection.¹¹¹ While the DeCosters' eggs and hens tested positive for salmonella on multiple occasions, the DeCosters never diverted eggs from the market prior to the USDA's implementation of a new rule.¹¹²

In 2010, roughly 56,000 Americans fell ill with salmonella after eating contaminated eggs.¹¹³ Officials later determined the outbreak originated at Quality Egg's facilities, and the company recalled eggs in response.¹¹⁴ Over the course of roughly two weeks in August 2010, the FDA inspected Quality Egg operations in Iowa.¹¹⁵ Its findings included:

live and dead rodents and frogs in the laying areas, feed areas, convey[or] belts, and outside the buildings . . . holes in the walls and baseboards of the feed and laying buildings . . . some rodent traps were broken, and others had dead rodents in them . . . [manure piled to the rafters] had pushed a screen out of the door which allowed rodents into the building[, and finally,] . . . employees not wearing or changing protective clothing and not cleaning or sanitizing equipment.¹¹⁶

Soon after, the FDA concluded, "Quality Egg had failed to comply with its written plans for biosecurity and salmonella prevention."¹¹⁷ A criminal investigation followed.¹¹⁸ The investigation revealed plenty:

Quality Egg previously had falsified records about food safety measures and had lied to auditors for several years about pest control measures and sanitation practices. Although its food safety plan stated that Quality Egg performed flock testing to identify and control salmonella, no flock testing was ever done. Quality Egg employees had also bribed a USDA inspector in 2010 to release eggs for sale which had been retained or "red tagged" for failing to meet minimum quality grade standards. Quality Egg also misled state regulators and retail customers by changing the packing dates of its eggs and selling the misbranded eggs into interstate commerce.¹¹⁹

Both DeCosters pled guilty to misdemeanors as the responsible corporate officers under the FDCA.¹²⁰ The court held the DeCosters' safety and sanitation procedures were "egregious," they knew about the bribed USDA inspectors, and they ignored the tests indicating their environments tested positive for salmonella by not testing the eggs in that environment.¹²¹ The district court sentenced both DeCosters to three months in prison and

Fed. Reg. 33,030, 33,031 (July 9, 2009) (codified at 21 C.F.R. §§ 16, 118 (2009)).

111. *DeCoster*, 828 F.3d at 630.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *DeCoster*, 828 F.3d at 630.

117. *Id.*

118. *Id.* at 631.

119. *Id.*

120. *Id.* Interestingly, the FDCA is also the Act under which the RCO doctrine was developed in *Dotterweich*. *United States v. Dotterweich*, 320 U.S. 277, 281–83 (1943).

121. *DeCoster*, 828 F.3d at 631.

imposed \$100,000 in fines.¹²²

On appeal, the DeCosters argued to the Eighth Circuit their prison sentences were unconstitutional because imposing prison sentences based on the RCO doctrine violated both the Due Process Clause and the 8th Amendment's prohibition on cruel and unusual punishment.¹²³ The DeCosters noted the district court parted with the long-standing practice of assigning only fines to responsible corporate officers convicted under the RCO doctrine.¹²⁴ The Supreme Court previously suggested "the imposition of severe penalties, especially a felony conviction, for the commission of a morally innocent act may violate the due process clause of the fifth amendment."¹²⁵ The DeCosters' argument rested on the premise they were sentenced not based on their actions,¹²⁶ but on their vicarious liability, and vicarious liability cannot constitutionally allow for imprisonment under the RCO doctrine.¹²⁷ Further, they alleged, because the FDCA is a strict liability offense, imposing a severe penalty violated due process.¹²⁸

The Eighth Circuit disagreed.¹²⁹ The court upheld the prison sentences even though the DeCosters themselves were not performing the acts leading to USDA violations.¹³⁰ First, the court concluded the defendants were not sentenced based on vicarious liability, but rather, the sentences were based on the DeCosters' own negligent conduct.¹³¹ The dissent took issue with the DeCosters' "supposed negligence," ruling they lacked a guilty mind, and, therefore, the sentences were due process violations.¹³² Still, in a concurring opinion, Judge Ray Gruender explicitly stated convictions under *Park* require proof of negligence.¹³³ By requiring prosecutors to prove negligence, as opposed to convicting through vicarious liability, courts avoid the due process issues raised by defendants like the DeCosters.¹³⁴ Secondly, the court held public welfare offenses that eliminate a mens rea requirement do not offend due process when the penalty, like the three-month imprisonment imposed here, is "relatively small," and "the conviction does not gravely damage the defendant's reputation, and congressional intent supports the imposition of the penalty."¹³⁵

After the Eighth Circuit's ruling in *DeCoster*, there was hope the Supreme Court would consider the case and either overturn or, at the very least, provide guidance to lower courts on its application.¹³⁶ The DeCosters' were perhaps the first party to explicitly ask

122. *Id.*

123. Appellants' Opening Brief at 23, 44, *United States v. DeCoster*, 828 F.3d 626 (8th Cir. 2016), 2015 WL 4504795.

124. *Id.* at 25.

125. *Id.* at 27–28 (quoting *United States v. Enochs*, 857 F.2d 491, 494 n.2 (8th Cir. 1988)).

126. The lower court accepted that the DeCosters did not have actual knowledge of the regulation violations. *DeCoster*, 828 F.3d at 631.

127. Appellants' Opening Brief, *supra* note 123, at 23.

128. *DeCoster*, 828 F.3d at 633.

129. *Id.*

130. *Id.*

131. *Id.* at 636.

132. *Id.* at 642 (Beam, J., dissenting).

133. *DeCoster*, 828 F.3d at 636–38 (Gruender, J., concurring).

134. *Id.* at 638.

135. *Id.* at 633 (citing *Staples v. United States*, 511 U.S. 600, 617 (1994)).

136. Sean Toomey, *U.S. Supreme Court's Decision Not to Take Certiorari in United States v. DeCoster Is a Reminder to the Food and Drug Industries to Be Mindful of the Park Doctrine*, LIKSOW & LEWIS: THE ENERGY

the Supreme Court to overrule *Park* and *Dotterweich*.¹³⁷ In the petition for certiorari, the DeCosters argued imprisoning supervisors for strict liability offenses violates due process.¹³⁸ Other corporations took interest; in fact, Purdue Pharma enlisted the Washington Legal Foundation to help weaken the RCO doctrine.¹³⁹ The organization wrote to the Supreme Court, urging it to reconsider the doctrine it categorized as a “peculiar anomaly in criminal law.”¹⁴⁰ Still, the Supreme Court denied cert.¹⁴¹

Surely, as experts agree, the DeCosters were not the only parties disappointed the Supreme Court let the RCO doctrine live another day.¹⁴² In response to the denial of certiorari, Michael W. Peregrine of McDermott, Will & Emery LLP stated:

This is not good news for the boards of pharma, medical devices and other companies subject to FDCA and similar public welfare laws. Neither is it good news for their supervisory and other management level employees, whose anxiety levels may spike when they become aware of the decision and its implications.¹⁴³

The *DeCoster* case is good law in the 8th Circuit, and the RCO doctrine has survived what was perhaps its first explicit challenge.

C. The Erroneous Due Process Arguments in *DeCoster*

The DeCosters put forth two erroneous arguments against prison sentences resulting from RCO doctrine-based misdemeanor convictions.¹⁴⁴

1. Strict Liability Crimes Do Not Violate the Due Process Clause

First, the DeCosters posit that it is unconstitutional for a strict liability offense to result in imprisonment.¹⁴⁵ The defense makes this argument in connection with its second

L. BLOG (Aug. 8, 2017), <https://www.theenergylawblog.com/2017/08/articles/government-investigations-white-collar-defense/u-s-supreme-courts-decision-not-to-take-certiorari-in-united-states-v-decoster-is-a-reminder-to-the-food-and-drug-industries-to-be-mindful-of-the-park-doctrine/> [https://perma.cc/J6M8-L6GZ].

137. Thomas, *supra* note 100, at *2.

138. Petition for a Writ of Certiorari at 1–4, *DeCoster v. United States*, 137 S. Ct. 2160 (2017) (No. 16-877), 2017 WL 105831.

139. Lee Fang, *OxyContin Maker Quietly Worked to Weaken Legal Doctrine That Could Lead to Jail Time for Executives*, INTERCEPT (Feb. 23, 2018, 9:13 AM), <https://theintercept.com/2018/02/23/purdue-pharma-oxycontin-opioid-crisis/> [https://perma.cc/Q26L-QB9Z].

140. Brief of Washington Legal Foundation as *Amici Curiae* in Support of Petitioners, *DeCoster v. United States*, 137 S. Ct. 2160 (2017) (No. 16-877), 2017 WL 3328142, at *6.

141. *DeCoster v. United States*, 137 S. Ct. 2160 (2017).

142. Michael W. Peregrine, *The “Responsible Corporate Officer Doctrine” Survives to Perplex Corporate Boards*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 5, 2017), <https://corpgov.law.harvard.edu/2017/07/05/the-responsible-corporate-officer-doctrine-survives-to-perplex-corporate-boards/> [https://perma.cc/ZBP7-2MQ4].

143. *Id.*

144. See discussion *supra* Section III.B (explaining the DeCosters’ due process arguments based on vicarious and strict liability).

145. See Petition for Writ of Certiorari, *supra* note 138, at 23 (“Due process bars the government from imprisoning a person for an offense predicated on his unknowing failure to prevent a company from committing a strict liability violation.”).

argument, described below.¹⁴⁶ Strict liability offenses, though, exist throughout our criminal justice system. For instance, statutory rape is considered a strict liability crime, often punishable by imprisonment.¹⁴⁷ The apparent logic behind strict liability crimes is that some things are so dangerous, the prosecution is not required to prove any mental state; rather, the act alone will support a guilty verdict. And this logic extends to the case at hand; in the DeCosters' case, their inaction resulted in a salmonella outbreak affecting 56,000 people.¹⁴⁸

2. *The RCO Doctrine Is Not Based on Vicarious Liability*

In front of the Eighth Circuit, the DeCosters argued they faced vicarious liability, and imprisonment based on this liability would be unconstitutional.¹⁴⁹ Vicarious liability is liability “based solely on a relationship between the two persons. Indirect or imputed legal responsibility for acts of another; for example, the liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent.”¹⁵⁰

The Eighth Circuit correctly held RCO doctrine prosecutions are not based on vicarious liability.¹⁵¹ Rather, the responsible corporate officer is held accountable for his inaction and “his own failure to prevent or remedy the conditions which gave rise to the charges against him.”¹⁵² The RCO doctrine is predicated on the idea that these officers have a responsibility to oversee their companies in an effective manner, and when violations happen on their watch, it is because they have failed to exercise proper care.¹⁵³ The Eighth Circuit explicitly makes it clear they were not sentencing the defendants based on their positions in the company, but rather, their inaction.¹⁵⁴ While it may seem harsh, these corporate officers are in the best positions to prevent these outbreaks.

This view of the RCO doctrine is well-established under *Park* and *Dotterweich*. In *Park*, the Court held “the Act punishes ‘neglect where the law requires care, or inaction where it imposes a duty.’”¹⁵⁵ Further, the *Park* court stated:

The concept of a ‘responsible relationship’ to, or a ‘responsible share’ in, a violation of the Act indeed imports some measure of blameworthiness; but it is equally clear that the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. The failure thus to fulfill the

146. *Id.*

147. MODEL PENAL CODE § 213.1 (AM. L. INST., 1962). There are many other examples of strict liability crimes. For instance, in Utah, selling alcohol is a strict liability offense. *See generally* Miller v. United States, 104 P.3d 1202 (Utah 2004) (holding Dram Shop Act imposed strict liability). Other common examples include torts involving wild animals, fireworks, or the environment.

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

149. *Id.* at 632.

150. *Vicarious Liability*, BLACK’S LAW DICTIONARY (11th ed. 2019).

151. *DeCoster*, 828 F.3d at 633.

152. *Id.* at 633 (citing United States v. Park, 421 U.S. 658, 675 (1975) (quotation marks omitted)).

153. *Supra* Section III.A.

154. *DeCoster*, 828 F.3d at 633.

155. *Park*, 421 U.S. at 659 (quoting *Morissette v. United States*, 342 U.S. 246, 255 (1952)).

duty imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link. The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability.¹⁵⁶

This language specifically shows the Court has tied RCO liability to blameworthiness based on a failure to act as opposed to a defendant's position in the company. Further, in *Park*, the Court established an exception: when it is "objectively impossible" for a responsible corporate officer to prevent violations from occurring, that officer will not be held liable.¹⁵⁷ If the *Park* court held the RCO doctrine is predicated on vicarious liability, there would not be an exception.

IV. RECOMMENDATION

The RCO doctrine is a tool prosecutors can use to charge corporate officials whose conduct and leadership prioritize profits over public health.¹⁵⁸ Still, the doctrine alone cannot bring justice without additional support, namely resources for prosecutors, a steady Supreme Court view of the RCO, and if needed, a codified version of the doctrine.

A. Prosecutors Need Resources

One of the obvious contributions to the opioid epidemic is so few pharmaceutical executives have been criminally sanctioned for their roles in the opioid epidemic.¹⁵⁹ While many allege politics is the reason executives have not been criminally charged,¹⁶⁰ it is also possible the extensive resources needed to prosecute these cases are preventing progress. Not only is the pure expansiveness of the conduct overwhelming for any particular prosecutor's office, but pharmaceutical companies like Purdue can afford to fight long, arduous, and expensive legal battles.¹⁶¹ Therefore, Congress should be setting aside funds to help prosecute these cases at a state level, especially in light of the DOJ's decision to settle with Purdue Pharmaceuticals.¹⁶²

156. *Id.* at 673–74.

157. *Id.* at 673.

158. *Supra* Section III.A.

159. *Supra* Part II.

160. See Brian Mann, *As Drugmakers Face Opioid Lawsuits, Some Ask: 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> [<https://perma.cc/3DTN-LPRL>] ("At the 11th hour, top political appointees at the Department of Justice blocked those indictments and as a result a much weaker set of plea agreements was entered into with these Purdue executives that really amounted to a slap of the wrist."). The 2006 Purdue Pharmaceuticals lawsuit has many experts wringing their hands, asking why higher charges were never pursued against the three Purdue executives who eventually pleaded guilty to misdemeanors. *Id.* The prosecutor, John Brownlee, has since stated he wanted to pursue felony charges, but efforts fizzled after a meeting between political appointees at the DOJ and Purdue's legal team. Meier, *supra* note 41.

161. Purdue Pharmaceuticals is a privately held company, and the Sackler family, who owns the company, is believed to be worth roughly \$13 billion. *America's Richest Families Net Worth*, *supra* note 71. For context, the Sackler family has a higher net worth than the famous Rockefeller family and just less than the Busch family of the Anheuser-Busch company. Kerry A. Dolan, *Billion-Dollar Clans: America's 25 Richest Families 2016*, FORBES (June 29, 2016, 9:00 AM), <https://www.forbes.com/sites/kerryadolan/2016/06/29/billion-dollar-clans-americas-25-richest-families-2016/#3b35c7e232f5> [<https://perma.cc/Q58V-LNJJ>].

162. Luthi, *supra* note 65.

There *has* been some effort to hold big pharmaceutical companies responsible for the opioid epidemic, in part, by imposing criminal liability. Three Purdue executives were convicted in 2007 for fraudulent misdemeanors, and the corporation was convicted for felony misbranding.¹⁶³ In the Oklahoma case against Johnson & Johnson, Oklahoma Attorney General Mike Hunter charged the corporation (though none of its executives) as a public nuisance.¹⁶⁴ Other statutes provide prosecutors with the ability to charge a corporation and its agents with crimes; those charges include the Food, Drug, and Cosmetic Act, 21 U.S.C. § 331, anti-kickback statutes, and mail and wire fraud statutes.¹⁶⁵

Still, the public's overarching concern with the pharmaceutical companies that helped create the opioid epidemic is that without the threat of imprisonment, big Pharma executives will remain undeterred by the weak financial incentives currently imposed by society, and these company executives will continue their current behavior. As Keith Humphreys, a Professor of Psychiatry at Stanford University and a faculty member at Stanford Law School, stated, "If no Sacklers end up behind bars, an entire class of people will continue to feel that writing a check is the worst thing that will happen to them ever no [matter] what they do."¹⁶⁶ Prosecutors should act aggressively to prosecute high-level individuals within these corporations.

B. The Supreme Court Should Uphold the RCO Doctrine If It Is Challenged

There are no legal arguments to justify overturning the RCO doctrine.¹⁶⁷ While the doctrine does face criticism, those criticisms are largely policy-based; for instance, one critic suggests the RCO imposes too-high costs on companies because corporations are already risk-averse, and therefore, there is no evidence imposing additional costs on companies and their executives achieves a deterrent purpose.¹⁶⁸ Additionally, opponents argue this places additional costs on the government, as the government is then expending its resources to prosecute individuals.¹⁶⁹ While there are naturally costs associated with additional compliance programs for pharmaceutical companies and more prosecutions from the government, society has already faced a great financial burden from the cost of the opioid epidemic.¹⁷⁰ It is hardly efficient for society to bear the costs of the opioid epidemic when corporate executives acted in ways harming the general public, especially

163. Kim, *supra* note 40, at 147.

164. Jackie Fortiér, *Pain Meds as Public Nuisance? Oklahoma Tests a Legal Strategy Against Opioid Maker*, KAISER HEALTH NEWS (July 17, 2019), <https://khn.org/news/listen-opioid-trial-in-oklahoma-wraps-up/> [<https://perma.cc/D42S-LFWZ>].

165. Andrew E. Lelling, *Corporate Accountability for the Opioid Epidemic*, 66 DEP'T JUST. J. FED. L. & PRAC. 159, 161–64 (2018).

166. Keith Humphreys (@KeithNHumphreys), TWITTER (Aug. 27, 2019, 7:14 PM), <https://twitter.com/KeithNHumphreys/status/1166504370311032832?s=20>. Humphreys "served as a drug policy advisor in the Bush and Obama White Houses, and currently advises many state and national governments on how scientific evidence can inform policies regarding addiction and other psychiatric disorders. His [writing at the Washington Post] focuses mainly on addiction, drug policy, mental health and the criminal justice system." Keith Humphreys, WASH. POST, <https://www.washingtonpost.com/people/keith-humphreys/> [<https://perma.cc/794R-NJMF>].

167. *Supra* Section III.C.

168. Petrin, *supra* note 99, at 309–11.

169. *Id.* at 311.

170. *Supra* Section II.C.

when companies are in the best positions to understand their own inner workings and the conditions that lead to an opioid epidemic type of threat. Further, these are policy arguments, not arguments grounded in the current legal landscape.

In many ways, the criminal case against Purdue Pharmaceutical executives parallels the case against the DeCosters. The pharmaceutical executives, like the DeCosters, are responsible corporate officers of their respective companies. Their actions have had deadly consequences and perhaps irreparably changed public health. Therefore, the courts should continue to uphold the RCO doctrine.

C. Congress Should Codify the RCO Doctrine

After the Eighth Circuit decided *United States v. DeCoster*, some commentators believed the Supreme Court would take up the case and potentially gut the RCO doctrine.¹⁷¹ The Supreme Court's decision to deny cert left some uncertainty surrounding the doctrine.¹⁷² Of course, because there are relatively few cases prosecuted under the RCO, there are few opportunities for the Supreme Court to provide any interpretive guidance. It is plausible the Purdue Pharmaceuticals executives would, if convicted under the doctrine, appeal it to the Supreme Court simply because they have the resources to do so.

For that very reason, it is vital for Congress to codify the doctrine to ensure the Purdue executives are not the defendants who will overturn the RCO's existence. The Sackler family knows what is at stake with the existence of the Responsible Corporate Officer Doctrine; indeed, the family financed an attempt to unravel the RCO doctrine.¹⁷³

Multiple politicians have proposed legislation to hold executives criminally responsible in this arena and functionally codify the RCO, at least with respect to the opioid epidemic.¹⁷⁴ During a presidential primary debate, Democratic presidential candidates addressed the issue with varying levels of generalities.¹⁷⁵ For instance, California Sen. Kamala Harris has said:

I will tell you as a former prosecutor, I do think of this as being a matter of justice and accountability because they are nothing more than some high-level dope dealers. They should be held accountable. This is a matter of justice. And so as president of the United States, I would ensure that the United States Department of Justice understands that you want to deal with who is really a criminal. Let's end mass incarceration and end that failed war on drugs, and let's go after these pharmaceutical companies for what they've been doing to destroy our country

171. *Supra* Part III.

172. *Supra* Part III.

173. Fang, *supra* note 139. The Washington Legal Foundation—the organization Purdue Pharmaceuticals provided funding to that later wrote the Supreme Court to urge the Court to abandon the doctrine—has been repeatedly accused of undermining efforts to ensure public health and safety. *Id.* The organization has previously briefed the Supreme Court in favor of the tobacco industry.

174. *See infra* notes 168–172 and accompanying text.

175. *See* German Lopez, *The Democratic Candidates Are Calling for Locking up Opioid Executives*, VOX (Oct. 15, 2019, 10:30 PM), <https://www.vox.com/policy-and-politics/2019/10/15/20916684/democratic-debate-opioid-epidemic-executives-sacklers> (listing how the various presidential candidates answered a question on whether they believe opioid executives should go to prison).

and states like Ohio.¹⁷⁶

Additionally, Sen. Bernie Sanders, along with Reps. Ro Khanna and Tulsi Gabbard, have introduced the Opioid Crisis Accountability Act, introducing criminal penalties and ten-year statutory maximums for those who engage in “dubious marketing or distribution practice with respect to an opioid.”¹⁷⁷

President Donald Trump has also vowed to hold pharmaceutical companies behind the epidemic accountable.¹⁷⁸ The DOJ under Trump has filed charges against the Rochester Drug Co-Operative, a large distribution company in the U.S., and two of its chief executives.¹⁷⁹ No charges have yet been filed against Purdue Pharmaceuticals.

This legislation should, however, avoid any due process concerns currently at play with the RCO doctrine. To do this, legislation would specify corporate officers tried under the RCO are not sentenced based on their vicarious liability, but rather, their own negligence. A law successfully avoiding any due process concerns would assign corporate officers a duty of care where they are responsible to the public for actions of their subordinates. Tying corporate officers’ jail sentences to negligence may protect judges’ abilities to sentence defendants to imprisonment.

V. CONCLUSION

The American society is currently addressing the legal fallout of the greatest public health crisis in the country. The RCO doctrine ensures the people whose actions led to widespread opioid addiction are held responsible and that future criminal conduct is adequately deterred. Prosecutors should move forward with bringing these cases, and the Supreme Court should refuse to overturn the doctrine. Because it is unclear how the Court would treat the RCO doctrine, Congress should enact a law codifying the doctrine and with language further specifying the basis for these convictions. The RCO doctrine has a role to play in justly addressing the opioid epidemic, and it should be allowed to do just that.

176. *Id.*

177. Opioid Crisis Accountability Act of 2019, H.R. 2917, 116th Cong. (2019).

178. Dartunorro Clark, *Trump on Opioid Crisis: ‘We Are Holding Big Pharma Accountable’*, NBC NEWS (Apr. 24, 2019, 3:04 PM), <https://www.nbcnews.com/politics/donald-trump/trump-opioid-crisis-we-are-holding-big-pharma-accountable-n998186> [<https://perma.cc/L7BZ-RDNW>].

179. *Id.*