

RECKLESSNESS AS A STATE OF MIND IN 10(B) CASES: THE CIVIL-CRIMINAL DIALECTIC

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INTRODUCTION

A corporation issues an earnings report containing various misrepresentations regarding the strength of its soon-to-be-released—and financially critical—product line. In an open analyst call, the CEO suggests that the product launch was delayed because, in her experience, the fall buying season offers a more favorable marketplace. In reality, the launch had been delayed because the flagship product of the line malfunctions frequently and tests poorly. Evidence reveals that it is “common knowledge” among the company rank-and-file that the new product being touted as the savior for the failing firm is in fact a dud. The fact is that the product is destined to fail, and the company

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has no other promising products in its pipeline. In the short term, the CEO's misdirection artificially props up the stock price; but when the truth comes out, the stock plummets.¹ Injured shareholders file a civil suit. Under section 10(b) of the Securities Exchange Act² and rule 10b-5³ promulgated thereunder,⁴ the plaintiffs' attorneys must show that the CEO's statements were at a minimum *reckless*. Although recklessness is the presumptive minimum state of mind required for a violation in the civil context, most courts have interpreted this standard to be very close to actual intent to defraud.⁵ Without the smoking gun of a memo to the CEO detailing the product's malfunctions, and with little more than a sense that "she must have known," the court unceremoniously dismisses the class action suit. The dismissal is upheld on appeal.

The duplicitous CEO's actions are also subject to criminal law; intrepid prosecutors indict her for securities fraud. She faces imprisonment and a stiff fine for her part in the ruse. Her lawyers try to cast doubt on the allegation that she acted recklessly, but the jury hears testimony from company employees who maintain that it was widely known within the company that the product was worthless—despite the CEO's "plausible denial."⁶ How could she *not* have known? She is found to have acted recklessly and is convicted, thus eliciting a macro policy question: *What kind of legal system eschews civil liability on the one hand, while imposing a criminal penalty for the same behavior on the other?*

1. This fact pattern is loosely based on *In re Apple Comput., Inc. Sec. Litig.*, 243 F. Supp. 2d 1012 (N.D. Cal. 2002), *aff'd*, 127 F. App'x 296 (9th Cir. 2005). The authors rewrote the outcome of the case to introduce the convoluted state of interpretations of "recklessness."

2. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2013).

3. 17 C.F.R. § 240.10b-5 (2014).

4. The Supreme Court refers to the statute and rule together simply as "§ 10(b)." *See, e.g.*, *SEC v. Zandford*, 535 U.S. 813, 816 n.1 (2002) ("The scope of Rule 10b-5 is coextensive with the coverage of § 10(b); therefore, we use § 10(b) to refer to both the statutory provision and the Rule." (citations omitted)). This paper follows suit.

5. *See infra* Part II.

6. Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 GEO. L.J. 1843, 1899 & n.302 (2007) (observing that accused executives deny knowledge of inaccurate information "when their house of cards [comes] crashing down"). Because discovery under the PSLRA is stayed until after the dismissal motion is heard, our hypothetical CEO need not falsely deny anything. *See* Securities Exchange Act of 1934 § 21D(b)(3)(B), 15 U.S.C. § 78u-4(b)(3)(B) (2013). Instead, as is appropriate at that stage, she may simply stay silent and the answer filed on her and the corporation's behalf denies the existence of any fraud. The implication/argument at that stage is that she will deny knowing the truth if and when the merits of the case are heard.

Though somewhat pervasive in the arena of securities fraud,⁷ as a concept, recklessness has been long neglected by scholars, frequently abused by practitioners, and all too often misunderstood by judges. Here, we adopt an Archimedean viewpoint⁸ on recklessness as a state of mind in the context of securities fraud violations. We explore the curious and overlapping civil and criminal recklessness standards in 10(b) cases. We argue that the heightened pleading standard of the Private Securities Litigation Reform Act (PSLRA)⁹ and the twenty years of meandering jurisprudence following in its wake have dangerously narrowed the civil recklessness standard, in some cases seeming to conflate it with other mens rea standards like “actual purpose” or “intent to defraud.”¹⁰ And on the criminal side, courts have defined and applied the concept of recklessness loosely. These conflicting standards prompted us to wonder: what would come of applying the prevalent civil and criminal interpretations of recklessness to the same hypothetical facts, as stated above? As you can see, the result of our thought experiment demonstrates an absurd and unacceptable phenomenon in which the same behavior may be excused civilly but punished criminally.¹¹

By comparing the civil and criminal standards, and laying bare their inconsistencies, we contend that these contradictory standards—over-inclusive on the criminal side and under-inclusive on the civil side—have created an unjust and unsustainable incongruity in the law. Part I identifies some sources of the confusion, describing the general black-letter definitions of recklessness in the civil and criminal contexts. In Part II, we set out the current state of relevant civil securities

7. Samuel W. Buell has effectively argued that “securities fraud” is no single thing but instead a category of wrongs, some of which qualify as “core fraud” and others of which are more akin to misrepresentation. Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 526–30, 564–65 (2011). By “securities fraud,” we generally mean 10b-5 fraud-on-the-market claims in a class-action setting and crimes arising from the same facts.

8. The Archimedean point is a hypothetical perspective that is outside the subject of inquiry, ostensibly providing a more objective or truthful view. The term derives from Archimedes’s mythical statement that if he had a lever or fulcrum long enough, he could move the earth. SIMON BLACKBURN, OXFORD DICTIONARY OF PHILOSOPHY 12 (2d rev. ed. 2008).

9. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, sec. 101(b), § 21D(b), 109 Stat. 737, 746–47 (codified as amended at 15 U.S.C. § 78u(4)(b) (2013)).

10. See *infra* Part II.

11. Admittedly, this thought experiment ignores the many other factors that can influence the outcome of criminal and civil processes, including procedural rules, market forces, prosecutorial discretion, and the reality of juries. The civil and criminal universes are not perfectly parallel. Here, we bracket other, albeit important, differences to focus on intersecting scienter standards.

law, including the history and context of PSLRA jurisprudence. Following that, in Part III, we deal with section 10(b)'s criminal-law counterpart, section 32(a) of the Securities Exchange Act of 1934, demonstrating that a dissimilar, much broader (that is, looser) recklessness standard applies in that domain. Part IV concludes with a call to courts and legislators to resolve this contradiction, and to realign these different standards with the core objectives of the criminal and civil laws so as not to perpetuate injustice.

I.

THE FOUNDATIONAL DISTINCTIONS—AND CONFUSION—OF CRIMINAL AND CIVIL RECKLESSNESS

Recklessness is ubiquitous in the law. A hallmark of tort and criminal law, it is also a relevant state of mind in a panoply of federal statutes ranging from the Dodd-Frank Act¹² and Sarbanes-Oxley,¹³ to patent law,¹⁴ the Bankruptcy Code,¹⁵ and further afield into other areas such as immigration law.¹⁶ More generally, a finding of recklessness commonly triggers the imposition of punitive damages in tort actions,¹⁷ including statutory claims like civil rights violations.¹⁸

12. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, §747, 123 Stat. 1376, 1739 (2010) (codified as amended at 7 U.S.C. § 6c(a)(7) (2013)) (allowing for liability to be imposed when one acts with reckless disregard of the fact that counterparties to a swap transaction will use the swap to defraud).

13. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 4C(b)(1), 116 Stat. 745, 794 (codified as amended at 15 U.S.C. § 78d-3(b)(1) (2013)).

14. *E.g.*, *Global Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011) (defining the patent law doctrine of “willful blindness” by reference to criminal recklessness); *see also In re Seagate Tech., LLC*, 497 F.3d 1360, 1370 (Fed. Cir. 2007).

15. For instance, the Supreme Court has held that the term “defalcation” in 11 U.S.C. § 523(a)(4) includes conduct that can be characterized as “gross recklessness.” *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1757 (2013). For a discussion of the holding and the potential pitfalls it creates, see Jonathon S. Byington, *The Challenges of the New Defalcation Standard*, 88 AM. BANKR. L.J. 3 (2014).

16. *See, e.g.*, Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, § 5, 2010 Ariz. Sess. Laws 450, 456 (codified at ARIZ. REV. STAT. ANN. § 13-2929 (2014)) (criminalizing transportation of aliens in “reckless[] disregard[]” of the fact that the alien is unlawfully present); *see also* Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 94–95 & nn.77–78 (2013) (discussing and citing other state statutes with similar provisions).

17. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 908(2) (AM. LAW INST. 1977) (“Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.”). For a discussion of the provision, *see also id.* § 908(2) cmt. b.

18. *Smith v. Wade*, 461 U.S. 30, 56 (1983) (“[A] jury may be permitted to assess punitive damages in a § 1983 action when the defendant’s conduct involves reckless or callous indifference . . .”).

Despite the frequency with which recklessness standards are employed in the law, recklessness is “poorly understood.”¹⁹ Its literature is surprisingly thin. The Supreme Court has called recklessness, as a concept, “nebulous.”²⁰ As one court put it, this confusion has “left its wound on our law.”²¹ Indeed, the concept of recklessness appears to be unworkably vague, making it more of an *ex post* label used to describe bad behavior than a prescriptive, *ex ante* liability standard.

To some, the concept of recklessness may give rise to notions of well-accepted physical risk: the indulgent parent who serves alcohol to minors, or the intoxicated person who chooses to drive. But how does that translate when the “driver” is a CEO touting a new product she knows will be unsuccessful? When the risk is financial rather than corporeal, and the conduct verbal rather than physical, recklessness becomes harder to define. When standards are ill-defined, they are apt to confuse, diluting their ability to regulate behavior, and, as we show,²² risking incongruous outcomes.

Recklessness generally “entails (1) the conscious disregard of (2) a substantial and unjustifiable risk that (3) a forbidden result may occur or that relevant circumstances exist.”²³ However, what seems like a straightforward definition has, in application, confused even the most experienced of commentators and jurists, including Supreme Court Justices.²⁴

As might be expected, the term “recklessness” tends to carry different meanings in the civil and criminal arenas. The Supreme Court has described the general differences between recklessness standards in these different contexts:

[T]he term recklessness is not self-defining. The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. The criminal

19. Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111, 111 (2008).

20. *Farmer v. Brennan*, 511 U.S. 825, 836 n.4 (1994).

21. *Williamson v. McKenna*, 354 P.2d 56, 59 (Or. 1960).

22. See *infra* Part IV.

23. LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 23 (2009).

24. *Smith v. Wade*, 461 U.S. 30, 37–38 n.6 (1983) (“Justice Rehnquist [in his dissent] consistently confuses, and attempts to blend together, the quite distinct concepts of *intent to cause injury*, on one hand, and *subjective consciousness* of risk of injury (or of unlawfulness) on the other.”).

law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.²⁵

One would imagine that with their divergent black-letter foundations and distinct objectives, the civil and criminal standards would not be in danger of confusion to the point of conflation. In fact, courts have held that the scienter standards are essentially the same when it comes to criminal 10(b) prosecutions and their civil counterparts.²⁶ And at least one scholar has argued that they *should* be the same.²⁷

As discussed in greater detail below, 10(b) does not define the requisite state of mind for imposing civil liability, but instead the judiciary has shaped 10(b)'s civil scienter requirements.²⁸ The Supreme Court has held that 10(b) requires a showing of "an intent to deceive, manipulate or defraud," and has suggested that a finding of recklessness could suffice toward that end.²⁹ The lower courts have taken the Supreme Court at its word, and consequently, a checkered jurisprudence has developed in civil 10(b) case law.³⁰ On the criminal side, a parallel phenomenon has occurred.³¹ Section 32(a) of the Securities Exchange Act of 1934 (Securities Exchange Act) criminalizes viola-

25. *Farmer*, 511 U.S. at 836–37 (citations omitted). *Farmer* was an Eighth Amendment case that upheld a subjective recklessness standard.

26. In upholding a jury charge in a criminal securities case stating that intent to deceive may be found from a material misstatement of fact made with reckless disregard of the facts, the Third Circuit reasoned as follows: "[T]here is no reason to suppose that in enacting criminal statutes prohibiting . . . securities fraud the Congress intended that the substantive element of the offense—the scienter—should be different than for civil liability for fraud." *United States v. Boyer*, 694 F.2d 58, 60 (3d Cir. 1982). Other courts have followed suit. *See, e.g.*, *United States v. Gutstein*, No. 91-50704, 1992 WL 354151, at *1 (9th Cir. Nov. 30, 1992) (holding that recklessness satisfies the scienter requirement); *Williams v. United States*, No. 92-1110, 1992 WL 332029, at *3 (1st Cir. Nov. 13, 1992) ("[T]he scienter element . . . can be satisfied by something less than fraudulent intent or knowing falsehoods."); *United States v. Charnay*, 537 F.2d 341, 348 (9th Cir. 1976) (stating that the law of Rule 10b-5 does not vary in civil and criminal contexts except as to the government's burden of proof); *Sparrow v. United States*, 402 F.2d 826, 828 (10th Cir. 1968) (holding that acting in good faith is inconsistent with recklessly making false representations). Although all of these cases predate the passage of the PSLRA, they remain good law and continue to be cited with frequency.

27. Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025, 1025–26 (2001).

28. *See infra* Part II.

29. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 & n.12 (1976).

30. *See, e.g.*, *First Va. Bankshares v. Benson*, 559 F.2d 1307, 1314 (5th Cir. 1977). For an in-depth discussion of the jurisprudence in the civil context, see *infra* Part III.

31. *See infra* Part III.

tions of section 10(b) and Rule 10b-5.³² Like its civil counterpart, the statute has a vague scienter requirement, providing only that the defendant must have violated the statute *willfully*.³³ Some courts have distinguished recklessness from willfulness,³⁴ but others have held that making a material misstatement with a “reckless disregard for truth or falsity” is sufficient to sustain a finding of “willful” criminal securities fraud, and the Supreme Court has not taken an opportunity to alter or correct the latter interpretation.³⁵ As a result, recklessness—whatever it is—evidently is enough for liability in both civil and criminal securities fraud cases. But what exactly is recklessness? How should it best be construed in this context?

Let us first try to elucidate where courts have jumbled the inquiry. For our purposes, we identify three dimensions along which courts have faltered in interpreting recklessness: (a) the requisite awareness of the risk (How conscious does the actor need to be of the risk?); (b) the relevance of an individual’s accurate assessment of the risk (Are we judging the actor according to what she actually knew, or what she should have known?); (c) the type of evidence necessary to establish recklessness (What types of inferences must we draw to support a finding of recklessness in what is, by definition, a circumstantial matter?).

A. *The Consciousness Dimension: A Defendant’s Awareness of the Risk*

The etymology of the term “reckless” betrays the broad spectrum of different types of consciousness it encompasses. On one hand, the term’s Old English roots (*receleas*) define it as “careless, thoughtless,

32. Securities Exchange Act of 1934, § 32(a), 15 U.S.C. § 78ff(a) (2013). Similarly, section 24 of the Securities Exchange Act provides for criminal liability for willful violations. § 77x.

33. In pertinent part, section 32(a) provides as follows: “[a]ny person who *willfully* violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter.” § 78ff(a) (emphasis added). For a court’s discussion of this requirement, see the Second Circuit’s decision in *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005).

34. *E.g.*, *United States v. Gansman*, 657 F.3d 85, 91 n.7 (2d Cir. 2011) (“To impose criminal sanctions, the government must prove . . . that the defendant’s conduct was willful. Civil liability, on the other hand, may attach if the government proves . . . that the defendant’s conduct was merely reckless, rather than willful.”).

35. *E.g.*, *United States v. Farris*, 614 F.2d 634, 638 (9th Cir. 1979), *cert. denied*, 447 U.S. 926 (1980); *see also* *United States v. Boyer*, 694 F.2d 58, 60 (3d Cir. 1982); *Elbel v. United States*, 364 F.2d 127 (10th Cir. 1966).

or heedless,”³⁶ a standard seeming to approximate negligence. On the other hand, the term’s German (*ruchlos*) and Dutch (*roeckeloos*) roots signify “wicked,”³⁷ something that appears much closer to actual intent. Sitting in the gray area between heedlessness and wickedness, recklessness can mimic purposefulness when the actor is aware of the risk that his actions will likely harm others and yet he does not care whether or not the harm materializes (*he willfully acts while mindful of the risk of specific harm his conduct is capable of inflicting*).³⁸ In this regard, the CEO from the opening hypothetical, who assured investors of future profits she knew were unlikely to come from her defective product, was reckless.

On the other end of the risk-awareness dimension, recklessness can also manifest as a narrow intent to act without foresight as to the risk or its consequences, as with the businessperson who makes rosy misrepresentations about his company without first verifying their veracity (*his act is willful, but not performed while mindful of the specific harm his conduct is capable of inflicting*). In this case, the speaker’s purpose is not to lure his audience into investing in his company on false pretenses. Perhaps his narrower motive is to make himself sound successful or clever. Nevertheless, his sloppy statements, resulting in collateral fraud, are likely to be culpable when viewed through the prism of recklessness.³⁹

Section 10(b) civil case law, especially post-PSLRA, reveals courts placing recklessness at different relevant points along the dimension of risk-awareness, variously referring to it as inadvertence, willful blindness, conscious recklessness, deliberate recklessness, and extreme recklessness.⁴⁰ On the criminal side, the Model Penal Code attempts to tether the concept of recklessness, defining it as one of the four distinct mental states on the spectrum of consciousness: purpose, knowledge, recklessness, and negligence.⁴¹ But it has not succeeded entirely; the criminal law bears out that recklessness is more of a moving target than a fixed point, as discussed below.⁴² This is not just a

36. Douglas Harper, *Reckless*, ONLINE ETYMOLOGY DICTIONARY, <http://www.etymonline.com/index.php?term=reckless> (last visited July 31, 2015).

37. *Reckless*, BARNHART DICTIONARY OF ETYMOLOGY (Robert K. Barnhart & Sol Steinmetz eds., 1988).

38. See, e.g., SEC v. McNulty, 137 F.3d 732, 741 (2d Cir. 1998).

39. See, e.g., AUSA Life Ins. Co. v. Ernst & Young, 206 F.3d 202, 220–21 (2d Cir. 2000); see also JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 672–73 (6th ed. 2009).

40. For a discussion of the latter three and an overview of the varying standards of “super recklessness” that courts have concocted, see *infra* Part III.

41. MODEL PENAL CODE § 2.02 (AM. LAW INST. 1985).

42. See discussion *infra* Part III.

semantic conundrum. The fact is that in the courts, recklessness under 10(b)—whether of the civil or criminal variety—operates as a spectrum between knowledge and negligence.⁴³ And, importantly, these shifting definitions and interpretations may have rendered the state of mind known as “recklessness” quite meaningless.⁴⁴

B. The Ontological Dimension: Objective Versus Subjective Standards of Recklessness

When we judge a person’s behavior as reckless, are we superimposing a societal standard of reasonable conduct (*he should have known*) or are we measuring his own perceptions and ensuing risk assessment (*he knew*)?

In the civil tort system, a person is said to be reckless when he “acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.”⁴⁵ This definition has been referred to as *objective recklessness*.⁴⁶ The term “objective” refers to an abstract reasonable person standard, which examines a hypothetical reasonable person’s knowledge and perceptions under the circumstances, rather than at-

43. Donald C. Langevoort, “*Fine Distinctions*” in the *Contemporary Law of Insider Trading*, 2013 COLUM. BUS. L. REV. 429, 435–41 (2013) (commenting on the spectrum of courts’ divergent conceptions of recklessness in 10b-5 cases).

44. Donald C. Langevoort, *The Reform of Joint and Several Liability Under the Private Securities Litigation Reform Act of 1995: Proportionate Liability, Contribution Rights, and Settlement Effects*, 51 BUS. LAW. 1157, 1165–66 (1996) (“Many . . . have noted the fine line between recklessness and negligence. But there is an equally fine line between recklessness and knowledge.”).

45. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 213–14 (5th ed. 1984); accord RESTATEMENT (SECOND) OF TORTS § 500 (AM. LAW INST. 1965). Compare this with the definition provided in the *Third Restatement of the Law of Torts*:

A person acts with recklessness in engaging in conduct if:

- (a) the person knows of the risk of harm created by the conduct or knows facts that make that risk obvious to another in the person’s situation, and
- (b) the precaution that would eliminate or reduce that risk involves burdens that are so slight relative to the magnitude of the risk as to render the person’s failure to adopt the precaution a demonstration of the person’s indifference to the risk.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 (AM. LAW INST. 2010). This definition, though now two-pronged, is also overtly objective in nature.

46. *Farmer v. Brennan*, 511 U.S. 825, 837–38 (1994) (“An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis.”).

tempting to get inside the thoughts of the accused.⁴⁷ Ultimately, the trier of fact must decide whether the defendant's behavior comported with the way a reasonable person would have acted. Patent law and bankruptcy law, both previously mutable in their interpretations of recklessness, have recently adopted this objective recklessness standard.⁴⁸

Conversely, criminal law subscribes to a higher standard: a finding of recklessness is proper only when a person disregards a risk of harm of which he is aware.⁴⁹ Referred to as "subjective recklessness," this standard is reflected in the Model Penal Code:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.⁵⁰

"Recklessness" as articulated in the MPC, then, involves conscious risk creation, plainly stated as the actor's actual awareness of a risk.⁵¹

47. See, e.g., *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402 (2011) ("By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave, the objective test [as to whether or not a suspect is in custody for purposes of *Miranda* inquiries] avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind."); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 799 n.71 (1994) ("In objective jurisdictions, reasonableness is measured against the standard of a hypothetical generic reasonable person (or man).").

48. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1370–72 (Fed. Cir. 2007). In *Seagate*, the Court establishes a new test for willful infringement, holding that willful infringement requires a showing of "objective recklessness" on the part of the infringer. *Id.* at 1371. The Court sets forth a new, two-step process for determining whether the infringer's conduct has been objectively reckless: First, the "patentee must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions infringed a valid patent." *Id.* In making this threshold determination, the infringer's subjective state of mind is irrelevant. *Id.* Second, if the patentee can meet this threshold requirement, then "the patentee must demonstrate that the objectively [high] risk . . . was either known or should have been known" to the infringer. *Id.*

49. See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 115–16, 120, 128 (2d ed. 1960); ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 850–51 (3d ed. 1982).

50. MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985); see also *id.* § 2.02(2)(c) cmt. 3.

51. MODEL PENAL CODE § 2.02(2)(c). Note that while the risk is objectively defined, the heart of the standard—the awareness of the risk—is subjective.

It stands to reason that depriving a person of liberty and property requires a more stringent standard, not merely a “should have known” standard. The MPC’s authors stressed that it was unjust to measure criminal liability based on what the individual should have believed or what most people would have intended.⁵² The MPC formulation is substantially the same as definitions of recklessness commonly found throughout criminal law, in both federal and state codes.⁵³ While the MPC’s definition has made strides in the conceptualization of criminal recklessness, it is not uniformly adopted and has no civil counterpart.

C. The Evidentiary Dimension: The Types of Inferences Involved in Establishing Recklessness

The recklessness question is inevitably intertwined with a thorny evidentiary one. How does one go about proving a civil or criminal defendant’s risk assessment? On the civil side, without a clear inculpatory statement by the civil defendant, proof will rely heavily or exclusively on circumstantial evidence and whatever inferences the trier of fact can properly draw therefrom.⁵⁴ Arriving at conclusions from such inferences necessarily involves applying objective standards.⁵⁵ Proof that a defendant knew his statement was contradicted by fact can lead to the inference that he spoke recklessly, either ignoring the possibility that his statement might result in harm, gambling that it would not, or more cynically, that he spoke with intent to deceive.⁵⁶ Proof that he spoke without verifying the accuracy of his statements may also result in an inference that he spoke recklessly, having recognized a risk of harm but nonetheless hoping that circumstances would conspire with him rather than against him, so that he would not actually inflict harm.⁵⁷

The same logic is at play on the criminal side: proof of any state of mind, including recklessness, will be circumstantial, meaning, it will be arrived at through inferences, and the government must prove the criminal defendant’s subjective recklessness or his personal state

52. *Id.* § 2.02(2)(c) cmt. 2.

53. See ALEXANDER & FERZAN, *supra* note 23, at 25 n.5 (citing, inter alia, U.S. SENTENCING GUIDELINES MANUAL § 2A1.4 cmt. n.1 (U.S. SENTENCING COMM’N 1998); CAL. PENAL CODE § 450(f) (West 1999); N.Y. PENAL LAW §15.05(3) (McKinney 1999)).

54. See *infra* Part II.

55. See Earl Fruchtman, *Recklessness and the Limits of Mens Rea: Beyond Orthodox Subjectivism*, 29 CRIM. L.Q. 315, 320, 324 & n.33 (1987).

56. See *infra* Part II.

57. See *infra* Part II.

of mind.⁵⁸ For example, in assessing whether the accused foresaw the probable harmful consequences of his behavior, the trier of fact can consider what the accused *must* have foreseen on the basis of the evidence.⁵⁹ This will inevitably involve a consideration of what a reasonable person in the accused's situation would have foreseen—a tort-like calculus.⁶⁰

Confounding this evidentiary dimension of recklessness is the relevant burden of proof: how much evidence must be put forward to establish recklessness? Civil claims of fraud require a stronger degree of evidence than most other civil claims: rather than the preponderance-of-the-evidence standard of most civil claims, fraud must be proven by “clear and convincing” evidence.⁶¹ On the criminal side, a prosecutor seeking a criminal conviction must prove his case “beyond a reasonable doubt.”⁶² If the jury agrees that an alternative to the government's case can reasonably be imagined, the prosecutor has not met his burden.⁶³

How can we compare proverbial apples and oranges? Justice Harlan provided some abstract guidance:

[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact finder can acquire is a belief of what *probably* happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases “preponderance of the evidence” and “proof beyond a reasonable doubt” are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.⁶⁴

Naturally, then, the criminal burden of proof requires a higher degree of confidence than any civil standard. However, at least one

58. See *infra* Part III.

59. See *infra* Part III.

60. See *supra* Part I.B.

61. E.g., *Addington v. Texas*, 441 U.S. 418, 424 (1979).

62. E.g., *In re Winship*, 397 U.S. 358, 364 (1970) (holding that the Due Process Clauses of the Fifth and Fourteenth Amendments protects an individual accused of a criminal offense from conviction “except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”).

63. See *id.*

64. *Id.* at 370 (Harlan, J., concurring).

scholar has argued that the standard utilized in civil fraud cases is more exacting than the criminal law's reasonable-doubt standard. Lawrence M. Solan has demonstrated using empirical evidence and linguistic studies that "it is more difficult to establish proof by clear and convincing evidence than it is to establish proof beyond a reasonable doubt," and he therefore has endorsed a "very high degree of certainty" standard as more in keeping with historical and related policy concerns in criminal cases.⁶⁵

If in fact the civil standard is more exacting than the criminal one, this may in part explain the problem we have identified. Let us now untangle this knot in the 10(b) context. In the next two Parts, we affirm the predicate of our argument: that the inferences one needs to draw in order to establish civil liability under 10(b) are more difficult than those required to establish criminal liability under the same section.

II.

UNDER-INCLUSIVE RECKLESSNESS STANDARDS FOR THE IMPLIED RIGHT OF ACTION UNDER 10(B)

Section 10(b) of the Securities Exchange Act makes it unlawful to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [U.S. Securities and Exchange] Commission may prescribe."⁶⁶ Rule 10b-5 then implements the Securities Exchange Act, prohibiting, inter alia, "mak[ing] any untrue statement of a material fact."⁶⁷

The elements of the private right of action⁶⁸ are commonly understood to be: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) a causal connection between the misrepresentation/omission and the economic loss."⁶⁹ Notice pleading, even of the more definite variety re-

65. Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 105, 123-35 (1999).

66. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2013).

67. 17 C.F.R. § 240.10b-5 (2014).

68. "Section 10(b) . . . affords a right of action to purchasers or sellers of securities injured by its violation." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318 (2007).

69. *Stoneridge Inv. Partners v. Scientific-Atlanta*, 552 U.S. 148, 157 (2008); *accord City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Waters Corp.*, 632 F.3d 751, 756 (1st Cir. 2011); *Slayton v. Am. Express Co.*, 604 F.3d 758, 765 (2d Cir.

quired to allege fraud, is not sufficient. The Private Securities Litigation Reform Act of 1995, on a mission to reduce costly strike suits filed only for their settlement value, mandated a heightened pleading standard with regard to allegations of falsity and of scienter.⁷⁰ Consequently, civil 10(b) litigation primarily plays out at the pleading stage, before discovery begins. Plaintiffs who proffer allegations that meet the heightened scienter standard and survive dismissal are typically offered settlements.⁷¹ Nearly without exception, then, the published civil 10(b) opinions addressing recklessness are district court decisions on, and circuit court appeals related to, motions to dismiss.

To avoid dismissal, a securities fraud complaint must do more than allege that the defendant acted with scienter, as would be permitted under Rule 9 of the Federal Rules of Civil Procedure.⁷² Instead, under the PSLRA, the plaintiff must, “with respect to each act or omission alleged . . . state *with particularity* facts giving rise to a *strong inference* that the defendant acted with the required state of mind.”⁷³ Early cases addressing the PSLRA’s separate particularity requirement held that the plaintiff has to allege the “who, what, when, where, and how: the first paragraph of any newspaper story.”⁷⁴ In other words, plaintiffs are required to “provide a list of all relevant circumstances in great detail.”⁷⁵ Without specific allegations related, for instance, to internal memoranda detailing which officers knew the truth and when, the particularity standard would not be met.⁷⁶

2010); *Thompson v. Paul*, 547 F.3d 1055, 1060 (9th Cir. 2008); *Cal. Pub. Emps.’ Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004); *Adams v. Kinder-Morgan*, 340 F.3d 1083, 1095 (10th Cir. 2003).

70. *Tellabs, Inc.*, 551 U.S. at 308 (“As a check against abusive litigation in private securities fraud actions, the Private Securities Litigation Reform Act . . . includes exacting pleading requirements.”).

71. See, e.g., Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 499 (1991) (concluding that survival of a motion to dismiss provides plaintiffs with substantial leverage to command a high settlement figure); Steven J. Choi et al., *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35, 35–36 (2009) (“Trials . . . are almost unheard of in this area; cases that are not dismissed are settled.”).

72. FED. R. CIV. P. 9(b).

73. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, sec. 101(b), § 21D(b), 109 Stat. 737, 746–47 (codified as amended at 15 U.S.C. § 78u(4)(b) (2013)).

74. See *In re Burlington Coat Factory*, 114 F.3d 1410, 1422 (3d Cir. 1997) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)).

75. *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 983–84 (9th Cir. 1999).

76. *Id.* at 984–85 (“[Plaintiff] fails to state facts relating to the internal reports, including . . . which officers reviewed them [I]n the absence of such specifics, we

In the ensuing years, focused discussions of the particularity requirement have given way to a broader view of complaints—including their level of particularity—in the quest to ascertain whether they merit the necessary strong inference. In its most recent pronouncements on PSLRA scienter pleading in a civil 10(b) case, the Supreme Court has indicated that the requisite strong inference will arise after a “holistic[]” view of the pleadings that “take[s] into account ‘plausible opposing inferences,’”⁷⁷ and that the inference “need not be irrefutable, *i.e.*, of the ‘smoking-gun’ genre, or even the ‘most plausible of competing inferences.’”⁷⁸ Instead, the Supreme Court has explained, the requisite strong inference under the PSLRA arises “only if a reasonable person would deem the inference of scienter *cogent and at least as compelling* as any opposing inference one could draw from the facts alleged.”⁷⁹

However, neither the Court nor the statutory provision or rule has explicitly defined the relevant “required state of mind” that is to be inferred. Rather, as is typical for the elements of the implied private right of action for securities fraud under 10(b), the limits of the scienter requirement have been vaguely sketched, most notably in the seminal case of *Ernst & Ernst v. Hochfelder*, which stated that 10(b) required a showing of “an intent to deceive, manipulate or defraud,” but also left open the possibility that recklessness might suffice under certain circumstances.⁸⁰ Since then, as the Supreme Court observed in 2007, “[e]very Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement” for civil liability under 10(b) “by showing that the defendant acted [either] intentionally or recklessly.”⁸¹ The Supreme Court has shed no light on the adequacy of recklessness in securities fraud, preferring to reserve the question of “whether [a showing of] reckless behavior is sufficient,”

cannot determine whether there is any basis for alleging that the officers knew that their statements were false at the time they were made—a required element in pleading fraud.”).

77. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1324 (2011) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 326, 324 (2007)).

78. *Tellabs, Inc.*, 551 U.S. at 324 (quoting *Fidel v. Farley*, 392 F.3d 220, 227 (6th Cir. 2004)).

79. *Id.* at 324 (emphasis added).

80. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 & n.12 (1976). Footnote twelve of the decision raises the possibility that recklessness might also suffice. *Id.*

81. *Tellabs, Inc.*, 551 U.S. at 319 n.3.

and has refrained from explaining what recklessness would need to consist of were it sufficient.⁸²

And so time and the lower courts have marched on, dutifully attempting to give shape to this otherwise nebulous concept. Seeking at minimum a guiding principle, rather than a pragmatic definition, courts have tended to refer to recklessness as a level of scienter akin or closer to intentional conduct than to mere negligence.⁸³ This characterization of recklessness as akin to intent can be traced back to a single test⁸⁴ reiterated by the Seventh Circuit in *Sundstrand Corp. v. Sun Chemical Corp.*: “reckless conduct may be defined as . . . an extreme departure from the standards of ordinary care . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.”⁸⁵ While this oft-quoted definition may appear at first blush to provide useful substance—perhaps even some applicable or testable prongs—upon closer inspection it does little to develop our understanding of the scienter standard.⁸⁶

That recklessness is closer to intentional conduct than negligence seems obvious, but it is not clear that the *Sunstrand* court provided any additional insights for where to draw the line between the two. Most circuits have implemented some form or other of “super recklessness” by adding an amplifying adjective or enhancing modifier to the core concept. So, for instance, in the First Circuit the minimum level of scienter is not mere recklessness but “a high degree of recklessness.”⁸⁷ The Fourth and Eleventh Circuits prefer to use “severe recklessness.”⁸⁸ The Fifth Circuit calls its standard “severe reckless-

82. *Id.*; accord *Matrixx Initiatives, Inc.*, 131 S. Ct. at 1323–24 (“[W]e assume, without deciding, that the standard applied by the Court of Appeals is sufficient to establish scienter.”).

83. *E.g.*, *Novak v. Kasaks*, 216 F.3d 300, 312 (2d Cir. 2000) (describing recklessness as “a state of mind approximating actual intent, and not merely a heightened form of negligence”).

84. See Ann Morales Olazábal, *The Search for “Middle Ground”: Towards a Harmonized Interpretation of the Private Securities Litigation Reform Act’s New Pleading Standard*, 6 STAN. J.L. BUS. & FIN. 153, 159–61 (2001).

85. *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977) (quoting *Franke v. Midwestern Okla. Dev. Auth.*, 428 F. Supp. 719, 725 (W.D. Okla. 1976)).

86. See Ann Morales Olazábal, *Defining Recklessness: A Doctrinal Approach to Deterrence of Secondary Market Securities Fraud*, 2010 WIS. L. REV. 1415, 1442–45.

87. *E.g.*, *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008) (quoting *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 82 (1st Cir. 2002)).

88. *E.g.*, *Edward J. Goodman Life Income Tr. v. Jabil Circuit, Inc.*, 594 F.3d 783, 790 (11th Cir. 2010) (citing *McDonald v. Alan Bush Brokerage Co.*, 863 F.2d 809, 814 (11th Cir. 1989)).

ness,”⁸⁹ the Second Circuit, “conscious recklessness,”⁹⁰ and the Ninth Circuit usually prefers the term “deliberate recklessness.”⁹¹

It is unclear where this inconsistent and in some cases oxymoronic terminology leaves us, but perhaps we can best begin to understand recklessness vis-à-vis the PSLRA by determining what recklessness is not. On the one hand, the Supreme Court has long cautioned against 10(b) expanding into a net that is so wide that it penalizes “mere instances of corporate mismanagement.”⁹² And, of course, if the most cogent and compelling inference that can be drawn from a set of 10(b) allegations or facts is that the defendant was careless or negligent, no liability will ensue.⁹³ On the other hand, the Supreme Court’s own disjunctive language referring to defendants who have acted “[either] intentionally *or* recklessly” makes clear that recklessness is something *apart from* (and presumably less than) *intentional deception*.⁹⁴

In the vast area between these two clear propositions—that negligent corporate mismanagement is not sufficient for culpability, but that recklessness is something apart from and less than intentional deception—the doctrine remains a “mess.”⁹⁵ Many courts, apparently without even attempting to clarify what they are doing, hollowly recite the ubiquitous *Sundstrand* definition of recklessness, thereby collapsing recklessness into or conflating it with actual intent to defraud.⁹⁶

89. *E.g.*, *Abbott v. Equity Grp., Inc.*, 2 F.3d 613, 621 n.25 (5th Cir. 1993) (emphasis added) (quoting *Broad v. Rockwell Int’l Corp.*, 642 F.2d 929, 961–62 (5th Cir. 1981)).

90. *E.g.*, *S. Cherry St., LLC v. Hennessee Grp.*, 573 F.3d 98, 109 (2d Cir. 2009) (quoting *Novak v. Kasaks*, 216 F.3d 300, 312 (2d Cir. 2000)).

91. *E.g.*, *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 782 (9th Cir. 2008) (quoting *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 977 (9th Cir. 1999)).

92. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477 (1977) (“Mere instances of corporate mismanagement in which [the] essence of the complaint is that shareholders were treated unfairly by a fiduciary are not within the state or rule.”).

93. *See In re Smith & Wesson Holding Corp. Sec. Litig.*, 669 F.3d 68, 77 (1st Cir. 2012) (“[T]he defendant’s conduct may have been a negligent misjudgment. But, without more, an inference of culpable recklessness is a bridge too far.”); *In re Level 3 Comm’ns, Inc. Sec. Litig.*, 667 F.3d 1331, 1339 (10th Cir. 2012) (stating that “even if [the Court agreed that] defendants had made material misstatements,” the plaintiff still “fail[ed] to adequately plead scienter”).

94. *E.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007).

95. Buell, *supra* note 7, at 548, 556 (referring to his discussion of scienter as “The Scienter Mess” and stating that “[t]he lower federal courts have issued dozens of opinions making a mess of the matter”).

96. *See, e.g.*, *FindWhat Inv’r Grp. v. FindWhat.com*, 658 F.3d 1282, 1300 (11th Cir. 2011) (stating that Rule 10b-5 requires either “intent to defraud” or “severe recklessness . . . [meaning that the fraud is] either known to the defendant or . . . so obvious that the defendant must have been aware of it”). One possible explanation for

Too frequently, courts engage in a tautological exercise, seeking facts that allow them generally to infer defendants' "recklessness as to" (or, sometimes, "disregard for") the truth or falsity of the statement at hand.⁹⁷ In other cases, the court will start at square one, advertent to, but not managing actually to, apply the *Sundstrand* definition as a test (that is, "the danger of misleading is known or so obvious that it should have been known").⁹⁸ Some courts even seek to infer a *reckless failure to disclose*, formulated along these lines: "defendants knew, or were reckless in not knowing, of material information that they were obligated to disclose and acted . . . recklessly in failing to disclose it."⁹⁹ Other courts attempt to use a recklessness standard that is closely tied to the evidence itself in order to form that elusive link between the truth and the defendant.

Our review of recent case law reveals that despite the variety of super-recklessness labels, only a small number of standards are repeatedly used in the federal courts of appeals. These standards vary, perhaps predictably, along a *negligence-intent spectrum*. From most inclusive (most likely to result in case proceeding toward trial or settlement) to loosest (most likely to result in dismissal at the pleading stage), the standards are as follows¹⁰⁰:

1. The court finds it "absurd to suggest" or "hard to believe," based on the complaint, that the defendant did not know important information he contradicted in public statements.¹⁰¹

this confusion is that no court has actually accepted recklessness as the required state of mind. Instead, the argument would go, all courts that have invoked recklessness have done so only because facts tending to show recklessness also permit an inference of actual knowledge of falsity, and therefore intent to deceive. It seems as unlikely that courts are in agreement about this, given that they disagree about how recklessness should be defined in this context.

97. Buell, *supra* note 7, at 558 n.170 (noting that a Texas district court in one case "stat[ed] that the elements of mail fraud include both intent to defraud and knowledge or recklessness as to falsity, but later stat[ed] that '[i]f specific intent cannot be proven, the government must show that the defendants "made material misrepresentations of fact with reckless disregard to their truth or falsity"' (quoting *United States v. Quadro Corp.*, 928 F. Supp. 688, 696 (E.D. Tex. 1996))).

98. *Id.* at 550–52 & n.134.

99. *Mississippi Pub. Emps.' Ret. Sys. v. Bos. Sci. Corp.*, 649 F.3d 5, 28 (1st Cir. 2011) (citing *N.J. Carpenters Pension & Annuity Funds v. Biogen IDEC Inc.*, 537 F.3d 35, 45 (1st Cir. 2008)).

100. Playing out the same debate that goes on in criminal-law circles, the loosest definitions of recklessness in the civil context focus on knowledge of the wrongfulness of conduct, while the narrowest definitions focus on one's understanding of the misrepresentation. The latter definitions are most likely to result in further litigation. See Buell, *supra* note 7, at 557.

101. *E.g.*, *Berson v. Applied Signal Tech.*, 527 F.3d 982, 988 (9th Cir. 2008) (stating that "it is hard to believe that [defendant corporate officers] would not have known" of important corporate matters); see also *Glazer Capital Mgmt. v. Magistri*, 549 F.3d

2. The defendant “had access to information contradicting [the company’s] public statements”¹⁰² or “w[as] on notice” of the misleading nature of their statements.¹⁰³
3. The defendant knew of facts *suggesting* that his statements were inaccurate or misleading.¹⁰⁴
4. The defendant turned a blind eye toward the truth.¹⁰⁵
5. The defendant knew of the falsity of his public statements.¹⁰⁶
6. The court suggests that the allegations must support an inference that the defendant acted with intent or “purpose” to deceive investors.¹⁰⁷

The strictest reckless standards are most relevant to our discussion, and the Fourth Circuit’s 2014 decision in *Yates v. Municipal*

736, 746–47 (9th Cir. 2008) (rejecting plaintiffs’ claim that it was “absurd to suggest” that officer-defendants were unaware of salient facts about the corporation (quoting *Berson*, 527 F.3d at 988–89)).

102. *S. Ferry L.P., No. 2 v. Killinger*, 542 F.3d 776, 785–86 (9th Cir. 2008) (quoting *In re Daou Sys., Inc.*, 411 F.3d 1006 (9th Cir. 2005)); *see also In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 742–43 (8th Cir. 2002) (stating that the plaintiffs did not “plead the existence of any facts or further particularities that, if true, demonstrate that the defendants had access to, or knowledge of, information contradicting their public statements”).

103. *E.g., In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 710 (9th Cir. 2012).

104. *See, e.g., Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 82 (1st Cir. 2002) (explaining that the plaintiff must merely “show that his characterization of the events and circumstances as showing scienter is highly likely”).

105. *See, e.g., In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d at 708 (“Recklessly turning a ‘blind eye’ to impropriety is equally culpable conduct under 10b-5.”); *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000) (referring to “[a]n egregious refusal to see the obvious, or to investigate the doubtful” as a possible scenario in which liability would inhere (quoting *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 269 (2d Cir. 1996))).

Much has been written about willful blindness as an appropriate equivalent of intent on the criminal side, including in a criminal prosecution for securities fraud. *See generally* Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351 (1992) (describing “the problem with current practice” and subsequently arguing that willful blindness should be defined as a level of intent higher than recklessness).

106. *See Applestein v. Medivation, Inc.*, 561 Fed. App’x 598, 600–01 (9th Cir. 2014) (dismissing a complaint because the plaintiff failed to show that witnesses directly told defendant officers the information in question); *New Orleans Emps. Ret. Sys. v. Celestica, Inc.*, 455 Fed. App’x 10, 14 (2d Cir. 2011) (holding that witnesses’ statements that they directly gave defendant-CEO information were sufficient for an inference of scienter); *Goldstein v. MCI WorldCom*, 340 F.3d 238, 246 (5th Cir. 2003) (holding that plaintiffs’ circumstantial evidence, “without more,” did not “sufficiently connect[] to [defendant-officers] such that [a] strong inference of scienter on their part [would be] appropriate”).

107. *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 893–94 (4th Cir. 2014) (“[E]ven if some senior officers had concluded . . . that the accounting was wrong, that does not establish that they acted with fraudulent *purpose* to conceal the problems.” (emphasis added)).

Mortgage & Equity, LLC is illustrative of how a stricter standard operates in practice. There, plaintiffs alleged that defendants disseminated false financial statements regarding the issuer's compliance with generally accepted accounting principles, specifically FIN 46R, and failed to disclose the cost of proper consolidation under that accounting rule.¹⁰⁸ The court started its analysis by identifying the issue as "'whether the allegations in the complaint, viewed in their totality and in light of all the evidence in the record, allow us to draw a strong inference, at least as compelling as any opposing inference,' that the [defendant officers and directors] *either knowingly or recklessly* defrauded investors."¹⁰⁹ The court then engaged in a thorough review of the pleaded facts and the "strong inferences" that could be drawn therefrom, and in the end suggested that the defendants' conduct might have been negligent but doubted that it had been reckless.¹¹⁰ The court's language also expressed the belief that there is a clear distinction between intent and recklessness, observing that the facts "ma[de] it difficult to infer that the [defendant officers and directors] intentionally, or even recklessly, misrepresented the state of the Company's financial affairs."¹¹¹

After careful consideration of the facts and available inferences, the Fourth Circuit found the inference of negligence most cogent and compelling.¹¹² The troubling part of the decision is subsequent language purporting to require much *more* than mere recklessness to meet the intent requirement under the PSLRA: "even if some senior officers had concluded by mid-2006 that the FIN 46R accounting was wrong, *that does not establish that they acted with fraudulent purpose to conceal the problems* until January 2007."¹¹³ While only dictum, this statement still suggests that the pendulum is swinging very far toward a notion of recklessness *qua* intent.

Though less extreme, even typical applications of the recklessness standard in class action suits reveal that it has been pulled closer and closer toward actual intent to defraud. For example, in *Goldstein v. MCI WorldCom*, the plaintiffs alleged that CEO Bernie Ebbers made rosy statements about the company's growth and profitability during a period in which \$685 million of worthless receivables were

108. *Id.* at 888–89.

109. *Id.* at 885 (emphasis added) (quoting *Pub. Emps.' Ret. Ass'n v. Deloitte & Touche LLP*, 551 F.3d 305, 313 (4th Cir. 2009)).

110. *Id.* at 885–99.

111. *Id.* at 894.

112. *Id.* at 893.

113. *Id.* at 893–94 (emphasis added).

being kept on the books.¹¹⁴ To establish a strong inference of scienter, plaintiffs pointed to a \$405 million after-tax write-off taken shortly after MCI WorldCom's failed attempt to merge with Sprint, alleging that Ebbers either knew or recklessly disregarded the fact that the worthless receivables were artificially inflating the company's financial standing.¹¹⁵ Applying its "severe recklessness" standard, the Fifth Circuit rejected plaintiffs' scienter pleadings as insufficient, noting that no direct evidence of Ebbers's guilty knowledge had been pled, stating, "[T]he complaint fails to connect Ebbers . . . to the write-off procedure in a manner that demonstrates involvement in the initiation of write-offs, [and] the complaint fails to allege that Ebbers ever actually received a write-off request, or rejected a request to write-off a delinquent account."¹¹⁶

In assessing recklessness in this manner, the court required a strong inference that the officer actually knew of contrary information when he made his rosy statement. Of course, this evidence would also provide a strong inference that the executive or corporate defendant intended to mislead.¹¹⁷ If, to surmount a motion to dismiss, courts require factual allegations that allow a strong inference of intent to defraud, then recklessness has been swallowed and ceases to exist as a state of mind that establishes civil liability in 10(b) suits. Yet, as we demonstrate in the next section, recklessness remains alive and well on the criminal side of 10(b).

III.

THE BREADTH OF CRIMINAL RECKLESSNESS IN 10(B) AND 10B-5 JURISPRUDENCE

Neither the text of section 10(b) nor Rule 10b-5 provides for criminal penalties. Instead, they give rise to civil or administrative causes of action. Section 32(a) of the '34 Act criminalizes violations of section 10(b) and Rule 10b-5,¹¹⁸ but in so doing, gives only vague guidance regarding the requisite mens rea for a conviction.

Section 32(a) states that "[a]ny person who *willfully* violates any provision of this chapter . . . or any rule or regulation thereunder" shall

114. *Goldstein v. MCI WorldCom*, 340 F.3d 238, 242–43 (5th Cir. 2003).

115. *Id.* at 243–44.

116. *Id.* at 251–52. The court characterized the scienter allegations as "perhaps . . . gross mismanagement" by those charged with handling accounts. *Id.* at 254.

117. *See, e.g., Rothman v. Gregor*, 220 F.3d 81, 91–92 (2d Cir. 2000) (holding that scienter was sufficiently pled where facts contrary to defendants' statements were public record).

118. Securities Exchange Act of 1934 § 32(a), 15 U.S.C. § 78ff(a) (2013).

be subject to penalties.¹¹⁹ These criminal penalties include imprisonment for up to twenty years, fines of up to \$5 million for individuals and \$25 million for defendants other than natural persons, or both.¹²⁰ Section 32(a) concludes by admonishing: “no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.”¹²¹

The government is thus required to prove specific intent as it relates to the action constituting the fraudulent, misleading, or deceitful conduct.¹²² Reading the statute literally, evidence that the defendant acted “willfully” in making a false or misleading statement is necessary.¹²³ But the statute provides no indication of the meaning of “willfulness.” And while the Supreme Court has stated that the government must prove that the securities fraud defendant “willfully” violated Rule 10b-5,¹²⁴ just as in the civil context, the Court has not opined as to whether this “willfulness” encompasses recklessness. This uncertainty has left jurists and commentators guessing about the level of volition, knowledge, or purpose necessary for a criminal 10(b) conviction, including specifically what recklessness is in that context.¹²⁵ Although one might imagine that the criminal law would require a predictable and higher mens rea standard, the precise contours of “willfulness” have been drawn by the lower federal courts in an inconsistent and often lax fashion.¹²⁶

With few exceptions, courts agree that mere negligence is insufficient for criminal liability for securities fraud.¹²⁷ But no one has yet defined where negligence ends and willfulness begins. Does “willful-

119. *Id.* Similarly, section 24 of the amended Securities Exchange Act provides for criminal liability for willful violations. § 77x.

120. § 78ff(a).

121. *Id.*

122. *E.g.*, *United States v. Brown*, 578 F.2d 1280, 1284 (9th Cir. 1978).

123. *E.g.*, *United States v. O'Hagan*, 139 F.3d 641, 647 (8th Cir. 1998).

124. *E.g.*, *United States v. O'Hagan*, 521 U.S. 642, 665–66 (1997).

125. *See* Jed. S. Rakoff, “Willful” Intent in Criminal Securities Cases, N.Y. L.J., May 11, 1995, at 3, 3; Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1580–98.

126. *See, e.g.*, Buell, *supra* note 7, at 556 (noting that “the lower federal courts have issued dozens of opinions making a mess of the matter”).

127. Surprisingly, some older cases upheld convictions that seemed to involve mere negligence. *See* *United States v. Schaefer*, 299 F.2d 625, 629 (7th Cir. 1962); *Stone v. United States*, 113 F.2d 70, 75 (6th Cir. 1940); *see also* *United States v. Meyer*, 359 F.2d 837, 839 (7th Cir. 1966) (holding that a defendant cannot prevail on a good-faith defense to a securities fraud charge “if he could have ascertained the true facts by the exercise of that degree of care expected of a reasonably prudent person”); *accord* MODEL PENAL CODE § 2.02(3) (AM. LAW INST. 2012).

ness” mean purposeful fraud,¹²⁸ or willingness to disregard or ignore falsity,¹²⁹ or are the more lenient “must have known”¹³⁰ or “simple” recklessness standards enough?¹³¹ Several courts have reached each of these conclusions.¹³² Most disturbing are those courts purporting to employ a recklessness standard and upholding convictions in cases that likely would have been dismissed at the pleading stage if brought by civil plaintiffs.

A close look at the facts of a seminal case in this area, *United States v. Tarallo*, helps to elucidate our problem. Aldo Tarallo was a telemarketer at Intellinet, Inc., where his role was to solicit investors for a portfolio of businesses, including weight loss clinics and a medical technology firm.¹³³ Tarallo told potential investors that the clinics were financially strong, that C. Everett Koop and Tom Brokaw were affiliated with the firms, and that the medical technology company had earned FDA approval for a system that could detoxify a person of all alcohol or drugs in just minutes.¹³⁴ He also promised clients that their investments would be held safely in a trust, yield twelve percent yearly interest, and be paid back before the firm’s initial public offering.¹³⁵ In reality, there was no such trust and the businesses were fictitious; investors lost their money and criminal prosecutions ensued.¹³⁶

At Tarallo’s trial, the district court instructed the jury that conviction was proper if it found that the defendant had made a false statement “which was a representation that either ‘(a) was then known to be untrue by the person making or causing it to be made or (b) was made or caused to be made with reckless indifference as to its truth or

128. See *United States v. Piepgrass*, 425 F.2d 194, 199–200 (9th Cir. 1970); *Rice v. United States*, 149 F.2d 601, 603 (10th Cir. 1945).

129. See *United States v. Gentile*, 530 F.2d 461, 469–70 (2d Cir. 1976); *United States v. Mackay*, 491 F.2d 616, 623 (10th Cir. 1973); *United States v. Amick*, 439 F.2d 351, 363–64 (7th Cir. 1971); *United States v. Benjamin*, 328 F.2d 854, 862–63 (2d Cir. 1964).

130. See *United States v. DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998); *United States v. Natelli*, 527 F.2d 311, 320–23 (2d Cir. 1975).

131. Some commentators have opined that “willfulness” does not encompass behavior that is reckless. *E.g.*, Blaine F. Burgess, Note, *Securities Prosecution: Unconventional Securities and the Inherently Defective Common Enterprise Rules*, 41 N. KY. L. REV. 159, 162–63 (2014).

132. See Buell, *supra* note 7, at 557 (identifying a spectrum of standards and citing cases).

133. *United States v. Tarallo*, 380 F.3d 1174, 1180 (9th Cir. 2004).

134. *Id.*

135. *Id.*

136. *Id.* at 1180–81.

falsity.’”¹³⁷ The jury convicted Tarallo on multiple counts of criminal securities fraud.¹³⁸

Tarallo appealed his conviction, arguing, among other things, that he did not have the requisite knowledge or intent to give rise to a willful breach of securities laws and that the district court erroneously applied a “recklessness” standard.¹³⁹ In short, Tarallo argued that he did not know his statements were false. According to Tarallo, he merely dutifully delivered his employer’s official typewritten script and informational financial materials, which “were sophisticated and were not recognizably false.”¹⁴⁰

However, evidence showed that the very same “trust” Tarallo touted to investors as secure was in fact the account that paid his salary, loosely suggesting that he must have known, or at least suspected, that there were either shenanigans surrounding the company’s finances or that the so-called “trust” was vulnerable.¹⁴¹ Coynes, Tarallo’s co-worker, had testified for the prosecution that he came to the realization that the investor money he and Tarallo were soliciting was not being held safely in a trust because “we were getting paid a commission, the sales manager was getting paid a commission, and the owner of the company was obviously living a decent life-style and that money had to come from somewhere.”¹⁴² Therefore, even if Tarallo’s direct knowledge of the truth, or the falsity of his representations on behalf of his employer, could not be proven, the circumstantial evidence suggested that he was surrounded by red flags. On appeal, Tarallo’s conviction was upheld.¹⁴³

137. *Id.* at 1188–89.

138. *Id.* at 1181.

139. *Id.*

140. *Id.* at 1181–82.

141. *Id.*

142. *Id.* at 1182.

143. The pressing legal issue in *Tarallo* was whether recklessness sufficed as a level of intent in light of section 32(a)’s use of the word “willfully.” Tarallo’s defense contended that the Supreme Court, in its 1997 decision in *United States v. O’Hagan*, 521 U.S. 642 (1997), required more than recklessness for a conviction of securities fraud. *Tarallo*, 380 F.3d at 1189. The Ninth Circuit did not agree, opting to interpret the Supreme Court’s words as the Eighth Circuit did in its subsequent *O’Hagan* opinion on remand. *Id.* There, the Eighth Circuit concluded that “willfully” simply required the intentional doing of the wrongful act, not knowledge of its illegality. *United States v. O’Hagan*, 139 F.3d 641, 647 (8th Cir. 1998). Thus, the Ninth Circuit interpreted “willingness” in the 10(b) context as volition to misrepresent, without elucidating on the state of mind involved in formulating the lie (i.e., whether the misrepresentation was negligent, calculated, or the result conscious avoidance of the truth). *Tarallo*, 380 F.3d at 1189. On these legal bases, the court upheld the recklessness jury instruction that led to Tarallo’s conviction. *Id.* (“[R]eckless disregard for truth or falsity is sufficient to sustain a conviction for securities fraud.”).

Though opinions in 10(b) criminal cases are not as plentiful as they are on the civil side, *Tarallo* does not stand entirely alone. *United States v. Farris*, an earlier Ninth Circuit case, closely resembles *Tarallo*. *Farris* involved the resale of fraudulent mortgage-backed securities.¹⁴⁴ Like Aldo Tarallo, Jamie Farris and his co-defendant were not the inventors of the scheme, but rather were on the frontline selling the fraudulent products to brokers and the public.¹⁴⁵ As in *Tarallo*, there was little proof establishing what the defendants actually intended. Evidence in *Farris* suggested that the defendants knew the underlying mortgages were risky, and that their issuer was so short on cash that it had asked Farris for a loan to make payroll.¹⁴⁶ Despite this knowledge, the *Farris* defendants pursued opportunities to sell these products, which were represented to investors as “good investments.”¹⁴⁷ The Ninth Circuit upheld the convictions, reasoning that there was at least “reckless disregard as to truth or falsity,” and that this state of mind was sufficient to meet the 10(b) burden.¹⁴⁸

Other criminal cases are similar.¹⁴⁹ The collection of criminal 10(b) decisions points to a slippery standard for recklessness that appears to veer away from subjective knowledge toward circumstantial, objective-style assessments. If courts uphold convictions where there is neither a strong inference of specific intent to mislead nor a strong inference that the defendant actually knew his statements were fraudulent when made, then the criminal 10(b) standard has become looser than the relatively strict civil standard we saw at work in the preceding Part.

144. *United States v. Farris*, 614 F.2d 634, 636–37 (9th Cir. 1979).

145. *Id.*

146. *Id.* at 638–40.

147. *Id.* at 639.

148. *Id.* at 638–39.

149. *See United States v. Henderson*, 446 F.2d 960, 966 (8th Cir. 1971) (recklessness inferred because the defendant displayed “familiarity with the books”); *Elbel v. United States*, 364 F.2d 127, 131–32 (10th Cir. 1966) (recklessness found where executive sold securities in the face of “danger signals”); *United States v. Cen-Card Agency/C.C.A.C.*, 724 F. Supp. 313, 316–17 (D.N.J. 1989) (“[W]here the fraud is so clear on its face, the mere assertion that the speaker intended no fraud is insufficient to raise a factual issue.”). *But see United States v. Goyal*, No. CR 04-00201 MJJ, 2008 WL 755010, at *8 (N.D. Cal. Mar. 21, 2008), *rev’d*, 629 F.3d 912 (9th Cir. 2010); *United States v. Koenig*, 388 F. Supp. 670, 711–12 (S.D.N.Y. 1974) (holding that defendants could not be said to have knowledge when they were not given any details of a possible restructuring). Affirmation or reversal of convictions is, like exoneration or conviction itself, dependent on fact-specific inquiries.

IV.

WHAT ART THOU, RECKLESSNESS?

As we have shown, defining recklessness is difficult, shifting about as it does on the cloudy spectrum between simple negligence at one end and guilty knowledge or deceptive purpose at the other.¹⁵⁰ We hope to have also demonstrated the muddle in which intent—particularly recklessness—finds itself in the 10(b) arena, particularly when we capture and attempt to reconcile the criminal and civil standards all at once.¹⁵¹

Let us now return to our hypothetical from the Introduction to reinforce these points. The fact pattern began with a CEO optimistically touting her company's important new product, a product the company is relying on for its continued profitability. The CEO's comments suggest that any perceived delay in the product's market debut was no more than a business decision to make the most of the fall buying season. In reality, the launch was delayed because the product was not ready for the market. Repeated tests showed that it was poorly designed and suffered from several significant malfunctions. Ultimately, the product was released, failed, and took the company down with it. The corporation's earnings report and the CEO's accompanying statements came under scrutiny from the plaintiff's bar and federal prosecutors.¹⁵²

If we simultaneously applied an exacting civil definition and loose criminal standard of recklessness, what would result under the PSLRA and 10(b)? After all, a civil court *is* likely to apply one of the post-PSLRA super-recklessness standards.¹⁵³ *Yates* would demand allegations supporting an inference that our hypothetical CEO "purposely" sought to defraud investors.¹⁵⁴ *Goldstein* would require particularized cogent allegations compelling an inference that our CEO both knew about the product malfunctions and that the malfunctions were the cause of the delayed release, contrary to her public statements; in other words, *Goldstein* would require a strong inference that the CEO intended to defraud the market.¹⁵⁵ Despite the fact that civil recklessness is supposed to be assessed on an objective basis, civil courts are applying the PSLRA's "strong inference" pleading

150. See *supra* Parts II, III.

151. See *supra* Parts II, III.

152. See *supra* notes 2–6 and accompanying text.

153. See *supra* Part II.

154. See *supra* notes 107–13 and accompanying text.

155. See *supra* notes 114–16 and accompanying text.

standard to require an inference of *subjective* knowledge of the risk, if not actual purpose to deceive.¹⁵⁶

Under *Goldstein*, despite common knowledge within the company about the product's difficulties and likely failure, without allegations of specific conversations with (or memoranda directed to) the CEO, a civil court will not find a strong inference of recklessness on her part.¹⁵⁷ The civil suit by investors is likely to be dismissed with prejudice.

On the other hand, criminal securities fraud can be premised on "reckless disregard as to truth or falsity."¹⁵⁸ In criminal securities-fraud cases like *Tarallo*, *Farris*, and their ilk, courts are required to apply a subjective recklessness standard, asking what the defendant actually knew rather than what a reasonable person should have known.¹⁵⁹ Although seemingly applying a subjective recklessness standard, some courts—or, more specifically, their juries—seem to veer toward the more objective "he-should-have-known" or "how-could-he-not-have-known?" standard.¹⁶⁰ Courts have also shown their willingness to make inferences about the defendant's knowledge based on tenuous circumstantial evidence, such as a coworker's suggestion that it was "ridiculous" to think there were no shenanigans and based on the defendant's purported knowledge that he was being paid out of a trust account.¹⁶¹ And courts of appeals have repeatedly upheld these assessments of recklessness as being sufficient for convictions.¹⁶²

156. See *supra* Parts I.B, II.

157. See *supra* notes 114–16 and accompanying text.

158. See *supra* Part III.

159. See *supra* Part I.B.

160. See *supra* Part III. There is a robust empirical literature on the potentially dilutive effects of juror decision-making (i.e., understanding, emotion, intuition, anger, and other biases) on criminal standards of proof. See Andreas Glöckner & Christoph Engel, *Can We Trust Intuitive Jurors? Standards of Proof and the Probative Value of Evidence in Coherence-Based Reasoning*, 10 J. EMPIRICAL LEGAL STUD. 230, 245–47 (2013) (finding that jurors rely heavily on "cohesive-based reasoning" to construct coherent interpretations of the facts and do not rely heavily on the probative value of the evidence); Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 L. & HUM. BEHAV. 655, 657–58 (1996) (finding that jurors sometimes use their own commonsense understanding of fairness to define "beyond a reasonable doubt," and positing that this confusion might permit a jury to apply a subjective standard of proof that is lower than what the law requires).

161. *United States v. Tarallo*, 380 F.3d 1174, 1182 (9th Cir. 2004). See *supra* notes 133–43 and accompanying text.

162. See *supra* notes 143–49 and accompanying text.

Using *Tarallo* as a guide and taking an *objective* evidentiary approach,¹⁶³ the criminal trier of fact could rightly conclude that the circumstantial evidence in our hypothetical establishes that the CEO knew of the product's poor design and test results and misstated the facts with conscious disregard of the substantial and unjustifiable risk that her statements would lure new investors and retain current ones.¹⁶⁴ Thus, the CEO is likely to face stiff criminal penalties, including incarceration.

CONCLUSION

A case in which a CEO's reckless statements are absolved in civil court yet punished in criminal court has yet to occur. However, this thought experiment demonstrates that it is possible. Statutes like the Securities Exchange Act, which carry both criminal and civil penalties, offer insight into the unusual interactions between statutes and the common law, and in particular, force us to critically assess whether the civil and criminal laws are embodying their purported policy objectives.

It is well-established that criminal-law standards should be more stringent than their civil-law counterparts.¹⁶⁵ Yet we have shown that criminal recklessness standards can result in the drawing of adverse inferences that would be prohibited in civil class-action suits, pointing toward the absurd result of criminal conviction and civil dismissal for the same behavior.¹⁶⁶

What can we make of a system that can hold a defendant criminally liable and yet absolve her in a civil suit based on the same conduct? As the Supreme Court once noted, the concept of recklessness is "hopelessly versatile."¹⁶⁷ It is unpredictable and context-specific, and covers a broad range of behaviors and forms of intent. Undoubtedly, some flexibility is necessary in defining recklessness. But recklessness need not be an abstruse concept, so loose as to fit any and all circumstances or none at all. In the 10(b) securities fraud context, where a single denotation of "recklessness" is shared in civil and criminal suits, the courts have recast and stretched the conceptual bounds of

163. See *supra* Part I.B.

164. See *supra* notes 133–49 and accompanying text.

165. In 2011, Professor Buell touched on this problem, stating plainly that it should be "uncontroversial" to "insist[] that the standard for *criminal* fault [in securities fraud cases] be both high and clear and that it be closely tethered to a conception of genuine core fraud [as opposed to a species of misrepresentation]." Buell, *supra* note 7, at 573.

166. See *supra* Part III.

167. *Farmer v. Brennan*, 511 U.S. 825, 838 (1994).

recklessness, resulting in two or more concepts sharing little or no family resemblance.¹⁶⁸

Twenty years after the passage of the PSLRA, we can now see its unintended, and perhaps unforeseen, consequences. Though seemingly procedural in nature, the PSRLA's heightened pleading standard has had a profound effect on the substantive recklessness standard being applied in the courts.¹⁶⁹ Our findings make clear that the more restrictive recklessness standards used in civil 10(b) cases since the adoption of the PSLRA have moved toward a subjective-evidence approach, one that is inconsistent with the traditional boundaries between criminal and civil liability.¹⁷⁰ The goals and purposes of the civil law will be best met with an objective, external recklessness standard, while the goals and objectives of criminal law can best be met through a subjective, intent-based recklessness standard. And while both the inherent mutability of the concept of recklessness and the passage of the PSLRA have brought about this problem, only clear judicial guidance can bring about a solution.

168. *See supra* Part I.A.

169. *See supra* Part II.

170. *See supra* Part II.

