Why FIRREA and Civil Enforcement Cannot Replace Individual Criminal Liability

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> *I was in a meeting with one of [my bosses], and a few other traders, and they were talking about the new hedge-fund regulations. Most everyone on Wall Street thought they were a bad idea. "But isn't it better for the system as a whole?" I asked. The room went quiet, and my boss shot me a withering look. I remember his saying, "I don't have the brain capacity to think about the system as a whole. All I'm concerned with is how this affects our company." . . . From that moment on, I started to see Wall Street with new eyes.*[1]
>
> —Sam Polk, former Wall Street trader

INTRODUCTION

In the wake of the Savings and Loan Crisis, prosecutors convicted over eight hundred corporate executives for criminal fraud.[2] In the

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1. Sam Polk, Op-Ed., *For the Love of Money*, N.Y. TIMES (Jan. 18, 2014), http://www.nytimes.com/2014/01/19/opinion/sunday/for-the-love-of-money.html.

2. William Black, *Banking System Rotten to the Core*, FINANCIAL SENSE (Nov. 11, 2011), http://www.financialsense.com/contributors/william-black/2011/11/25/banking-system-rotten-to-the-core. *See also Two Financial Crises Compared: The Savings and Loan Debacle and the Mortgage Mess*, N.Y. TIMES (Apr. 13, 2011), http://www.nytimes.com/interactive/2011/04/14/business/20110414-prosecute.html ("By 1992, there had been 1,100 criminal prosecutions of individuals involved in 'major' S.&L. fraud [resulting in] 839 convictions of these individuals.").

aftermath of the 2008 Financial Crisis[3]—a calamity seventy times more devastating—the federal government has yet to jail even a single executive (save for a solitary bit player).[4] This lack of criminal convictions is unusual especially given the way the government has addressed previous financial crises.[5] To compensate, the federal

3. For the sake of brevity, this Note concentrates on individual criminal liability and does not delve into corporate entity criminal liability.

4. Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions*, 9 VA. L. & BUS. REV. 153, 168 (2015) ("To date, there have been no prosecutions of any Wall Street CEOs, board members, or others at the 'executive suite' level. And there have been no successful prosecutions of truly senior-level executives either."); David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1438 ("There has not been a single conviction of a bailed-out bank, or a single senior executive who ran one."). In 2009, federal prosecutors in the Eastern District of New York lost a pair of prosecutions against two fund managers of Bear Stearns. Zachary Kouwe & Dan Slater, *2 Bear Stearns Fund Leaders Are Acquitted*, N.Y. TIMES (Nov. 10, 2009), http://www.nytimes.com/2009/11/11/business/11bear.html. Several years later, Angelo Mozilo, the CEO of Countrywide Mortgage who oversaw the origination of hundreds of billions-of-dollars worth of subprime mortgages, was investigated but criminal charges were never brought. *See* Scott E. Reckard, *U.S. Drops Criminal Probe of Former Countrywide Chief Angelo Mozilo*, L.A. TIMES (Feb. 18, 2011), http://articles.latimes.com/2011/feb/18/business/la-fi-mozilo-20110219. Finally, in November 2013, a full five years after the financial crisis, a former investment banker for Credit Suisse, was convicted. Rachel Abrams & Peter Lattman, *Ex-Credit Suisse Executive Sentenced in Mortgage Bond Case*, N.Y. TIMES (Nov. 22, 2013, 6:37 PM), http://dealbook.nytimes.com/2013/11/22/ex-credit-suisse-executive-sentenced-in-mortgage-case/; Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES (Apr. 30, 2014), http://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html?_r=0. *See also* Editorial, *No Crime, No Punishment*, N.Y. TIMES (Aug. 25, 2012), http://www.nytimes.com/2012/08/26/opinion/sunday/no-crime-no-punishment.html?hp&_r=0.

5. The Savings and Loan Crisis is one useful comparison point, but it is important to note that the pattern of public investigations and criminal prosecutions following a financial crisis stretches back to the Pujo Committee of 1912–1913 that followed the 1907 Financial Panic. Brooklynbadboy, *The Pujo Committee and Today's Banker's Senate Committee*, DAILY KOS (June 17, 2012, 7:00 AM), http://www.dailykos.com/story/2012/06/17/1100630/-The-Pujo-Committee-and-today-s-Banker-s-Senate-Committee#. *See also Pujo Committee "Money Trust" Wall Street Banking Cartel Investigation 1912–1913*, PUBLIC INTELLIGENCE (Oct. 5, 2011), https://publicintelligence.net/pujo-committee-money-trust-wall-street-banking-cartel-investigation-1912-1913/; PUJO, REPORT OF THE COMMITTEE APPOINTED PURUANT TO HOUSE RESOLUTIONS 429 AND 504 TO INVESTIGATE THE CONCENTRATION OF CONTROL OF MONEY AND CREDIT, H.R. REP. NO. 62-1593 (1913), *available at* https://fraser.stlouisfed.org/title/?id=1329. The pattern continued with the 1932–34 Pecora Commission after the Wall Street Crash of 1929, the "Keating Five" Congressional hearing and prosecutions following the Savings and Loan Crisis, the prosecution of Michael Milken and Ivan Boesky following the 1980s "junk bond" bubble that triggered the Crash of 1987, and the prosecution of Jeff Skilling and Kenneth Lay (among many others) after the "dot-com" bubble in 2000. *See, e.g.*, Alan Brinkley, *When Washington Took on Wall Street*, VANITY FAIR (June 2010), http://www.vanityfair.com/business/features/2010/06/pecora-201006; S. REP. NO. 73-1455 (1934), https://www.scribd.com/doc/73235213/Pecora-Commission-Report-Stock-Exchange-Practices-

government has instead resorted to slapping financial institutions with civil fines.[6]

Despite the Department of Justice's (DOJ) success in extracting record-breaking penalties,[7] questions still linger about whether these civil penalties are enough to make up for the lack of jailed executives.[8] These questions arise largely from the fact that fines have not been effective in carrying out the roles traditionally played by the criminal system. That is, civil fines have not successfully deterred risky bets and illegal behavior,[9] punished past wrongful and

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Report-1934; *Keating Five*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/k/keating_five/index.html, *Charles H. Keating Jr.*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/k/charles_h_keating_jr/index.html; Robert McFadden, *Charles Keating, 90, Key Figure in '80s Savings and Loan Crisis, Dies*, N.Y. TIMES (Apr. 2, 2014), http://www.nytimes.com/2014/04/02/business/charles-keating-key-figure-in-the-1980s-savings-and-loan-crisis-dies-at-90.html; *Preliminary Inquiry Into Allegations Regarding Senators Cranston, DeConcini, Glenn, McCain, and Riegle, and Lincoln Savings and Loan: Open Session Hearings Before the Select Committee on Ethics*, 101st Cong. (1990–1991), *available at* http://catalog.hathitrust.org/Record/011337544; *The Turbulence in the Financial Markets Last October, the Functioning of our Financial Markets During that Period, and Proposals for Structural and Regulatory Reforms: Hearings Before the S. Comm. on Banking, Hous., and Urban Affairs*, 100th Cong. (1988), *available at* http://babel.hathitrust.org/cgi/pt?id=pur1.32754073963526;view=1up;seq=1; Laurel Brubaker Calkins, *Enron Fraud Trial Ends in 5 Convictions*, WASH. POST, Nov. 4, 2004, at E01; *The Financial Collapse of Enron: Hearing Before the Subcomm. on Oversight and Investigations of the H.R. Comm. on Energy and Commerce*, 107th Cong. (2002).

6. *See* David Kerem, *Change We Can Believe In: Comparative Perspectives on the Criminalization of Corporate Negligence*, 14 TRANSACTIONS: TENN. J. BUS. L. 95, 107 (2012); Peter Lattman & Ben Protess, *From Anonymity to Scourge of Wall Street*, N.Y. TIMES, Oct. 31, 2013, at A1; *see also* Tynan DeBold & Elaine He, *The Tab for the Financial Crisis*, WALL ST. J. (Nov. 19, 2013), http://graphicsweb.wsj.com/documents/legaltab/ ("The six largest U.S. bank-holding companies have paid about $130 billion in settlements, fines and other costs related to the mortgages and the financial crisis.").

7. Jason M. Breslow, *How Bank of America's $16.65 Billion Settlement Compares*, FRONTLINE (Aug. 21, 2014, 1:59 PM), http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/how-bank-of-americas-16-65-billion-settlement-compares/.

8. *See, e.g.*, Barry Ritholtz, *Why Prosecutors Whiffed on Subprime Crime*, BLOOMBERG VIEW (Mar. 14, 2014, 9:50 AM), http://www.bloombergview.com/articles/2014-03-14/why-prosecutors-whiffed-on-subprime-crime ("One of the great 'mysteries' of the post-financial-crisis era is why there has been almost no prosecution of obvious criminality, particularly in the mortgage business."); Jed. S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/; Ron Chernow, Op-Ed., *Where Is Our Ferdinand Pecora?*, N.Y. TIMES (Jan. 5, 2009), http://www.nytimes.com/2009/01/06/opinion/06chernow.html?pagewanted=all.

9. *See infra* notes 98–101.

fraudulent conduct,[10] or adequately expressed the American public's condemnation of bankers' reckless misbehavior[11]—misbehavior that resulted in 5 million foreclosed homes,[12] 8.7 million lost jobs,[13] and the destruction of $12.8 trillion in gross domestic product (GDP).[14]

While it would normally be unfair to measure the civil system against the standards of the criminal system, the government's use of civil penalties makes it clear that the civil system was being employed to accomplish what the criminal system had failed to do.[15] Given the lengths that prosecutors and judges[16] have gone to stretch the civil system as a substitute for the lack of criminal convictions, it seems appropriate to ask what held prosecutors back from using the criminal justice system to jail executives in the first place. While there are a wide range of contributing causes—the sheer size of financial institutions,[17] the labyrinthine complexity of the financial

10. *See infra* notes 103–09.

11. *See infra* notes 92–96.

12. CORELOGIC NATIONAL FORECLOSURE REPORT 2 (2014).

13. Jim Puzzanghera, *Economy Has Recovered 8.7 Million Jobs Lost in Great Recession*, L.A. TIMES (June 6, 2014, 4:26 PM), http://www.latimes.com/business/la-fi-jobs-20140607-story.html.

14. DENNIS KELLEHER, STEPHEN HALL & KATELYNN BRADLEY, THE COST OF THE WALL STREET-CAUSED FINANCIAL COLLAPSE AND ONGOING ECONOMIC CRISIS 1 (2012), *available at* http://www.corporatecrimereporter.com/wp-content/uploads/2012/09/bettermarkets.pdf. Note that other reports peg the loss anywhere from $6 trillion up to $14 trillion. *See* Eduardo Porter, *Recession's True Cost is Still Being Tallied*, N.Y. TIMES, Jan. 21, 2014, at B1.

15. Kerem, *supra* note 6, at 107 ("It is the very existence of a bifurcated enforcement system in the United States which, in attempting to compensate for the inadequacies of American corporate criminal statutes, exacerbates the inequities associated with entity-level enforcement."). *See generally* Lattman & Protess, *supra* note 6 (explaining that because banks cannot land in jail, civil penalties are often "the strongest tool at the government's disposal"); Andrew Grossman, Emily Glazer, & Christina Rexrode, *Fine Mess: The Memo that Cost Banks $37 Billion*, WALL ST. J., Dec. 19, 2014, at A1 (noting that Financial Institutions Reform, Recovery, and Enforcement Act presented a "powerful alternative to criminal prosecutions[.]").

16. *See infra* notes 62–72.

17. Andrew J. Ceresney, Gordon Eng & Sean R. Nuttall, *Regulatory Investigations and the Credit Crisis: The Search for Villains*, 46 AM. CRIM. L. REV. 225, 241 (2009) ("The potential amount of fraud in the mortgage industry, coupled with the complexity of fraud investigations and federal resource constraints, makes systematic prosecution difficult."). Sheer size is also important in relation to the limited staffing of the FBI and DOJ on these labor intensive cases. *See* Don Mayer, Anita Cava & Catharyn Baird, *Crime and Punishment (or the Lack Thereof) for Financial Fraud in the Subprime Mortgage Meltdown: Reasons and Remedies for Legal and Ethical Lapses*, 51 AM. BUS. L.J. 515, 568 (2014).

fraud (and the accompanying complex investigations),[18] the government's fear of breaking a still-fragile global economy[19]—this Note focuses primarily on the high burden of proving specific criminal intent[20] and asks whether lowering the required level of criminal intent might make prosecutions of financial executives more viable,[21] while still properly protecting individual due process rights.

Part I of this Note lays out how the DOJ has handled the crisis over the last seven years by focusing on one civil tool,[22] the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), to illustrate how the civil system as a whole has been stretched to

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18. Ceresney, Eng & Nuttall, *supra* note 17, at 235–36, 246 (noting the lack of "objective pricing indicators for many of these [financial] instruments, and accounting rules [that] allow for significant flexibility and discretion in their valuation"); Kai Ryssdal, *Michael Lewis: Wall Street Is "Lost"*, MARKETPLACE (Oct. 28, 2014, 2:23 PM), http://www.marketplace.org/2014/10/28/business/michael-lewis-wall-street-lost. In comparing his time at the bonds trading desk at Salomon Brothers in 1980s to Wall Street of present day, author and financial journalist Michael Lewis stated, "[Wall Street has] gotten so much more complicated. All of a sudden, you're looking at a truly opaque black box when you're looking at something that used to be as simple as the stock market." *Id.*

19. *See* Lanny Breuer, Assistant Attorney Gen., Address Before the New York City Bar Association on the Role of Deferred Prosecution Agreements in White Collar Criminal Law Enforcement (Sept. 12, 2012) (speech notes available at http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html and video available at https://www.youtube.com/watch?feature=player_embedded&v=1gbcB5BRzXo); Andrew Ross Sorkin, *Realities Behind Prosecuting Big Banks*, N.Y. TIMES, Mar. 12, 2013, at B1 (expressing his concern before the Senate Judiciary Committee, United States Attorney General Holder stated, "the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if we do prosecute—if we do bring a criminal charge—it will have a negative impact on the national economy, perhaps even the world economy"); Andrew Ross Sorkin, *Pulling Back the Curtain on Inquiries*, N.Y. TIMES, Dec. 7, 2010, at B1 (noting that the lack of criminal prosecutions may also be influenced by the demise of Arthur Andersen after it was criminally charged for its role in the Enron scandal).

20. *See* Peter J. Henning, *Making Sure "The Buck Stops Here": Barring Executives for Corporate Violations*, 2012 U. CHI. LEGAL F. 91, 105 (2012) ("Unlike civil securities claims that can be established by showing recklessness or, under some provisions, just negligence, proof of intent to defraud can be quite daunting."); Ceresney, Eng & Nuttall, *supra* note 17, at 241, 246 ("Absent the existence of explicit directives that promoted fraud . . . it may be difficult to show that any criminal act [was] taken at executives' behest or with their knowledge.").

21. Peter J. Henning, *A New Crime for Corporate Misconduct?*, 84 MISS. L.J. 43, 47 (2014) ("If a primary reason for the lack of prosecutions of executives is the high threshold for proving intent, then one potential response . . . may be to reduce the requisite intent element, so that it is easier to pursue a case and establish a violation when there are substantial losses from corporate decisions.").

22. This section also touches upon other civil tools such as deferred prosecution agreements and the Federal Claims Act to provide a complete picture of the civil system.

become a substitute for the criminal system.[23] Part II analyzes how FIRREA fails to effectively condemn, deter, and punish the way individual criminal prosecutions can. In light of these deficiencies, Part III lays out the case for a financial mismanagement law that lowers intent from specific intent to recklessness, and then raises and addresses the critiques of such an approach.[24] Part IV concludes the Note with a statement on how the financial mismanagement law fits within the regulatory ecosystem.

I. BACKGROUND

A. Advantages of FIRREA (12 U.S.C.A. § 1833a)

After the 2008 Financial Crisis, federal prosecutors could not mount a single successful criminal case against any of the major banks or their executives.[25] With few options at the ready, the DOJ began scouring the country for ways to punish banks and other financial actors.[26] In Los Angeles, the DOJ discovered a federal prosecutor who had been using 12 U.S.C. § 1833a, a tiny provision buried within FIRREA,[27] to prosecute smalltime mortgage fraud.[28] As

23. In recent remarks by several top DOJ officials, the DOJ has suggested that it has not lost sight of the need for criminal prosecutions of corporate individuals. *See, e.g.*, Eric Holder, Att'y Gen., Remarks on Financial Fraud Prosecutions at NYU Law School (Sept. 17, 2014) (transcript available at http://www.stopfraud.gov/iso/opa/stopfraud/ag-speech-140917.html) ("[W]hen it comes to financial fraud, the department recognizes the inherent value of bringing enforcement actions against individuals, as opposed to simply the companies that employ them . . . We ought to . . . modify our laws where appropriate. It would be going too far to suggest reversing the presumption of innocence for any executive, even one atop the most poorly-run institution. But we need not tolerate a system that permits top executives to enjoy all of the rewards of excessively-risky activity while bearing none of the responsibility.").

24. While this idea has met with strong resistance from academics, lawmakers, and practitioners on this side of the Atlantic, their counterparts in Great Britain have embraced it. *See generally* Holder, *supra* note 23 (explaining Britain's recent financial reform law that requires companies to make one officer personally responsible for any misconduct).

25. *See* Lattman & Protess, *supra* note 6.

26. *See generally id.*

27. For further information on the history of FIRREA and its role in cleaning up the Savings and Loan Crisis, *see* FREDERIC MISHKIN, ECONOMICS OF MONEY, BANKING, AND FINANCIAL MARKETS ch. 12 app. 1 (10th ed. 2012) *available at* http://wps.aw.com/wps/media/objects/13761/14091673/appendixes/ch11apx1.pdf. *See also* Robert J. Laughlin, *Causes of the Savings and Loan Debacle*, 59 FORDHAM L. REV. S301 (1991).

28. Lattman & Protess, *supra* note 6.

the DOJ learned more, it realized that FIRREA had the potential to be a powerful weapon against large financial institutions.[29]

By way of introduction, FIRREA broadens the scope of a prosecutor's powers.[30] Under the False Claims Act,[31] another common tool for prosecuting financial fraud, prosecution is generally restricted to instances where "the United States suffers a pecuniary loss as a result of fraud."[32] FIRREA expands upon this power by allowing for the prosecution of persons or entities who perpetrate financial fraud affecting a "federally insured financial institution."[33]

Second, the burden of proof for FIRREA's predicate offenses is lower than in criminal prosecution.[34] To trigger FIRREA, a defendant must commit one of fourteen predicate offenses.[35] While a criminal case requires prosecutors to prove the commission of any of these offenses beyond a reasonable doubt, 12 U.S.C. § 1833a(f) states that penalties may be levied where the underlying crime has been established by a preponderance of the evidence.[36]

Third, FIRREA allows prosecutors to access valuable information through administrative subpoenas—without the need for judicial

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29. *Id.* ("[Tony] West [then head of the DOJ Civil Division] circulated a three-page memo to every United States attorney in the country, urging broader use of Firrea. Citing the 'potential deterrent effect,' Mr. West outlined the Justice Department's 'guidelines for approval' of cases under Firrea.").

30. Antonia Dias et al., *FIRREA Civil Money Penalties: The Government's Newfound Weapon Against Financial Fraud*, JONES DAY (May 2013), http://www.jonesday.com/firrea-civil-money-penalties-the-governments-newfound-weapon-against-financial-fraud/.

31. 31 U.S.C. §§ 3729–3733 (2012).

32. Dias et al., *supra* note 30.

33. *Id.*; 12 U.S.C. § 1833(c)(2) (2012).

34. Dias et al., *supra* note 30; 12 U.S.C. § 1833a(f).

35. Dan Webb & Robb C. Adkins, *DOJ Using Old Law in New—and Worrisome—Way*, NAT'L L.J. (Dec. 2, 2013), http://cdn2.winston.com/images/content/7/4/v2/74767/005121302 Winston.pdf. These predicate offenses fall generally under several categories: bribery and graft; various forms of theft and embezzlement; and fraud and false statements, including mail and wire fraud. *See* 12 U.S.C. § 1833a (2012).

36. 12 U.S.C. § 1833a(f) ("Burden of proof. In a civil action to recover a civil penalty under this section, the Attorney General must establish the right to recovery by a preponderance of the evidence."); *see* John R. Rowlett, *The Chilling Effect of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and the Bank Fraud Prosecution Act of 1990: Has Congress Gone Too Far?*, 20 AM. J. CRIM. L. 239, 246 (1993) ("The provisions allowing civil penalties for criminal offenses are unfair because they allow prosecution to circumvent the criminal standard of proof for these offenses . . . [T]he Attorney General need only prove guilt by a preponderance of the evidence, although the action is based on criminal activities, which require proof beyond a reasonable doubt.").

approval or having to contend with motions to dismiss.[37] Under 12 U.S.C. § 1833a(g), the DOJ can "tak[e] depositions of key witnesses and compel . . . the production of documents and records, without obtaining prior judicial authorization,"[38] so long as it is done "in contemplation of a civil proceeding under [FIRREA]."[39] The defendant in such a case has no reciprocal power.[40]

Fourth, information gathered from a civil investigation can be provided to a parallel criminal investigation.[41] Perhaps more importantly, criminal prosecutors working on a parallel criminal investigation may provide civil prosecutors access to grand jury material without a court order.[42] This flow of information allows a civil suit to capitalize on evidence developed in a criminal investigation, even if the criminal investigation does not go forth.[43]

Fifth, for mail or wire fraud (two of the fourteen predicate crimes listed in 12 U.S.C. § 1833a(c)) that affects a financial institution, the statute of limitations is ten years.[44] This limitations period is longer than standard civil suits, and longer than mail or wire fraud that does not affect a financial statute.[45]

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37. Andrew W. Schilling, *U.S. Using Subpoenas Under 1989 Act as New Tool to Probe Financial Firms*, REUTERS BLOG (Jan. 3, 2013), http://blogs.reuters.com/financial-regulatory-forum/2013/01/03/u-s-using-subpoenas-under-1989-act-as-new-tool-to-probe-financial-firms/.

38. Dias et al., *supra* note 30.

39. 12 U.S.C. § 1833a(g)(1).

40. *See* Jay Williams, Valrie Hays & Mir Ali, *FIRREA: An Old Acronym Is Turning Into the Government's New Hammer on Banks and Other Financial Institutions*, 129 BANKING L.J. 579, 581–82 (2012).

41. *Supra* note 37. Moreover, the United States Attorneys' Manual strongly encourages parallel investigations and communication between criminal and civil investigations. *See* Memorandum from the Attorney Gen. to All United States Attorneys, Director, FBI, All Assistant United States Attorneys, All Litigating Divisions & All Trial Attorneys (Jan. 30, 2012), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/doj 00027.htm ("Department policy is that criminal prosecutors and civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate. . . .").

42. Andrew W. Schilling, *Understanding FIRREA's Reach: When Does Fraud 'Affect' a Financial Institution?*, 99 BBR 186 (2012), *available at* http://www.buckleysandler.com/ uploads/36/ doc/understanding-firreas-reach.pdf (citing 18 U.S.C. § 3322(a)).

43. *Id.*

44. Patricia Hurtado, *Lots of Ways to Extend Statute of Limitations, Bharara Says*, BUSINESSWEEK (July 17, 2013, 9:01 PM), http://www.businessweek.com/news/2013-07-17/bharara-says-u-dot-s-dot-has-more-time-to-bring-insider-trading-cases; 12 U.S.C. 1833(h) (2006).

45. Dias et al., *supra* note 30; William M. Sloan, *Mail and Wire Fraud*, 48 AM. CRIM. L.

And finally, although FIRREA does not allow for imprisonment, its financial penalties are hefty. Under 12 U.S.C. § 1833a(b), a violator can be fined up to $1.1 million per violation, or up to $5.5 million per continuing violation.[46] This amount can be increased "up to the amount of the pecuniary gain that any person derives from the violation, or the amount of pecuniary loss suffered by any person as a result of the violation."[47]

Together, these advantages[48] give federal prosecutors the power to essentially build a criminal case without the hassle of proving their case beyond a reasonable doubt.[49] If FIRREA could pass muster in the courts, it would allow federal prosecutors to levy stiff penalties. The only thing left for the DOJ to do was test the waters.

B. Interpreting FIRREA

Up until 2009, there had been little FIRREA case law to define the boundaries of the statute.[50] One of the most important questions courts had to address was how to interpret FIRREA's requirement that a wire or mail fraud "affect . . . a federally insured financial institution."[51] *United States v. The Bank of New York Mellon*[52] was the first case to answer that question.[53] In doing so, it would set the

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REV. 905, 925 (2011).

46. Dias et al., *supra* note 30. Although 12 U.S.C. § 1833a lists penalties of $1 million and $5 million, in 1999, the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990 increased the amounts to $1.1 million and $5.5 million. *See* Adjustments to Penalties, 28 C.F.R. § 85.3(a)(6), (7) (2014).

47. Dias et al., *supra* note 30; 12 U.S.C. § 1833a(b)(3)(A).

48. One final powerful feature of FIRREA is its whistleblower bounty (12 U.S.C. § 4205(d)(1)(a)(i) (2012)). While not as generous as the False Claims Act's whistleblower bounty (31 U.S.C. § 3730(d)(1) & (2) (2012)), it has proven itself useful in the case against Bank of America. *See* Andrew W. Schiller, *Should FIRREA Whistleblower Bounties Be Higher?*, LAW360 (Sept. 29, 2014), http://www.law360.com/articles/581235/should-firrea-whistleblower-bounties-be-higher; Nate Raymond, *Bank of America Fraud Trial Spotlights Whistleblower Awards*, REUTERS (Sept. 27, 2013, 5:20 PM), http://www.reuters.com/article/us-bankofamerica-hustle-whistleblower-idUSBRE98Q18420130927.

49. *Supra* notes 34–36.

50. Webb & Adkins, *supra* note 35.

51. 12 U.S.C. § 1833a(c)(2) (2006).

52. 941 F. Supp. 2d 438 (S.D.N.Y. 2013).

53. *Id.* at 443 ("[T]his decision marks the first occasion upon which a court has been called to interpret the meaning of the phrase 'affecting a federally insured financial institution' under that section.").

stage for applying FIRREA to future prosecutions of banks involved in the 2008 Financial Crisis.

1. *United States v. The Bank of New York Mellon*

In *Bank of New York Mellon*, the Bank of New York Mellon (BNYM) fraudulently misrepresented the way it priced foreign currency exchanges.[54] Its advertising to clients stated that BNYM would exchange foreign currencies at the "best execution standards."[55] General banking practices interpreted this phrase to mean "at the best available market price."[56] In practice, however, BNYM would trade currency at the highest possible price for clients, re-trade at a lower price, and then pocket the difference.[57]

The U.S. Attorney's Office for the Southern District of New York (USAO) brought suit using FIRREA.[58] In order to apply FIRREA to financial institutions, however, the USAO had to overcome one major hurdle: the interpretation of the word "affecting."[59] In its motion to dismiss, BNYM contended that the most reasonable interpretation of the word "affecting" was "victimize" because it reflected Congress' purpose when it created FIRREA—to protect banks from being defrauded.[60] BNYM went on to argue that under 12 U.S.C. § 1833a, a fraud had to be perpetrated, not by any person internal to a financial institution, but by outside actors who directed their fraud at a financial institution.[61] BNYM also questioned the logic of USAO's claim. It argued that to accept a definition of FIRREA that encompassed the broader meaning of "indirectly harm,"

54. Matt Levine, *Wait, Sorry, Bank of New York Thought You* Wanted *To Buy High and Sell Low, Was That Wrong?*, DEALBREAKER (Oct. 5, 2011, 6:18 PM), http://dealbreaker.com/2011/10/wait-sorry-bank-of-new-york-thought-you-wanted-to-buy-high-and-sell-low-was-that-wrong/; *Bank of N.Y. Mellon*, 941 F. Supp. 2d at 445–46, 449–50.

55. *Bank of N.Y. Mellon*, 941 F. Supp. 2d at 445–46.

56. *Id.* at 445.

57. Levine, *supra* note 54; *Bank of N.Y. Mellon*, 941 F. Supp. 2d at 447–48. This model was highly profitable. *Bank of N.Y. Mellon*, 941 F. Supp. 2d at 448 ("The [second amended complaint] alleges that BNYM's sales margins for its top 200 standing instructions clients totaled over $1.5 billion from 2007 to 2010.").

58. *Bank of N.Y. Mellon*, 941 F. Supp. 2d at 459.

59. *Id.* at 451–57.

60. *Id.* at 454.

61. *Id.* at 451.

as the USAO suggested, would be to say that BNYM was both the perpetrator and the victim of its own fraud.[62]

Judge Lewis Kaplan rejected BNYM's narrow definition. Instead, he held that "affecting" could be read more broadly to mean something akin to "involving."[63] He reasoned that several features of the statute and legislative history suggested this broader approach. First, Judge Kaplan pointed to the dictionary definitions for "affecting": "to produce a material influence upon . . . to have a detrimental influence on."[64] Nowhere could he find, nor could he infer, that "victimize" was within or necessary to the definition.[65] Second, within the entire statutory schema—that is, beyond the sections circumscribed by BNYM (12 U.S.C. § 1833a(c)(1)-(3))—the frauds affecting financial institutions were listed alongside other predicate offenses that "do not require that any financial institution be victimized."[66] Such a listing suggested that Congress was not concerned solely with victimization, but also "with the presence of criminal activity in matters meaningfully involving financial institutions, however that activity may affect them."[67] Third, even accepting BNYM's contention that "affecting" meant "victimized," Judge Kaplan read the legislative history as showing that S&L depositors and federal taxpayers—not banks—were the underlying victims Congress sought to protect.[68] Finally, Judge Kaplan rejected the notion that the fraud had to be perpetrated by a third party.[69] "[I]t would be entirely unnatural to make determination of whether a bank was 'affected' by a scheme turn on whether it participated in it."[70]

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62. Marvin G. Pickholz & Mary C. Pennisi, *Recent Federal Court Decisions Revitalize The Government's Civil Enforcement Power Under FIRREA*, FIN. FRAUD L. REP., July–Aug. 2013, at 599.

63. *Bank of N.Y. Mellon*, 941 F. Supp. 2d at 454.

64. *Id.* at 451 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 35 (1993)).

65. *Id.* Judge Kaplan relied partially on a line of Second Circuit decisions starting with *United States v Bouyea*, 152 F.3d 192 (2d Cir. 1998). These cases reject the idea that "a financial institution participating in a fraudulent scheme could not be 'affected' because it was not the victim of the scheme." *Bank of N.Y. Mellon*, 941 F. Supp. 2d at 452.

66. *Id.* at 453.

67. *Id.*

68. *Id.* at 455.

69. *Id.* ("Congress was addressing not only frauds by insiders who were trying to harm their employers, but also frauds by insiders seeking to benefit their employers.")

70. *Id.*; *see also id.* at 461 ("It is perfectly natural to say that one's actions may affect

In applying this interpretation of "affected" to the facts in SDNY's complaint, Judge Kaplan concluded that BNYM had been affected negatively: BNYM lost clients, increased its legal liability, and suffered damage to its reputation.[71] Moreover, such damage could not be offset by the fact BNYM profited from its own scheme.[72] BNYM's motion to dismiss the FIRREA charges was denied.[73]

2. *U.S. ex rel. O'Donnell v. Bank of America Corp et al* and *U.S. v. Wells Fargo Bank, N.A.*

With the success of applying FIRREA to large financial institutions in general, the DOJ needed to test the statute specifically on banks that had been involved in the 2008 Financial Crisis. The USAO did just that in *U.S. ex rel. O'Donnell v. Bank of America Corp et al*.[74] Under the auspices of Judge Jed Rakoff, the District Court addressed the question of whether the broad interpretation of FIRREA—dubbed the "self-affecting" theory—would apply to a division of Bank of America that had fraudulently misrepresented the quality of bundled mortgage loans.[75] Because neither of its intended victims—Fannie Mae and Freddie Mac—were federally insured, the federal prosecutors could only apply FIRREA if they could claim Bank of America affected itself while perpetrating its own fraud.[76]

Bank of America filed a motion to dismiss the FIRREA claim, repeating many of the same arguments that the defendants made in

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oneself. For example, one might say 'John's criminal behavior is affecting his future career prospects' and 'John's criminal behavior [thus] is affecting him.'").

71. *Id.* at 458–59.

72. *Id.* at 459.

73. *Id.* at 443, 463.

74. This case was formerly *United States v. Countrywide Financial Corp.*, until the Government joined the Edward O'Donnell whistleblower suit against Bank of America. United States ex rel. O'Donnell v. Countrywide Home Loans, Inc. 33 F.Supp.3d 494, 497 (S.D.N.Y. 2014).

75. United States v. Countrywide Fin. Co., 961 F. Supp. 2d 598, 604-06 (S.D.N.Y. 2013).

76. *Id.*; *see* Memorandum in Support of Motion to Dismiss at 13-17, United States ex rel. O'Donnell v. Bank Of America Corp., 83 F. Supp. 3d 528 (S.D.N.Y. 2015) (No. 12-cv-1422 (JSR)), 2012 WL 7655487 ("[B]ecause the allegedly 'defrauded' GSE's [i.e., Fannie Mae and Freddie Mac] are not federally insured financial institutions protected by § 1833a, the Complaint advances a tortured theory of injury to *other* institutions that invested with the GSEs.").

BNYM.[77] While Judge Rakoff stated in the hearing that he was "troubled" by the self-affected theory,[78] he eventually allowed the FIRREA claim to survive the motion to dismiss (and a subsequent summary judgment) based on a very quick plain language reading of the statute.[79] Several months later, a jury convicted Bank of America of the FIRREA charges.[80]

Within months of both *Bank of America* and *BNYM*, Judge Jesse Furman allowed a FIRREA suit to go to trial in *U.S. v. Wells Fargo Bank, N.A*.[81]

3. Settlements and Final Judgments

All three cases have yielded settlements in the hundreds of millions of dollars (or in the case of Bank of America, a trial judgment of more than $1 billion).[82] FIRREA has also resulted in large settlements elsewhere. In JP Morgan's $13 billion settlement with the DOJ, $2 billion of that was calculated based on violations of FIRREA.[83] Similarly, Deutsche Bank and Citimortgage have settled

77. *Id.* at 13–17 (arguing that Congress intended that any fraud in § 1833a(c)(2) "be limited to crimes against or directly concerning federally insured financial institutions" and that FIRREA was designed to protect financial institutions).

78. Transcript of Oral Argument at 20, 22, *O'Donnell*, F. Supp. 3d 528 (S.D.N.Y. 2015) (No. 12-cv-1422 (JSR)).

79. *See Countrywide Fin. Co.*, 961 F. Supp. 2d at 605 (rejecting the defendant's entire arguments in just two short paragraphs based on a Webster's Dictionary definition of "affect").

80. Nate Raymond, *Bank of America Liable for Countrywide Mortgage Fraud*, REUTERS (Oct. 23, 2013, 6:47 PM), http://www.reuters.com/article/2013/10/23/us-bankofamerica-hustle-idUSBRE99M14B20131023.

81. *See generally* United States v. Wells Fargo Bank, 972 F. Supp. 2d 593 (S.D.N.Y. 2013) (reasoning again that the self-affecting theory is supported by both legislative history and a plain language analysis).

82. United States ex rel. O'Donnell v. Countrywide Home Loans, Inc., 33 F. Supp. 3d 494, 502 (S.D.N.Y. 2014) (requiring Bank of America to pay $1.27 billion). Wells Fargo settled its case to the tune of $1.2 billion, but the details have not yet been worked out. Order of Dismissal at 1, United States v. Wells Fargo Bank, (S.D.N.Y. 2016) (No. 12-cv-7527 (JMF)) *available at* http://www.plainsite.org/dockets/download.html?id=231632508&z=2bd1fc3f. BNYM settled its case for $714 million, of which $167.5 million was calculated based on violations of FIRREA. BNYM Settlement at 8, *available at* https://www.justice.gov/archive/usao/nys/pressreleases/March15/BNYMSettlement2/US%20v%20%20BNYM%20et%20al%20stip%20&%20settlement.pdf.

83. JPMorgan Settlement Agreement at 3, *available at* http://www.justice.gov/iso/opa/resources/6952013111919124694195 8.pdf.

FIRREA claims for $202 million and $158 million, respectively.[84] In 2015, Standard & Poor's settled its longstanding suit with the DOJ for $1.375 billion,[85] after having been threatened with a $5 billion suit based on FIRREA.[86] Taken together, these cases have solidified FIRREA's place as the tool of choice for federal prosecutors.

II. ANALYSIS

A. How Does FIRREA Compare to Past Attempts at "Creative" White-Collar Prosecution?

The USAO's novel application of an old statute is part of a longstanding tradition of "creative" prosecution. During the 1980s, then U.S. Attorney Rudolph Giuliani used the Racketeer Influenced and Corrupt Organizations Act (RICO), a statute aimed primarily at mob bosses, to take down financial kingpins like Michael Milken and Ivan Boesky.[87] In the 1990s to early 2000s, New York Attorney General Eliot Spitzer revived the Martin Act to fight major financial institutions, including Merrill Lynch and American Insurance Group (AIG).[88]

What sets FIRREA apart from both RICO and the Martin Act, however, is its function as a quasi-proxy for criminal prosecution.[89] Where RICO and the Martin Act gave prosecutors the ability to pursue criminal *and* civil prosecutions, FIRREA's power is limited

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84. Peter Lattman, *U.S. Sues Wells Fargo, Accusing It of Lying About Mortgages*, N.Y. TIMES (Oct. 9, 2012, 7:19 PM), http://dealbook.nytimes.com/2012/10/09/u-s-sues-wells-fargo-alleging-mortgage-deceit/.

85. Press Release, United States Department of Justice, Justice Department and State Partners Secure $1.375 Billion Settlement with S&P for Defrauding Investors in the Lead Up to the Financial Crisis (Feb. 3, 2015), *available at* http://www.justice.gov/opa/pr/justice-department-and-state-partners-secure-1375-billion-settlement-sp-defrauding-investors.

86. Aruna Viswanatha & Lauren Taca Lacapra, *U.S. Government Slams S&P with $5 Billion Fraud Lawsuit*, REUTERS (Feb.5, 2013, 6:03 PM), http://www.reuters.com/article/2013/02/05/us-mcgrawhill-sandp-civilcharges-idUSBRE9130U120130205.

87. JAMES B. STEWART, DEN OF THIEVES 450, 471 (1991). Guiliani's use of RICO was not without criticism. *See* G. Robert Blakey, *Foreword: Debunking Rico's Myriad Myths*, 64 ST. JOHN'S L. REV. 701, 724 n.125 (1990).

88. Michael J. De La Merced, *In JPMorgan Case, the Martin Act Rides Again*, N.Y. TIMES (Oct. 2, 2012, 12:06 PM), http://dealbook.nytimes.com/2012/10/02/in-jpmorgan-case-the-martin-act-rides-again/.

89. *See supra* notes 15, 34–36 and accompanying text.

purely to civil suits predicated on a criminal offense.[90] In that sense, FIRREA acts not as a supplement to criminal prosecution, but instead as an effort to use civil prosecution to compensate for the DOJ's failure in criminal prosecutions. The combination of a predicate criminal offense, subpoena power, weighty penalties, and the ability to share material in parallel investigations creates a free pass for the federal government to build a criminal case without meeting the criminal standard for burden of proof.[91]

B. Is FIRREA, by Itself or in Conjunction with Other Civil Statutes, a Viable Substitute to Criminal Prosecutions?

Given its use as a replacement for the lack of criminal prosecutions, FIRREA must measure up to what an effective criminal prosecution could offer. And on all three fronts—condemnation, deterrence, and punishment—it fails.

FIRREA fails first in its lack of condemnation for those who bear the greatest responsibility for the financial crisis.[92] Being labeled a convict or a felon is powerful because it expresses society's moral disapproval for particularly abhorrent action and, in doing so, marks the condemned for all to see.[93] Civil penalties, on the other hand, do not attach the same moral disapprobation.[94] Instead, they do little more than suggest a minor infraction of rules designed to keep

90. *See* 12 U.S.C. § 1833a (2012) (labeled "Civil Penalties").

91. *See supra* notes 34–36 and accompanying text.

92. *See* Peter J. Henning, *Making Sure "The Buck Stops Here": Barring Executives for Corporate Violations*, 2012 U. CHI. LEGAL F. 91, 116 (2012). Not all academics subscribe to this divide or accept the idea that only criminal punishment is stigmatizing. *See, e.g.*, Abraham S. Goldstein, *White-Collar Crime and Civil Sanctions*, 101 YALE L.J. 8, 1895, 1899 (1992) ("Civil processes and sanctions have emerged that are often more punitive than criminal processes but equally stigmatizing.").

93. John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models. And What Can Be Done About It*, 101 YALE L. J. 8, 1875, 1876 (1992) ("[A]pplying the civil law to behavior that has traditionally been punished criminally might deprive society of its ability to focus censure and assign blame with the moral force that the criminal law may uniquely possess.").

94. *See, e.g.*, United States ex rel. O'Donnell v. Countrywide Home Loans, Inc., 33 F. Supp. 3d 494, 498 (S.D.N.Y. 2014) (noting that because FIRREA is a civil statute, "there is no threat of imprisonment nor the stigma associated with a criminal charge").

society functioning and orderly.[95] In other words, FIRREA's fines do not condemn executives because the fines are analogous to a parking ticket—less of a rebuke and more of an inconvenience that can be easily paid. Seen in this light, the payment of these fines also affirms an unseemly truth of the American justice system: those with power and money can, more often than not, buy their way out of punishment while the rest of the America cannot.[96]

Second, despite defense lawyers' overdramatic gripes about onerous financial penalties,[97] fines do little to reform behavior.[98] In several major bank settlements (not directly related to mortgage fraud), large financial institutions have continued to violate the terms of the settlement[99] or misrepresent the extent of their liability.[100] Even

95. *See supra* note 93 and accompanying text (describing how civil law "prices" while criminal law "sanctions").

96. From the view of equal justice before the law, there is also an implicit message that the criminal system affords wealthy individuals a chance at rehabilitation that the indigent or every day person does not have. *See* Susan Beck, *Q&A: Brandon Garrett on Corporate Prosecution Agreements*, AM. LAW. LITIG. DAILY (Oct. 17, 2014), http://www.litigationdaily.com/id=1202673782472/QA-Brandon-Garrett-on-Corporate-Prosecution-Agreements?slreturn=20160803190851 ("In the everyday criminal justice system, there's a firm focus on holding individuals accountable. But when corporations obtain deferred prosecution agreements, only one-third of the time do you see people prosecuted, and it's usually not a CEO or a top executive."); Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 920–21 (2011) ("[Not punishing] the crimes of the rich and powerful sends an unmistakable message: despite the obvious and extensive harm they cause to many, elite criminals are above the law and will not pay a price to society for disrupting its rules and imposing suffering on others.").

97. Jesse Eisinger, *In Turnabout, Former Regulators Assail Wall St. Watchdogs*, N.Y. TIMES, Oct. 23, 2014, at B9. One prominent defense attorney felt that punishing financial institutions has become a "scrum" among federal agencies where "penalties cannot be too large" and there is "no consistency [other] than that penalties and sanctions are much more draconian." *Id.*

98. *See* Coffee, Jr., *supra* note 93 (noting that aside from punitive damages, the overriding character of civil deterrence is to "price," while the overriding character of criminal deterrence is to "sanction"). While FIRREA is considered a punitive civil statute, in this instance, it truly operates more as a price than a sanction on financial institutions given the ratio of fines to company profits.

99. Peter J. Henning, *Banks' Cycle of Misbehavior*, N.Y. TIMES (Nov. 3, 2014, 1:13 PM), http://dealbook.nytimes.com/2014/11/03/banks-cycle-of-misbehavior/?emc=edit_dlbkpm_20141103&nl=business&nlid=35739953&_r=0 (noting that banks that had negotiated settlements are adding more money to their legal reserves, anticipating more fines for ongoing foreign exchange rate manipulation even though such manipulation violates their settlements); *see also* Christie Smythe & David Voreacos, *UBS Said to Be Probed for Deferred-Prosecution*, *Breach*, BLOOMBERG BUSINESS (Feb. 12, 2015, 5:00 AM), http://www.bloomberg.com/news/articles/

when these fines are coupled with negotiated settlements, such settlements often only require that institutions "do better on compliance" or "use best practices," leading some critics to argue that these compliance requirements are "largely cosmetic."[101] Part of the powerlessness of penalties and settlements may also result from the fact that fines of corporations are so diffuse in pinpointing responsibility, especially in comparison to criminal prosecutions of individuals.[102]

Finally, despite the eye-popping size of FIRREA penalties, it is clear that the fines are hardly punitive.[103] There are several reasons for this. First, in comparison to the profits reaped by most banks, the fines only made a small dent in their bottom lines.[104] Second, any possible punitive impact has been blunted further by the fact that banks can either write-off large portions of the penalties as tax deductions[105] or, when corporations have liability insurance, shunt the

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2015-02-12/ubs-bond-probe-said-to-look-at-whether-bank-breached-tax-deal ("Investigators suspect the [illegal] conduct may have occurred when the bank was still bound by the deferred-prosecution agreement . . . 'UBS has already settled three prosecution agreements since 2009 . . . UBS is already a recidivist many times over. . . .'").

100. Ben Protess & Jessica Silver-Greenberg, *Prosecutors Suspect Repeat Offenses on Wall Street*, N.Y. TIMES, Oct. 30, 2014, at A1 (noting that Standard Chartered and Bank of Tokyo-Mitsubishi UFJ may have failed to disclose the full extent of its involvement in transferring money for Iran and other blacklisted countries).

101. Rakoff, *supra* note 8 ("I suggest that the future deterrent value of successfully prosecuting individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing.").

102. *See* Michael Rothfeld, *Firms Are Penalized, but Many Workers Aren't*, WALL ST. J., Jan. 17, 2014, at C1.

103. *See generally* Lynnley Browning, *How Credit Suisse Got Off Easy*, NEWSWEEK (June 19, 2014, 9:32 AM), http://www.newsweek.com/2014/06/27/how-credit-suisse-got-easy-255453.html ("As serious on paper as a guilty plea is, says Jonathan Macey, a professor of corporate, finance and securities law at Yale University, 'no one is taking these settlements seriously anymore.'").

104. Jason M. Breslow, *How Bank of America's $16.65 Billion Settlement Compares*, FRONTLINE (Aug. 21, 2014), http://www.pbs.org/wgbh/frontline/article/how-bank-of-americas-16-65-billion-settlement-compares/. Note that only Bank of America had a total financial penalty that has come close to equaling or outsizing its post-financial crisis profits.

105. *See, e.g.*, Michael Rapoport, *BofA Could See $4 Billion in Tax Savings From $16.65 Billion Settlement*, WALL ST. J. (Aug. 21, 2014, 6:29 PM), http://online.wsj.com/articles/bofa-could-see-4-billion-in-tax-savings-from-16-65-billion-settlement; Michael Rapoport & Christina Rexrode, *Citigroup to Get Tax Silver Lining in $7 Billion Settlement*, WALL ST. J. BLOGS, (July 14, 2014, 5:22 PM), http://blogs.wsj.com/moneybeat/2014/07/14/citigroup-to-get-tax-silver-lining-in-7-billion-settlement/; Michael Rapaport & Dan Fitzpatrick, *J.P. Morgan's $5.1 Billion Settlement Is Tax Deductible*, WALL ST. J. (Oct. 29, 2013, 5:30 PM),

costs off to insurance companies.[106] Third, the costs are not borne directly by the leadership, or even the employees of the firms, but instead divided among shareholders who have little to no influence on day-to-day operations.[107] The result is punishment of shareholders rather than true offenders.[108] Finally, the executives of financial institutions see these fines as a cost of business.[109] In their calculations, these fines and the associated legal fees likely do not outweigh the lucrative benefits of risky misbehavior.

III. A FINANCIAL RECKLESSNESS LAW

A. The Proposal

Given the failure of FIRREA to sufficiently address the needs of criminal punishment, what reforms could be made to the criminal system?[110] This section suggests creating a financial misconduct law—similar to the one employed by Great Britain—that lowers the intent requirement for prosecution from specific intent[111] to criminal

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http://online.wsj.com/articles/SB10001424052702304200804579166060830937826. *See also* Lynnley Browning, *Too Big to Tax: Settlements Are Tax Write-Offs for Banks*, NEWSWEEK (Oct. 27, 2014, 11:16 AM), http://www.newsweek.com/2014/11/07/giant-penalties-are-giant-tax-write-offs-wall-street-279993.html ("Payments flagged as penalties or fines, typically outlined in criminal cases, are generally not deductible, as opposed to the civil settlements with banks.").

106. *See, e.g.*, Lisa L. Casey, *Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution of Honest Services Fraud*, 35 DEL. J. CORP. L. 1, 96 (2010).

107. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1495 (1996); Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, 85 U. COLO. L. 1, 25 (2014) ("[B]ecause the penalty for corporate criminal liability is ultimately monetary, shareholders directly bear the cost.").

108. Elizabeth A. Plimpton & Danielle Walsh, *Corporate Criminal Liability*, 47 AM. CRIM. L. REV. 331, 332 (2010) ("[P]unishing a corporation in effect punishes innocent stockholders.").

109. Press Release, Office of United States Senator Patrick Leahy, Leahy Calls On Congress To Close Tax Loophole For Corporate Misconduct (Jan. 13, 2015) ("Under current law, a corporation or individual business owner may deduct the cost of court-ordered punitive damages as an 'ordinary' business expense . . . [t]hat undermines the whole point of punitive damages.").

110. This does not address the obvious critique that it would be virtually impossible to lower the intent requirement given the criminal defense lobby and financial power of corporate executives.

111. *Supra* note 22.

recklessness[112] as an answer to one piece of the regulatory puzzle.[113]

A financial misconduct law has several advantages. The most obvious advantage is that it lowers the hurdle for bringing a prosecution.[114] Second, it works through the criminal system to

112. According to the Model Penal Code: "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." MODEL PENAL CODE § 2.02(c) (1981). Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319 n.3 (2007) ("Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required."). *See infra* note 123 for further discussion.

113. As prosecutors in America hashed out the liability of banks in the court room, the leaders of Parliament in the United Kingdom attempted to remedy the wrongs they saw by passing the Financial Services (Banking Reform) Act of 2013. Memorandum from Cleary Gottlieb, *UK Enacts Banking Reform Act 2013*, CLEARY GOTTLIEB (Feb. 18, 2014), *available at* http://www.cgsh.com/files/News/e311a0e2-ec4f-4675-b973-1e0d00a70376/Presentation/NewsAttachment/1d136084-0301-4b1b-84bc-1eca500ea814/UK%20Enacts%20Banking%20Reform%20Act.pdf; Financial Services (Banking Reform) Act c. 33 (2013), *available at* http://www.legislation.gov.uk/ukpga/2013/33/contents/enacted. Included in the Act was a new law criminalizing "reckless mismanagement causing a financial institution to fail." Financial Services (Banking Reform) Act (2013), *supra*. The Act was written to target only the top executives of financial institutions and only in the most extreme situations of institutional failure. Gary Wilson & Sarah Wilson, *Criminal Responses and Financial Misconduct in Twenty-First Century Britain: Tradition and Points of Departure, and the Significance of the Conscious Past*, 3 L. CRIME & HIST. 1 (2013), *available at* http://www.pbs.plymouth.ac.uk/solon/journal/vol.3%20issue3%202013%20pt3/Wilson,%20Conscious%20Past%20%20Nov%202013.pdf. The punishment for violating the law included an "unlimited fine and a custodial sentence of up to 7 years." Memorandum from Clearly Gottlieb, *supra*. The law was originally spurred by the 2008 financial crisis, which caused the collapse of the Royal Bank of Scotland and the United Kingdom's subsequent bailout/capital injection. *See* FIN. SERVS. AUTH. BD., THE FAILURE OF THE ROYAL BANK OF SCOTLAND (Dec. 2011), *available at* http://www.fsa.gov.uk/static/pubs/other/rbs.pdf. *See also* Henning, *supra* note 21 for an excellent discussion of Germany and Great Britain's laws regarding individual liability for executives.

114. *See generally* Ann M. Olazabal, *The Search for "Middle Ground": Towards A Harmonized Interpretation of the Private Securities Litigation Reform Act's New Pleading Standard*, 6 STAN. J.L. BUS. & FIN. 153, 158–61 (2001) (noting that the Supreme Court has "reserved the issue of whether recklessness would suffice to prove scienter in a securities fraud case, hinting only that 'in certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act'") (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976)); *see also id*. at 160 ("Reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.").

condemn and properly brand an irresponsible executive in a way that the civil system cannot.[115] Third, because this law will be within the criminal system, it retains the Constitutional protections afforded criminal defendants.[116] Fourth, if the legislation is modeled closely upon the British reckless management law, the American law's reach will be limited in two crucial ways: it would apply to high-level executives and only when their extreme mismanagement contributes directly to system-wide financial collapse.[117] Finally, a criminal recklessness standard correctly balances the punishment of a culpable mental state while not punishing actions that lack a *mens rea* or *scienter* in the way a negligence[118] or strict liability scheme would.[119]

B. The Critiques

The approach is certainly not without criticisms. First, opponents fear that the criminal recklessness standard criminalizes behavior that is simply not criminal.[120] They argue that, if anything, the captains of industry made poor business decisions during the 2008 Financial Crisis based on miscalculated risk.[121] Second, in a closely related argument, if such behavior is not criminal, to punish such action

115. *See supra* note 90.

116. *See* Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 908 (2012) ("Because administrative penalties are 'civil' in nature, they escape the wide range of constitutional provisions protecting the rights of criminal defendants.").

117. *See supra* note 113.

118. Kerem, *supra* note 6, at 109–13 (advocating a simple negligence, or in some cases recklessness, standard for punishing corporate misconduct).

119. *See* Colin Maher, *Crisis Not Averted: Lack of Criminal Prosecutions Leave Limited Consequences for Those Responsible for the Financial Crisis*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 459, 474–75 (2013) (advocating strict liability as a way to promote accountability and prosecutions of financial executives).

120. *E.g.*, Mark Pomerantz, *There Were No Convictions of Bankers for Good Reason*, N.Y. TIMES (Aug. 28, 2014, 12:03 PM), http://www.nytimes.com/roomfordebate/2014/08/27/ holding-bankers-accountable/there-were-no-convictions-of-bankers-for-good-reason ("The reason that senior bankers did not face charges . . . is that the executives running companies like Bank of America, Citigroup and JP Morgan were not committing criminal acts. To the extent that there was misconduct, there is no evidence that it occurred at the highest levels or that top executives knew that mortgages accepted for securitization did not meet underwriting standards."). What the author's logic misses, however, is that the lack of evidence does not equate to a lack of wrongdoing.

121. *E.g.*, Ceresney, Eng & Nuttall, *supra* note 17, at 273 ("Many institutional failures in the credit crisis were the result of human errors in judgment—in some cases, massive errors—but not intentional wrongdoing.").

would be mob justice, making an example of executives merely to satisfy populist bloodlust.[122] Third, others argue that criminal recklessness does not make prosecutions more viable because criminal recklessness is a slippery term and a controversial concept in criminal law.[123] It will be even more difficult to determine what constitutes the normal level of risk that a prudent banking executive should exercise when, for example, the volatile derivatives market was practically inscrutable,[124] and then to show that the banking executive knew and ignored a known risk. Fourth, the reflexive desire to use the criminal system to solve social woes adds to the problem of over-criminalization.[125] Finally, there are clawback provisions and industry bars that punish without the problems listed above.[126]

C. The Retort

Each of these critiques will be taken in turn.

First, the idea that nothing reprehensible happened because the big banks did not foresee the risk associated with mortgage-backed

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122. *See* Zaring, *supra* note 4, at 1418 ("Those calling for more cases must respond to an objection about criminal prosecution widely held among corporate legal scholars, who have viewed it in the past as an unattractive and random scapegoating of business leaders that caters to mob sentiments and often is used to mask the lack of effective regulation that should have prevented the risky behavior before the fact.").

123. In regards to a few other financial crimes, such as mail and wire fraud, several circuits have recognized recklessness as an appropriate form of *mens rea*. *See, e.g.*, United States v. Bermes, 9 F. App'x 207, 209 (4th Cir. 2001) ("Fraudulent intent is shown if a representation is made with reckless indifference to its truth or falsity.") (quoting United States v. Cusino, 694 F.2d 185, 187 (9th Cir. 1982)); United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013) ("The government met the mail- and wire-fraud statutes' intent requirements through proof that [the defendant] was reckless in his disregard for the truth of the statements that he made to victims to obtain their money.).

124. *See generally* Patricia Hurtado, Bob Van Voris, & Linda Sandler, *Bear Managers' Acquittal May Hamper U.S. Fraud Prosecutions*, BLOOMBERG (Nov. 11, 2009, 12:24 AM), http://www.bloomberg.com/app s/news?pid=newsarchive&sid=alBcul0c3hPk ("Larry Ribstein, a law professor at University of Illinois, said the Bear Stearns case was 'standard business dealings where the views of the markets were shifting rapidly and these guys were being criminally punished for expressing views on one day and acting differently another day.'").

125. Peter J. Henning, *Making Sure "The Buck Stops Here": Barring Executives for Corporate Violations*, 2012 U. CHI. LEGAL F. 91, 92, 107–17 (2012) (discussing issues related to over-criminalization and advocating full-usage of current civil statutes rather than changes in criminal law).

126. *Id.*

securities defies both the history of past financial crises[127] and the facts.[128] Economists, even those hired by the banks themselves,[129] foresaw the coming tsunami.[130] Internal emails have been uncovered that show bankers knew, in the words of Senator Carl Levin, that the financial products they were hocking were "piece[s] of crap."[131] In a

127. *Wall Street Fraud and Fiduciary Duties: Can Jail Time Serve as an Adequate Deterrent for Willful Violations? Hearing Before the Subcomm. On Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 127 (2010), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-111shrg63555/pdf/CHRG-111shrg63555.pdf (noting several historical studies on fraud during past financial crises and that the 2008 Financial Crisis possesses many of the hallmark traits of past crises that showed fraud).

128. *See* Binyamin Appelbaum, *How Mortgage Fraud Made the Financial Crisis Worse*, N.Y. TIMES (Feb. 12, 2015), http://www.nytimes.com/2015/02/13/upshot/how-mortgage-fraud-made-the-financial-crisis-worse.html?mabReward=R6&abt=0002&abg=1 (citing an academic paper that provides "evidence that the lending industry's conduct during the housing boom often broke the law") (citing ATIF R. MIAN & AMAR SUFI, FRAUDULENT INCOME OVERSTATEMENT ON MORTGAGE APPLICATIONS DURING THE CREDIT EXPANSION OF 2002 TO 2005 (Feb. 2015), *available at* http://www.nber.org/papers/w20947); Scot Paltrow, *Special Report: The Watchdogs that Didn't Bark*, REUTERS (Dec. 22, 2011, 2:15 PM), http://www.reuters.com/article/2011/12/22/us-foreclosures-idUSTRE7BL0MC20111222 (discussing the thousands of forged mortgage documents from across the country); Nizan Geslevich Packin, *Breaking Bad? Too-Big-To-Fail Banks Not Guilty as Not Charged*, 91 WASH U. L. REV. 1089, 1095 (2014) ("[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[.]'"); Ceresney, Eng & Nuttall, *supra* note 17, at 237 (noting that "[t]he number of suspicious activity reports that financial institutions filed relating to mortgage fraud [in 2007]" was six times the number filed in 2003.) (quoting figure 1 from the *2007 Mortgage Fraud Report*, FBI (Apr. 2008) http://www.fbi.gov/stats-services/publications/mortgage-fraud-2007/mortgage-fraud-2007). *See generally* BARRY RITHOLTZ, FOLLOW THE MONEY: HOW SYSTEMIC BANK FRAUD CONTRIBUTED TO THE FINANCIAL CRISIS, *available at* http://www.ncdoj.gov/getdoc/38af0f2b-1768-40cd-bd58-09277d4f8559/04-12-2011-Summit-Ritholtz-Follow_the_Money.aspx.

129. Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 876 n.37 (2011) (listing several leading economists—including those at Merrill Lynch (now part of Bank of America) and Morgan Stanley—who foresaw the financial crisis years in advance).

130. Jennifer Taub, *Mythbusters: Telling the Truth About the Financial Crisis, Part III*, PARETO COMMONS (Feb. 10, 2011), http://www.theparetocommons.com/2011/02/ mythbusters-telling-the-truth-about-the-financial-crisis-part-iii/ ("Financial sector insiders, consumer advocates, regulators, economists and other experts saw the warning signs. They spoke out frequently concerning the housing bubble and the predatory and lax mortgage underwriting practices that fueled it.").

131. *Wall Street and the Financial Crisis: The Role of Investment Banks: Hearing Before the U.S. Senate Permanent Subcommittee on Investigations*, 111th Cong. 132 (Apr. 27, 2010) (questioning Lloyd Blankfein, CEO of Goldman Sachs, about the mortgage instruments sold by Goldman Sachs sold to unwitting customers); *see also* Grossman, Glazer & Rexrode, *supra* note 15 (noting emails from bankers and traders at Bank of America and J.P. Morgan that stated

recent case developing against Morgan Stanley, there is indisputable evidence that the bank was not just a passive consumer, but a sophisticated partner actively shaping these securities.[132] Of course, none of this evidence establishes that a high-level executive had the knowledge or intent to defraud. This reality is in part because as the warning call went up the chain, those in the know chose to ignore the sirens or dismissed those who had raised the cry.[133]

Second, if the first retort is correct (that there was indeed criminal misconduct), then the public impulse to punish financial executives is not misplaced. By focusing disproportionately on populist emotion, the critics conflate a simpleton's anger with the proper moral outrage that fuels any form of criminal condemnation. And by using the term "mob justice," critics imply retribution bloated on cathartic anger, but empty of logical, moral, or policy grounds. What the critics miss is that a proper weighing of whether moral condemnation is justified takes more into consideration than emotion alone; it takes into account whether corresponding and independent reasons for proportional punishment exist. By painting popular support of punishment as uncontrolled, pitchforks-in-hand, populist justice, critics obscure the underlying logic and facts described in the previous paragraph.[134]

"These are the worst mortgages I've ever seen," and "[l]ike a fat kid in dodgeball, these [low quality loans] need to stay on the sidelines").

132. Nathaniel Popper, *Court Filing Illuminates Morgan Role in Lending*, N.Y. TIMES, Dec. 30, 2014, at B1 ("[Morgan Stanley] actively influenced New Century's push into riskier and more onerous mortgages, and brushed aside questions about the ability of homeowners to make the payments.").

133. *Id.* (describing an incident where Morgan Stanley terminated a due diligence officer when the officer notified the company of fraud).

134. Much of the narrative on populist anger in the context of the 2008 Financial Crisis has been driven by the media, by Occupy Wall Street, and the protests against AIG bonuses. *See, e.g.*, Jeffrey M. Jones, *Majority of Americans Angry About Financial Crisis*, GALLUP (Oct. 2, 2008), http://www.gallup.com/poll/110914/Majority-Americans-Angry-About-FinancialCrisis.aspx; Phil Mintz, *Off With Their Heads: Samples of AIG Outrage*, BLOOMBERG BUSINESS (Mar. 17, 2009), http://www.businessweek.com/bwdaily/dnflash/content/mar2009/ db2009 0317_032819.htm; Ivan J. Dominguez, *Calling for a Cooling-Off Period: Avoiding a Rush to Judgment in the Midst of the Market Meltdown*, 32 CHAMPION 57 (2008) ("'Off with their heads!' scream the hordes of angry taxpayers, pitchforks and torches in hand as they march on the banking system and the government demanding human names and faces with criminally culpable minds and hands. Oh, and never mind so much about culpability, it is the punishing part that is most important.").

Third, the criticism that the standard of recklessness still makes prosecution difficult misunderstands the balance achieved by the recklessness standard. The idea behind lowering the intent requirement is not to make any and all kinds of criminal prosecution related to financial misconduct "easy." Instead, the idea is to take a standard (*i.e.*, specific intent) that made it practically impossible to prosecute, and adjust that standard to make prosecutions more viable for an extreme situation where prosecution should have occurred (i.e., a financial crisis that ranks as one of the two most devastating in US history). Moreover, such difficulty in prosecution is not without purpose because where a person's liberty is at stake, the standard should encompass *some* form of mens rea. To jail someone for negligence or under strict liability crosses the line into mob justice.

Fourth, the problem of overcriminalization cannot be pinned on this single proposed law that lowers intent for just one crime. Rather, it is symptomatic of the accumulation of overlapping, poorly aimed, reactive laws.[135] If this law can be narrowly tailored with a clear a mens rea, if it aims to fix a gap that the current criminal system cannot fill, and if it is crafted with adequate consideration towards the purposes of condemnation, punishment, and deterrence, it can be an appropriate law.[136] In other words, if written with limits similar to

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135. *See generally Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 11 (2010) ("Duplicative statutes, federalization of conduct traditionally belonging to the States, *criminalization of regular business activity* or social conduct and interactions, this is overcriminalization. When any of these elements is combined with poor legislative drafting, *inadequate mens rea requirements*, or unfettered prosecutorial discretion, the result is inevitably the victimization of more law-abiding citizens.") (emphasis added); Ellen S. Podgor, *Introduction Overcriminalization: New Approaches to A Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 530 (2012) ("The continuous multiplication of laws creates problems. You end up adding more laws to the existing ones, without discarding any in the process. This dynamic is the problem of overcriminalization and overfederalization.").

136. *See* Kerem, *supra* note 6, at 113. ("Even those . . . who insist that criminal law ought to be reserved for conduct that society finds so repugnant as to warrant the severest sanctions will be hard-pressed to deny that the corporate misconduct which produced the societal suffering endured since the 2008 Financial Crisis' onset qualifies as sufficiently repugnant.") (quotation marks and citations omitted).

those in the British law,[137] there is no reason to believe that it will punish those who are not truly responsible.[138]

As to the fifth point, the SEC has not used the clawback and industry bar provisions against major executives, so it is unclear whether those provisions can fulfill the roles of punishment, deterrence, and condemnation. To be fully effective, however, these punishments will likely need to be carried out under the imprimatur of a criminal prosecution that fully attaches the stigma of society's disapprobation. In addition, nothing prevents lawmakers from writing a law that uses clawbacks and industry bars in conjunction with incarceration.

Finally, there is an assumption not voiced in the critics' analysis. Without any changes to the current legal system,[139] we are forced to accept that American taxpayers will continue to bear the social and economic costs of corporate risk-taking while corporate executives retain both their riches and a de facto zone of immunity from prosecution.[140] This business-as-usual arrangement is not one the American people can accept.

CONCLUSION

The quote which starts this Note can be read as an indictment of the morals of Wall Street, a scapegoating of bankers while masking the failure of regulators, law makers, and others involved in the financial crisis. It is not intended as such. Bankers have not grown more immoral than their predecessors, nor have the number of immoral bankers overrun the number of moral ones. Instead, the

137. Peter J. Henning, *A New Crime for Corporate Misconduct?*, 84 MISS. L.J. 43, 77–79 (2014) (noting three important limits to the UK legislation: a seven year limit on imprisonment, subjective awareness of the risk of a decision by a corporate executive, and massive failure of a financial institution that would require government takeover).

138. *Id.* at 86–87 (suggesting a monetary threshold of $1 billion to further limit the application of the law to only the worst of the worst financial crimes).

139. That does not necessarily mean that the change of adding a financial misconduct law is the right answer. As Judge Rakoff has astutely suggested, it might mean mustering the political will to simply enforcing the laws that already exist. Rakoff, *supra* note 8.

140. *See generally* Barry Ritholtz, *The Biggest Lie of the Century*, BLOOMBERG VIEW (Sept. 10, 2012, 10:19 AM EDT), http://www.bloombergview.com/articles/2014-09-10/the-biggest-lie-of-the-new-century ("One can't help think that [Bank of America's $16.65 billion settlement] bought immunity from prosecution for executives.").

quote highlights the reality of modern American capitalism and the humans who function within it. Bankers are competitive.[141] They are in the business of making money. That they take every advantage they can, as far as—and all too often farther than—the letter of the law allows, is to be expected.

But given that fact, government regulation is the proper counterbalance to that force.[142] While not perfect, it is the government's role as enforcer that tempers the excesses of Wall Street and creates a level playing field for bankers who play by the rules. Most of all, it takes into account the collateral damage of banks' risk-taking by protecting citizens who—neither party to the trades that took place nor desirous of its results—lost jobs, life savings, and homes.

To properly serve the people, it will take more than tagging financial institutions with civil fines.[143] Instead, a financial misconduct law that employs recklessness as the appropriate mens rea is an important part of the regulatory ecosystem.[144] Such a law is not, however, a panacea to this financial crisis or a prophylactic for the next. It is just another weapon in the prosecutorial arsenal. In the end, the financial misconduct law will only be effective if those charged with watching the inmates have the political will to wield it.

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141. John Cassidy, *Why Do Banks Go Rogue: Bad Culture or Lax Regulation?*, NEW YORKER (Apr. 4, 2013), http://www.newyorker.com/news/john-cassidy/why-do-banks-go-rogue-bad-culture-or-lax-regulation ("[I]nvestment bankers will inevitably be driven to cut corners, take outlandish risks, and generally engage in behavior that, although privately rational, is socially pernicious.").

142. *Id.* ("The only way to control investment banks, and to direct their activities in a more socially useful direction, is to sit on them hard—with strict limits on leverage, intrusive regulation, and harsh punishments for self-dealing behavior.").

143. *See* Brandon L. Garrett, *The Corporate Criminal As Scapegoat*, 101 VA. L. REV. 1789, 1839–49 (2015) (disagreeing with the need for expanded criminal prosecution but suggesting other ways to improve criminal prosecution).

144. "Regulatory ecosystem" refers to the legislators who create the legislative rules, the regulators who enforce the rules, the financial institutions that live under the rules, and the public, which trusts that these rules are fair.