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Citation: 40 Del. J. Corp. L. 280 2015



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REINING IN RECIDIVIST FINANCIAL INSTITUTIONS

JOEL SLAWOTSKY*

ABSTRACT

Large financial institutions have demonstrated a systemic disregard for U.S. laws and international sanctions, repeatedly engaging in severe illegal conduct. In 2014 alone, in addition to numerous "lesser" settlements, BNP paid nearly \$9 billion and Bank of America paid nearly \$17 billion to resolve various investigations. The criminal conduct admitted to by these financial institutions includes violating international law, rigging interest rates, enabling tax evasion, engaging in market fraud, manipulating currencies, and bribing officials.

These activities have caused numerous primary adverse results, such as human rights violations, terrorism, tremendous economic losses, and even possible contribution to the global financial crisis. Secondary negative results include loss of faith and confidence in American political institutions, democracy, and fair play, as well as a sense that a double standard exists wherein large corporations can commit crimes with impunity.

Some financial institutions have become serial lawbreakers, violating not only civil, but also criminal laws. Many of the institutions are subject to multiple investigations, and some of them previously assured prosecutors and regulators that criminal activity would not be repeated after they were involved in what was widely considered a historic settlement. Financial corporations' systemic violation of the law reveals that financial institutional misconduct is widespread, deeply embedded, and broad based.

Despite the imposition of large monetary fines, regulatory and prosecutorial efforts have largely failed to stem large financial institutions' criminal activities. The government ensures that waivers are granted so that the financial institution suffers no loss in its ability to conduct commerce. Essentially, the financial institutions are welcomed back immediately after paying a fine. Market reaction is generally positive as reputational harm is nonexistent, and business continues as usual. No prison sentences are meted out for managers or officers, and the

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corporation's guilty plea is seen as the cost of pursuing a profitable course of action.

Neither government fines nor penalties seem to have a meaningful effect on the misconduct. A new approach is therefore needed that will serve as an adequate punishment and deter such wrongdoing. This article proposes that, under certain circumstances, the law should provide for the extraordinary punishment of breaking up a corporation by selling units to rival entities. This punishment would be reserved for outrageous misconduct that endangers national security, imperils financial markets, or is undertaken by a serial wrongdoer. Moreover, only misconduct directly or indirectly approved or ratified by managers or directors would be subject to this punishment. Actions taken by a rogue employee would not qualify. Additionally, the level of misconduct would track the standard for punitive damages and not be the result of ordinary negligence.

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I. INTRODUCTION

Vibrant and trustworthy financial markets are the cornerstone of American economic prosperity.¹ As titanic financial institutions wielding immense power and influence, financial services corporations, investment houses, and banks are at the epicenter of these markets.² Financial institutions that engage in criminal behavior weaken the United States because law-abiding financial institutions are also crucial for upholding American international relations and foreign policy.³ Exemplifying this crucial link between finance and American international relations, "U.S. foreign policy is increasingly targeting financial activity by criminals, enemy states and individuals in sanctioned regimes."⁴

Unfortunately, financial institutions have demonstrated a systemic disregard for U.S. laws and international sanctions, repeatedly engaging in severe illegal conduct.⁵ Numerous financial institutions have become serial lawbreakers,⁶ violating not only civil, but also criminal laws.⁷ The

¹See WILLIAM C. DUDLEY & R. GLENN HUBBARD, HOW CAPITAL MARKETS ENHANCE ECONOMIC PERFORMANCE AND FACILITATE JOB CREATION 1-2 (2004), *archived at* <https://perma.cc/P8EH-68BW> (noting that vibrant markets generate numerous economic benefits).

²See SALZ REVIEW: AN INDEPENDENT REVIEW OF BARCLAYS' BUSINESS PRACTICES 20-22 (2013), *archived at* <http://perma.cc/E7E7-S9C6> (explaining how large banks and investment houses play a central role in modern economics).

³See *id.* at 4 ("Banks also play a central role in supporting the global economy by facilitating international trade and helping to manage risk. As a result, the largest banks operate in many regions and countries, making them globally significant in world affairs.").

⁴Elisa Martinuzzi & Ambercen Choudhury, *Europe Bankers Cringe at Rising U.S. Fines Amid BNP Probe*, BLOOMBERG BUS. (June 12, 2014), *archived at* <http://perma.cc/2F7K-CYQA>; see also *id.* ("Caught in the middle are international lenders, whose desire to avoid business and reputational risk assures their cooperation.").

⁵See Robert Passikoff, *HSBC: the Worldwide Local Bank . . . for Money Laundering and Rogue Nations. Some Brand Positioning, Huh?*, FORBES (Dec. 13, 2012), *archived at* <http://perma.cc/26PR-SQPK>. Passikoff reported on HSBC's connections with various criminal organizations and sanctioned regimes:

HSBC also understood the subtleties of—and were, apparently, fully invested in—money laundering for drug kingpins and terror cells, while ignoring U.S. sanctions established against rogue nations. HSBC's US unit managed to position the brand in this way by accepting \$7 billion of dollars [sic] from Mexican drug cartels, conducting 25,000 Iranian transactions totaling over \$19 billion in just one week, and helping Saudi banks with terror financing for groups like al-Qaeda.

Id.; see also Tom Schoenberg, *BNP Said Close to \$9 billion Sanctions Accord with U.S.*, BLOOMBERG BUS. (June 23, 2014), *archived at* <http://perma.cc/9P3C-AJZA> (discussing fines imposed against French bank for intentionally providing \$30 billion in financial transactions to sanctioned nations such as Iran and Sudan).

⁶See Matt Taibbi, *Why Isn't Wall Street in Jail?*, ROLLING STONE (Feb. 16, 2011), *archived at* <http://perma.cc/FM9F-AKCU> (enumerating instances of corporate fraud).

⁷Dawn Kopecki & Hugh Son, *JPMorgan Discloses Eight DOJ Probes from Asia to Madoff*, BLOOMBERG BUS. (Nov. 1, 2013, 10:00 PM), *archived at* <http://perma.cc/EFY3->

fact that well-known financial institutions—the global leaders of capitalism—are repeat offenders speaks volumes to the entrenchment of such criminal behavior.⁸

Recently announced settlements and fines reveal that financial institutional misconduct is widespread, deeply embedded, and broad based.⁹ For example, in June 2014 a global bank, BNP, plead guilty to criminal charges that resulted in a huge penalty—nearly \$9 billion—for violations of U.S. sanctions against rogue states.¹⁰ In August 2014, Bank of America agreed to pay almost \$17 billion to resolve mortgage fraud claims that are alleged to have caused or contributed to the 2008 financial crisis.¹¹

The BNP and Bank of America settlements are merely two examples of numerous multi-billion dollar fines imposed on large financial institutions.¹² In addition to multi-billion dollar settlements,

NLN6 ("Some of these probes are criminal, they're not even just civil anymore, and I think it's very telling about the broad risk-taking culture . . ."). Other commentators have also noted the seriousness of corporate criminality: "[T]he criminal acts of large corporations have rocked the nation and brought the world economy to its knees. It is no exaggeration to say that corporate crime, and the struggle to counteract it, has become one of the most pressing legal issues of the new millennium." Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PENN. J. BUS. L. 797, 799 (2013).

⁸See Markoff, *supra* note 7, at 799. This phenomenon is a recent development: The beginning of the twenty-first century has seen the dawning of a new era of criminality. This new era has been planned and perpetuated not by such traditional criminal players as organized crime or drug cartels, but instead by the large, multinational corporations that are essential actors in both the economy and society at large.

Id.

⁹See Jenny Anderson, *4 Banks, Including JPMorgan, Fined in Europe Over 'Cartel' Behavior*, N.Y. TIMES DEALBOOK (Oct. 21, 2014), archived at <http://perma.cc/LR8V-D63V>.

¹⁰See Steve Schaefer, *BNP Paribas Hit With Nearly \$9B Fine, Pleads Guilty to Skirting U.S. Sanctions*, FORBES (June 30, 2014, 6:15 PM), archived at <http://perma.cc/6DJZ-MGG7> (internal quotation omitted) ("BNP Paribas went to elaborate lengths to conceal prohibited transactions, cover its tracks and deceive U.S. authorities . . . violating economic sanctions by moving dollar-denominated transactions through the American banking system on behalf of Sudanese, Iranian and Cuban parties.").

¹¹See Danielle Douglas, *Bank of America and DOJ Reach \$17 Billion Settlement Over Mortgage Securities*, WASH. POST (Aug. 21, 2014), archived at <http://perma.cc/Y66A-6FTB>:

A record \$17 billion is heading out the door of Bank of America and into the hands of a host of state and federal authorities to end multiple investigations into the bank's sale of faulty mortgage securities.

Bank of America on Thursday became the third Wall Street bank to reach a multibillion-dollar agreement with the Justice Department for allegedly misleading investors about the quality of bonds sold in the lead-up to the 2008 financial crisis.

¹²See Tom Schoenberg, Dakin Campbell & Christie Smythe, *Citigroup Reaches \$7 billion Mortgage-Bond Settlement*, BLOOMBERG BUS. (July 14, 2014, 12:05 PM), archived at <http://perma.cc/Q9N8-V2FH> ("[In July 2014,] Citigroup Inc. agreed to pay \$7 billion in fines and consumer relief to resolve government claims that it misled investors about the quality of mortgage-backed bonds sold before the 2008 financial crisis."); see also David Voreacos &

there have been a host of "lesser" fines and settlements for illegal activity encompassing a broad range of culpable conduct, including purposeful evasion of sanctions against rogue regimes,¹³ intentional fraudulent market manipulation of key interest rates¹⁴ and foreign exchange rates,¹⁵ money laundering for drug traffickers and terrorists,¹⁶ providing private wealth management to dictators to enable despots to loot their national treasures,¹⁷ and fraudulent conduct with respect to market rigging.¹⁸

Deeply troubling is that, despite lawless behavior and the extensive fines imposed nearly a decade ago, financial institutions have repeatedly engaged in illegal conduct.¹⁹ Many of the same financial institutions fined recently were among the firms sanctioned in the previous "[h]istoric settlement" hailed as imposing substantial penalties and which was going to reform financial institutions.²⁰ Indeed, only ten years ago, regulators assured investors that wide-scale fraud was being severely punished and would not reoccur.²¹ In 2003, former SEC Chairman William H. Donaldson ("Donaldson") claimed, "[t]hese cases reflect a sad chapter in the history of American business—a chapter in

Tom Schoenberg, *Credit Suisse Pleads Guilty in Three-Year U.S. Tax Probe*, BLOOMBERG BUS. (May 19, 2014), archived at <http://perma.cc/77QS-5QVL> ("Credit Suisse AG agreed to pay \$2.6 billion in penalties and pleaded guilty to helping Americans cheat on their taxes"); Dan Fitzpatrick, *J.P. Morgan Settles its Madoff Tab*, WALL ST. J. (Jan. 7, 2014), <http://www.wsj.com/articles/SB10001424052702304887104579306323011059460> ("J.P. Morgan Chase & Co. will pay a high price for Bernard Madoff's crimes. After years of denying culpability in the Ponzi scheme, the bank agreed to \$2.6 billion in payments to resolve charges it failed to police Mr. Madoff's activities").

¹³See, e.g., Press Release, Dep't of Justice, *Commerzbank AG Admits to Sanctions and Bank Secrecy Violations, Agrees to Forfeit \$563 Million and Pay \$79 Million Fine* (Mar. 12, 2015), archived at <http://perma.cc/4AXX-Q5AE>.

¹⁴Ben Protesch & Mark Scott, *Barclays Settles Regulators' Claims Over Manipulation of Key Rates*, N.Y. TIMES DEALBOOK (June 27, 2012), archived at <http://perma.cc/B48H-AWCV>.

¹⁵Liam Vaughan, Gavin Finch & Ambercen Choudhury, *Traders Said to Rig Currency Rates to Profit Off Clients*, BLOOMBERG BUS. (June 11, 2013), archived at <http://perma.cc/N9DZ-FB5X>.

¹⁶See Robert Mazur, Op-Ed., *How to Halt the Terrorist Money Train*, N.Y. TIMES, Jan. 2, 2013, available at <http://www.nytimes.com/2013/01/03/opinion/how-bankers-help-drug-traffickers-and-terrorists.html> (discussing "shocking" statistics).

¹⁷Anthea Lawson, Op-Ed., *The Stolen Money Trail*, N.Y. TIMES, Nov. 23, 2011, available at <http://www.nytimes.com/2011/11/24/opinion/the-stolen-money-trail.html>.

¹⁸See Tom Schoenberg, Dawn Kopceki, Hugh Son & Dakin Campbell, *JPMorgan Said to Reach Record \$13 billion U.S. Settlement*, BLOOMBERG BUS. (Oct. 20, 2013, 1:27 AM), archived at <http://perma.cc/5ALK-6NUN> (explaining that JPMorgan agreed to resolve claims of mortgage-backed security fraud with the U.S. Justice Department in exchange for a \$13 billion payment).

¹⁹See Kevin McCoy, *Banks Face Intensified Sanctions Probes in U.S.*, USA TODAY (July 9, 2014, 7:20 PM), archived at <http://perma.cc/DUY4-DCEV>.

²⁰Joint Press Release, Sec. & Exch. Comm'n et al., *Ten of Nation's Top Investment Firms Settle Enforcement Actions Involving Conflicts of Interest Between Research and Investment Banking* (Apr. 28, 2003), archived at <http://perma.cc/Q9ZX-A95M>.

²¹*Id.*

which those who reaped enormous benefits from the trust of investors profoundly betrayed that trust."²² As former New York Attorney General Eliot Spitzer ("Spitzer") stated, "[t]his global settlement is one of the largest effected by securities regulators to date. It fulfills our promise to help restore integrity to the marketplace and investor confidence in our system."²³ However, as will be discussed below, the very same financial institutions purportedly chastened by the "historic settlement" continued to engage in illegal behavior in the years immediately following their "chastening."²⁴

Thus, the existing regime of punishment and deterrence of outrageous criminal fraud is malfunctioning, and the fraud and deceptive dealings are not being deterred.²⁵ Senator Elizabeth Warren has commented on the current system's failure: "When big financial institutions are not deterred from breaking the law—when, in fact, they have a financial incentive to break the law—then that's what they will do."²⁶ Similar to a hypothetical traffic violator who causes road accidents but continues to drive and rack up monetary fines, financial institutions serially violate the law and simply pay a fine.²⁷

The current prosecutorial and regulatory regime relevant to financial institutional misconduct is broken. New revelations of wrongdoing are exposed on a rather frequent basis.²⁸ Even after a "prolonged" period of relative quiet, government regulators and prosecutors eventually discover and investigate new wrongdoing of financial institutions.²⁹ Promises of "vigorous enforcement" are followed by settlement discussions that result in "substantial" monetary penalties.³⁰ Incredibly, despite the substantial penalties imposed, some

²²*Id.*

²³*Id.*

²⁴See *infra* Part III.

²⁵But see McCoy, *supra* note 19 (stating that the prospect of being cut out of the American economy put economic pressure on violators).

²⁶Senator Elizabeth Warren, Remarks at the Levy Institute's 24th Annual Hyman P. Minsky Conference, The Unfinished Business of Financial Reform (Apr. 15, 2015) [hereinafter Warren], archived at <http://perma.cc/7JRL-4WV7>.

²⁷See McCoy, *supra* note 19 ("[P]otential violations continue emerging . . .").

²⁸See *supra* note 12 and accompanying text.

²⁹See, e.g., Jean Eaglesham & Christopher M. Matthews, *Big Banks Face Scrutiny Over Pricing of Metals*, WALL ST. J. (Feb. 23, 2015), <http://www.wsj.com/articles/big-banks-face-scrutiny-over-pricing-of-metals-1424744801> (reporting investigation of possible metal price rigging).

³⁰See Letter from Chris Katopis, Excc. Dir., Ass'n of Mortg. Investors, to Eric Holder, U.S. Atty Gen. (Oct. 7, 2013), archived at <http://perma.cc/EAL4-F9F7>. Mr. Katopis indicated that some settlements with large financial institutions "have resulted in the responsible party shifting a portion of the settlement costs" to investors in residential mortgage-backed securities, and "[t]hese precedents are very troubling for investors and their impact on the general public. These are not unforeseen consequences, but rather an obvious scheme by Too-

recidivist financial institutions do not take long to revert to their criminal activities: both Barclays and UBS are being investigated for violating recent agreements with U.S. prosecutors, conduct befitting racketeers, not corporations.³¹

The actors in this surreal drama seem to have a vested interest in continuing the saga.³² Financial institutions are apparently not sufficiently punished, as the public experiences repeated fraud.³³ There is an apparent reluctance to truly punish these financial institutions. A former SEC litigator criticized the agency for its lack of enthusiasm in prosecuting financial institutional misconduct.³⁴ According to the attorney, senior regulators at the SEC "were more focused on getting high-paying jobs after their government service than on bringing difficult cases."³⁵ The recurring misconduct of financial institutions indicates insufficient punishment relative to their profits, resulting in a lack of incentive to change behavior.³⁶ Inertia and an unwillingness to amend the broken system are evident.³⁷

The current regulation and government policy have led to a system wherein financial institutions commit crimes and are not meaningfully punished, which naturally builds public distrust.³⁸ Fines, which are essentially paid by the shareholders rather than the directors or officers, are ineffectual.³⁹ Apparently, the current system is encouraged to continue because it provides significant benefits to the principal actors

Big-To-Fail (TBTF) banks to evade the consequences for their misconduct by further abusing their duties to investors." *Id.* at 2.

³¹Greg Farrell, Gavin Finch & Tom Schoenberg, *Barclays Said to Face US Fine for Breaching Libor Settlement*, BLOOMBERG BUS. (May 15, 2015, 6:57 PM), archived at <http://perma.cc/NB3Y-TFJA> ("Barclays Plc will probably be fined for violating a three-year-old settlement over interest-rate rigging, but U.S. prosecutors will stop short of seeking a guilty plea"); Tom Schoenberg, *U.S. Set to Rip Up UBS Libor Accord, Seek Conviction*, BLOOMBERG BUS. (May 12, 2015, 6:04 PM), archived at <http://perma.cc/5PBP-4QLN> ("The U.S. Justice Department is set to rip up its agreement not to prosecute UBS Group AG for rigging benchmark interest rates, according to a person familiar with the matter, taking a new step to hold banks accountable for repeat offenses.").

³²See Joint Press Release, Sec. & Exch. Comm'n et al., *supra* note 20.

³³*Id.*

³⁴*Id.*

³⁵Robert Schmidt, *SEC Goldman Lawyer Says Agency Too Timid on Wall Street Misdeeds*, BLOOMBERG BUS. (Apr. 8, 2014), archived at <http://perma.cc/Q4MT-AR7Y>.

³⁶See *id.*

³⁷See *id.* (quoting James Kidney, a former SEC attorney) ("On rare occasions when enforcement does go to the penthouse, good manners are paramount. Tough enforcement, risky enforcement, is subject to extensive negotiation and weakening.").

³⁸See McCoy, *supra* note 19 (noting "potential violations continue emerging amid investigative pressure" despite the threat of penalties and sanctions).

³⁹See, e.g., Ted Kaufman, *Lopsided Approach to Wall Street Fraud Undermines the Law*, N.Y. TIMES DEALBOOK (May 8, 2014), archived at <http://perma.cc/D7VY-36ZJ> (arguing that large fines paid by the shareholders of megabanks for the egregious fraud on Wall Street will not stop similar violations).

involved: regulators, prosecutors, government coffers, and the institutions whose profits dwarf the penalties imposed.⁴⁰

However, a tipping point has either been reached or will soon be attained. A growing number of Americans perceive that large financial institutions are corrupt and that the government is complicit in their unethical behavior.⁴¹ There is a deep sense that financial institutions fail to play by the existing rules.⁴² The American public perceives such corporations as wielding undue influence that effectively immunizes them from punishment.⁴³ Free market capitalism and shareholder value-based corporate governance, which has led to great prosperity in the United States, is under considerable criticism.⁴⁴

An increasing number of Americans also feel disenfranchised from the "system," and many believe the economy is "rigged" and that "Too Big to Fail" ("TBTF") and "Too Big to Jail" ("TBTJ") corporations have an unfair advantage over ordinary citizens.⁴⁵ The Occupy Wall Street movement ("OWS"), the popularity of Bitcoin and other virtual currencies, and the rising number of Americans who believe in conspiracy theories symbolize a growing distrust of big corporations, government, and the free market.⁴⁶ "The resulting lack of clarity fuels indiscriminate resentment toward 'bankers' as a class and supports the

⁴⁰Matt Taibbi, *Everything is Rigged: The Biggest Price-Fixing Scandal Ever*, ROLLING STONE (Apr. 25, 2013), archived at <http://perma.cc/P6KL-CSNT>.

⁴¹Eduardo Porter, *The Spreading Scourge of Corporate Corruption*, N.Y. TIMES, July 10, 2012, at B1, available at <http://www.nytimes.com/2012/07/11/business/economy/the-spreading-scourge-of-corporate-corruption.html>.

⁴²*Id.*

⁴³News Release, Pew Research Ctr., *The People and Their Government: Distrust, Discontent, Anger and Partisan Rancor 7* (Apr. 18, 2010), archived at <http://perma.cc/T736-5S9J>.

⁴⁴See *id.*; see also LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 3 (2012).

⁴⁵See Bourree Lam, *Quantifying Americans' Distrust of Corporations*, ATLANTIC (Sept. 25, 2014), archived at <http://perma.cc/4Y4A-DYRC>.

⁴⁶See Kurt Eichenwald, *The Plots to Destroy America*, NEWSWEEK (May 15, 2014), <http://www.newsweek.com/2014/05/23/plots-destroy-america-251123.html> ("Conspiracy theories have been woven into the fabric of American society since before the signing of the Constitution."); Jeff Bercof, *Who Is Alex Jones, Anyway? Five Fun Facts*, FORBES (Jan. 9, 2013), archived at <http://perma.cc/47EE-XEQB> ("Infowars.com and Prisonplanet.tv . . . attract a monthly unique audience of 4 million."); see also Documentary Tube, *The Trillion-Dollar Conspiracy: 9/11 Mounting Evidence*, YOUTUBE (Sept. 25, 2014), <https://www.youtube.com/watch?v=4LZns-O9rCw> (alleging that 9/11 was ordered by President George W. Bush); SupportLocalScene, *Conspiracy Theory: President Barack Obama*, YOUTUBE (Feb. 27, 2012), <https://www.youtube.com/watch?v=519UKLqWLPY> (contending numerous conspiracy theories about President Barack Obama); SubscriptionFreeTV, *Federal Reserve Conspiracy Documentary*, YOUTUBE (May 9, 2013), <https://www.youtube.com/watch?v=wkXmrpM6R4Q> (asserting that the Federal Reserve "print[s] money from nothing, lend[s] it to the U.S. government and charge[s] interest on these loans").

narrative that highly placed executives are above the law."⁴⁷ In response, there are calls to break up the biggest banks to avoid repeated fraudulent activity.⁴⁸ Presidential hopeful Bernie Sanders has also been a vocal opponent of large banks and has called for major reform: "If Congress cannot regulate Wall Street, there is just one alternative. It is time to break these too-big-to-fail banks up so that they can never again destroy the jobs, homes, and life savings of the American people."⁴⁹

These sentiments are no longer the banter of fringe political rhetoric: the President of the New York Federal Reserve, William Dudley, has made similar statements.⁵⁰ Dudley has questioned whether "the sheer size, complexity and global scope of large financial firms today have left them too big to manage."⁵¹

The public perception is that a palpable double standard exists wherein large financial institutions engage in criminal activity with immunity from prosecution.⁵² There is a vital need to restore a level and fair justice system for all citizens—including large financial institutions.⁵³ A new model of punishment and deterrence must be effectuated to deter recidivist financial services corporations from serially violating the law.

As the Supreme Court ruled in *Citizens United*, corporations have rights like individuals.⁵⁴ Therefore, corporations should be subject to punishment like individuals. As a serial traffic violator loses driving privileges,⁵⁵ so should a repeat corporate financial institutional offender

⁴⁷*The Case of the Missing White-Collar Criminal*, BLOOMBERG VIEW (June 22, 2014, 6:02 PM), archived at <http://perma.cc/R7BK-Q7UW>.

⁴⁸See Warren, *supra* note 26 ("So what should we do about Too Big to Fail? End it, once and for all. Not talk about ending it—truly end it. How? First, break up the biggest banks."); see also Toluse Olorunnipa, *Martin O'Malley Channels Elizabeth Warren in Call for Breakup of Large US Banks*, BLOOMBERG (Jul. 9, 2015, 9:15 AM), archived at <http://perma.cc/FQY4-XGND> (noting that presidential candidate Martin O'Malley proposes breaking up the largest U.S. banks).

⁴⁹Kellan Howell, *Bernie Sanders Unveils Plan To Break Up Wall Street Banks*, WASH. TIMES (Dec. 13, 2014), archived at <http://perma.cc/3THE-HSB9>.

⁵⁰Matthew Boesler, *Dudley Warns Banks Must Improve Culture or Be Broken Up*, Bloomberg (Oct. 20, 2014, 5:32 PM), archived at <http://perma.cc/D2MV-3MGM> ("Banks must change the way employees are compensated and take other steps to fix a corporate culture that encourages misdeeds or face being broken up, said William C. Dudley, president of the Federal Reserve Bank of New York.").

⁵¹*Id.* (internal quotations omitted).

⁵²See Joint Press Release, Sec. & Exch. Comm'n et al., *supra* note 20 (acknowledging financial scandals are making investors "cynical").

⁵³See Joe Brancucci, *Restoring Confidence in Our Financial Institutions*, CREDIT UNION TIMES (Jan. 25, 2015), archived at <http://perma.cc/RG55-Z6UK>.

⁵⁴*Citizens United v. FEC*, 558 U.S. 310, 376 (2010) ("Congress may not prohibit political speech, even if the speaker is a corporation or union.").

⁵⁵See Melissa Crumish, *Actions that Lead to the Loss of Driving Privileges*, DMV.ORG (June 10, 2012), archived at <http://perma.cc/SA4Y-3N2D>.

forfeit its right to engage in business. This article proposes that financial institutions violating certain types of laws, with the requisite intent, should in effect have their licenses revoked by having their businesses sold to competitors.⁵⁶ Similar to traffic violators who initially pay fines but after repeated infractions have their right to drive suspended or revoked, serial recidivist financial institutions should lose their right to conduct business.

However, due to the latent potential for severe economic damage, this penalty should be imposed only under specific guidelines.⁵⁷ The license would not be "lost" with the resulting chaos arising from a breach of investor confidence.⁵⁸ The license of a serial violator would in effect be re-distributed to the defendant's competitors.⁵⁹ The proposal defines serial violations as at least three convictions of specific federal laws conducted either intentionally or with reckless disregard within a ten-year time frame. If a settlement is reached prior to trial, then the conviction itself—the guilty plea—will be sufficient to constitute a violation.

The article proceeds as follows. Part II of this article describes the current problems arising from financial institutional malfeasance.⁶⁰ It focuses on the incentives to act corruptly, rising public discontent and distrust, and the tremendous cost to stakeholders and the economy.⁶¹ Part III describes the rampant criminal behavior in which financial institutions engage.⁶² Such behavior includes cooperation with and support of rogue states and actors⁶³ and institutional financial fraud, such as LIBOR manipulation and sub-prime mortgages.⁶⁴ Part IV explains how the current system of deterrence has failed and proposes a new

⁵⁶This would exclude violations of more modest offenses or those committed by a single rogue employee who carries out a crime despite reasonable controls being in place. *Cf.* U.S. SENTENCING COMM'N, 2014 GUIDELINES MANUAL § 8, introductory comment (2014) (stating that fines should be based on the seriousness of the offense and degree of the organization's culpability).

⁵⁷*Cf. id.* at § 8C1.1 (describing guidelines for fining organizations for criminal activities).

⁵⁸See Marilyn Price & Donna M. Norris, *White-Collar Crime: Corporate and Securities and Commodities Fraud*, 37 J. AM. ACAD. PSYCHIATRY & L. 538, 538 (2009) (explaining the far-reaching consequences and harms of corporate fraud).

⁵⁹It is reasonable to assume that financial institutions would be interested in obtaining competitors' licenses. *Cf.* 3 MURL BAKER ET AL., CONFLICT TIMBER: DIMENSIONS OF THE PROBLEM IN ASIA AND AFRICA § A-4.6.1 (2003) (explaining that banks are willing to pay for their competitors' confidential client lists).

⁶⁰See *infra* Part II.

⁶¹See *infra* Part II.A-D.

⁶²See *infra* Part III.

⁶³See *infra* Part III.A.

⁶⁴See *infra* Part III.B.

system for punishing and deterring illegal conduct by financial institutions.⁶⁵ Part V provides closing remarks.⁶⁶

II. THE MULTIPLE PROBLEMS ARISING FROM THE CURRENT SYSTEM

This section provides a brief description of the endemic fraudulent conduct and its ramifications. This section also discusses reasons for the systemic recurring nature of the wrongdoing.

A. *Examples of Illegal Conduct*

Numerous global financial institutions have effectively become habitual crooks.⁶⁷ HSBC is a prime exemplar.

HSBC . . . understood the subtleties of—and [was], apparently, fully invested in—money laundering for drug kingpins and terror cells, while ignoring U.S. sanctions established against rogue nations. HSBC's US unit managed to position the brand in this way by accepting \$7 billion of dollars [sic] from Mexican drug cartels, conducting 25,000 Iranian transactions totaling over \$19 billion in just one week, and helping Saudi banks with terror financing for groups like al-Qaeda.⁶⁸

Another example of a financial institution that in essence has acted as a criminal enterprise is JPMorgan, which disclosed in 2013 that it was the subject of numerous investigations alleging it has been involved in various financial schemes.⁶⁹ The bank admitted it was the target of eight federal investigations for activities ranging from possible bribery of foreign officials in Asia to allegations of improper mortgage-bond sales.⁷⁰ In January 2014, after investigations into its involvement in corruption, sub-prime fraud, and LIBOR rigging, JPMorgan agreed to

⁶⁵ See *infra* Part IV.

⁶⁶ See *infra* Part V.

⁶⁷ See Taibbi, *supra* note 40.

⁶⁸ See Passikoff, *supra* note 5.

⁶⁹ Kopecki & Son, *supra* note 7.

⁷⁰ *Id.* ("[JPMorgan] disclosed . . . that the Justice Department is examining its energy-trading practices, which were subject to a \$410 million civil settlement with the Federal Energy Regulatory Commission in July. Investigations are also focusing on mortgage-bond sales, interest-rate rigging, the credit-derivatives market, and the bank's trading loss last year . . .").

pay \$2 billion to resolve charges that it aided and abetted the mammoth Madoff Ponzi fraud.⁷¹

Credit Suisse provides another illustration of a titan of capitalism turned criminal.⁷² Large-scale tax evasion requires sophisticated financial services.⁷³ In 2014 Credit Suisse was fined \$2.6 billion for enabling thousands of U.S. clients to intentionally hide at least \$10 to \$12 billion in income from the IRS.⁷⁴ This was not a small backroom operation consisting of one or two "rogue" employees.⁷⁵ Rather, Credit Suisse dedicated a large number of employees to this undoubtedly highly profitable niche business.⁷⁶ Credit Suisse utilized 1,800 employees who falsified documents and engaged in other actions designed to allow their clients to purposely violate the law.⁷⁷ According to a U.S. Senate Report, "Credit Suisse helped clients cheat the IRS by opening accounts under false names, avoiding the mail when delivering account statements and servicing clients in the U.S. or Switzerland."⁷⁸

Another example is Barclays, whose "new" CEO, Antony Jenkins,⁷⁹ admitted in early 2013 that the bank's business culture incentivized profitable illegal conduct.⁸⁰ Jenkins pledged to overhaul Barclay's corporate culture and "commit[]" Barclays to "integrity."⁸¹ According to Jenkins, "[t]here will be no going back to the old ways of doing things We get it. We are changing the way we do business, we are changing the type of business we do and we are setting out a new

⁷¹Ben Protess & Jessica Silver-Greenberg, *JPMorgan Is Penalized \$2 Billion Over Madoff*, N.Y. TIMES DEALBOOK (Jan. 7, 2014), archived at <http://perma.cc/LY7V-FAW9>.

⁷²See Vorcacos & Schoenberg, *supra* note 12.

⁷³*Id.* (explaining how Credit Suisse used sham entities and other surreptitious methods to assist its clients in committing tax fraud).

⁷⁴*Id.*

⁷⁵See David Vorcacos & Alan Katz, *Credit Suisse Helped Clients Hide Billions*, *Senate Says*, BLOOMBERG BUS. (Feb. 26, 2014, 5:47 AM), archived at <http://perma.cc/XXY7-XHZT> (noting that tax fraud involved 1,800 Credit Suisse employees).

⁷⁶*Id.*

⁷⁷*Id.*; see also Vorcacos & Schoenberg, *supra* note 12 ("Credit Suisse AG agreed to pay \$2.6 billion in penalties and pleaded guilty to helping Americans cheat on their taxes, making it the first global bank in a decade to admit to a crime in a U.S. courtroom.").

⁷⁸See Vorcacos & Katz, *supra* note 75 ("Credit Suisse Group AG helped American customers hide as much as \$10 billion in assets from the Internal Revenue Service, more than double the amount previously known, according to a U.S. Senate committee.").

⁷⁹Jenkins's tenure as CEO did not last long—he was fired by the directors in 2015. See Jill Treanor, *Barclays Fires Chief Executive Antony Jenkins*, GUARDIAN (July 8, 2015, 10:54 AM), archived at <http://perma.cc/MAM8-JUU3> ("A long-running boardroom row over the future of Barclays' investment banking side, the business that was built up by his predecessor Bob Diamond, was said to be behind Jenkins' departure.").

⁸⁰Elisa Martinuzzi & Richard Partington, *Barclays CEO Falters in Culture Shift as Suit Cites Fraud*, BLOOMBERG BUS. (June 27, 2014, 2:30 PM), archived at <http://perma.cc/J6N2-LJ6M>.

⁸¹*Id.*

course."⁸² Despite this promise, New York's Attorney General filed a complaint in June 2014 alleging a widespread serial pattern of lies and fraud with respect to trading that continued as recently as April 2014.⁸³

B. *The Current System Is Broken*

Financial institutions act corruptly, apparently oblivious to any consequences.⁸⁴ The belief that the imposition of monetary fines is simply a cost of doing business is well supported.⁸⁵ First, the profits garnered from the illegal activity may dwarf the fine.⁸⁶ If the fines are a fraction of the windfall of illegal profits, then a strong incentive exists to continue to misbehave. For example, presuming the LIBOR manipulation rigged rates on trillions of dollars of commercial and consumer loans, the profits from such scheming will dwarf the penalty.⁸⁷ If a company manipulated the LIBOR rate by 0.25% on a portfolio of \$4 trillion dollars of loans, then the resulting \$10 billion rigged-interest differential would be large enough to make "crime pay." A former SEC insider referred to the fines and settlements with financial institutions as a "tollbooth on the bankster turnpike."⁸⁸

Indeed, following the "massive record" \$9 billion fine imposed on BNP, the bank stated the enormous sum "won't force it to reduce its dividend or derail growth plans."⁸⁹ Indeed, BNP boasted that the fine would not affect the bank⁹⁰ and that it would "retain its licenses and expect[ed] 'no impact' on its operational or business capabilities."⁹¹ Often, punishments involving the suspension or revocation of privileges

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Roberta Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 HOFSTRA L. REV. 25, 25 (2014).

⁸⁵ See Jonathan Berr, *Banks Pay Fines, but Show Little Sign of Reform*, CBS NEWS MONEY WATCH (Nov. 12, 2014), archived at <http://perma.cc/P777-WR5S> (arguing that repeated fines do not work).

⁸⁶ Stephen D. Simpson, *The Uneven Consequences of Corporate Misbehavior*, INVESTOPEDIA (Sept. 16, 2012), archived at <http://perma.cc/YLS3-VQX3>.

⁸⁷ Chad Bray & Jack Ewing, *Europe Sets Big Fines in Settling Libor Case*, N.Y. TIMES DEALBOOK (Dec. 4, 2013), archived at <http://perma.cc/GM29-H9VV>.

⁸⁸ See Schmidt, *supra* note 35 (quoting James Kidney, former SEC attorney).

⁸⁹ Fabio Benedetti-Valentini, *BNP Rises as Bank Sticks with Dividend Plans after Fine*, BLOOMBERG BUS. (July 1, 2014, 8:13 AM), archived at <http://perma.cc/QP3D-BRVP>.

⁹⁰ See Joseph Ax, Aruna Viswanatha & Maya Nikolacva, *U.S. Imposes Record Fine on BNP in Sanctions Warning to Banks*, REUTERS, July 1, 2014, archived at <http://perma.cc/T5KF-LH48>.

⁹¹ Tiffany Kary, Del Quentin Wilber & Patricia Hurtado, *BNP to Pay Almost \$9 Billion to End U.S. Sanctions Probe*, BLOOMBERG BUS. (July 1, 2014, 3:21 AM), archived at <http://perma.cc/Y53G-QE6K>.

and licenses are waived, thus further eliminating any real punishment to the bottom line.⁹²

Second, the "cost" of the fines is not completely paid by the offending financial institution.⁹³ Costs and expenses may be insurable and are generally tax-deductible.⁹⁴ Further, any uncovered costs can also be "legally laundered" into the economy either through higher service costs or reduced value to consumers.⁹⁵ Moreover, typical agency corporate governance proves that crime pays.⁹⁶ Even presuming *arguendo* the corporation had to pay fines from its own coffers, years of illegal profits will likely have led to large raises and bonuses for the senior managers who initiated, approved, or ratified the misconduct. The senior managers may not care about fines the corporation may have to pay at some future point—the loss is principally borne by the company and/or its shareholders at the time the penalty is imposed.⁹⁷

Third, there is almost no criminal prosecution for the officers and directors who initiate, approve, or ratify misconduct.⁹⁸ Since there is little risk of a prison sentence,⁹⁹ the managers who decide to act

⁹²Ben Protes, *S.E.C. Chief Defends Agency's Handling of Bank Punishment*, N.Y. TIMES DEALBOOK (Mar. 12, 2015), <http://www.nytimes.com/2015/03/13/business/dealbook/scc-chief-defends-agencys-handling-of-bank-punishment.html>; see also Neil A. Weinberg & Jeffrey Voegeli, *Credit Suisse Among Banks in Limbo Over Regulatory Waiver*, BLOOMBERG BUS. (Nov. 14, 2014), archived at <http://perma.cc/MU8D-BEDN> ("[Credit Suisse] said . . . it is pleased that the Labor Department's temporary waiver and proposal 'allows [it] to continue serving [its] pension clients without disruption.'").

⁹³Settlements often are not costly to the banks, as the expenses are partly shifted to other parties. See Letter from Chris Katopis, *supra* note 30, at 2 (noting that some settlements with large financial institutions "have resulted in the responsible party shifting a portion of the settlement costs" to investors in residential mortgage-backed securities).

⁹⁴See Michael Corkery, *Citigroup Settles Mortgage Inquiry for \$7 Billion*, N.Y. TIMES DEALBOOK (July 14, 2014), archived at <http://perma.cc/NM9C-99LY> ("The payments to the states are tax-deductible . . .").

⁹⁵See Brian J. O'Connor, *Piggish Bankers Went Whole Hog to Abuse Consumers in 2014*, CHI. TRIB. (Dec. 28, 2014), archived at <http://perma.cc/CGX7-UWVE> ("[B]ank customers paid 6.5 percent more for ATM surcharges this year, 1.7 percent more for a bounced check, and had to keep more money than ever in low- or no-interest checking accounts to avoid even higher service fees.").

⁹⁶See Vincent Acbi, Gabriele Sabato & Markus M. Schmid, *Risk Management, Corporate Governance, and Bank Performance in the Financial Crisis 3* (Oct. 11, 2011) (unpublished manuscript), archived at <http://perma.cc/Y5M2-4HUT> (arguing that a limited number of banks followed the best practices in corporate governance in 2007).

⁹⁷William C. Dudley, President and Chief Excc. Officer of the Fed. Reserve Bank of N.Y., Remarks at the Workshop on Reforming Culture and Behavior in the Financial Services Industry, *Enhancing Financial Stability by Improving Culture in the Financial Services Industry* (Oct. 20, 2014), archived at <http://perma.cc/PDN2-XBTZ>.

⁹⁸*Why Have So Few Bankers Gone to Jail?*, ECONOMIST EXPLAINS (May 13, 2013), archived at <http://perma.cc/D7RK-KL75>.

⁹⁹See Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAG., Apr. 30, 2014, available at <http://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html> (reporting that only one Wall Street financial executive will go to jail for his role in the latest financial crisis).

criminally are not personally punished and are only rewarded for bad conduct.¹⁰⁰ As U.S. Senator John McCain has noted, these fines are levied on the corporation, and there has been precious little criminal prosecution of the senior managers involved in the illegal conduct.¹⁰¹ The lack of individual criminal accountability following the 2008 financial crisis is instructive:

The senior executives who played leading roles in the 2008 financial crisis [breathed] a sigh of relief: If any committed crimes, the statute of limitations [ran] out for most of them [in 2014]. It's safe to say nobody will go to jail. . . .

Even where the government has demonstrated that crimes occurred in and around the crisis, individual culpability has been notably lacking. From 2009 through May 2014, federal prosecutors filed or threatened criminal charges in 21 separate actions against major financial companies, which admitted to such misdeeds as laundering hundreds of millions of dollars for Mexican and Colombian drug traffickers, systematically lying about their borrowing costs, and devoting hundreds of employees to helping U.S. citizens commit tax fraud.¹⁰²

The lack of criminal charges is mystifying. In contrast to the lack of prosecution over recent criminal misconduct, the 1980s banking misconduct witnessed numerous criminal prosecutions.¹⁰³

After the savings-and-loan bust of the 1980s, more than 1,000 people were charged, and more than 100 company officers and directors served prison terms. The accounting and other corporate scandals of the early 2000s led to criminal charges against at least 30 top-level executives, most of whom were convicted or pleaded guilty.¹⁰⁴

¹⁰⁰Gretchen Morgenson & Louise Story, *In Financial Crisis, No Prosecutions for Top Figures*, N.Y. TIMES (Apr. 14, 2011), <http://www.nytimes.com/2011/04/14/business/14prosecute.html>.

¹⁰¹Dawn Kopecki & Peter Cook, *McCain Pressures Justice to Hold JPMorgan Executives Accountable*, BLOOMBERG BUS. (Sept. 30, 2013, 5:47 PM), archived at <http://perma.cc/U6SD-KX8C>.

¹⁰²*The Case of the Missing White-Collar Criminal*, *supra* note 47.

¹⁰³*Id.*

¹⁰⁴*Id.*

The lack of prosecution for the current misconduct, which dwarfs the savings-and-loan fraud of thirty years ago, encourages criminal behavior.

Fourth, the government reaps substantial revenue from the imposition of fines.¹⁰⁵ "Large corporations have demonstrated a willingness to pay eye-popping sums, at shareholders' expense, to avoid the uncertainty and embarrassment of extended trials."¹⁰⁶ Therefore, ironically, federal and state governments may benefit from the illegal activities of financial institutions.

Fifth, a "cottage industry" has developed between investigated corporations and former government prosecutors and regulators.¹⁰⁷ For example, JPMorgan's chief counsel, Stephen Cutler, was a former chief of enforcement at the SEC.¹⁰⁸ In another illustration, the former Justice Department counsel, Lanny Breuer ("Breuer"), accepted a vice-chairman position with a reported \$4 million annual salary at a large law firm representing some of these investigated financial institutions.¹⁰⁹ Interestingly, Breuer has been heavily criticized "for not bringing cases against the banks and executives at the center of the [financial] crisis."¹¹⁰ Eric Holder, whose tenure was marked by investigations over the vast financial institutional scandals, has accepted a partnership at a large law firm that represents clients being investigated for wrongdoing.¹¹¹ "Holder, who left office in April, is giving his critics a new round of ammunition by returning to Covington & Burling, the Washington-based law firm with a corporate clientele that has included Bank of America, Citigroup, JPMorgan Chase and Wells Fargo."¹¹²

The prospect of a lucrative, post-government, large-firm employment offer may constitute a corrupting inducement. "Prosecutors with limited resources, no matter how dedicated to justice they may be,

¹⁰⁵ *Id.*

¹⁰⁶ *The Case of the Missing White-Collar Criminal, supra* note 47.

¹⁰⁷ Ben Protess & Jessica Silver-Greenberg, *Neil Barofsky, Old Foe of Bank Bailouts, Said to Be a Monitor for Credit Suisse*, N.Y. TIMES DEALBOOK (June 23, 2014), archived at <http://perma.cc/57GW-JWVR>.

¹⁰⁸ James B. Stewart, *When Trying to Follow Rules Isn't Enough*, N.Y. TIMES (Sept. 20, 2013), <http://www.nytimes.com/2013/09/21/business/at-jpmorgan-trying-to-do-the-right-thing-isnt-enough.html>.

¹⁰⁹ See Ben Protess, *Once More Through the Revolving Door for Justice's Breuer*, N.Y. TIMES DEALBOOK (Mar. 28, 2013), archived at <http://perma.cc/L978-WJP3> ("Like Mr. Breuer, Covington operates at the nexus of Washington and Wall Street. It has represented several financial clients facing federal scrutiny, including the New York Stock Exchange, JPMorgan Chase and the former chief executive of IndyMac.").

¹¹⁰ *Id.*

¹¹¹ *Eric Holder, Former U.S. Attorney General, Has a New Job*, FORTUNE, July 6, 2015, <http://fortune.com/2015/07/06/eric-holder-new-job/> (internal quotation omitted) ("[Holder] will focus on complex cases including matters that are international in scope and raise significant regulatory enforcement issues . . .").

¹¹² Laurence Arnold, *Eric Holder's Job Prospects Were Too Big to Fail*, BLOOMBERG POL. (July 8, 2015, 10:45 AM), archived at <http://perma.cc/9W52-4R2B>.

can't ignore the attractions of such negotiated settlements: more headlines, more money for victims and federal coffers, less risk of failure, and better statistics with which to impress bosses and *potential employers in the private sector*.¹¹³ The perception, and in fact reality, is that government regulators have a vested self-interest to "go easy" on financial institutions.¹¹⁴ Corroborating this truth, a former SEC enforcement attorney bluntly stated, "I have had bosses, and bosses of my bosses, whose names we all know, who made little secret that they were here to punch their ticket They mouthed serious regard for the mission of the commission, but their actions were tentative and fearful in many instances."¹¹⁵

Not only American financial institutions hire regulators; it is a global phenomenon.¹¹⁶ For example, "Morgan Stanley and Banco Santander SA are hiring executives from the U.K. markets regulator for their London operations, as banks look to the watchdog for staff to see them through—and keep them clear of—probes."¹¹⁷ Other financial institutions also engage in this practice:

Banks targeted by the markets watchdog have been increasingly hiring its alumni. Six months after settling claims Barclays Plc manipulated interbank offered rates, the bank hired the man who led the watchdog during the probe. Hector Sants joined the London-based lender in 2013 to a newly created job as head of compliance and government and regulatory relations. Royal Bank of Scotland Group Plc., also fined for rate rigging, named the regulator's former managing director of supervision Jon Pain as head of conduct and regulatory affairs in August.¹¹⁸

The current governance system incentivizes prosecutorial and regulatory tolerance rather than aggressive enforcement and punishment. The fines are substantially smaller than the profits generated by violating the law. Moreover, the legal defense fees are generally tax-deductible as a business expense, and fines may be also. None of the individuals responsible are imprisoned, and no officer or manager has to disgorge illegal gains. From a corporate governance perspective, financial

¹¹³*The Case of the Missing White-Collar Criminal*, *supra* note 47 (emphasis added).

¹¹⁴Schmidt, *supra* note 35.

¹¹⁵*Id.* (quoting James Kidney, former SEC attorney).

¹¹⁶*See, e.g., About the EY Global Regulatory Network*, ERNST & YOUNG GLOBAL LTD., archived at <http://perma.cc/27YP-PAKZ> (last visited Aug. 15, 2015).

¹¹⁷Suzi Ring, *Banks Hire FCA Alumni to Staff Top U.K. Compliance Posts*, BLOOMBERG BUS. (June 11, 2014), archived at <http://perma.cc/8RFL-5FAB>.

¹¹⁸*Id.*

institutional fraud is a perfect storm of management agency conflicts. The managers of the business can potentially reap immense short-term raises and bonuses knowing the expenses, if any, will be borne by the shareholders. Since the potential windfall of salary and bonuses dwarfs the possibility that their own shares will lose value—and the amount of loss would be a tiny fraction of the gain—there is no incentive to refrain from engaging in illegal activity.

C. *Lack of Vigorous Prosecution*

The U.S. government's prosecutors and regulators have displayed great reluctance to aggressively pursuing financial institutional wrongdoing.¹¹⁹ Senator Elizabeth Warren is a vocal critic of the lack of vigorous criminal prosecution:

Today, the Department of Justice doesn't take big financial institutions to trial—ever—even when financial institutions engage in blatantly criminal activity. Instead, DOJ uses what it calls deferred prosecution agreements and non-prosecution agreements, in which it asks the offending firm to pay a fine and to work with the government to come up with a plan for doing better in the future.¹²⁰

Attorney General Eric H. Holder ("Holder") conveyed a sobering connotation when he stated that the government could not prosecute some corporations because doing so might result in severe damage to the economy.¹²¹ In other words, Holder's remarks suggest that large financial institutions can cross the line and commit criminal acts knowing that the government is reluctant to prosecute these institutions because of the potential adverse ramifications on the economy.¹²² Holder stated that the reticence to prosecute "is a function of the fact that some

¹¹⁹ According to this view, prosecuting financial institutions may result in severe collateral damage:

Convicting businesses can harm innocent employees and the broader economy—a lesson learned when the 2002 prosecution of Enron Corp. auditor Arthur Andersen LLP cost thousands of people their jobs. The stakes become even higher with a systemically important bank. Hence, U.S. attorneys tend to tread carefully. Even if they demand a guilty plea—as they did last month in Credit Suisse Group AG's tax-fraud case—they go to great lengths to make sure the damage isn't too severe.

Id.

¹²⁰ Warren, *supra* note 26.

¹²¹ Jillian Berman, *Eric Holder's 1999 Memo Helped Set the Stage for 'Too Big to Jail'*, HUFFINGTON POST (June 4, 2013), archived at <http://perma.cc/5MXW-6XF6>.

¹²² *Id.*

of these institutions have become too large It has an inhibiting impact on [the government's] ability to bring resolutions that I think would be more appropriate."¹²³

Echoing these sentiments, Lanny Breuer, Chief of the Justice Department's Criminal Division, noted the risk to the general economy arising from aggressive prosecution:

We are frequently on the receiving end of presentations from defense counsel, CEOs, and economists who argue that the collateral consequences of an indictment would be devastating for their client. In my conference room, over the years, I have heard sober predictions that a company or bank might fail if we indict, that innocent employees could lose their jobs, that entire industries may be affected, and even that global markets will feel the effects.¹²⁴

The statements of these key Justice Department officials are unsettling for two reasons. First, some financial institutions may have become so entrenched in the American economy that the U.S. is indeed so dependent on their wellbeing that fraudulent indiscretions are overlooked. "Bigger" is thus certainly "better" when it comes to engaging in malfeasance.¹²⁵ That certain financial institutions have become so entrenched could also bode ill for American democracy:

When that other Roosevelt—Teddy Roosevelt—broke up the monopolies, he did it in large part because those giant companies threatened our democracy. Big corporations, Roosevelt said, should not have the power "to interfere in politics in order to secure privileges to which [they are] not entitled." Our economy suffers when those who can hire armies of lobbyists and make huge political contributions can decide what the financial cops can and cannot do. Our democracy suffers when Congress puts the interests of a handful of giant banks ahead of the needs of 320 million American citizens. If the big banks keep calling the shots, they will own both our economy and our democracy.¹²⁶

¹²³Phil Mattingly, *Too-Big-to-Fail Banks Limit Prosecutor Options, Holder Says*, BLOOMBERG BUS. (Mar. 6, 2013, 2:19 PM), archived at <http://perma.cc/NS2A-2Z45>.

¹²⁴Lanny A. Breuer, Assistant Att'y Gen., Speech at the New York City Bar Association (Sept. 12, 2012), archived at <http://perma.cc/E5YW-GBDQ>.

¹²⁵See *supra* Part II.A-B.

¹²⁶Warren, *supra* note 26.

Second, by so admitting, the United States has provided large financial institutions an incentive to commit criminal wrongdoing since they are armed with the knowledge that their misconduct is essentially immune from prosecution.¹²⁷ The government is signaling that there is no reason to stay within the boundaries of the law since violating the law brings tremendous profit to the financial institution and there is no fear of being prosecuted.¹²⁸ In fact, the larger the financial institution, the more it is exempt from compliance with the law.¹²⁹ Thus, ironically, the larger the company, the less likely it will be prosecuted, despite the inherently more extensive damage that a major global business can inflict.¹³⁰

There are valid points to the argument that overly fervent prosecutions can lead to harsh economic consequences.¹³¹ Should a large institution be indicted, many clients can be expected to find other institutions. The Enron saga provides a useful context.¹³² Enron's accounting firm, Arthur Andersen, was convicted in 2002 of obstruction of justice.¹³³ In 2005, the United States Supreme Court reversed the conviction.¹³⁴ However, the damage was done from the outset of the indictment.¹³⁵ Upon the issuance of indictment, most of the firm's clients left and, despite being ultimately cleared, the firm remains a shadow of its former self.¹³⁶ Arthur Anderson's indictment demonstrates the dangers attendant to criminal prosecution of financial institutions.¹³⁷

¹²⁷ See Breucr, *supra* note 124 (stating that more often than not, the guilty party simply "walked away").

¹²⁸ *Id.*

¹²⁹ See Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1794-95 (2011) (noting that large corporations may be relatively safe from government prosecution).

¹³⁰ See *id.* at 1807-11 (showing large and public corporations receive a "disproportionately" large number of "deferred and non-prosecution agreements").

¹³¹ See Robert Schmidt, *Charging Banks Can Be Terminal for US Prosecutors*, SYDNEY MORNING HERALD (May 3, 2014), <http://www.smh.com.au/business/charging-banks-can-be-terminal-for-us-prosecutors-20140502-37lch.html> ("The government rarely charges large banks . . . because it usually proves fatal for the company. The 2002 indictment of accounting firm Arthur Andersen put 85,000 people out of work and created a public relations debacle for the Justice Department that still influences its decision making.").

¹³² See *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

¹³³ *Id.* at 698, 702.

¹³⁴ *Id.* at 698 (reversing guilty verdict due to improper jury instructions).

¹³⁵ See James Kelly, *The Power of an Indictment and the Demise of Arthur Andersen*, 48 S. TEX. L. REV. 509, 511 (2006) ("In short, the United States Government has the power to destroy a partnership, such as an accounting or law firm, without the burden of trial or having to provide evidence of a crime beyond a reasonable doubt.").

¹³⁶ See *id.* at 510-11.

¹³⁷ See Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 426 (2007) ("A criminal indictment can have devastating consequences for a corporation and risks the market imposing what is in effect a corporate death penalty.").

Accordingly, post-Enron, prosecutors have focused criminal litigation on smaller companies.¹³⁸ When confronted with serious wrongdoing on the part of large corporations, prosecutors focus on Deferred Prosecution Agreements ("DPA").¹³⁹ "[B]y using DPAs, the DOJ avoids the potential collateral consequences of indictment and conviction while obtaining structural reforms and the corporation's aid in prosecuting individual corporate officers. In exchange, the DOJ gives up the increased deterrent effect of actually prosecuting the corporation itself."¹⁴⁰ However, these types of resolutions were not intended to provide cover for financial institutional racketeering:

These kinds of agreements were originally created to deal with low-level, non-violent individual offenders, but they have now been transformed beyond recognition to create get-out-of-jail-free cards for the biggest corporations in the world.¹⁴¹

Ironically, it is the large global criminal actor that most likely will reap the benefit of a DPA.¹⁴² Furthermore, financial institutions that serially commit crimes reap the benefits of subsequent DPAs, further entrenching the lack of incentive to stop criminal activity:

No firm should be allowed to enter into a deferred prosecution or non-prosecution agreement if it is already operating under such an agreement—period. Any firm that enters one of these agreements should have to pay—as a mandatory minimum—fines at least equal to every dime of profit generated as a result of their illegal activity. And we should change the legal standards so that there is some meaningful judicial review of whether these agreements are appropriate.¹⁴³

Notwithstanding the risks, the argument of TBTF or TBTJ financial institutions must be re-evaluated in light of the extraordinary

¹³⁸ See Markoff, *supra* note 7, at 800 ("In large part because of the backlash caused by Andersen's demise, the DOJ has shifted its approach to enforcing the criminal law against large corporations.").

¹³⁹ See *id.*

¹⁴⁰ *Id.* at 807.

¹⁴¹ Warren, *supra* note 26.

¹⁴² *Id.*

¹⁴³ *Id.*

serial criminal activity.¹⁴⁴ While aggressive prosecution may pose risks, ardent criminal conduct must be deterred. Moreover, it is imperative to note the recurring nature of the misconduct and the misplaced hype surrounding the "historic" settlements over a decade ago that were supposed to ensure that financial institutions stopped engaging in illegal conduct.¹⁴⁵ The facts of the "historic" \$1.4 billion settlement in 2003 with numerous financial institutions are quite instructive.¹⁴⁶ According to the accompanying SEC Press Release, "[i]n addition to the monetary payments, the firms are also required to comply with significant requirements that dramatically reform their future practices"¹⁴⁷

Former SEC Chairman Donaldson remarked that the settlement reflected a new chapter in fairness and integrity:

The hallmark of our business and financial system is that the rule of law must prevail and when wrongdoing occurs, it must be confronted and punished. Today we do just that. . . . These cases reflect a sad chapter in the history of American business—a chapter in which those who reaped enormous benefits from the trust of investors profoundly betrayed that trust. These cases also represent an important new chapter in our ongoing efforts to restore investors' faith in the fairness and integrity of our markets.¹⁴⁸

Likewise, former Attorney General Eliot Spitzer claimed that wide-ranging structural reforms would restore integrity:

This global settlement is one of the largest effected by securities regulators to date. It fulfills our promise to help restore integrity to the marketplace and investor confidence in our system. The wide-ranging structural reforms to firms' research operations will empower investors to use securities research in a practical and meaningful way when making investment decisions.¹⁴⁹

A former North American Securities Administrators Association ("NASAA") President, Christine Bruenn, stated, "We're hopeful that the

¹⁴⁴ See Markoff, *supra* note 7, at 812-30 (discussing the federal government's reluctance to prosecute and presenting powerful evidence that prosecutions are one of the best methods of inducing corporations to act legally).

¹⁴⁵ *Id.* at 801.

¹⁴⁶ See Joint Press Release, Sec. & Exch. Comm'n et al., *supra* note 20.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

settlement announced today will help restore the faith and trust of wary and cynical investors."¹⁵⁰

Then-National Association of Securities Dealers ("NASD") Chairman and CEO Robert Glauber made similar optimistic comments:

Today marks an ending, but even more, a beginning. Because in finalizing this settlement, we take a giant step on the road to restoring and renewing investor confidence. The final resolution we announce today is a good one for everyone, everywhere, who has a stake in the integrity of the U.S. capital markets.¹⁵¹

Former New York Stock Exchange ("NYSE") Chairman Dick Grasso boasted, "I am absolutely certain that we will come out of this period with a stronger system that puts the interests of the investing public first."¹⁵²

These statements, in historical context, are almost surreal. Over a decade ago, regulators proudly proclaimed that "the rule of law must prevail" and that "we take a giant step on the road to restoring and renewing investor confidence."¹⁵³ One would think these prosecutorial and regulator statements were referring to the substantial scandals and frauds of recent years. Incredibly, these comments were made in 2003 and simply underscore the failure of the current model of punishing large financial institutions.¹⁵⁴ Many of the very same financial institutions that were allegedly taught a lesson in 2003 are involved in the current plethora of illegal conduct.¹⁵⁵ JPMorgan, UBS, Goldman Sachs, and Merrill Lynch (now Bank of America) were all involved in the supposedly historic settlement that was touted as the foundation of a "stronger system" to prevent fraudulent conduct.¹⁵⁶ These same financial institutions have been shown to continually engage in rogue banking and criminal conduct.¹⁵⁷

Incipient indications that the U.S. government may be shifting to a more litigious position regarding corrupt financial institutions have

¹⁵⁰ See Joint Press Release, Sec. & Exch. Comm'n et al., *supra* note 20.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Joint Press Release, Sec. & Exch. Comm'n et al., *supra* note 20.

¹⁵⁴ *Id.*

¹⁵⁵ David Benoit, *J.P. Morgan Fallout: Estimating Other FHFA Settlement Payments*, WALL ST. J. BLOG (Oct. 22, 2013), <http://blogs.wsj.com/moneybeat/2013/10/22/j-p-morgan-fallout-estimating-other-fhfa-settlement-payments/>.

¹⁵⁶ *Id.*

¹⁵⁷ See *infra* Part III.

begun to appear.¹⁵⁸ In a video posted to the Justice Department's website in May 2014, Holder stated that the government is aggressively reviewing financial institutional misconduct "that could result in action in the coming weeks and months."¹⁵⁹ Holder, attempting to retract the potential damage of his previous TBTJ remarks, stated, "I intend to reaffirm the principle that no individual or entity that does harm to our economy is ever above the law. . . . There is no such thing as 'too big to jail.'"¹⁶⁰ Holder was evidently alluding to the guilty pleas of Credit Suisse, BNP, and Citigroup. Yet, a closer examination of these three so-called prosecutions reveals that aside from headline-grabbing fines, not much has been affected. Indeed, business as usual continues.

According to Holder, "BNP Paribas went to elaborate lengths to conceal prohibited transactions, cover its tracks and deceive U.S. authorities. . . . If sanctions are to have teeth, violations must be punished."¹⁶¹ Prosecutors called BNP "the worst offender."¹⁶² Incredibly, despite being the "worst offender," BNP bragged that the fine would have no effect on its operations.¹⁶³ Moreover, BNP obtained a waiver from a ban that would have prevented the bank from operating as an investment adviser.¹⁶⁴

Despite claims that no one is above the law and promises of aggressive prosecutions, the outrageous misconduct relative to the Forex manipulation provides another example of extremist prosecutorial leniency. Prosecutors expressed concern at the defendants' Forex rate rigging:

The scheme was a "brazen display of collusion," Attorney General Loretta Lynch said in a statement. "This Department of Justice intends to vigorously prosecute all those who tilt the economic system in their favor, who

¹⁵⁸ *Banks Could Face Criminal Cases Soon, Attorney General Says*, NEWSWEEK (May 5, 2014), <http://www.newswweek.com/banks-could-face-criminal-cases-soon-attorney-general-says-249631>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Benedetti-Valentini, *supra* note 89.

¹⁶² Ben Prottess & Jessica Silver-Greenberg, *BNP Paribas Admits Guilt and Agrees to Pay \$8.9 billion Fine to U.S.*, N.Y. TIMES DEALBOOK (June 30, 2014), archived at <http://perma.cc/2R54-UNR5>.

¹⁶³ Benedetti-Valentini, *supra* note 89.

¹⁶⁴ Dave Michaels, *BNP Paribas to Remain U.S. Investment Advisor After Guilty Plea*, BLOOMBERG BUS. (June 30, 2014), archived at <http://perma.cc/XHW8-DPGM> ("The bank won a temporary reprieve from a ban on serving as an investment adviser under an order issued today by the U.S. Securities and Exchange Commission.").

subvert our marketplaces, and who enrich themselves at the expense of American consumers," she said.¹⁶⁵

Yet, incredibly, despite the brazen fraud, and the prosecutors' stated intentions, the defendants were permitted to simply pay a fine and continue business as usual: "All of the banks that pleaded guilty said they received needed waivers from the Securities and Exchange Commission to continue managing mutual funds and raise capital quickly, a person familiar with the matter told Bloomberg."¹⁶⁶

Credit Suisse similarly demonstrates the abject failure of the current system. Credit Suisse helped thousands of Americans evade taxes. Credit Suisse admitted that its criminal misconduct "spanned decades."¹⁶⁷ Yet, prosecutors and regulators actively sought to mitigate the defendant's damages.¹⁶⁸

Last week, the Securities and Exchange Commission also voted to grant Credit Suisse a temporary exemption from a federal law that requires a bank to hand over its investment-adviser license in the event of a guilty plea, according to two of the people briefed on the matter. That decision effectively spares Credit Suisse from one of the harshest repercussions of pleading guilty.¹⁶⁹

Another example is Citigroup, which agreed to resolve mortgage-fraud claims for approximately \$7 billion. Holder referred to the conduct as "egregious" and stated the bank confessed to its wrongdoing in "great detail."¹⁷⁰ Notwithstanding the "egregiousness," and its "detailed confession," the Justice Department agreed to release claims relating to collateralized debt obligations ("CDOs").¹⁷¹ "In a boon for Citigroup, the deal with the Justice Department forgoes any potential cases against the bank related to [CDOs], which were often tied to mortgages."¹⁷² Not surprisingly, the bank's shares went up three percent upon the

¹⁶⁵David McLaughlin, Tom Schoenberg & Gavin Finch, *Six Banks Pay \$5.8 Billion, Five Guilty of Market Rigging*, BLOOMBERG BUS. (May 20, 2015, 10:00 AM), archived at <http://perma.cc/P7GA-ACJE>.

¹⁶⁶*Id.*

¹⁶⁷Ben Protes & Jessica Silver-Greenberg, *Credit Suisse Pleads Guilty in Felony Case*, N.Y. TIMES DEALBOOK (May, 19, 2014), archived at <http://perma.cc/F9FA-GKVV>.

¹⁶⁸*Id.* ("The Justice Department sought to contain the damage.")

¹⁶⁹*Id.*

¹⁷⁰Sheelah Kolhatkar, *Citigroup Settlement Gives the Government a Financial-Crisis Win*, BLOOMBERG BUS. (July 14, 2014), archived at <http://perma.cc/WEC3-C2V8>.

¹⁷¹See Corkery, *supra* note 94.

¹⁷²*Id.*

announcement,¹⁷³ and the CEO was pleased with the outcome.¹⁷⁴ It seems that despite the severity of the wrongdoing, there is no anticipated substantive negative effect on the bank.

In addition to the lack of meaningful penalty imposition, it is crucial to note that financial institutions suffer no consequences. As mentioned earlier, BNP boasted that the settlement will not affect its operations.¹⁷⁵ In other words, it will continue to do business. This underscores a crucial fact that government regulators often grant waivers of penalties.¹⁷⁶ Sometimes, a financial institution deserves to be disqualified from conducting specific transactions. Yet, despite the deserved penalty, disqualification waivers are routinely granted.¹⁷⁷ Waivers are often extended by regulators based upon concerns that imposing restrictions could have deleterious effects on the financial institution, as well as "other parties."¹⁷⁸ Waiving punishments serves to corroborate the suspicion that large institutions are above the law. Senator Warren has sharply criticized the propensity of the SEC to grant waivers and to fail to pursue civil charges:

The SEC is even worse. The SEC rarely takes any big institutions to trial, and it also fails to use other tools in its enforcement toolbox. For example, the SEC grants the status of "Well-Known Seasoned Issuer" to certain companies that it believes are uniquely trustworthy. That status allows these companies to access the capital markets more easily. By law, the SEC is supposed to revoke this privilege if a company receives a criminal conviction or violates the anti-fraud provisions of the federal securities laws. But more often than not, the SEC waives this automatic revocation, and passes up yet another opportunity to meaningfully deter future misconduct.¹⁷⁹

¹⁷³*Id.*

¹⁷⁴See Dakin Campbell, *Citigroup Beats Estimates as Bank Reaches Mortgage Accord*, BLOOMBERG BUS. (July 14, 2014), archived at <http://perma.cc/H6VG-BFXG> ("The bank's Basel 3 Tier 1 common-capital ratio increased to 10.6 percent from 10.5 percent in the first quarter.").

¹⁷⁵Benedetti-Valentini, *supra* note 89.

¹⁷⁶Floyd Norris, *Convicted of Felonies, Banks Are Allowed to Stay in Business*, N.Y. TIMES (May 15, 2014), http://www.nytimes.com/2014/05/16/business/banks-that-are-criminals-remain-in-business.html?_r=0%20May%2015,%202014.

¹⁷⁷*Id.*

¹⁷⁸See *supra* Part II.C (discussing incidental harm to innocent employees and the overall economy).

¹⁷⁹Warren, *supra* note 26.

In a dissent from granting a waiver, SEC Commissioner Kara M. Stein ("Stein") forcefully articulated the disadvantages in granting waivers.¹⁸⁰ According to Stein, "the Commission's action to waive [its] own automatic disqualification provisions arising from RBS' criminal misconduct may have enshrined a new policy—that some firms are just too big to bar."¹⁸¹ Moreover, "[s]uffice it to say, this is egregious criminal conduct with far-reaching consequences in the United States, in the markets the Commission oversees, as well as in global financial markets. This factor weighs strongly against granting a waiver."¹⁸² Stein adds that:

Over the years, Congress and the Commission have adopted numerous disqualification provisions, intended to protect investors and the markets from "bad actors." Yet the Commission routinely waives them. We need to step back and think broadly about what these provisions are intended to accomplish, and ask ourselves—are we achieving the intended goals? Are they being fairly applied to all firms and individuals? Large institutions should be treated no differently, neither better nor worse, than small and medium-sized issuers.

. . . These disqualification and bad actor provisions have the potential for deterrence at large institutions that no one-time financial penalty could ever wield. Yet, we repeatedly relieve issuers of the supposedly automatic consequences of their misconduct.

Our website is replete with waiver after waiver for the largest financial institutions. Some large firms have received well over a dozen waivers of one sort or the other over the past several years. One large financial firm alone, in a 10 year period, has received over 22 different waivers—often making the argument that it has a "strong record of compliance with federal securities laws."¹⁸³

Essentially, large financial institutions have acted as lawbreakers, yet are not truly punished. BNP is the archetype exemplar.¹⁸⁴ Indeed,

¹⁸⁰Public Statement, Kara M. Stein, Comm'r, Sec. & Exch. Comm'n, Dissenting Statement in the Matter of the Royal Bank of Scotland Group, plc, Regarding Order under Rule 405 of the Securities Act of 1933, Granting a Waiver from Being an Ineligible Issuer (Apr. 28, 2014), *archived at* <http://perma.cc/G39T-NR5S>.

¹⁸¹*Id.*

¹⁸²*Id.*

¹⁸³*Id.*

¹⁸⁴*See* Benedetti-Valentini, *supra* note 89.

BNP shares soared the day after the settlement.¹⁸⁵ "The firm said in a statement it will retain its licenses and expects 'no impact' on its operational or business capabilities."¹⁸⁶

The perception has developed that a double standard exists whereby financial institutions are not adequately prosecuted:

Perhaps the most interesting part of the prolonged and leak-filled dance leading up to the expected criminal charges has been the effort to assure that the banks will stay in business after they plead guilty. Credit Suisse is expected to admit that it helped Americans evade taxes, and BNP Paribas is expected to admit that it did business with countries blacklisted by the United States. Regulators will not enforce statutes that would seem to bar the banks from some activities.

To put it another way, the Justice Department has gone to great lengths to guarantee that convicted banks will not be treated as criminals.

In being treated that way, the banks will receive the same breaks other banks have come to expect when they are caught violating rules or laws.¹⁸⁷

The fact that financial institutional misconduct is not vigorously prosecuted and is often accompanied by waivers of penalties¹⁸⁸ is not surprising. Prosecutors and regulators have an incentive not to deliver a serious blow to defendants who can offer them lucrative private sector employment.¹⁸⁹ As discussed above, a revolving door exists whereby senior government lawyers and regulators are often subsequently hired by financial institutions.¹⁹⁰

D. *Public Perception of Unfairness*

When large financial institutions repeatedly violate laws and apparently get away with it, the public responds, as expected, with cynicism and distrust.¹⁹¹ Commentators have noted the disconnect between popular notions of the consequences associated with guilty pleas and those experienced by large financial institutions:

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Norris, *supra* note 176.

¹⁸⁸ See *supra* Part II.B-C.

¹⁸⁹ See *supra* Part II.B.

¹⁹⁰ See Protes, *supra* note 109.

¹⁹¹ See *supra* Part II.B-C.

For most people, pleading guilty to a felony means they will very likely land in prison, lose their job and forfeit their right to vote.

But when five of the world's biggest banks plead guilty to an array of antitrust and fraud charges as soon as next week, life will go on, probably without much of a hiccup.¹⁹²

A myriad of political, economic, and social problems stem from the perception, let alone the reality, that large financial institutions repeatedly commit fraud and get away with it.¹⁹³ One of the main reasons for this belief is the lack of meaningful prosecution of corporate offenders or their directors and officers.¹⁹⁴

A direct outcome of the misconduct is increased distrust of governmental and social institutions.¹⁹⁵ Significant segments of the public are convinced that there is an inequitable element to justice in America.¹⁹⁶ This reaction is to be expected in light of the government's repeated failure to rein in rogue conduct.¹⁹⁷

Protest movements, such as OWS, and the attacks on Google buses illustrate tremendous frustration and resentment.¹⁹⁸

Even as the tech companies extend their global reach and jostle to own the future, their hometown is turning from admiration to anger. The buses, which illegally use city stops, have become an unlikely rallying point. First, people were priced out of their homes, activists say; now they are being pushed off the streets.

Demonstrators regularly block the shuttles. Last week, a group of activists stalked a Google engineer at his

¹⁹²Ben Protess & Michael Corkery, *5 Big Banks Expected to Plead Guilty to Felony Charges, But Punishments May Be Tempered*, N.Y. TIMES DEALBOOK (May 13, 2015), http://www.nytimes.com/2015/05/14/business/dealbook/5-big-banks-expected-to-plead-guilty-to-felony-charges-but-punishments-may-be-tempered.html?_r=0.

¹⁹³*See id.* (opining that the big financial institutions would be out of business if they truthfully disclosed their financial dealings).

¹⁹⁴*See id.* (arguing that current regulations do not work).

¹⁹⁵*Lack of Trust—Caused by Institutional Corruption—Is Killing the Economy*, WASHINGTON'S BLOG (May 4, 2012), archived at <http://perma.cc/BWS3-JKSL>.

¹⁹⁶*Id.*

¹⁹⁷*Id.*

¹⁹⁸*See About OWS, OCCUPY WALL STREET*, archived at <http://perma.cc/GW6X-HQJP> (last visited Aug. 15, 2015) (describing OWS's activities).

East Bay house, urging the masses to 'Fight evil. Join the revolution.'¹⁹⁹

Anger at banks' behavior has been a motivating factor of OWS.²⁰⁰ Distrust of financial institutions is at a high level. "Almost half of the public thinks the sentiment at the root of the [OWS] movement generally reflects the views of most Americans."²⁰¹

Gallup results only further emphasize the growing animosity toward banks in America. Never before 2009 had more Americans expressed more distrust than trust in banks. That has not only been the norm for three years now, but the gap is widening.

Gallup, [which] has been tracking confidence in banks for over thirty years now, notes the steady decline of confidence in their release, pointing out that 60 percent of Americans had at least "quite a lot" of confidence in banks in 1979. That fell to 30 percent in the early 1990s, but then steadily rose to 53 percent in the [mid-2000s].

The percentage of Americans with a good deal of trust in banks has been nearly halved since 2007²⁰²

Approximately half of Americans believe the economic system is unfair.²⁰³ In contrast, twenty years ago only a third of Americans believed the American economic system was unfair.²⁰⁴

Perhaps even more disturbing is a recent Gallup poll that found that only 52 percent of Americans thought that there was a lot of opportunity for people who worked hard. In response to the same question in 1952, 87 percent of

¹⁹⁹David Streitfeld & Malia Wollan, *Tech Rides Are Focus of Hostility in Bay Area*, N.Y. TIMES (Jan. 31, 2014), <http://www.nytimes.com/2014/02/01/technology/tch-rides-arc-focus-of-hostility-in-bay-area.html>.

²⁰⁰*Id.*

²⁰¹See Jeff Zeleny & Megan Thee-Brenan, *New Poll Finds a Deep Distrust of Government*, N.Y. TIMES (Oct. 25, 2011), http://www.nytimes.com/2011/10/26/us/politics/poll-finds-anxiety-on-the-economy-fuels-volatility-in-the-2012-race.html?_r=0.

²⁰²Maxwell Strachan, *American Distrust of Banks Reaches Highest-Recorded Level: Gallup*, HUFFINGTON POST (June 24, 2011), archived at <http://perma.cc/A7YS-5T62>.

²⁰³Bill King, *Income Disparity Fuels Our Discontent*, CHRON (Dec. 4, 2013), archived at <http://perma.cc/H9U4-NGES>.

²⁰⁴*Id.*

Americans thought there was plenty of opportunity for someone who worked hard.²⁰⁵

In addition to lack of faith in government and social institutions, another negative outcome is that financial institutional fraud may have caused the severe global financial crisis.²⁰⁶

E. *Fraud as a Cause of the Financial Crisis*

A growing body of evidence indicates that financial institutional fraud played a prominent role in the 2007-2009 financial crisis.²⁰⁷ The economic toll was harsh, and the United States still reels from the effects of the "Great Recession."²⁰⁸ Estimates are that the financial crisis may have cost the United States up to \$14 trillion:

Washington turned a blind eye as risks were packaged and re-packaged, magnified, and then sold to unsuspecting pension funds, municipal governments, and many others who believed the markets were honest.

Not long after the cops were blindfolded and the big banks were turned loose, the worst crash since the 1930s hit the American economy—a crash that the Dallas Fed estimates has cost a collective \$14 trillion.²⁰⁹

The largest financial institutions "have played a substantial role [in causing the crisis], by deceiving the investors who ultimately purchased mortgage-backed securities."²¹⁰ Fraudulent conduct is linked to the financial crisis:

The global financial crisis, it is now clear, was caused not just by the bankers' colossal mismanagement. No, it was due also to the new financial complexity offering up the opportunity for widespread, systemic fraud. Friday's announcement that the world's most famous investment

²⁰⁵ *Id.*

²⁰⁶ See *infra* Part III.E.

²⁰⁷ See *Maybe It Was Fraud After All*, ECONOMIST (Oct. 13, 2010), archived at <http://perma.cc/RD93-WBV7>.

²⁰⁸ See *Financial Crisis: What the World Bank Is Doing*, WORLD BANK GROUP (June 2015), archived at <http://perma.cc/3J6P-RS7V> ("The world is still feeling the effects of the 2008 financial crisis.").

²⁰⁹ Warren, *supra* note 26; see also *How Bad Was It? The Costs and Consequences of the 2007-09 Financial Crisis*, STAFF PAPERS (Fed. Reserve Bank of Dallas, Tex.), July 2013, at 8, archived at <http://perma.cc/S84L-CHEM>.

²¹⁰ *Maybe It Was Fraud After All*, *supra* note 207.

bank, Goldman Sachs, is to face civil charges for fraud brought by the American regulator is but the latest of a series of investigations that have been launched, arrests made and charges made against financial institutions around the world. Big Finance in the 21st century turns out to have been Big Fraud.²¹¹

The financial crisis was not an act of nature: it was a man-made economic assault that cost millions of jobs, evaporated billions of dollars in retirement savings and put our nation in its worst economic tailspin since the Great Depression.²¹² The most culpable entities responsible for the recent financial crisis were the financial institutions.²¹³ "Without the banks providing financing to the mortgage brokers and Wall Street while underwriting their own issues of toxic securities, the entire pyramid scheme would never have got off the ground."²¹⁴ As noted by U.S. District Court Judge Jed Rakoff, the evidence strongly suggests that recidivist financial institutions proximately caused the financial crisis:

[T]he Financial Crisis Inquiry Commission, in its final report, uses variants of the word "fraud" no fewer than 157 times in describing what led to the crisis, concluding that there was a "systemic breakdown," not just in accountability, but also in ethical behavior.

As the commission found, the signs of fraud were everywhere to be seen, with the number of reports of suspected mortgage fraud rising twenty-fold between 1996 and 2005 and then doubling again in the next four years. As early as 2004, FBI Assistant Director Chris Swecker was publicly warning of the "pervasive problem" of mortgage fraud, driven by the voracious demand for mortgage-backed securities.²¹⁵

²¹¹Will Hutton, *Now We Know the Truth. The Financial Meltdown Wasn't a Mistake—It Was a Con*, GUARDIAN (Apr. 19, 2010), archived at <http://perma.cc/5V33-7W7S>.

²¹²See generally PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE (Comm. Print 2011) (discussing Wall Street insiders' role in the recent crisis).

²¹³See James Rickards, *Repeal of Glass-Steagall Caused the Financial Crisis*, U.S. NEWS & WORLD REPORT (Aug. 27, 2012, 1:19 PM), archived at <http://perma.cc/3QSD-XUCH>.

²¹⁴*Id.*

²¹⁵See Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), archived at <http://perma.cc/6ZYX-QBKA>.

Interestingly, the 1930s depression was also largely caused by financial institutional fraud.²¹⁶ The bank-caused depression led to the enactment of the Glass-Steagall Act, which prevented banks from using deposits to underwrite private securities and sell them to their own customers—until it was repealed in the 1990s.²¹⁷ Without the separation of banking and underwriting, banks will likely repeat the profitable practice of originating bad quality debt and marketing the "toxic assets" to customers locally and globally.²¹⁸ Senator Warren has introduced legislation in support of a new Glass-Steagall in order to effectively break up large banks:

Despite the progress we've made since 2008, the biggest banks continue to threaten our economy. The biggest banks are collectively much larger than they were before the crisis, and they continue to engage in dangerous practices that could once again crash our economy.²¹⁹

As noted above, a remarkable contrast exists between the recent episodes of fraud and a similar one in the 1980s known as the "savings and loan debacle."²²⁰ Although the latter was a tiny fraction of the recent frauds with respect to both losses and the amount of fraud, it resulted in over 1,000 felony convictions.²²¹ Such dichotomy also contributes to the public's lack of faith in corporate America and the justice system.

F. *"Incidental" Economic Costs: Legal Expenses, Fines, and Damage to the Economy*

Financial institutional fraud is immensely costly.²²² Indeed, the costs have been staggering.²²³ The resolutions alone (not including legal fees) generally include a substantial fine.²²⁴ For example, in October 2013, JPMorgan reached an agreement to resolve claims of mortgage

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See Rickards, *supra* note 213.

²¹⁹ See Joseph Lawler, *Warren Introduces Glass-Steagall Bill To Break Up Big Banks*, WASH. EXAMINER (July 7, 2015, 5:15 PM), archived at <http://perma.cc/WC7P-76KV>.

²²⁰ Joshua Holland, *Hundreds of Wall Street Execs Went to Prison During the Last Fraud-Fueled Bank Crisis*, MOYERS & CO. (Sept. 17, 2013), archived at <http://perma.cc/C6U6-X34X>; see also *id.* (noting that regulatory bodies, including the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Federal Reserve, and the FDIC, made zero criminal referrals).

²²¹ *Id.*

²²² See Schoenberg, Kopecki, Son & Campbell, *supra* note 18.

²²³ *Id.*

²²⁴ *Id.*

security fraud with the U.S. Justice Department.²²⁵ The settlement included payment of "\$4 billion in relief for unspecified consumers and \$9 billion in payments and fines" ²²⁶

JPMorgan has paid more than \$1 billion to five different regulators in the past month to settle probes into botched derivatives trades It also settled unrelated claims it unfairly charged customers for credit-monitoring products.

The bank faces an investigation into its hiring practices in Asia. It's also the subject of a probe by Manhattan U.S. Attorney Preet Bharara into claims it abetted Bernard Madoff's Ponzi scheme ²²⁷

The U.S. Justice Department later announced it was preparing more suits against financial institutions in 2014.²²⁸ At that time, some banks had already rejected settlements, almost guaranteeing additional suits.²²⁹

The actual costs to the financial institutions are mind-boggling. "The six biggest U.S. banks, led by JPMorgan Chase & Co. and Bank of America Corp., have piled up \$103 billion in legal costs since the financial crisis, more than all dividends paid to shareholders in the past five years."²³⁰ This sum represents various litigation expenses as well as fines and settlements:²³¹

That's the amount allotted to lawyers and litigation, as well as for settling claims about shoddy mortgages and foreclosures, according to data compiled by Bloomberg. The sum, equivalent to spending \$51 million a day, is enough to erase everything the banks earned for 2012.²³²

²²⁵ *Id.*

²²⁶ Schoenberg, Kopecki, Son & Campbell, *supra* note 18.

²²⁷ *Id.*

²²⁸ David Ingram & Aruna Viswanatha, *Exclusive: U.S. Plans New Bank Fraud Cases in Early 2014—Attorney General*, REUTERS, Dec. 4, 2013, archived at <http://perma.cc/KP4N-7KHM>.

²²⁹ Gaspard Scbag, *JPMorgan Said to Snub Euribor Deal as EU Readies Bank Fines*, BLOOMBERG BUS. (Dec. 3, 2013, 3:50 PM), archived at <http://perma.cc/9Z55-5NQG> ("JPMorgan Chase & Co. and two other banks rejected a European Union deal to end an antitrust probe into the rigging of Euribor lending rates, risking higher fines and challenging the future of the EU's settlement process.").

²³⁰ Donal Griffin & Dakin Campbell, *U.S. Bank Legal Bills Exceed 100 billion*, BLOOMBERG BUS. (Aug. 28, 2013, 12:02 PM), archived at <http://perma.cc/Y77R-KL2D>.

²³¹ *Id.*

²³² *Id.*

The amount has now been updated and is \$125 billion.²³³ "The fines will add to the spiraling cost to banks for cleaning up past misdeeds. Globally this is expected to reach about \$125 billion if JP Morgan agrees a \$13 billion deal with the U.S. authorities over mortgages."²³⁴ Moreover, these estimates do not reflect the "newer" investigations into the foreign currency ("Forex") market rigging which have already led to numerous guilty pleas and fines:

Probes into allegations that traders rigged foreign-exchange benchmarks could cost banks as much as \$41 billion to settle, Citigroup Inc. analysts said.

Deutsche Bank AG is seen as probably the "most impacted" with a fine of as much as 5.1 billion euros (\$6.5 billion), Citigroup analysts led by Kinner Lakhani said yesterday, estimating the Frankfurt-based bank's settlements could reach 10 percent of its tangible book value, or its assets' worth.

Using similar calculations, Barclays Plc could face as much as 3 billion pounds (\$4.8 billion) in fines and UBS AG penalties of 4.3 billion Swiss francs (\$4.6 billion), they wrote in a note first sent to clients on [October 3rd].²³⁵

While the legal costs alone are staggering, the overall losses to various stakeholders will likely dwarf the legal expense.²³⁶ The immense costs and fees incurred since the global financial crisis exceeds the amount these financial institutions have paid in dividends.²³⁷ The wrongdoing among the European banks is equally costly.²³⁸

Several lenders added to their litigation provisions in the third quarter, indicating that more settlements with clients and regulators are due to conclude.

²³³Foo Yun Chee, *Exclusive: EU to Fine Banks billions of Euros Over Rate Rigging*, REUTERS, Nov. 6, 2013, archived at <http://perma.cc/R985-XMNV>.

²³⁴*Id.*

²³⁵Richard Partington, *Forex-Rigging Fines Could Hit \$41 Billion Globally: Citi*, BLOOMBERG BUS. (Oct. 20, 2014, 12:48 PM), archived at <http://perma.cc/R94T-P6HY>.

²³⁶See Nicholas Comfort, *European Banks Legal Tab Tops \$77 Billion as Probes Widen*, BLOOMBERG BUS. (Nov. 21, 2013, 6:01 PM), archived at <http://perma.cc/GJ6V-CZ89> (discussing banks' reports to clients following litigation and settlement with the U.S. government).

²³⁷*Id.* ("The six biggest U.S. banks, led by JPMorgan Chase & Co. and Bank of America Corp., have allotted more than \$100 billion to lawyers, litigation and settlements since the financial crisis, more than they've paid in dividends.")

²³⁸*Id.*

Deutsche Bank co-Chief Executive Officer Anshu Jain raised his bank's reserves by 1.2 billion euros at the end of September from three months earlier, telling investors on a conference call to expect settlements "in the near future."²³⁹

European-based banks have a slightly lower but equally astounding legal expense bill:

The \$77-billion legal tab is less than the \$103 billion the six biggest U.S. banks had allotted as of late August to lawyers and litigation, as well as for settling claims for shoddy mortgages and foreclosures since the start of 2008, according to data compiled by Bloomberg.²⁴⁰

The banks' expense tab does not include payments for U.K. mortgage and interest rate derivatives.²⁴¹ In addition to the direct payments for legal fees and fines, banks incurred serious indirect costs as well.²⁴² "The payments have hurt banks' profit and slowed efforts to build capital. Future penalties may prompt firms to delay boosting dividends or buying back stock"²⁴³

While the total legal expense bill of approximately \$200 billion through 2013 is astonishing,²⁴⁴ global financial institutions are likely to eventually pay substantially more. According to KBW's analysis, "[LIBOR] probes could cost global investment banks \$46 billion and investigations into manipulating currencies could trigger another \$26 billion That's in addition to settling claims over faulty mortgages with the Federal Housing Finance Agency, which may total \$24 billion"²⁴⁵ Moreover, it is likely that "[b]anks will be contending with litigation for several years"²⁴⁶

The above section described the extensive structural problems in the regulatory and prosecutorial architecture with respect to financial institutional misconduct.²⁴⁷ The next section focuses on the systemic nature of unlawful conduct. It first discusses the enabling of rogue actors

²³⁹ *Id.*

²⁴⁰ Comfort, *supra* note 236.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ See *supra* note 240 and accompanying text.

²⁴⁵ Comfort, *supra* note 236.

²⁴⁶ *Id.*

²⁴⁷ See *supra* Part II.

to commit violations of international law²⁴⁸ and then describes financial market misconduct, including rate rigging, market manipulation, and fraud.²⁴⁹

III. THE PERVASIVE EXTENT OF FINANCIAL INSTITUTIONAL CRIMINAL BEHAVIOR

The criminal behavior of the financial services industry is not limited to a specific area of misconduct.²⁵⁰ To the contrary, corrupt behavior is widespread and envelops a wide array of conduct. Iconic financial institutions involved in serious wrongdoing include: JPMorgan (\$13 billion);²⁵¹ BNP (\$10 billion);²⁵² Citigroup (\$7 billion);²⁵³ HSBC (\$1.9 billion);²⁵⁴ Standard Chartered (\$667 million);²⁵⁵ ING (\$619 million);²⁵⁶ Credit Suisse (\$536 million);²⁵⁷ Lloyds TSB Group (\$350 million);²⁵⁸ and Barclays (\$298 million).²⁵⁹

The first sub-section discusses the vital role played by financial institutions in providing services to a host of rogue actors. These

²⁴⁸ See *infra* Part III.A.

²⁴⁹ See *infra* Part III.B.

²⁵⁰ See, e.g., Statement of James H. Freis, Jr., Dir., Fin. Crimes Enforcement Network, U.S. Dep't of Treasury, Before the United States Senate Committee on Homeland Security and Government Affairs Permanent Subcommittee on Investigations 2 (Feb. 4, 2010), archived at <http://perma.cc/8YB4-JWRU> (highlighting the broad areas of financial services not protected from criminal activity).

²⁵¹ Schoenberg, Kopecki, Son & Campbell, *supra* note 18.

²⁵² Christina Passariello, *France Working to Reduce U.S. Fine on BNP Paribas*, WALL ST. J. (June 15, 2014), <http://www.wsj.com/articles/france-working-to-reduce-u-s-s-10-billion-fine-on-bnp-paribas-1402838313>. U.S. authorities and BNP eventually agreed to a fine closer to \$9 billion. Patricia Hurtado, *BNP Paribas Pleads Guilty in U.S. to Violating Sanctions*, BLOOMBERG BUS. (July 9, 2014), archived at <http://perma.cc/RQR9-JPRF>.

²⁵³ Christina Rexrode & Andrew Grossman, *Citi to Pay \$7 Billion in Mortgage Probe*, WALL ST. J. (July 15, 2014), <http://www.wsj.com/articles/citigroup-to-pay-7-billion-to-resolve-mortgage-probe-1405335864>.

²⁵⁴ See Ramy Inocencio & Paavan Mathema, *Record Fines: 'New Normal' for Banking Business?*, CNN (Dec. 12, 2012), archived at <http://perma.cc/8GH5-MPEJ> ("In a historic fine, HSBC will pay out a record \$1.92 billion to U.S. authorities to settle money laundering accusations . . .").

²⁵⁵ *Id.* ("Standard Chartered . . . agreed to pay \$327 million to settle U.S. Treasury Department charges In August Standard Chartered paid \$340 million to the state of New York's Department of Financial Services to settle civil charges alleging it had concealed \$250 billion in illegal transactions with Iran.").

²⁵⁶ *Id.* (noting that ING's fine resulted from its involvement in a "cover-up of fund transfers that violated U.S. sanctions against Cuba and Iran").

²⁵⁷ *Id.* (noting that Credit Suisse's fine resulted from charges that it "[a]llow[ed] clients in Iran, Libya, Sudan, Myanmar and Cuba to conduct financial transactions").

²⁵⁸ Inocencio & Mathema, *supra* note 254 (noting that Lloyds's charges involved "[a]llowing Iranian and Sudanese clients access to the U.S. banking system").

²⁵⁹ *Id.* (stating that Barclay's fine resulted from charges that it "[a]llow[ed] client payments from Cuba [and] Sudan").

financial services have enabled dictators to loot their nations and maintain repressive regimes.²⁶⁰ Additionally, financial institutions have engaged in money laundering and banking services for terrorists and global drug dealers.²⁶¹

A. *Financial Institutional Collaboration with Rogue Actors*

Financial institutions have enabled egregious violations of international law.²⁶² Dictators, terrorists, and narcotics gangs all require sophisticated financial services which large financial institutions are eager to perform—for a hefty profit.²⁶³ Even human smugglers are valued clients of large financial institutions: "Major banks, including Bank of America Corp., JPMorgan Chase & Co. and Wells Fargo, have been used as financial conduits for the smuggling industry, according to evidence in a federal criminal case against a gang of 15 human smugglers and warrants from prosecutors in Arizona, Maryland and Texas."²⁶⁴ Financial institutions are vital for the smuggling business: "'Human smuggling is a big business,' says Stephen Adaway, chief of the U.S. Homeland Security Investigations unit for human smuggling in Washington. 'And they couldn't operate on the scale they do without the banks.'"²⁶⁵

The systemic violations of the law and the frequency of mischief demonstrate an entrenched and accepted business practice.²⁶⁶ Financial institutions also allow rogue actors to finance activities and loot their national treasuries.²⁶⁷ Spiritng away large amounts of money and

²⁶⁰ See Marc Sarr & Tim Swanson, *Corruption and the Curse: The Dictator's Choice 2-3* (Fondazione Eni Enrico Mattei Research Paper Series, Working Paper No. 6.2013, 2012), archived at <http://perma.cc/S5C8-KMGA> ("Excessive resource-based liquidity provided by commercial lenders can induce political instability and looting.").

²⁶¹ See, e.g., Ed Vulliamy, *How a Big US Bank Laundered billions from Mexico's Murderous Drug Gangs*, GUARDIAN (Apr. 2, 2011, 7:04 PM), archived at <http://perma.cc/9HBQ-7HQA> (reporting that drug smugglers purchased a plane with money "laundered" through Wachovia).

²⁶² Joel Slawotsky, *Are Financial Institutions Liable for Financial Crime Under the Alien Tort Statute?*, 15 U. PA. J. BUS. L. 957, 963-68 (2013).

²⁶³ *Id.*

²⁶⁴ Michael Smith & Esmé E. Deprez, *One Thing Gangs Smuggling Latin Migrants Over the Border Can't Do Without: Big U.S. Banks*, BLOOMBERG BUS. (Jan. 16, 2015, 12:01 AM), archived at <http://perma.cc/3VXA-QBZR>.

²⁶⁵ *Id.*

²⁶⁶ See Jessica Silver-Greenberg, *Regulator Says British Bank Helped Iran Hide Deals*, N.Y. TIMES (Aug. 6, 2012), http://www.nytimes.com/2012/08/07/business/standard-chartered-bank-accused-of-hiding-transactions-with-iranians.html?_r=1&hp ("The accusations against Standard Chartered come as United States officials work to crack down on the flow of money to foreign countries, companies and individuals connected to terrorism, weapons of mass destruction and drug trafficking.").

²⁶⁷ See Slawotsky, *supra* note 262, at 963-66.

parking these assets offshore requires the services of financial institutions.²⁶⁸

The vital relationship between international law violators and financial markets is well established.²⁶⁹ For example, in the aftermath of Nazi Germany's invasion of Norway in 1940, the U.S. Department of the Treasury established the Office of Foreign Funds Control (the "FFC") to block securities and foreign exchange transactions.²⁷⁰ The U.S. Department of the Treasury later established a successor to the FFC, the Office of Foreign Assets Control (the "OFAC"), thereby demonstrating the vital importance of financial institutions to rogue actors.²⁷¹ The OFAC's mission is to disable rogue actors' access to global banks through enforcement of sanctions and blocking of assets.²⁷² Moreover, the OFAC works in tandem with other nations to enforce international sanctions.²⁷³ Access to financial services is crucial to international law violators, and the following sub-sections detail the partnering between financial institutions and rogue actors.

1. Rogue States and Despots

Partnering with despots and dictators is highly profitable and can result in staggering profits from a single client.²⁷⁴ "For almost ten years, [Standard Chartered Bank] schemed with the Government of Iran[,] . . . reaping . . . hundreds of millions of dollars in fees."²⁷⁵ Indeed, the revenue must be astonishing, given that major international financial institutions repeatedly break the law despite knowing the risks of being caught and fined. To large financial services entities, doing business with rogue actors may simply be a cost of doing business.²⁷⁶

HSBC also understood the subtleties of—and were, apparently, fully invested in—money laundering for drug

²⁶⁸ *Id.*

²⁶⁹ *Id.*; see also SUBCOMM. ON OVERSIGHT & INVESTIGATIONS, COMM. ON INT'L RELATIONS, OFFSHORE BANKING, CORRUPTION, AND THE WAR ON TERRORISM 90 (Comm. Print 2006).

²⁷⁰ *Terrorism and Financial Intelligence: Office of Foreign Assets Control (OFAC)*, U.S. DEP'T OF THE TREASURY, archived at <http://perma.cc/Z2JP-MX6K> (last visited Aug. 15, 2015).

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ See Standard Chartered Bank, (N.Y. Dep't of Fin. Servs. Aug. 6, 2012) [hereinafter "IMO Standard Chartered"] (Order Pursuant to Banking Law § 39), archived at <http://perma.cc/J6SW-DD8G>.

²⁷⁵ *Id.*

²⁷⁶ See generally Slawotsky, *supra* note 262 (discussing violations in-depth).

kingpins and terror cells, while ignoring U.S. sanctions established against rogue nations. HSBC's U.S. unit managed to position the brand in this way by accepting \$7 billion of dollars from Mexican drug cartels, conducting 25,000 Iranian transactions totaling over \$19 billion in just one week, and helping Saudi banks with terror financing for groups like al-Qaeda.²⁷⁷

An example of the array of fee-generating services can be gleaned from the Senate subcommittee report on HSBC. HBUS, HSBC's U.S. affiliate and the nexus for HSBC's international network of banks, made enormous profits providing accounts for 1,200 banks world-wide.²⁷⁸ "Called correspondent banking, HBUS provides these banks with U.S. dollar services, including services to move funds, exchange currencies, cash monetary instruments, and carry out other financial transactions."²⁷⁹ Clearly, for HSBC, providing services to rogue actors was highly profitable.

New York financial regulators found that Standard Chartered Bank earned huge fees doing business with Iran.²⁸⁰ "For almost ten years, [this bank] schemed with the Government of Iran and hid from regulators roughly 60,000 secret transactions, involving at least \$250 billion . . ."²⁸¹ In addition, numerous banks that had vowed to desist from engaging in business with Iran have in fact not done so:

[e]xact figures on the volume of transactions aren't publicly known, . . . the [Wall Street] Journal's review shows that European banks have billions of euros in long-term trade-finance contracts in Iran. The dealings are a sign of Iran's continued access to the global financial system despite U.S. efforts to isolate Iran, and contradict a perception among some observers that the banks have cut ties to Iran completely.²⁸²

²⁷⁷ Passikoff, *supra* note 5.

²⁷⁸ James Pilant, *HSBC Avoids Criminal Charges*, PILANT'S BUS. ETHICS (Jan. 1, 2013), archived at <http://perma.cc/J9QV-B8LD>.

²⁷⁹ See Permanent Subcomm. on Investigations, *HSBC Exposed U.S. Financial System to Money Laundering, Drug, Terrorist Financing Risks*, HOMELAND SEC. & GOVERNMENTAL AFFAIRS (July 16, 2012), archived at <http://perma.cc/W8R8-L9K2>.

²⁸⁰ Commodity Trade Mantra, *Standard Chartered Bank: Another Crack in the Global Banking System*, ECONMATTERS (Aug. 8, 2012), archived at <http://perma.cc/S8ZB-ZR65>.

²⁸¹ See IMO Standard Chartered, *supra* note 274, at 1.

²⁸² David Crawford & Laura Stevens, *European Lenders Keep Ties to Iran*, WALL ST. J. (Sept. 13, 2012, 3:45 PM), <http://www.wsj.com/articles>.

The U.S. Senate investigation on financial crime is instructive in demonstrating the extensive mutually beneficial connection between dictators and financial institutions.²⁸³ The investigation revealed a wide array of exemplars demonstrating how global financial institutions have profited from the plundering of national wealth.²⁸⁴ The Senate Report unequivocally states that banks are the facilitators of asset transfers and money laundering.²⁸⁵

In one example, a political strongman ruling Equatorial Guinea transferred large sums out of the country:

[O]ver a two-month period in 2006, Mr. Obiang was able to move \$73 million from Equatorial Guinea into the United States using wire transfer systems operated by Wachovia Bank; and over a four-year period from 2002 to 2006, he was able to move \$37 million through wire transfer systems operated by Citibank.²⁸⁶

The Senate Report described how financial institutions aided Obiang in carrying out his scheme:

This case history shows how a controversial political figure, from the ruling family of a country plagued by corruption, moved vast amounts of wealth into the U.S. financial system, by employing American professionals such as attorneys, real estate and escrow agents to help him bypass U.S. [financial] controls, and by taking advantage of U.S. wire systems unequipped to screen out high-dollar transfers sent by . . . from high-risk countries. Over a four year period, from 2004 to 2008, Teodoro Obiang was able to move over \$100 million in suspect funds into or through the [U.S.] financial system.²⁸⁷

Another section of the Senate Report described similar occurrences:

²⁸³ See STAFF REPORT FOR THE PERMANENT SUBCOMM. ON INVESTIGATIONS, KEEPING FOREIGN CORRUPTION OUT OF THE UNITED STATES: FOUR CASE HISTORIES (2010) [hereinafter "FOUR CASE HISTORIES"] (examining how foreign officials have used the services of U.S. professionals and financial institutions to bring large amounts of suspect funds into the United States).

²⁸⁴ *Id.* (utilizing four case histories to demonstrate how some political persons have used U.S. lawyers, real estate and escrow agents, lobbyists, bankers, and university officials to circumvent U.S. anti-money laundering and anti-corruption safeguards).

²⁸⁵ *Id.* at 1-6.

²⁸⁶ *Id.* at 98.

²⁸⁷ FOUR CASE HISTORIES, *supra* note 283, at 105.

Federal law requires U.S. financial institutions to identify the name and address of the originator of each wire transfer Yet from 1999 to 2003, Bank of America allowed accounts for Pierre, Sonia, and Vincente Falcone to receive over \$3.6 million in wire transfers from unnamed clients using accounts in such known secrecy jurisdictions as the Cayman Islands, Luxembourg, and Switzerland. From September 2001 to December 2003, the Monthigne account also received a series of payments from hidden "clients," ranging from \$100,000 to \$400,000 at a time, most often from "one of our clients" using a UBS account in Singapore. In just over two years, the payments to Monthigne added up to nearly \$2.5 million.²⁸⁸

The investigation by the U.S. Senate on the relationship between financial institutions and former Chilean dictator Augusto Pinochet²⁸⁹ is equally compelling:

Riggs Bank had secretly opened accounts for the former President of Chile, Augusto Pinochet, created offshore corporations for him, accepted about \$8 million in suspect deposits, and secretly couriered millions of dollars in cashiers checks to him in Chile. In 2005, a supplemental report by the Subcommittee showed that Mr. Pinochet and his family members had opened a secret network of over 125 accounts under a variety of names at financial institutions operating in the United States.²⁹⁰

According to U.S. Senator Carl Levin, "[s]ome banks actively helped [Pinochet] hide his funds, [and] others failed to comply with U.S. regulations requiring banks to know their customers."²⁹¹

The former dictator of Gabon, El Hadj Omar Bongo ("Bongo"), looted and transferred money from his nation.²⁹² With the assistance of financial institutions, Gabonese national wealth was looted and

²⁸⁸*Id.* at 256-57.

²⁸⁹Jonathan Kandell, *Augusto Pinochet, Dictator Who Ruled by Terror in Chile, Dies at 91*, N.Y. TIMES (Dec. 11, 2006), <http://www.nytimes.com> ("Gen. Augusto Pinochet Ugarte, the brutal director who repressed and reshaped Chile for nearly two decades and became a notorious symbol of human rights abuse and corruption, died [on December 10, 2006] at the Military Hospital of Santiago. He was 91.").

²⁹⁰FOUR CASE HISTORIES, *supra* note 283, at 9-10.

²⁹¹Bill Condie, *Pinochet Had Accounts at Royal Bank Coutts' US Arm*, EVENING STANDARD, Mar. 16, 2005.

²⁹²David Randall & Greg Walton, *Africa's Illicit Money Sent to Western Banks*, INDEPENDENT (Feb. 7, 2010), [archived at http://pcrma.cc/R4RP-JQ5P](http://pcrma.cc/R4RP-JQ5P).

transferred into the United States, generating fees to the facilitating financial institutions.²⁹³

Nigeria's former President Sani Abacha ("Abacha"), a leader who looted his nation,²⁹⁴ also formed a mutually profitable relationship with his numerous business partners: global banks and investment houses.²⁹⁵ The Chairman of the Swiss Banking Commission noted that "[t]he mere fact that significant assets of dubious origin, from people close to former Nigerian President Sani Abacha, were deposited at Swiss banks is highly unsatisfactory and damages the image of Switzerland as a financial centre"²⁹⁶

Abacha believed in diversification and spread the billions of looted funds into numerous locales besides Switzerland, enabling many banks to profit from the looting.²⁹⁷ In addition to Swiss banks, Abacha also used U.K. banks to facilitate his financial crimes.²⁹⁸ "Britain's financial watchdog, the Financial Services Authority, revealed that 23 London banks had handled \$1.3 [billion] belonging to family and friends of General Abacha."²⁹⁹ Among the other looting profiteers were "Germany's Deutsche Bank and Commerzbank, France's BNP Paribas and Credit Agricole as well as Switzerland's leading banks, Credit Suisse and UBS[,] . . . HSBC, Barclays and NatWest. American banks Goldman Sachs, Merrill Lynch and Citibank also feature in the list . . . alongside several Nigerian banks."³⁰⁰

The Bank of Credit and Commerce International ("BCCI") provides another example of a rogue bank earning immense profits by partnering with terrorists, dictators, and an array of criminal clients:

BCCI's criminality included fraud by BCCI and BCCI customers involving billions of dollars; money laundering in Europe, Africa, Asia, and the Americas; BCCI's bribery of

²⁹³ *Id.* (reporting that President Bongo of Gabon's daughter deposited \$1 million in a safe deposit box at a New York bank).

²⁹⁴ Ian Simpson, *U.S. Takes Control of \$480 Million Stolen by Nigerian Dictator Abacha*, REUTERS, Aug. 7, 2014, 3:53 PM, archived at <http://perma.cc/WFM8-C7FV>.

²⁹⁵ *See Swiss Banks Rapped Over Abacha Loot*, BBC NEWS (Sept. 4, 2000), archived at <http://perma.cc/K2PA-ZXW6> (explaining that nineteen banks had dealings with Abacha and his regime).

²⁹⁶ *Id.* (quoting Kurt Hauri, Banking Commission Chairman).

²⁹⁷ *See* Camillus Eboh, *Nigeria to Recover \$228 Million of Abacha Loot after 16-Year Fight*, REUTERS, June 19, 2014, 1:21 PM, archived at <http://perma.cc/SU5M-SWHB> (explaining that Abacha hid money in Liechtenstein, "France, Britain[,] and British offshore centers[,] such as Jersey").

²⁹⁸ *Id.*

²⁹⁹ *See Britain Goes after Abacha Millions*, BBC NEWS (Oct. 18, 2001), archived at <http://perma.cc/AAS4-8PQT>.

³⁰⁰ *Abacha Accounts' to Be Frozen*, BBC NEWS (Oct. 3, 2001), archived at <http://perma.cc/ZA2T-973U>.

officials in most of those locations; support of terrorism, arms trafficking, and the sale of nuclear technologies; management of prostitution; the commission and facilitation of income tax evasion, smuggling, and illegal immigration; illicit purchases of banks and real estate; and a panoply of financial crimes limited only by the imagination of its officers and customers.³⁰¹

According to Transparency International's former director, Jerome Pope, "The international banks, the western businessmen who bribe to get the contract, those who are in cahoots with all the millionaires, they are all up to their eyeballs in what is taking place. When it comes to moral standing, everybody belongs in the gutter together."³⁰² The extent of funds lost through these systems is staggering:

In Kenya, \$4 billion disappeared during the presidency of Daniel Arap Moi's 24 years in power. . . . The country's Central Bank was looted, money was stolen by making fictitious payments on foreign debt, kickbacks were collected on all public contracts and when that didn't supply enough cash, politicians awarded themselves phony contracts.³⁰³

Gabon is yet another nation that has been plagued with severe corruption and is a failed state.³⁰⁴ Gabon's former President Omar Bongo ruled for over four decades until his death in 2009.³⁰⁵ Although Bongo came from poverty, over his time in power he managed to accumulate an incredible fortune by taking advantage of his position.³⁰⁶ One method through which Bongo and his family stole Gabonese funds was through U.S. accounts opened by his first wife, an American citizen, using either her maiden name or the name of a trust she established in California.³⁰⁷

The examples above demonstrate that financial institutions have partnered with dictators, despots, and failed regimes in the pursuit of earning profits.

³⁰¹ JOHN KERRY & HANK BROWN, THE BCCI AFFAIR: A REPORT TO THE COMMITTEE ON FOREIGN RELATIONS, S. DOC. NO. 102-140, at 4 (2d Sess. 1992).

³⁰² *Id.*

³⁰³ *Corruption in Africa*, WASH. TIMES (Nov. 4, 2006), archived at <http://perma.cc/XGL7-SZN4> (internal quotation omitted).

³⁰⁴ See FOUR CASE HISTORIES, *supra* note 283, at 107 (noting Gabon's "widespread government corruption") (internal quotation omitted).

³⁰⁵ *Id.* at 106.

³⁰⁶ See *id.* at 107-09.

³⁰⁷ *Id.* at 159-61.

2. Profiting from Narcotics Trafficking

U.S. federal and state governments have numerous laws criminalizing drugs, and there are powerful federal laws targeting drug trafficking.³⁰⁸ Globally, most nations have laws against drug trafficking.³⁰⁹ International drug trafficking is enabled by access to financial institutions that reap enormous profits doing business with these illegal organizations.³¹⁰ "Federal and state authorities are investigating a handful of major American banks for failing to monitor cash transactions in and out of their branches, a lapse that may have enabled drug dealers and terrorists to launder tainted money"³¹¹ In one example, nearly \$400 billion of illegal drug-generated profits were laundered through the banking system.³¹² According to a U.S. federal prosecutor, "Wachovia's blatant disregard for our banking laws gave international cocaine cartels a virtual carte blanche to finance their operations"³¹³

According to Antonio Costa, the former executive director of the United Nations Office on Drugs and Crime, international criminal gangs were not merely laundering money but were influencing the banking system as such funds were a major source of cash during a liquidity crisis.³¹⁴ He stated that "[s]ome of the evidence put before his office indicated that gang money was used to save some banks from collapse when lending seized up," raising troubling questions about the influence

³⁰⁸See, e.g., *DEA Programs*, DRUG ENFORCEMENT ADMIN., archived at <http://perma.cc/9ZWS-L4ME> (last visited Aug. 15, 2015) (detailing various anti-drug laws and programs); Eric E. Sterling, *Drug Laws and Snitching: A Primer*, PBS FRONTLINE, archived at <http://perma.cc/SXG7-GJXB> (last visited Aug. 15, 2015) (discussing minimum mandatory sentencing); *Rockefeller Drug Laws*, N.Y. TIMES, archived at <http://perma.cc/G4CM-PN8X> (last visited Aug. 15, 2015) (discussing New York anti-drug laws).

³⁰⁹GLOBAL COMM'N ON DRUG POLICY, *WAR ON DRUGS 2* (2011), available at http://issuu.com/gcdp/docs/global_commission_report_english/1?c=4620863/2855236 (discussing the devastating effects of drugs and the global effort to combat trafficking).

³¹⁰See, e.g., Peter Finn & Sari Horwitz, *Justice Department Outlines HSBC Transactions with Drug Traffickers*, WASH. POST (Dec. 11, 2012), archived at <http://perma.cc/L4QU-MQCV> (relating how billions of dollars in illicit money traveled between HSBC and Mexican drug traffickers).

³¹¹Jessica Silver-Greenberg & Ben Protes, *Money-Laundering Inquiry Is Said to Aim at U.S. Banks*, N.Y. TIMES (Sept. 14, 2012), http://www.nytimes.com/2012/09/15/business/money-laundering-inquiry-said-to-target-us-banks.html?_r=0.

³¹²See Ed Vulliamy, *How a Big US Bank Laundered Billions from Mexico's Murderous Drug Gangs*, GUARDIAN (Apr. 2, 2011, 7:04 PM), archived at <http://perma.cc/647S-YXTF> ("[T]he bank was sanctioned for failing to apply the proper anti-laundering strictures to the transfer of \$378.4 [billion]—a sum equivalent to one-third of Mexico's gross national product—into dollar accounts from [Mexican] currency exchange houses with which the bank did business.").

³¹³*Id.*

³¹⁴*Id.*

of crime on the economic system at times of crisis.³¹⁵ Narcotics have caused severe harm to the United States.³¹⁶ "After 40 years, the United States' war on drugs has cost \$1 trillion and hundreds of thousands of lives, and for what? Drug use is rampant and violence even more brutal and widespread."³¹⁷ Global drug cartels, particularly those that market drugs in the United States, substantially affect the United States, yet financial institutions enable them.³¹⁸

3. Profiting from Terrorism

Terrorism is a business, and terrorist groups may in fact be organized as corporate affiliates.³¹⁹ The business of terrorism requires access to financial markets for money laundering purposes and wiring abilities; funds available for investment require money management skills.³²⁰ All of these services are fee generators.³²¹ U.S. Southern District Attorney Preet Bharara stated, "Money is the lifeblood of terrorist and narcotics organizations, and while banks which launder money for terrorists and narco-traffickers may be located abroad, today's announcement demonstrates that those banks and their assets are not beyond our reach"³²²

Money laundering facilitates terrorism since money is the key to such activity.³²³ "Money laundering is the process of disguising criminal

³¹⁵*Id.*

³¹⁶See Gary S. Becker & Kevin M. Murphy, *Have We Lost the War on Drugs?*, WALL ST. J. (Jan. 4, 2013, 8:39 PM), <http://www.wsj.com> (describing numerous negative effects that drugs have caused in the United States).

³¹⁷*AP Impact: After 40 Years, \$1 Trillion, US War on Drugs Has Failed to Meet Any of Its Goals*, FOXNEWS.COM, May 13, 2010, archived at <http://perma.cc/FN8S-LLS2>.

³¹⁸See Ausan Al-Eryani, *Mexico's Drug War [A]ffects US As Well*, COLLEGIATE TIMES (Sept. 26, 2011, 12:00 AM), archived at <http://perma.cc/QZT9-VN6A> (reporting that Mexican drug cartels have gang members in nearly 200 American cities).

³¹⁹See Stephanic Clifford, *Testifying in His Own Defense, Terror Suspect Starts Strong Before Faltering*, N.Y. TIMES (Feb. 26, 2015), <http://www.nytimes.com> (describing letters between al-Qaeda members in which many phrases seemed to be taken straight out of corporate life).

³²⁰See Joan M. O'Sullivan-Butler, *Combating Money Laundering and International Terrorism: Does the USA Patriot Act Require the Judicial System to Abandon Fundamental Due Process in the Name of Homeland Security?*, 16 ST. THOMAS L. REV. 395, 395 (2004) ("In the aftermath of the events of September 11, 2001, it has become increasingly apparent that 'money laundering, and the defects in financial transparency on which money launderers rely, are critical to financing of global terrorism and the provision of funds for terrorists attacks.'").

³²¹See IMO Standard Chartered, *supra* note 274, at 1.

³²²Christie Smythe & Patricia Hurtado, *Feds Grab \$150 Million Tied to Hezbollah Money-Laundering*, BLOOMBERG BUS. (Aug. 20, 2012, 4:12 PM), archived at <http://perma.cc/PK6P-85SU> (quoting statement by Manhattan U.S. Attorney Preet Bharara).

³²³See FIN. ACTION TASK FORCE, TERRORIST FINANCING 7 (2008), archived at <http://perma.cc/E9CC-7JU2> ("The costs associated not only with conducting terrorist attacks

proceeds and may include the movement of clean money through the United States with the intent to commit a crime in the future (e.g., terrorism)."³²⁴ Banks are central to money laundering.³²⁵ As such, terrorist groups may be highly desirable and lucrative clients of financial institutions since these groups deal in large sums of money.³²⁶

As detailed above, financial institutions have played a key role in propping up despots and failed states and, in so doing, have profited substantially from their rogue clients.³²⁷ Moreover, by providing services to sanctioned nations and other bad actors, the institutions have not merely violated U.S. laws, but also have aided and abetted various human rights abuses and violations of international law.³²⁸ As the next sub-section discusses, financial institutional misconduct has also involved fraud committed with respect to financial instruments. Numerous end-users, such as governments, consumers, and commercial clients, have been economically damaged by the misconduct.³²⁹

B. Financial Institutional Fraud

The following sub-section discusses the machinations engaged in by financial institutions in the markets. The chicanery included manipulation and fraud with respect to LIBOR banking rates, selling sub-prime mortgage investments, securities laws violations, bribery, consumer fraud, and rigging of foreign exchange markets.³³⁰

1. LIBOR

The LIBOR manipulation constituted an emboldened fraud perpetrated on potentially millions of consumers.³³¹ LIBOR rates "affect

but also with developing and maintaining a terrorist [organization] and its ideology are significant.").

³²⁴IRS, INTERNAL REVENUE MANUAL, § 9.5.5.1(1) (2008), archived at <http://perma.cc/P354-Y68U>.

³²⁵See *Money Laundering at Lebanese Bank*, N.Y. TIMES (Dec. 13, 2011), <http://www.nytimes.com/interactive/2011/12/13/world/middleeast/lebanese-money-laundering.html> ("According to American officials, the Lebanese Canadian Bank was the hub of an international drug money laundering operation with ties to Hezbollah. Used car and other consumer goods sales revenues had been used to mask the proceeds of illegal drug trade.").

³²⁶See Smythe & Hurtado, *supra* note 322 ("The U.S. seized \$150 million in connection with a Hezbollah-related money laundering scheme that involved the defunct Lebanese Canadian Bank . . .").

³²⁷See *supra* notes 297-308 and accompanying text.

³²⁸See *supra* notes 229-308 and accompanying text.

³²⁹See *infra* Part III.B.

³³⁰See *infra* Part III.B.1-6.

³³¹Bray & Ewing, *supra* note 87.

trillions of dollars of business and consumer loans and credit each year."³³² The rate rigging compromised the integrity of LIBOR and other benchmarks that the financial institutions were setting.³³³ Benchmarks like LIBOR determine rates on a wide variety of loans.³³⁴ "Interest rates on hundreds of trillions of dollars of loans and other financial contracts are pegged to the benchmarks. Central banks rely on them to help determine their monetary policies."³³⁵ The fraud affected "trillions of dollars in loans and other financial products," and the insidious scheme was vast and pervasive—although led by UBS, it involved other banks.³³⁶ According to the *Wall Street Journal*, "[m]ore than \$800 trillion in securities and loans are linked to Libor."³³⁷ "Regulators described the alleged illegality as 'epic in scale,' with dozens of traders and managers in a UBS-led ring of banks and brokers conspiring to skew interest rates to make money on trades."³³⁸ UBS settled the claims for approximately \$1.5 billion.³³⁹ In 2015, Deutsche Bank agreed to resolve LIBOR manipulation claims for the payment of a multi-billion dollar penalty:

To settle the case, the bank agreed to pay \$2.5 billion in penalties, a record for the interest rate cases, which have already stung the likes of Barclays and UBS. Deutsche Bank—Germany's largest financial institution and, at least for now, a problem child in the eyes of regulators—also agreed to accept a criminal guilty plea for the British subsidiary at the center of the case. It is the most significant banking unit to accept a criminal plea in the long-running investigation into the manipulation of the London interbank offered rate, or Libor.³⁴⁰

Yet incredibly, despite being heavily fined and entering into an agreement with the U.S. Justice Department, UBS could not refrain from

³³² *Id.*

³³³ See David Enrich & Jean Eaglesham, *UBS Admits Rigging Rates in "Epic" Plot*, WALL ST. J. (Dec. 20, 2012, 7:17 AM), <http://www.wsj.com/articles/SB10001424127887324407504578188342618724274>.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ Michael Ovaska & Margot Patrick, *The Libor Settlements*, WALL ST. J., <http://www.wsj.com> (last visited July 5, 2015).

³³⁸ Enrich & Eaglesham, *supra* note 333.

³³⁹ *Id.*

³⁴⁰ Ben Proccs & Jack Ewing, *Deutsche Bank to Pay \$2.5 Billion Fine to Settle Rate-Rigging Case*, N.Y. TIMES DEALBOOK (Apr. 23, 2015), <http://www.nytimes.com/2015/04/24/business/dealbook/deutsche-bank-settlement-rates.html>.

violating the terms of the agreement, and U.S. prosecutors are set to void the agreement based upon the failure of UBS to cease the criminal activity:

The move by the U.S. would be a first for the industry, making good on a March threat by a senior Justice Department official to revoke such agreements and putting banks on notice that these accords can be unwound if misconduct continues.³⁴¹

Undoubtedly, the potential profits are so immense, that it is worthwhile to risk additional fines for violating a settlement agreement with the Justice Department.

Commenting on the LIBOR scandal, the European Union's ("E.U.") anti-trust commissioner noted that several of the world's largest banks were scheming together:

[A]n investigation had uncovered a collusive scheme by traders at some of the world's largest banks. Citigroup, JPMorgan Chase, Deutsche Bank, Royal Bank of Scotland and Société Générale were found to have improperly influenced the London interbank offered rate, or Libor, as it relates to the Japanese yen and the euro interbank offered rate, or Euribor.³⁴²

The LIBOR fraud cost not only the end users, such as consumers, immensely via higher payments, but also the banks' shareholders, who have been severely penalized.³⁴³ "Libor probes could cost global investment banks \$46 billion . . ." ³⁴⁴ Various injured parties are suing for damages.³⁴⁵ The city of Baltimore and the California counties of San Diego and Sacramento are among the plaintiffs.³⁴⁶ "Philadelphia is the latest of a series of U.S. municipalities, following Houston . . . , to sue some of the world's biggest banks for financial losses incurred in the Libor interest-rate rigging scandal."³⁴⁷ The plaintiffs allege the price fixing proximately caused huge losses because "they received lower interest rate payments than they should have, or had to pay artificially

³⁴¹Schoenberg, *supra* note 31.

³⁴²Bray & Ewing, *supra* note 87.

³⁴³See Comfort, *supra* note 236.

³⁴⁴*Id.*

³⁴⁵See *id.*

³⁴⁶Hilary Russ, *Philadelphia Latest U.S. City to Sue Banks in Libor Scandal*, REUTERS, July 29, 2013, archived at <http://perma.cc/3RGN-Y5BK>.

³⁴⁷*Id.*

inflated rates because of the alleged manipulation."³⁴⁸ According to the Philadelphia lawsuit, "the city paid nearly \$110 million altogether in termination fees to various banks to unwind swap agreements"³⁴⁹ The manipulation caused "hundreds of millions or even billions of dollars" in damages.³⁵⁰

Brokerage giant Charles Schwab has also filed suit against banks over LIBOR rate rigging.³⁵¹ Schwab claims that it lost large amounts of money on debt instruments based upon LIBOR that had "artificially low returns" because of the bank rate manipulation.³⁵²

Fannie Mae ("FNMA") is suing a host of banks over losses caused by LIBOR fraud.³⁵³ FNMA alleges "manipulation of the benchmark London interbank offered rate, which four [banks] have admitted, cost the mortgage-financing company about \$800 million."³⁵⁴ An internal government audit report stated that Fannie Mae and Freddie Mac may have lost \$3 billion because of LIBOR rate rigging.³⁵⁵

The E.U. has fined various banks for LIBOR rate rigging.³⁵⁶ According to E.U. Competition Commissioner Alumina, "transcripts of Internet conversations between traders showed 'appalling' evidence of collusion. Such chats are now targeted by regulators in benchmark rigging probes. Deutsche Bank this week barred multi-party chat rooms at its fixed-income and currency trading businesses."³⁵⁷

Resolving LIBOR claims will be costly:

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ Russ, *supra* note 346 (quotation omitted).

³⁵¹ Karen Gullo, *Schwab Sues BofA and Other Banks Over Libor Manipulation*, BLOOMBERG BUS. (May 1, 2013, 12:01 AM), archived at <http://perma.cc/NG2Z-CNKN>; Gavin Finch et al., *London Banks Seen Rigging Rates Losing Credibility with Markets*, BLOOMBERG BUS. (Nov. 22, 2011, 7:01 PM), archived at <http://perma.cc/M9HY-VHZZ>.

³⁵² See Gullo, *supra* note 351.

³⁵³ See Jonathan Stempel, *Fannie Mae Sues Nine Banks for Rigging Libor*, REUTERS, Oct. 31, 2013, archived at <http://perma.cc/NT3H-UQRE>.

³⁵⁴ Patricia Hurtado & Christie Smyth, *Fannie Mae Sues Banks for \$800 Million Over Libor Rigging*, BLOOMBERG BUS. (Nov. 1, 2013, 2:25 PM), archived at <http://perma.cc/858J-VSMY>.

³⁵⁵ *Id.*

³⁵⁶ See Chec, *supra* note 233 (reporting that six banks, including Barclays and RBS, were fined); Press Release, Eur. Comm'n, Antitrust: Commission Settles RBS-JPMorgan Cartel in Derivatives Based on Swiss Franc LIBOR; Imposes €61.6 Million Fine on JPMorgan 2 (Oct. 21, 2014), archived at <http://perma.cc/ZQD8-WM9G>.

³⁵⁷ See Gaspard Sebag & Aoife White, *Deutsche Bank to RBS Fined by EU for Rate Rigging*, BLOOMBERG BUS. (Dec. 4, 2013, 11:10 AM), archived at <http://perma.cc/7P4G-3AMM> ("Deutsche Bank AG and Royal Bank of Scotland Group Plc are among six companies fined a record 1.7 billion euros (\$2.3 billion) by the European Union for rigging interest rates linked to Libor.").

Libor probes could cost global investment banks \$46 billion and investigations into manipulating currencies could trigger another \$26 billion, wrote the KBW analysts, led by Andrew Stimpson in London. That's in addition to settling claims over faulty mortgages with the Federal Housing Finance Agency, which may total \$24 billion, the analysts wrote.³⁵⁸

A host of banks have already agreed to resolve LIBOR investigations.³⁵⁹ In December 2012, UBS paid over \$1.5 billion to the U.S. Justice department, CFTC, the Swiss Financial Market Supervisory Authority, and U.K. Financial Services Authority.³⁶⁰ In February and December 2013, RBS entered into a settlement wherein it would pay over \$1.1 billion to settle LIBOR claims with the U.S. Justice Department, CFTC, U.K., and European Commission.³⁶¹ In October 2013, Rabobank settled for over \$1 billion claims filed by the U.S. Justice Department, CFTC, U.K., and Dutch prosecutors.³⁶² In December 2013, Deutsche Bank agreed to pay nearly \$1 billion to the European Commission.³⁶³ Also in December 2013, Société Générale agreed to pay over \$600 million to the European Commission.³⁶⁴ In June 2012, Barclays resolved to settle claims by U.S. Justice, CFTC, and U.K. for almost \$500 million.³⁶⁵ In December 2013, JPMorgan agreed to settle for over \$100 million with the European Commission,³⁶⁶ while Citigroup paid almost \$100 million.³⁶⁷

³⁵⁸See Comfort, *supra* note 236.

³⁵⁹See Press Release, Eur. Comm'n, *supra* note 356, at 1.

³⁶⁰Katharina Bart, Tom Miles & Aruna Viswanatha, *UBS Traders Charged. Bank Fined \$1.5 billion in Libor Scandal*, REUTERS, Dec. 19, 2012, archived at <http://perma.cc/QP22-HC52>.

³⁶¹Ben Proress & Mark Scott, *Guilty Plea and Big Fine for Bank in Rate Case*, N.Y. TIMES DEALBOOK (Feb. 6, 2013), archived at <http://perma.cc/6T6U-C7FU> ("[T]he \$612 million case [with RBS] amounted to the second-largest penalty levied in the multiyear investigation into rate manipulation.").

³⁶²Chad Bray, *Dutch Bank Settles Case Over Libor Deceptions*, N.Y. TIMES DEALBOOK (Oct. 29, 2013), archived at <http://perma.cc/RKT5-LUY2>.

³⁶³See Press Release, Deutsche Bank, *Deutsche Bank Reaches Agreement with European Commission as Part of a Collective Settlement on Interbank Offered Rates* (Dec. 4, 2013), archived at <https://perma.cc/GB7X-BEDV>.

³⁶⁴See Press Release, Eur. Comm'n, *Antitrust: Commission Fines Banks €1.71 billion for Participating in Cartels in the Interest Rate Derivatives Industry 3* (Dec. 4, 2013), archived at <http://perma.cc/KYR3-KUQR> (providing a breakdown of the imposed fines).

³⁶⁵Lindsay Fortado & Silla Brush, *Barclays Fined by U.K.. U.S. for Falsifying Libor Rates*, BLOOMBERG BUS. (June 27, 2012, 3:39 PM), archived at <http://perma.cc/C4E8-8F64>.

³⁶⁶See Press Release, Eur. Comm'n, *supra* note 356, at 3.

³⁶⁷*Id.*

In March 2014, the U.S. FDIC filed suit, alleging substantial fraud with regard to LIBOR rate setting.³⁶⁸ Filing on behalf of almost forty failed banks, the FDIC claimed over a dozen global financial institutions manipulated LIBOR from 2007 to 2011.³⁶⁹ The accused institutions included Bank of America, Credit Suisse, and Citigroup.³⁷⁰

2. Sub-Prime Mortgage Fraud

Another marker of serial criminal behavior is the sub-prime mortgage fraud.³⁷¹ A series of large settlements have underscored the embedded nature of the fraud.³⁷² Citigroup has settled for \$7 billion claims that it committed fraud with respect to mortgage loans.³⁷³ JPMorgan Chase has agreed to pay \$13 billion to regulators to settle investigations into its mortgage business.³⁷⁴ In 2012, under the National Mortgage Settlement, five American banks agreed to pay \$32 billion to provide mortgage relief to homeowners.³⁷⁵ Credit Suisse Group AG was ordered to face a \$10 billion lawsuit by New York's attorney general accusing the Swiss bank of fraud in the sales of mortgage-backed securities before the 2008 financial crisis:

A New York State Supreme Court justice rejected the bank's request to dismiss the case, a move that gives leverage to Attorney General Eric Schneiderman to demand internal bank documents and force a settlement. New York demonstrated the bank may have engaged in misconduct,

³⁶⁸Bob Van Voris, *BofA, Citigroup, Credit Suisse Sued by FDIC Over Libor*, BLOOMBERG BUS. (Mar. 15, 2014), archived at <http://perma.cc/CS53-SAP4>.

³⁶⁹*Id.* ("The FDIC, acting as receiver for 38 failed institutions [including Washington Mutual Bank, IndyMac Bank FSB and Colonial Bank], claimed that banks sitting on the U.S. dollar Libor panel 'fraudulently and collusively suppressed' the rate.").

³⁷⁰*Id.*

³⁷¹See Rakoff, *supra* note 215 ("[F]raud at every level permeated the bubble in mortgage-backed securities.").

³⁷²See *infra* notes 373-78 and accompanying text.

³⁷³Jim Edwards, *\$7 Billion: Citigroup Will Reportedly Pay Twice What Analysts Expected to Settle Mortgage Fraud Cases*, BUS. INSIDER (July 9, 2014), archived at <http://perma.cc/9PGU-NFJR> ("[Citigroup] will pay \$4 billion in cash to the DOJ and set aside \$3 billion in relief for mortgage holders.").

³⁷⁴Julia La Roche, *JPMorgan Will Pay Record \$13 billion Settlement over Mortgages*, BUS. INSIDER (Nov. 19, 2013), archived at <http://perma.cc/84J3-PPUF>.

³⁷⁵See Press Release, Nat'l Ass'n of Att'ys Gen., *State Attorneys General, Feds Reach \$25 billion Settlement with Five Largest Mortgage Services on Foreclosure Wrongs*, archived at <http://perma.cc/ECW8-5LCT> (reporting that settlements were reached with JPMorgan, Wells Fargo, Citigroup, GMAC, and Bank of America).

Justice Marcy Friedman said in a Dec. 24 decision, allowing the suit to head toward trial.³⁷⁶

By 2013, financial firms had agreed to over \$95 billion in mortgage-related penalties;³⁷⁷ surely this staggering number has since substantially increased to well over \$100 billion.

Despite these settlements, criminal investigations of financial institutional mortgage fraud may continue.³⁷⁸ For example, Bank of America is facing litigation by the U.S. Justice Department for nearly \$1 billion over mortgage bond fraud.³⁷⁹ The suit is based upon "violations of the Financial Institution Reform, Recovery and Enforcement Act of 1989."³⁸⁰ "The law allows the government to sue an individual or group for fraud that affects a federally insured financial institution. It carries a 10-year statute of limitations."³⁸¹

Bank of America and several other financial institutions have also been sued by a housing regulator.³⁸² The lawsuit seeks \$6 billion from Bank of America and asks for additional damages from numerous other banks.³⁸³ "The FHFA sued Bank of America and [seventeen] other firms over faulty mortgage bonds two years ago in an effort to recoup some of the losses taxpayers were forced to cover when the U.S. took over the failing mortgage finance companies in the wake of the credit crisis."³⁸⁴

³⁷⁶Linda Sandler & Christie Smythe, *Credit Suisse Must Face \$10 Billion Mortgage-Fraud Suit*, BLOOMBERG BUS. (Dec. 25, 2014, 10:52 AM), archived at <http://perma.cc/WR6G-WCB5>.

³⁷⁷*Payback Time for Subprime: Mortgage-Related Bank Fines*, ECONOMIST, Oct. 26, 2013, archived at <http://perma.cc/WC63-MUNW>.

³⁷⁸*Id.*

³⁷⁹Carla Main, *BofA Civil Probes, Deutsche Bank, BNY Mellon: Compliance*, BLOOMBERG BUS. (Oct. 23, 2013), archived at <http://perma.cc/UF9Z-7PVB>.

³⁸⁰*Id.*

³⁸¹*Bloomberg* reported on the efforts made by various states to investigate wrongdoing:

U.S. attorneys offices in Georgia and California are examining potential violations tied to Countrywide Financial Corp., the subprime lender Bank of America bought in 2008, said the people, who asked not to be identified because the inquiries aren't public. U.S. attorneys in New Jersey are looking into deals involving Merrill Lynch & Co., purchased by the firm in 2009, the people said.

Id.

³⁸²Keri Geiger, Clea Benson & Hugh Son, *FHFA Is Said to Seek at Least \$6 Billion from BofA for MBS Sales*, BLOOMBERG BUS. (Oct. 21, 2013), archived at <http://perma.cc/R6P4-NK2Z>.

³⁸³*Id.* ("A U.S. housing regulator is seeking at least \$6 billion from Bank of America Corp. to settle civil claims the firm sold faulty mortgage bonds to government-backed finance companies Fannie Mac and Freddie Mac, according to a person with direct knowledge of the discussions.")

³⁸⁴*Id.*

In August 2014, the U.S. Justice Department announced a nearly \$17 billion settlement with Bank of America resolving myriad claims relating to the subprime mortgage market, describing it as "an historic settlement."³⁸⁵ The announcement described the anticipated benefits of the settlement:

At nearly \$17 billion, today's resolution with Bank of America is the largest the department has ever reached with a single entity in American history. . . . But the significance of this settlement lies not just in its size; this agreement is notable because it achieves real accountability for the American people and helps to rectify the harm caused by Bank of America's conduct through a \$7 billion consumer relief package that could benefit hundreds of thousands of Americans still struggling to pull themselves out from under the weight of the financial crisis.³⁸⁶

Banking giants Morgan Stanley and JPMorgan agreed to resolve mortgage fraud claims brought by federal housing and mortgage agencies for nearly \$2 billion.³⁸⁷ Federal prosecutors alleged that JPMorgan and Morgan Stanley routinely violated the law and submitted thousands of fraudulent loans for insurance, which resulted in immense losses to the government and consumers.³⁸⁸ JPMorgan admitted that an internal review found five hundred instances of loan fraud.³⁸⁹ Morgan Stanley agreed to resolve Justice Department claims in 2015 relating to the sale of subprime securities:

Morgan Stanley said on Wednesday that it had reached a \$2.6 billion settlement with the Justice Department over the sale of mortgage securities before the financial crisis.

Other large banks have already struck similar settlements, with Bank of America agreeing to pay a record \$16.7 billion last year and JPMorgan Chase settling for \$13 billion in 2013.

³⁸⁵ Press Release, U.S. Dep't of Justice, Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), *archived at* <http://pcrma.cc/63PB-YJ57>.

³⁸⁶ *Id.*

³⁸⁷ See Michael J. Moore et al., *JPMorgan Joins Morgan Stanley in Settling U.S. Mortgage Lawsuits*, BLOOMBERG BUS. (Feb. 5, 2014), *archived at* <http://pcrma.cc/YKE9-9SAF>.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

Compared with other Wall Street banks, Morgan Stanley was responsible for a smaller volume of securities backed by troubled mortgages, the investments at the heart of the settlements.³⁹⁰

UBS is another financial institution that has been penalized for sub-prime fraud. Switzerland's UBS has resolved claims from U.S. regulators that the bank violated securities laws when it marketed and sold mortgage-backed bonds to Fannie Mae and Freddie Mac.³⁹¹ Federal regulators have agreed to accept almost \$1 billion from the bank for illegal conduct on mortgages.³⁹²

Prosecutors are seeking \$17 billion from Bank of America to resolve fraud claims arising from the sub-prime crisis.³⁹³ "Bank of America, the second-biggest U.S. lender, is among at least eight banks under investigation by the Justice Department and state attorneys general for misleading investors about the quality of bonds backed by mortgages amid a drop in housing prices."³⁹⁴ Private investors as well as local and foreign governments are also potential plaintiffs alleging financial institutions played a role in the mortgage market rout and housing crisis:

Wells Fargo & Co., HSBC Holdings Plc, Bank of New York Mellon Corp. and Deutsche Bank AG were sued by an Irish securities firm that claims the banks failed to protect investors in their role as trustees of securities backed by home loans that defaulted after the 2008 credit crisis.³⁹⁵

The U.S. Justice Department is continuing its efforts at investigating financial institutions for their role in contributing to the subprime led financial crisis; Goldman Sachs was negotiating in June

³⁹⁰Nathaniel Popper, *Morgan Stanley in \$2.6 Billion Settlement Over Crisis in Mortgages*, N.Y. TIMES DEALBOOK (Feb. 25, 2015), <http://www.nytimes.com/2015/02/26/business/dealbook/morgan-stanley-in-2-6-billion-mortgage-settlement.html>.

³⁹¹See M. Rochan, *RBS, Barclays, HSBC Face \$4bn Sub-Prime Fines as UBS Pays \$885m to Fannie Mae and Freddie Mac*, INT'L BUS. TIMES (July 26, 2013), [archived at http://perma.cc/6U28-T9ZE](http://perma.cc/6U28-T9ZE).

³⁹²*Id.* ("UBS will pay \$885m in a settlement with US regulators over allegations the scandal-ridden Swiss bank misrepresented mortgage-backed bonds during the housing bubble, sending a shiver through the City of London as more huge fines loom for top British banks.")

³⁹³See Darren Bocy, *U.S. Prosecutors Seek \$17 billion for BofA Settlement, NYT Says*, BLOOMBERG BUS. (June 10, 2014, 11:16 PM), [archived at http://perma.cc/DSX5-2B9G](http://perma.cc/DSX5-2B9G) ("The U.S. Justice Department is seeking about \$17 billion from Bank of America Corp. to settle probes into its handling of mortgages ahead of the financial crisis . . .").

³⁹⁴*Id.*

³⁹⁵Bob Van Voris, *Wells Fargo, HSBC Among Banks Sued Over Subprime Securities*, BLOOMBERG BUS. (Dec. 24, 2014, 11:07 AM), [archived at http://perma.cc/RFM9-TGAN](http://perma.cc/RFM9-TGAN).

2015 a multi-billion dollar settlement with the Justice Department over its creation and marketing of subprime debt:

Goldman Sachs Group Inc. is in talks to pay \$2 billion to \$3 billion to settle a probe into its sales of mortgage bonds leading up to the financial crisis, according to a person with direct knowledge of the situation. The investment bank could reach a deal with the U.S. Justice Department within weeks, the person said, asking not to be identified because the negotiations aren't public.³⁹⁶

3. The London Whale

Another dramatic example of rogue financial institutional conduct is the extensive illegal behavior conducted by JPMorgan in the "London Whale" deception.³⁹⁷ Both U.S. and U.K. regulators have imposed penalties on the bank for illegal conduct, including securities laws violations and fraud.³⁹⁸ In September 2013, JPMorgan agreed to pay over \$900 million to resolve the claims.³⁹⁹ Regulators claimed that senior management was aware of the fraud but decided not to disclose it.⁴⁰⁰ The allegations against JPMorgan with respect to U.K. law are set out in the "Final Notice," which details the illegal activity and sets forth the penalty imposed.⁴⁰¹

In October 2013, the CFTC announced that JPMorgan had agreed to pay another \$100 million to resolve its claims.⁴⁰² "The CFTC said . . .

³⁹⁶Tom Schoenberg, *Goldman Said to Near U.S. Settlement Exceeding \$2 Billion*, BLOOMBERG BUS. (June 4, 2015, 8:59 PM), archived at <http://perma.cc/E68T-JSEP>.

³⁹⁷See Patricia Hurtado, *The London Whale*, BLOOMBERG QUICKTAKE (Apr. 23, 2015), archived at <http://perma.cc/AX3L-9AS8> (reporting that Bruno Iksil, a JPMorgan investor nicknamed the "London Whale," who worked in part of the bank that was supposed to minimize risk, but big on an obscure corner of the credit market and incurred \$6.2 billion in losses).

³⁹⁸Steve Slater, *Banks Pay for Past Sins as U.S., Europe Levy Record Fines*, REUTERS, Dec. 24, 2013, archived at <http://perma.cc/9HNG-9BZC> (reporting that JPMorgan paid out \$13 billion in fines in one month to U.S. authorities).

³⁹⁹See David Scheer & Dawn Kopecki, *JPMorgan Pays \$920 Million to Settle London Whale Probes*, BLOOMBERG BUS. (Sep. 20, 2013), archived at <http://perma.cc/R57L-JFH2> ("JPMorgan Chase & Co., settling U.S. and U.K. probes of a \$6.2 billion trading loss, agreed to pay \$920 million in penalties and admitted violating securities laws last year as top managers withheld information from the board.").

⁴⁰⁰*Id.* ("Senior executives had evidence by late April 2012 that traders in the chief investment office in London were pricing a derivatives portfolio in a way that reduced reported losses . . .").

⁴⁰¹JPMorgan Chase Bank, N.A., No. 124491 (Fin. Conduct Auth. Nov. 11, 2014) (Final Notice), archived at <http://perma.cc/4WQG-6TEQ>.

⁴⁰²JPMorgan Chase Bank, N.A., Docket No. 14-01 (Commodity Futures Trading Comm'n Oct. 16, 2013).

that by selling a staggering volume of these swaps in a concentrated period, the bank 'recklessly disregarded the fundamental precept on which market participants rely, that prices are established based on legitimate forces of supply and demand.'⁴⁰³

4. Derivatives and Other Securities Law Violations

The Federal Reserve imposed a \$200 million penalty on JPMorgan based on illegal conduct with respect to derivatives.⁴⁰⁴ The Office of the Comptroller of the Currency ("OCC") has been active in fining banks for illegal conduct.⁴⁰⁵ In one example, the OCC fined JPMorgan \$350 million for deficient compliance programs with respect to money laundering, internal controls, and customer verification.⁴⁰⁶ The penalty was also levied "in part on JPMorgan Chase's failure to report suspicions about Bernard L. Madoff Investment Securities, LLC, to U.S. law enforcement and regulators, despite having alerted United Kingdom authorities in the months prior to Mr. Madoff's arrest."⁴⁰⁷ According to the Office of the Comptroller of the Currency, the bank also agreed to resolve criminal and civil complaints:

JPMorgan Chase entered into a deferred prosecution agreement with the U.S. Attorney's Office for the Southern District of New York and agreed to forfeit \$1.7 billion to the United States. Also concurrent with the OCC's enforcement action, the Financial Crimes Enforcement Network assessed a \$461 million civil money penalty that is deemed satisfied by the forfeiture to the U.S. government.⁴⁰⁸

Another example of a highly profitable service provided to a rogue actor was the servicing of the Bernard Madoff Ponzi scheme that caused

⁴⁰³See Virginia Harrison, *JPMorgan to Pay Fresh \$100M London Whale Fine*, CNNMONEY, (Oct. 16, 2013), *archived at* <http://perma.cc/MB5A-KG5F> ("The bank will pay \$100 million to the U.S. Commodity Futures Trading Commission, conceding 'reckless' behavior led to the trading debacle that generated about \$6 billion in losses.").

⁴⁰⁴JPMorgan Chase & Co., Docket No. 13-031-CMP-HC (Bd. of Governors of the Fed. Reserve Sys. Sept. 18, 2013), *archived at* <http://perma.cc/Y2AC-Q8R7>.

⁴⁰⁵JPMorgan Chase Bank, N.A., Docket No. AA-EC-2013-75 (Dep't of Treasury Comptroller of Currency Sept. 18, 2013), *archived at* <http://perma.cc/PX73-TW38>.

⁴⁰⁶News Release, Office of the Comptroller of the Currency OCC Assesses a \$350 Million Civil Penalty against JPMorgan Chase for Bank Secrecy Act Violations, NR-2014-1 (Jan. 7, 2014), *archived at* <http://perma.cc/AH7P-3BNS>.

⁴⁰⁷*Id.*

⁴⁰⁸*Id.*

severe losses to numerous investors.⁴⁰⁹ Similar to despots, drug gangs, and failed states, Madoff needed sophisticated financial services. Such activity enabled the rogue actor, Madoff, to perform his fraud. Indeed, "Irving H. Picard—the trustee trying to recoup money on behalf of Mr. Madoff's victims—filed against JPMorgan in 2010. Mr. Picard, who has recovered \$9.5 billion for victims, sued the bank for \$6.4 billion, accusing it of 'aiding and abetting' Mr. Madoff."⁴¹⁰ "JPMorgan's relationship with Mr. Madoff spanned more than two decades, from 1986 to the time of his arrest in 2008. JPMorgan served as his primary bank, Mr. Picard said, collecting fees from Mr. Madoff's brokerage firm, which moved billions of dollars through an account at the bank."⁴¹¹

In January 2014, JPMorgan agreed to pay \$2 billion to resolve government charges of illegal conduct.⁴¹² According to prosecutors, JPMorgan was uniquely qualified to be aware of the fraud.⁴¹³ "Having served as Mr. Madoff's primary bank for more than two decades, JPMorgan had a unique window into his scheme. In a document outlining the bank's wrongdoing, prosecutors argued that 'the Madoff Ponzi scheme was conducted almost exclusively' through various accounts held at JPMorgan."⁴¹⁴

5. Federal Corrupt Practices Act

Federal prosecutors are investigating whether financial institutions engaged in violations of the Federal Corrupt Practices Act ("FCPA") by illegally making payments to obtain business from sovereign wealth funds.⁴¹⁵ The examinations arose from an SEC investigation that financial institutions violated the FCPA to secure lucrative business from the Libyan sovereign wealth fund.⁴¹⁶ BNY Mellon is being probed for violating the FCPA with regard to obtaining business from sovereign wealth funds:

⁴⁰⁹See Jessica Silver-Greenberg & Ben Protess, *Criminal Action Is Expected for JPMorgan in Madoff Case*, N.Y. TIMES DEALBOOK (Dec. 11, 2013), archived at <http://perma.cc/GTP4-JCDD> (reporting a \$2 billion settlement).

⁴¹⁰*Id.*

⁴¹¹*Id.*

⁴¹²Protess & Silver-Greenberg, *supra* note 71 ("JPMorgan's lawyers accepted the \$1.7 billion penalty, the people briefed on the meeting said, which was within the range that prosecutors initially proposed. The bank also agreed to pay \$350 million to the Office of the Comptroller of the Currency, accepting the agency's only offer . . .").

⁴¹³*Id.*

⁴¹⁴*Id.*

⁴¹⁵See Tom Schoenberg, *U.S. Said to Probe Banks Over Sovereign Wealth Fund Deals*, BLOOMBERG BUS. (Feb. 3, 2014, 4:53 PM), archived at <http://perma.cc/9JQT-KMKN>.

⁴¹⁶*Id.*

Bank of New York Mellon Corp (BK.N) has disclosed in a filing that U.S. regulators are considering charging it with violating U.S. foreign bribery laws after an investigation into internships it gave to relatives of sovereign wealth fund officials.

In a regulatory filing on Friday, BNY Mellon said that U.S. Securities and Exchange Commission staff had notified it that they would recommend the SEC charge the bank over alleged violations of the Foreign Corrupt Practices Act.⁴¹⁷

Media reports suggest JPMorgan was among banks that engaged in the intentional hiring of children of powerful Chinese governmental officials to secure and retain business.⁴¹⁸ Bloomberg has reported that an internal document existed referencing the family member hired with specific business transactions.⁴¹⁹ More recent commentary confirms that this practice is under investigation:

The US Securities and Exchange Commission has subpoenaed JPMorgan Chase for its communications with some 30 senior Chinese government officials, according to these sources.

At least six other banks have received written demands about dozens of hires, according to these people and bank securities filings: Citigroup . . . Credit Suisse . . . Deutsche Bank . . . Goldman Sachs . . . Morgan Stanley . . . and UBS.

The US Department of Justice and the Federal Reserve Bank of New York are also involved in the investigations.⁴²⁰

Violating the anti-bribery provisions of the FCPA would mark yet further examples of criminal activity on the part of large financial institutions.

⁴¹⁷Nate Raymond & Aruna Viswanatha, *BNY Mellon May Face Bribery Charges Over Sovereign Wealth Funds: Filing*, REUTERS, Jan. 27, 2015, archived at <http://perma.cc/4X73-V9FU>.

⁴¹⁸Peter J. Henning, *JPMorgan Case Tests U.S. Law on Buying Influence Abroad*, N.Y. TIMES DEALBOOK (Sept. 3, 2013), archived at <http://perma.cc/5PAL-TWFZ>.

⁴¹⁹*Id.*

⁴²⁰Luc Olinga, *US Agencies Probe Big Banks On China Nepotism*, YAHOO NEWS: UK & IRELAND (June 4, 2015), archived at <https://perma.cc/WGA5-HV6H> ("US investigations into the hiring by large banks of the children of powerful Chinese officials are heating up, people familiar with the probes told AFP.").

6. General Fraud and Tax Evasion

Financial institutional misconduct has also directly reached the pockets of the ordinary consumer.⁴²¹ "J.P. Morgan Chase & Co. settled regulators' charges that it harmed consumers by allegedly making errors in hundreds of thousands of debt-collection lawsuits and leading more than two million credit-card customers to buy services they didn't want."⁴²²

In one settlement, Capital One Financial agreed to pay over \$200 million to resolve allegations that its employees violated laws in their dealings with consumers.⁴²³ In another example, Discover was ordered to make refunds to consumers of \$200 million and to pay a \$14 million fine for violating laws.⁴²⁴ "Discover's telemarketing scripts included misleading language that confused consumers about whether they were buying a product or just agreeing to consider it [T]elemarketers spoke quickly during the part of the call where the prices and terms of products are described."⁴²⁵ In December 2013, American Express was ordered to refund consumers nearly \$60 million and pay a fine of nearly \$10 million for deceptive credit card marketing.⁴²⁶

Barclays is currently being sued for defrauding customers and falsifying reports regarding high-frequency trading:

Barclays Plc was so bent on lifting its private trading venue to the upper ranks of Wall Street dark pools that it lied to customers and masked the role of high-frequency traders. . .

⁴²¹See Alan Zibel & Andrew R. Johnson, *J.P. Morgan Settles Consumer Cases—Deals Highlight Alleged Breakdowns in Controls Tied to Debt Collection and Credit-Card Products*, WALL ST. J., Sept. 20, 2013, at C2, available at <http://online.wsj.com/news/articles/SB10001424127887323308504579085020022276480>.

⁴²²*Id.*

⁴²³See Matthias Ricker et al., *Capital One Dealt Fine for Pitch to Customers*, WALL ST. J., July 19, 2012, at C1, available at <http://online.wsj.com/news/articles/SB10001424052702304217904577534782507899336> ("Capital One Financial Corp. will pay \$210 million to settle allegations that the large U.S. credit-card issuer allowed its call-center contractors to pressure customers into buying consumer-credit-protection products such as identity-theft-monitoring services.").

⁴²⁴See Danicl Wagner, *Feds Order Discover To Refund \$200M To Cardholders*, ASSOCIATED PRESS, Sept. 24, 2012, available at <http://perma.cc/LSV9-PG7Q> ("Discover, the sixth-biggest U.S. credit card issuer, will pay a \$14 million fine and refund \$200 million directly to more than 3.5 million customers . . .").

⁴²⁵*Id.*

⁴²⁶See CFPB Orders American Express to Pay \$59.5 Million for Illegal Credit Card Practices, CONSUMER FIN. PROT. BUREAU (Dec. 23, 2013), archived at <http://perma.cc/RJ83-5MHK> ("The Consumer Financial Protection Bureau (CFPB) today ordered American Express to refund an estimated \$59.5 million to more than 335,000 consumers for illegal credit card practices. . . . American Express will pay an additional \$9.6 million in civil penalties to the CFPB.").

. In the complaint, filed in New York state Supreme Court in Manhattan, Schneiderman said Barclays told customers that it was protecting them from "aggressive, predatory or toxic" high-frequency traders, while secretly courting them. Schneiderman painted a picture of "fraud and deceit" starting in 2011 at Barclays perpetrated by unidentified executives who lied to customers about the role played by high-frequency traders in its market as part of an effort to increase its size. Former "high-level" Barclays insiders helped frame the case, according to the complaint.⁴²⁷

Large financial institutions have enabled large-scale tax evasion by purposeful noncompliance with U.S. laws.⁴²⁸ The Senate Report on Offshore Banking addressed Credit Suisse's enabling of the large-scale tax fraud:

From at least 2001 to 2008, Credit Suisse employed banking practices that facilitated tax evasion by U.S. customers, including by opening undeclared Swiss accounts for individuals, opening accounts in the name of offshore shell entities to mask their U.S. ownership, and sending Swiss bankers to the United States to recruit new U.S. customers and service existing Swiss accounts without creating paper trails. At its peak, Credit Suisse had over 22,000 U.S. customers with Swiss accounts containing assets that exceeded 12 billion Swiss francs.⁴²⁹

Credit Suisse ultimately agreed to resolve the investigation by admitting its culpability and agreeing to pay nearly \$3 billion in penalties.⁴³⁰

7. Foreign Exchange

Financial institutions are being investigated for manipulation of exchange rates that set the value of trillions of transactions.⁴³¹ The

⁴²⁷Keri Geiger, Sam Mamudi & Chris Dolmetsch, *Dark Pool Greed Drove Barclays to Lie to Clients*, N.Y. SAYS, BLOOMBERG BUS. (June 25, 2014, 6:19 PM), archived at <http://perma.cc/PE2J-UAXQ>.

⁴²⁸CARL LEVIN & JOHN MCCAIN, OFFSHORE TAX EVASION: THE EFFORT TO COLLECT UNPAID TAXES ON BILLIONS IN HIDDEN OFFSHORE ACCOUNTS, COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS (Feb. 26, 2014), archived at <http://perma.cc/S5CA-G2F9>.

⁴²⁹*Id.*

⁴³⁰Robert W. Wood, *Credit Suisse: Guilty, \$2.6 billion Fine, But Avoids Death in U.S.—UBS Was Luckier*, FORBES (May 19, 2014), archived at <http://perma.cc/D8JY-Q36S>.

⁴³¹Vaughan, Finch & Choudhury, *supra* note 15.

foreign exchange or "FX" market is the largest financial market in the world, with a daily trading volume of nearly \$5 trillion. It is also "one of the least regulated and most opaque [markets] in the financial system."⁴³² Global regulators and prosecutors are investigating the rigging and manipulation of financial benchmarks by large banks that play a crucial role in setting exchange rates.⁴³³ Some banks have already been fined.⁴³⁴ One commentator reported on fines levied against several of these firms:

Barclays Plc, Royal Bank of Scotland Group Plc and UBS AG were fined a combined \$2.5 billion for rigging the London interbank offered rate, or Libor, used to price \$300 trillion of securities from student loans to mortgages. More than a dozen banks have been subpoenaed by the U.S. Commodity Futures Trading Commission⁴³⁵

The Justice Department and Federal Bureau of Investigation ("FBI") began investigating whether large financial institutions engaged in rate rigging and manipulation to profit from foreign exchange trading.⁴³⁶ The U.S. CFTC also initiated an investigation into whether the currency markets were illegally manipulated.⁴³⁷ Meanwhile, the Federal Reserve is examining banks to determine "whether traders shared information that may have let them manipulate prices in the \$5.3 trillion-a-day foreign-exchange market to maximize their profits."⁴³⁸

The U.S.-based investigations have yielded results that are not surprising. In 2014, Citigroup Inc. and JPMorgan Chase & Co. pleaded guilty to illegally manipulating foreign-exchange benchmarks.⁴³⁹ Commentators reported that these two firms were charged the highest penalties of their peers:

⁴³²Liam Vaughan & Gavin Finch, *Currency Spikes at 4 P.M. in London Provide Rigging Clues*, BLOOMBERG BUS. (Aug. 27, 2013, 7:01 PM), archived at <http://perma.cc/H2M5-G7MN>.

⁴³³*Id.*

⁴³⁴*Id.*

⁴³⁵*Id.*

⁴³⁶Lianna Brinded, *FX Fixing Scandal: DoJ and FBI Launch Criminal Investigation in US*, INT'L BUS. TIMES (Oct. 14, 2013), archived at <http://perma.cc/2ZP4-8VZY>.

⁴³⁷*Id.*

⁴³⁸Keri Geiger & Caroline Salas Gage, *Federal Reserve Said to Probe Banks Over Forex Fixing*, BLOOMBERG BUS. (Jan. 13, 2014, 1:54 PM), archived at <http://perma.cc/4UV3-KBRK> ("The Federal Reserve is investigating whether traders at the world's biggest banks rigged benchmark currency rates, raising the risk that firms will be penalized for lax controls as regulators look for wrongdoing.").

⁴³⁹Press Release, U.S. Dep't of Justice, *Five Major Banks Agree to Parent-Level Guilty Pleas* (May 20, 2015), archived at <http://perma.cc/4HQ3-WBTZ>.

Citigroup will pay \$1.02 billion to three regulators in the U.S. and U.K., and JPMorgan \$6 million less, according to statements from the firms today. They are among six firms that will pay \$4.3 billion to four regulators ranging from the U.S. to Switzerland's Financial Market Supervisory Authority.⁴⁴⁰

The guilty pleas and admissions continue to pile up. In 2015, "[s]ix of the world's biggest banks [agreed to] pay \$5.8 billion and five of them agreed to plead guilty to charges tied to a currency-rigging probe as they seek to wind down almost half a decade of enforcement actions."⁴⁴¹

This is yet another illustration of titanic financial institutions caught engaging in market fraud and collusion:

Citicorp, JPMorgan Chase & Co., Barclays Plc and Royal Bank of Scotland Plc agreed to plead guilty to felony charges of conspiring to manipulate the price of U.S. dollars and euros, according to settlements announced by the Justice Department in Washington Wednesday. . . . The four banks that agreed to plead guilty to currency charges are among the world's biggest foreign-exchange traders. They were accused of colluding to influence benchmark rates by aligning positions and pushing transactions through at the same time. Traders who described themselves as members of "The Cartel" used online chat rooms to discuss their positions before the rates were set and suppress competition in the market, the Justice Department said.⁴⁴²

In a separate but related action, the U.S. Federal Reserve "imposed fines of more than \$1.6 billion on the five banks for 'unsafe and unsound practices.' London-based Barclays will pay an additional \$1.3 billion as part of settlements with the New York Department of Financial Services, the Commodity Futures Trading Commission and the U.K.'s Financial Conduct Authority."⁴⁴³

⁴⁴⁰Suzi Ring & Liam Vaughan, *Citigroup, JPMorgan Pay Most in \$4.3 Billion FX Rig Cases*, BLOOMBERG BUS. (Nov. 12, 2014, 1:16 AM), archived at <http://pcrma.cc/PXG9-PGLF>.

⁴⁴¹McLaughlin, Schoenberg & Finch, *supra* note 165.

⁴⁴²*Id.*

⁴⁴³*Id.*

IV. THE NEED TO UTILIZE THE "ALMOST" ULTIMATE SANCTION

The existing remedy for illegal conduct perpetrated by financial institutions is woefully ineffective. The practice, wherein financial institutions systemically violate the law and the resulting profits dwarf the imposed penalties, has bred disenfranchisement and disdain among the American public.⁴⁴⁴ Large corporate profiteers and the racketeers themselves—managers, executives, and directors—bear little or no risk of meaningful criminal prosecution or imprisonment.⁴⁴⁵ Moreover, prosecutors are averse to criminally pursuing large financial institutions.⁴⁴⁶ Their hesitation is motivated by concerns for large-scale economic consequences:

The government has been reluctant to bring criminal charges against large corporations, fearing that such an action could imperil a company and throw innocent employees out of work. Those fears trace to the indictment of Enron's accounting firm, Arthur Andersen, which went out of businesses after its 2002 conviction, taking 28,000 jobs with it. Ever since, prosecutors have increasingly relied on deferred-prosecution agreements, which rebuke companies without threatening their health.⁴⁴⁷

While the prosecutors are averse, the schemes continue and the criminal conduct enriches the financial institutions.⁴⁴⁸ The public correctly perceives that the TBTF and TBTJ financial institutions have no meaningful incentive to change and will continue to scheme.⁴⁴⁹ The current regime of regulation and penalty assessment is outmoded and unsustainable. What should be the response to rampant corrupt behavior?

Corporations, as juridical organizations, can be prosecuted⁴⁵⁰ and subject to an array of sanctions, such as fines and disgorgement of profits.⁴⁵¹ For corporations whose main goal is to engage in criminal

⁴⁴⁴ See *supra* Part II.D.

⁴⁴⁵ See *supra* Part II.B-C.

⁴⁴⁶ See *supra* Part II.C.

⁴⁴⁷ See Silver-Greenberg & Prosser, *supra* note 409.

⁴⁴⁸ See *supra* Part II.B.

⁴⁴⁹ See *supra* Part II.D.

⁴⁵⁰ See U.S. SENTENCING COMM'N, *supra* note 56, § 8, introductory comment ("Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents.").

⁴⁵¹ V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1497 (1996).

acts, the law provides for the "execution" of the business.⁴⁵² Many call for prosecutors to become more aggressive and for regulators to cease waiving penalties.⁴⁵³ Yet, as outlined above,⁴⁵⁴ prosecutors and regulators have great personal incentive to not overly punish a financial institution. Thus, demands for more aggressive prosecutorial action may not prove substantially beneficial.

So what is the alternative? Under what circumstances is ordinary fine imposition inadequate? The U.S. Sentencing Guidelines ("Sentencing Guidelines") provide a useful perspective.⁴⁵⁵ Pursuant to the Sentencing Guidelines, certain acts of outrageous misconduct justify a departure from the ordinary guidelines and call for punishment that exceeds the norm.⁴⁵⁶ Among the types of actors that warrant extraordinary punishment are (1) actors that endanger national security,⁴⁵⁷ (2) serial criminals,⁴⁵⁸ and (3) actors that threaten financial markets.⁴⁵⁹ Accordingly, misconduct that impinges on the national security of the United States, is perpetrated by repeat offenders, or imperils the stability of financial markets should be treated differently.

Financial institutional misconduct closely tracks these types of outrageous misconduct. There is a match between the categories listed in the Sentencing Guidelines and a substantial amount of financial institutional wrongdoing.⁴⁶⁰ The institutional misconduct has enabled sanctions avoidance, terrorist enterprises, failed states, looting of national wealth, noncompliance with U.S. tax laws, LIBOR rate rigging, mortgage fraud, market manipulation, and may have proximately caused—or at the very least contributed to—the severe global financial crisis.⁴⁶¹ Thus, to a large extent, the misconduct imperils the national security of the United States and threatens American financial markets.⁴⁶² Moreover, many of the institutions are repeat offenders, making them serial criminals.⁴⁶³ In a stunning display of serial criminality, financial institutions have violated agreements with U.S. prosecutors; for example, Barclays—the bank that former CEO Jenkins promised had

⁴⁵²See U.S. SENTENCING COMM'N, *supra* note 56, § 8C1.1 (finding the imposition of a fine "sufficient to divest the organization of all its net assets," which is intended to put the corporation out of business).

⁴⁵³See *supra* Part II.A.

⁴⁵⁴See *supra* Part II.B.

⁴⁵⁵See U.S. SENTENCING COMM'N, *supra* note 56.

⁴⁵⁶See *id.* at § 8C4.2 to 4.6.

⁴⁵⁷*Id.* at § 8C4.3.

⁴⁵⁸See *id.* at § 8C4.6 (containing policy statement for "Official Corruption").

⁴⁵⁹U.S. SENTENCING COMM'N, *supra* note 56, § 8C4.5.

⁴⁶⁰See *supra* Part III.B.

⁴⁶¹See *supra* Part III.B.

⁴⁶²See *supra* Part III.B-C.

⁴⁶³See *supra* Part II.A.

changed its ways—was caught violating an agreement with the U.S. Justice Department.⁴⁶⁴ In another example, UBS was caught violating its agreement, and the U.S. Justice Department is scheduled to nullify the settlement:

The U.S. Justice Department is set to rip up its agreement not to prosecute UBS Group AG for rigging benchmark interest rates, according to a person familiar with the matter, taking a new step to hold banks accountable for repeat offenses.

The move by the U.S. would be a first for the industry, making good on a March threat by a senior Justice Department official to revoke such agreements and putting banks on notice that these accords can be unwound if misconduct continues.⁴⁶⁵

In sum, the misconduct of many financial institutions mirrors the list in the Sentencing Guidelines for defendants whose actions deserve extraordinary punishment.⁴⁶⁶

Financial institutions will not have an incentive to act legally unless they risk losing their right to profit or risk having senior managers, officers, or directors imprisoned.⁴⁶⁷ As long as these punishments are off the table, there is precious little incentive to rein in misconduct.⁴⁶⁸ By allowing the culprits to remain in business, the incentive to cease criminal activity is low:

Perhaps the most interesting part of the prolonged and leak-filled dance leading up to the expected criminal charges has been the effort to assure that the banks will stay in business after they plead guilty. Credit Suisse is expected to admit that it helped Americans evade taxes, and BNP Paribas is expected to admit that it did business with countries blacklisted by the United States. Regulators will not enforce statutes that would seem to bar the banks from some activities.

⁴⁶⁴See, e.g., Farrell, Finch & Schoenberg, *supra* note 31 ("Barclays Plc will probably be fined for violating a three-year-old settlement over interest-rate rigging, but U.S. prosecutors will stop short of seeking a guilty plea, which they are demanding from UBS AG, people familiar with the matter said.").

⁴⁶⁵Schoenberg, *supra* note 31.

⁴⁶⁶See U.S. SENTENCING COMM'N, *supra* note 56, § 8C4.2 to 4.6.

⁴⁶⁷See *supra* Part II.B.

⁴⁶⁸See *supra* Part II.B-C.

To put it another way, the Justice Department has gone to great lengths to guarantee that convicted banks will not be treated as criminals.

In being treated that way, the banks will receive the same breaks other banks have come to expect when they are caught violating rules or laws.⁴⁶⁹

Financial institutions must be more adequately punished to create a strong enough disincentive to break the law. However, liquidating the financial institution would risk engendering another Enron. A middle approach may be effective.

Financial institutions that commit certain misconduct within a certain time parameter should be sold off to their business rivals.⁴⁷⁰ The U.S. Congress should pass legislation that mandates federal courts to dissolve a financial institution whose misconduct falls within the three categories listed in the Sentencing Guidelines.⁴⁷¹ These corporations should be broken up and sold to business competitors.⁴⁷² Additionally, their managers and directors should be banned from employment with any successor entity.⁴⁷³ Convictions, including guilty pleas, would count as violations.⁴⁷⁴ Three violations committed within a ten-year time frame should trigger the penalty.⁴⁷⁵

This punishment would accomplish several goals. First, the punishment will serve as a clear deterrent from engaging in such behavior.⁴⁷⁶ Second, it would remove the senior managers and officers from positions of authority in the successor company hopefully preventing repeat abuse.⁴⁷⁷ Third, it would stop the culture of fraud and flouting of the law in the company as it is absorbed by another entity.⁴⁷⁸ Fourth, it would likely impede the executives from finding employment in the entire sector as other financial institutions would be loath to hire individuals responsible for the "almost" ultimate sanction.⁴⁷⁹ Fifth, it

⁴⁶⁹Norris, *supra* note 176.

⁴⁷⁰See *supra* note 59 and the accompanying text.

⁴⁷¹U.S. SENTENCING COMM'N, *supra* note 56, § 8C4.2 to 4.6.

⁴⁷²See *supra* note 59 and accompanying text.

⁴⁷³But see U.S. SENTENCING COMM'N, *supra* note 56, §§ 8D1.1 (discussing probation).

⁴⁷⁴*Cf. id.* at §§ 8C4.6 (discussing the departure of the official who received a bribe).

⁴⁷⁵See *id.* at §§ 8D.1.1 (suggesting time frames for measuring repeat offenses in context of organizational probation).

⁴⁷⁶See *supra* Part II.B (reviewing the inadequate deterrent effects of current sanction regime).

⁴⁷⁷See *supra* Part II.B (highlighting the repetitive nature of corporate offenses despite existing sanctions).

⁴⁷⁸See *supra* Part II.B.

⁴⁷⁹*Cf. Khanna, supra* note 451, at 1509-11 (discussing "rub off" effects of corporate sanctions on corporate managers).

would cause the managers and officers to lose their jobs, which will affect them personally.⁴⁸⁰ Sixth, it will potentially reduce the losses to be borne by the shareholders for future misconduct.⁴⁸¹ Seventh, it will reduce the discretionary waivers that prosecutors and regulators can award because of their self-interest in future employment.⁴⁸² A federal judge will likely not be subject to the same enticement and lure of future employment with financial institutions.⁴⁸³

What about the possible negative outcomes? First, senior managers and officers who wish to engage in criminal conduct for a large profit will not be deterred. There exists a potential for such large profits to be created and short-term bonuses awarded, that even severe punishment would not deter every individual. In other words, financial institutions will continue to some extent to engage in criminal behavior. But it should reduce the frequency of criminal conduct because some who would have engaged in the same will be deterred. Second, liability exposure is a latent risk that requires due diligence.⁴⁸⁴ By being sold to competitors, an entity becomes a successor and may be liable for the predecessor's hidden misdeeds, which may reduce the price the acquiring entity is willing to pay, thus reducing value to shareholders.⁴⁸⁵ Third, illegal conduct may potentially be not prosecuted at all as prosecutorial discretion empowers the government to simply choose not to prosecute.⁴⁸⁶ Fourth, settlement of prosecutions with a guilty plea may be discouraged since under the proposal a settlement and guilty plea is counted as a conviction resulting in possible defense verdicts or dismissals.⁴⁸⁷

Notwithstanding the potential drawbacks, the benefits to this proposal are tangible. The dangers inherent in corporate prosecution will be reduced because the corporation will continue to exist, albeit in a

⁴⁸⁰ *Cf. id.* (discussing reputational damage as a deterrent).

⁴⁸¹ *See supra* Part II.B.

⁴⁸² *See supra* Part II.B-C (discussing the "revolving door" between regulatory employment and criminal corporations).

⁴⁸³ *See Silver-Greenberg & Protess, supra* note 409.

⁴⁸⁴ *See Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1162 (1991) (explaining the doctrine of due diligence as an affirmative defense).

⁴⁸⁵ *See George Kuncy, A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. L. REV. 9, 11-14 (2007) (providing background information on the concept of successor liability).

⁴⁸⁶ *See Roger A. Fairfax, Jr., Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1247 (2011) ("A prosecutor can decline, for any reason or no reason at all, to proceed against an individual even though there is likely sufficient evidence to convict.").

⁴⁸⁷ *See supra* note 474 and accompanying text.

different form.⁴⁸⁸ This proposal will minimize or possibly eliminate the potential economic dislocation arising from the elimination of a business.⁴⁸⁹ Markets like certainty, and the knowledge that the entity will continue to exist should assuage concerns of unknown outcomes.⁴⁹⁰ There will be no bankruptcies or interruptions for customers, and the business departments will simply be operated by competitors.⁴⁹¹ This proposal would also substantially lessen the risk that an indictment will lead to unemployment and economic hardship, since clients and other stakeholders know the financial institution will simply be broken up.⁴⁹² This phenomenon is fairly common, given the last decade, which has included two merger waves where banks changed names with no effect on customer accounts.⁴⁹³ While there is no foolproof method to totally eliminate the risks, the current mode of punishment is broken, and continuing business as usual contains its own substantial risks.⁴⁹⁴ The marketplace should take care of the managers responsible, as other entities will be reluctant to hire the people responsible for the financial institution's downfall.⁴⁹⁵ Such a punishment will act as a deterrent because the competitor who takes over the company will have every incentive to file suit against the officers responsible.⁴⁹⁶

If a rogue employee caused the misconduct despite the presence of adequate compliance controls, then such extraordinary punishment is not

⁴⁸⁸ *But see* Joan-Alice M. Burn, *United States v. Stein: Has the "Perfect Storm" Led to a Sea Change?*, 32 DEL. J. CORP. L. 859, 877 (2007) ("Unlike the indictment of an individual, the indictment of a corporation is perceived as a death sentence.").

⁴⁸⁹ *See* Peter E. Millspaugh, *The Worker Dislocation Dilemma in the United States and Great Britain: Contrasting Legal Approaches*, 16 GA. J. INT'L & COMP. L. 285, 295-302 (1986) (describing the way in which the United States has responded to worker dislocation).

⁴⁹⁰ *See* Thomas N. Dahdoun & James F. Mongoven, *The Shape of Things to Come: Innovation Market Analysis in Merger Cases*, 64 ANTITRUST L.J. 405, 441 (1996) ("Businesses like certainty.").

⁴⁹¹ *Cf. id.* at 440 (pointing out that businesses agree to mergers to keep their research and development departments viable).

⁴⁹² *See* Burn, *supra* note 488, at 863 (explaining the consequences that followed the indictment of the Arthur Andersen firm).

⁴⁹³ *See* Richard G. Parker & David A. Balto, *The Merger Wave: Trends in Merger Enforcement and Litigation*, 55 BUS. LAW. 351, 351 (1999) (describing the "unprecedented merger wave" in the United States).

⁴⁹⁴ *See supra* Part II.B (demonstrating the ways in which the current system is ineffective).

⁴⁹⁵ *See* Jim Yardley, *Big Burden for Ex-Workers of Enron*, N.Y. TIMES (Mar. 3, 2002), <http://www.nytimes.com/2002/03/03/us/big-burden-for-ex-workers-of-enron.html> (describing the difficulties that former employees of Enron have experienced regarding new employment).

⁴⁹⁶ *But see* DEL. CODE ANN. tit. 8, § 102(b)(7) (2006) (providing that a corporation may include a provision in its certificate of incorporation exculpating its board from monetary damages caused by breaches of duty of care).

warranted.⁴⁹⁷ Corporate ratification of the wrongdoing should be required to trigger this punishment.⁴⁹⁸ Such ratification could occur when misconduct is approved, directed, or taken with the knowledge of senior managers and directors.⁴⁹⁹ The punishment would also not apply to mere negligence or even gross negligence.⁵⁰⁰ The misconduct would need to be similar to conduct needed for the imposition of punitive damages—reckless or intentional.⁵⁰¹ These concerns are alleviated because a guilty plea or conviction would be unlikely unless the misconduct was ratified or endorsed by senior management.⁵⁰² If, for example, someone deceives a bank into violating sanctions, then there would not be any qualifying conduct.

This article outlined serious problems with the current regulatory and prosecutorial architecture and concluded that the current system is ineffective. This proposal aims to substantially reduce these reasons and impose a harsher risk for engaging in criminal activity.⁵⁰³ The consequences must be serious enough that such activity is considered too problematic.⁵⁰⁴ The proposal described above attempts to balance various interests, such as preventing a financial institutional meltdown, allowing reasonable risk-taking, and preventing endemic illegal conduct.⁵⁰⁵ Understandably, there are no guarantees with this proposal. The most substantial criticism is that the wrongdoers will reap such a high benefit that it is worthwhile to engage in the conduct.⁵⁰⁶ However, merely continuing with business as usual almost guarantees future

⁴⁹⁷ See Miriam H. Bacr, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL'Y 1, 5-6 (2010) (explaining how a corporation may blame a rogue employee for its misconduct).

⁴⁹⁸ See James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1139-40 (1984) ("The complicity rule limits the imposition of vicarious liability for punitive damages to situations in which a managerial agent of the employer either commits the egregious act, specifically authorizes the act, or ratifies the act . . .").

⁴⁹⁹ See *id.* at 1139-40 (setting out the types of conduct that result in liability for punitive damages).

⁵⁰⁰ See *id.* at 1138 (stating that negligent conduct does not typically result in the imposition of punitive damages).

⁵⁰¹ See *id.* at 1130-38 (reviewing the intentional and reckless standards for punitive damages).

⁵⁰² See Sales & Cole, *supra* note 498, at 1139-40 (referencing the complicity rule).

⁵⁰³ See *supra* notes 470-83 and the accompanying text (presenting the harsher risk, specifically that the corporation be split up and sold off to its competitors).

⁵⁰⁴ See William L. Barnes, Jr., *Revenge on Utilitarianism: Renouncing a Comprehensive Economic Theory of Crime and Punishment*, 74 IND. L.J. 627, 630-32 (1999) (discussing the theory of deterrence).

⁵⁰⁵ See *supra* Part IV.

⁵⁰⁶ For example, a whopping bonus for a super profitable year of earnings may outweigh the potential risk of prosecution. See *supra* Part III.A (discussing the large profits gained as a result of engaging in corporate criminal conduct).

wrongdoing.⁵⁰⁷ "It's time to stop recidivism in financial crimes and to end the 'slap on the wrist' culture that exists at the Justice Department and the SEC."⁵⁰⁸

V. CONCLUSION

Financial institutions have repeatedly engaged in severe criminal activity, including numerous frauds, such as violating international law, rate rigging, tax evasion, fraud, and bribery.⁵⁰⁹ Numerous primary adverse results have arisen from their activity, such as human rights violations, terrorism, tremendous economic losses, and even possible contribution to the global financial crisis.⁵¹⁰ Secondary negative results include loss of faith and confidence in American political institutions, democracy, and fair play, as well as a sense that a double standard exists wherein large corporations can commit crimes with impunity.⁵¹¹

Regulatory and prosecutorial efforts have largely failed to stem large financial institutions' criminal activities.⁵¹² The current regulatory governance architecture is a failure. Large financial institutions admit wrongdoing, enter into NPAs or DPAs, or even plead guilty. The government ensures that waivers are granted so that the financial institution suffers no loss in its ability to conduct commerce. Essentially, the financial institutions are welcomed back immediately after paying a fine. Market reaction is generally positive, as reputational harm is nonexistent and the business continues as usual. No prison sentences are meted out for managers or officers, and the guilty plea is seen as the cost of engaging in profitable—if illegal—activity. Unlike individual felons, who are caught and convicted, for financial institutions, crime pays.

Neither government fines nor penalties seem to have a meaningful effect on the misconduct.⁵¹³ A new approach is needed that will serve as an adequate punishment and deter such wrongdoing.⁵¹⁴ A strong incentive must be developed to deter the wrongdoing. If a financial institution is too big to be meaningfully punished as a continuing

⁵⁰⁷ See *supra* Part II.B (addressing the present wrongdoing that would continue).

⁵⁰⁸ Warren, *supra* note 26.

⁵⁰⁹ See *supra* Part II.A (illustrating the numerous types of illegal conduct).

⁵¹⁰ See *supra* Parts II-III (describing the various negative results of corporate criminal conduct).

⁵¹¹ See Maya Krigman, *Prosecutorial Discretion of the Department of Justice in Corporate Criminal Cases: How Far is Too Far?*, 74 BROOK. L. REV. 231, 231-32 (2008) ("The era of corporate malfeasance has . . . caused a significant loss of investor confidence in the financial market and a strong distrust of corporations and their leaders.").

⁵¹² See *supra* Part II.C (suggesting that prosecutors are reluctant to prosecute large financial institutions).

⁵¹³ See *supra* Part II.B (reviewing five reasons why fines are ineffective).

⁵¹⁴ See *supra* Part IV (explaining the proposed "new approach").

criminal enterprise, then it is too big to exist in its current form. This article proposes that, under certain circumstances, the law should provide for the extraordinary punishment of breaking up a corporation by selling units to rival entities.⁵¹⁵ This punishment would be reserved for outrageous misconduct that endangers national security, imperils financial markets, or is undertaken by a serial wrongdoer.⁵¹⁶ Moreover, only misconduct directly or indirectly approved or ratified by managers or directors would be subject to this punishment.⁵¹⁷ Actions taken by a rogue employee would not qualify.⁵¹⁸ Additionally, the level of misconduct would need to track the standard for punitive damages and not be the result of ordinary negligence.⁵¹⁹

⁵¹⁵ See *supra* Part IV.

⁵¹⁶ See *supra* Part IV.

⁵¹⁷ See *supra* Part IV.

⁵¹⁸ See *supra* Part IV.

⁵¹⁹ See *supra* Part IV.

