THE LIMITS OF INDIVIDUAL PROSECUTIONS IN DETERRING CORPORATE FRAUD

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Fifteen years after the largest financial scandal and economic crisis in a century, discussion of the problem of corporate crime too often borders on cliché. Endless calls from Congress, the media, the public, many scholars, and even the Justice Department itself, to recommit, over and over, to locking up more managers and executives to deter corporate wrongdoing portray the problem as relatively straightforward and blame legislative and executive failure of will. Through examination of the litigation record from over 100 prosecutions spanning the period from the 2008 financial crisis to the present, this Article presents evidence that relying on individual prosecutions to deter the most significant corporate crimes, especially those involving fraud in the financial sector, is less promising than believed. Structural features of crimes in the largest corporate organizations have made securing individual convictions and imprisonment, especially at senior levels, a chancy project for prosecutors. The Article further argues that its evidence relating both to failure rates and causes of those failures should point policymakers and enforcers beyond hackneyed calls for perp walks and prison and toward deeper thinking about a full suite of preventive tools, especially regulatory design.

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INTRODUCTION

Public discussion of the subject of corporate crime in the United States is becoming clichéd. On September 22, 2010, in the wake of the largest and most widely infuriating economic crisis since the 1930s,[1]

1. An excellent summary of research on causes of the crisis, which does not address criminal liability, is John M. Griffin, *Ten Years of Evidence: Was Fraud a Force in the Financial Crisis?*, 59 J. ECON. LIT. 1293 (2021); *see also* ALAN S.

the Senate Judiciary Committee convened one of numerous congressional hearings to discuss causes of the crisis and responses. The chair, Senator Edward Kaufman of Delaware, began by declaring,

> [W]e have seen very little in the way of senior officer or board room-level prosecutions of the people on Wall Street who brought this country to the brink of financial ruin. Why is that? . . . If criminal conduct contributed to the financial meltdown, then the people responsible should be investigated, prosecuted, and sent to prison. . . . Criminals on Wall Street must be held to account; otherwise, one of the great foundations of this country—our capital markets—will simply fade away.[2]

More than thirteen years later, on December 13, 2023, the same Senate committee convened a hearing on "Ensuring Accountability for Corporate Criminals." Committee Chair Richard Durbin opened the hearing this way:

> Countless companies have settled multi-billion dollar lawsuits outside of court, but far too often, the executives responsible for the decisions that led to those lawsuits have escaped prosecution and liability. . . . Corporate executives have little incentive to change their criminal conduct without fear of real consequences for their actions. . . . There cannot be two systems of justice—one for wealthy corporations and executives, and one for everyday Americans.[3]

What happened over the thirteen intervening years that explains why even a cataclysmic financial crisis and great recession, with all the attention and outrage that ensued, failed to change the game when it comes to punishing and deterring fraud and other forms of criminal conduct in the corporate sector? Answering this question remains highly important, especially because the U.S. Justice Department (DOJ) has vocally committed itself—in response to harsh criticism within and outside of congressional oversight—to the basic model of deterrence that has governed the federal approach to corporate crime since at least the early 1990s.

BLINDER, AFTER THE MUSIC STOPPED: THE FINANCIAL CRISIS, THE RESPONSE, AND THE WORK AHEAD (2013); RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009).

2. *Investigating and Prosecuting Financial Fraud After the Fraud Enforcement and Recovery Act: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1–4 (2010) (statement of Sen. Edward E. Kaufman).

3. Press Release, Dick Durbin, U.S. Sen., Durbin Delivers Opening Statement During Senate Judiciary Committee Hearing on Ensuring Accountability for Corporate Criminals (Dec. 12, 2023), https://www.durbin.senate.gov/newsroom/press-releases/durbin-delivers-opening-statement-during-senate-judiciary-committee-hearing-on-ensuring-accountability-for-corporate-criminals.

Under that model, prosecutors use the unforgiving American rule of corporate criminal liability (respondeat superior, or master-servant liability, as to any crime by any corporate agent, with no defense for a company's compliance efforts[4]) to force corporations to cooperate with criminal investigations, including by agreeing to penalties in settlement processes. The purpose of doing so, according to the Department's policies, is not even primarily to make crime expensive for corporations but to help prosecutors collect otherwise elusive evidence of criminal violations so that corporate managers and executives are subject to individual criminal sanctions, including imprisonment.[5] According to a wide consensus of policymakers and academics, this is the best way to dissuade other such persons from breaking the law.[6] Over the last decade, the DOJ has doubled and tripled down on its commitment to this vision.[7]

This enforcement model has a strong foundation in neoclassical deterrence theory and influential ideas about behavioral and organizational psychology.[8] Together, these intellectual traditions support the view that business actors will weigh fear of imprisonment heavily against the potential financial rewards of law-breaking, and corporate managers cannot dismiss the risk of personal conviction nearly as easily as the potential costs to their firms of corporate liability.[9] The probability of apprehension looms as large, or larger, in

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4. *See* Samuel W. Buell, *Corporate Criminal Liability*, *in* RESEARCH HANDBOOK ON CORPORATE LIABILITY 106 (M. Petrin & C. Witting eds., 2023).

5. *See* U.S. Dep't of Just., Just. Manual § 9-28.010 (2018).

6. *Id.*

7. *See United States Attorneys' Offices Voluntary Disclosure Policy*, U.S. DEP'T OF JUST. (Feb. 22, 2023), https://www.justice.gov/d9/2023-07/usao_voluntary_self-disclosure_policy_0.pdf; Memorandum from Lisa Monaco, Deputy Att'y Gen., U.S. Dep't of Just., to all U.S. Att'ys, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022) [hereinafter DOJ Corporate Crime Memorandum], https://www.justice.gov/d9/pages/attachments/2022/09/15/2022.09.15_ccag_memo.pdf; Memorandum from Sally Quillian Yates, Deputy Att'y Gen., to all U.S. Att'ys (Sept. 9, 2015) [hereinafter Yates Memo], https://www.justice.gov/d9/pages/attachments/2015/09/10/individual_accountability_for_corporate_wrongdoing_dag_memo2.pdf.

8. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 198, 208 (1968); Jennifer Arlen & Lewis A. Kornhauser, *Battle for Our Souls: A Psychological Justification for Corporate and Individual Liability for Organizational Misconduct*, 2023 U. ILL. L. REV. 673, 683 (2023); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 689 (1997); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 834 (1994).

9. *See, e.g.*, JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 57 (2020); Julie R. O'Sullivan, *Is the Corporate Criminal Ecosystem Defensible?*, 47 J. CORP. L. 1047, 1056–57 (2022); Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1823 (2015).

this calculus than the absolute quantity of punishment, especially incarceration.[10] Given familiar optimism biases and the enormous size of the corporate sector relative to public enforcement institutions, deterrence can only be effective if individual corporate wrongdoers worry that conviction and punishment are material possibilities.[11] This requires that the government visibly bring cases within a variety of industries that look familiar to actors within those industries and that such cases succeed.

The more the government embraces this model, the less things appear to change. Given the limitations on available data, a large-scale empirical study of the deterrent effects of criminal law in the business realm is virtually impossible.[12] Observers constantly

10. *See* Arlen & Kornhauser, *supra* note 8, at 723–24. How much punishment is sufficient to produce individual deterrence is an important question that this Article will not address. In theory, many more visible instances of punishment in the corporate sector should produce deterrence even with modest prison sentences. *See* Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 345 n.71 (2017); Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 707 (2020). Moreover, higher levels of punishment are no longer an available substitute for more convictions because sentencing guidelines in federal court, where most corporate crime is prosecuted, are already very high for many white-collar crimes. *See* Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 835–41 (2014) [hereinafter Buell, *Privileged?*]; Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1646 (2007).

11. *Cf.* EUGENE SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL (2016) (recounting interviews of convicted offenders in which they relate personal accounts consistent with theories of optimism bias).

12. Corporate crime, and the effects of legal instruments directed at its control, are not visible in the absence of enforcement, levels of which are low in relation to arrests and prosecutions for street crimes. Without the ability to measure the denominator of the frequency with which financial fraud, bribery, money laundering, and the like are committed within corporations, there can be no estimating the causal relationship between enforcement and violations. In addition, selection effects in litigation are notoriously complicated and are aggravated in this setting by the abundant discretion of prosecutors. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 138 (2002); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 31, 34 (1984); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 538–39 (2001); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 158 n.80 (2008); *see also* MIRIAM H. BAER, MYTHS AND MISUNDERSTANDINGS IN WHITE-COLLAR CRIME 39–53 (2023) (explaining the extensive difficulties in measuring white-collar crime). Two papers have sought alternative sources for inferring levels of corporate crime, but neither is able to measure the incidence of prosecutable criminal violations in the corporate sector. Eugene F. Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923, 923 (2019) (examining the frequency of offenses within firms based on companies' own internal investigative data); Dorothy S. Lund & Natasha Sarin, *Corporate*

lament, however, that prosecution and conviction rates do not rise as much as policy commitments would suggest they should and that scandal after major corporate scandal—with the exception of the occasional nearly one-person fraud band like a Bernard Madoff, Elizabeth Holmes, or Samuel Bankman-Fried—results in no senior person landing in prison.[13]

There is a widely shared explanation for this situation: the DOJ and Congress simply have not devoted sufficient resources and effort to the task. Not enough investigators, not enough prosecutors, not enough indictments, not large enough budgets, and not enough government personnel with zeal to carry out the mission—as opposed to appetites for press conferences, headlines, and the revolving door. On this account, the cases are there—they just are not getting made.

Crime and Punishment: An Empirical Study, 100 TEX. L. REV. 285, 290 (2021) ("We recognize, however, that the implications that can be drawn from this data are necessarily limited due to imperfections in these datasets. For one, our data proxy for corporate misconduct, which may not correlate perfectly with corporate crime."). Additionally, there is the theoretical problem of what level of deterrence of corporate crime is efficient. Given enforcement and error costs, the optimal level of deterrence clearly is not 100 percent. This Article adopts the prevalent assumption that current deterrence levels are too low.

13. *See, e.g.*, Lund & Sarin, *supra* note 12, at 305 n.88.

This line of argument emanated in the first instance from journalists[14] and filmmakers,[15] who channeled understandable global

14. *E.g.*, JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017) [hereinafter EISINGER, THE CHICKENSHIT CLUB]; MATT TAIBBI, THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP (2014); JEFF CONNAUGHTON, THE PAYOFF: WHY WALL STREET ALWAYS WINS (2012); YVES SMITH, ECONNED: HOW UNENLIGHTENED SELF INTEREST UNDERMINED DEMOCRACY AND CORRUPTED CAPITALISM (2010); Colin Barr, *Where Are the Subprime Perp Walks?*, CNN (Sept. 16, 2009, 3:40 AM), https://money.cnn.com/2009/09/15/news/subprime.perpwalk.fortune/index.htm; Matt Taibbi, *Ten Years After the Crash, We've Learned Nothing*, ROLLING STONE (Sept. 13, 2018), https://www.rollingstone.com/politics/politics-features/financial-crisis-ten-year-anniversary-723798/; Matt Taibbi, *The People v. Goldman Sachs*, ROLLING STONE (May 11, 2011), https://www.rollingstone.com/politics/politics-news/the-people-vs-goldman-sachs-245191/; Lydia DePillis, *10 Years After the Financial Crisis, Have We Learned Anything?*, CNN BUS. (Sept. 13, 2018), https://money.cnn.com/2018/09/13/news/economy/financial-crisis-10-years-later-lehman/index.html; Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAG. (Apr. 30, 2014) [hereinafter Eisinger, *Why Only One*], https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html; Jesse Eisinger, *The Feds Stage a Sideshow, While the Big Tent Sits Empty*, N.Y. TIMES: DEALBOOK (Dec. 8, 2010, 3:09 PM), https://archive.nytimes.com/dealbook.nytimes.com/2010/12/08/where-are-the-financial-crisis-prosecutions/; William D. Cohan, *How Wall Street's Bankers Stayed Out of Jail*, ATLANTIC (Sept. 15, 2015), https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/; Joe Nocera, Opinion, *The Hole in Holder's Legacy*, N.Y. TIMES (Sept. 29, 2014), https://www.nytimes.com/2014/09/30/opinion/joe-nocera-the-hole-in-holders-legacy.html; Joe Nocera, *Biggest Fish Face Little Risk of Being Caught*, N.Y. TIMES (Feb. 26, 2011), https://www.nytimes.com/2011/02/26/business/economy/26nocera.html; Peter Schweizer, *Obama's DOJ and Wall Street: Too Big for Jail?*, FORBES (May 7, 2012, 5:36 PM), https://www.forbes.com/sites/realspin/2012/05/07/obamas-doj-and-wall-street-too-big-for-jail/; Frank Rich, *Obama's Original Sin*, N.Y. MAG. (July 1, 2011), https://nymag.com/news/frank-rich/obama-economy/presidents-failure/; George Packer, *A Dirty Business*, NEW YORKER (June 20, 2011), https://www.newyorker.com/magazine/2011/06/27/a-dirty-business; Editorial, *Going Soft on Corporate Crime*, N.Y. TIMES (Apr. 10, 2008), https://www.nytimes.com/2008/04/10/opinion/10thu2.html; Editorial, *No Crime, No Punishment*, N.Y. TIMES (Aug. 25, 2012), https://www.nytimes.com/2012/08/26/opinion/sunday/no-crime-no-punishment.html. Jed Rakoff, a prominent federal judge, lent credibility to these takes when, as he sat on the primary trial court hearing MBS-related matters, he published a harsh criticism of prosecutorial inaction. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted*?, N.Y. REV. BOOKS (Jan. 9, 2014), https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/. As did the candid comments of such circumspect figures as Nobel laureate Ben Bernanke. Darrell Delamaide, *Delamaide: Even Bernanke Asks How Bankers Avoided Jail*, USA TODAY (Oct. 6, 2015, 8:26 PM), https://www.usatoday.com/story/money/columnist/2015/10/06/de

outrage over massive systemic harms caused by the 2008 crisis in the banking sector. Soon the view became entrenched and found its way into scholarly treatments of the crisis and of corporate crime.[16]

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lamaide-bernanke-bankers-jail-comments/73459416/; Susan Page, *Ben Bernanke: More Execs Should Have Gone to Jail for Causing Great Recession*, USA TODAY (Nov. 13, 2015, 11:38 AM), https://www.usatoday.com/story/news/politics/2015/10/04/ben-bernanke-execs-jail-great-recession-federal-reserve/72959402/.

15. Charles Ferguson released his documentary *Inside Job* in 2010, which won the Oscar at a ceremony in which Ferguson used his acceptance speech to decry the government's failure to jail bankers. INSIDE JOB (Sony Pictures Classics 2010); Peter Lattman, *'Inside Job' Wins Oscar*, N.Y. TIMES: DEALBOOK (Feb. 28, 2011, 7:48 AM), https://archive.nytimes.com/dealbook.nytimes.com/2011/02/28/inside-job-wins-oscar/; *see also 60 Minutes: Prosecuting Wall Street* (CBS News television broadcast Dec. 4, 2011); *Frontline: The Untouchables* (PBS television broadcast Jan. 22, 2013). Five years later, Adam McKay released his popular fictional account of the MBS market collapse based on Michael Lewis' bestseller, a film that featured Steve Carrell's character virtually howling to the skies about the entire market having been "a fraud." THE BIG SHORT (Paramount Pictures 2015).

16. Several years after the crisis, Brandon Garrett published a widely cited book on corporate prosecutions, which provided the first comprehensive treatment of the modern practice of settling criminal cases with companies through deferred and nonprosecution agreements. BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014). The book is descriptive; however, because Garrett naturally included criticisms and policy observations, *id*. at 250–88, and because "Too Big to Jail" is a memorable phrase, others used the title in support of a variety of criticisms of ineffective white-collar enforcement. *See, e.g.*, Court E. Golumbic & Albert D. Lichy, *The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1295 (2014) (discussing how the DOJ's "perceived role in causing the [2008 financial] crisis prompted members of Congress, the press, and the public to question whether the agency has maintained a de facto policy that certain corporations 'too big [sic] jail' given their size and economic significance"); Prem Sikka, *Too Big to Jail: Why Crackdowns on Dodgy Finance Have Been So Ineffective*, GUARDIAN (Oct. 6, 2021, 6:00 AM), https://www.theguardian.com/commentisfree/2021/oct/06/crackdowns-finance-government-laws-regulation-pandora-papers. Others have written normatively since 2008 on the importance of individual prosecutions and the lack thereof. *See* COFFEE, *supra* note 9, at 57; GREGG BARAK, THEFT OF A NATION: WALL STREET LOOTING AND FEDERAL REGULATORY COLLUDING (2012); JENNIFER TAUB, BIG DIRTY MONEY: THE SHOCKING INJUSTICE AND UNSEEN COST OF WHITE-COLLAR CRIME (2020); William K. Black, *Why CEOs Are Able to Loot with Impunity—and Why It Matters*, *in* HOW THEY GOT AWAY WITH IT 171 (Susan Will, Stephen Handelman, & David C. Brotherton eds., 2013); 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 (2013); Amy J. Sepinwall, *Faultless Guilt: Toward a Relationship-Based Account of Criminal Liability*, 54 AM. CRIM. L. REV. 521 (2017); Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions*, 9 VA. L. & BUS. REV. 153 (2015); Henry N. Pontell et al., *Too Big to Fail, Too Powerful to*

Meanwhile, it became a repeated theme in the halls of Congress and on campaign trails that continues to this day.[17]

Jail? On the Absence of Criminal Prosecutions after the 2008 Financial Meltdown, 61 CRIME L. & SOC. CHANGE 1, 1–3 (2013); William K. Black, *The Department of Justice "Chases Mice While Lions Roam the Campsite": Why the Department Has Failed to Prosecute the Elite Frauds That Drove the Financial Crisis*, 80 UMKC L. REV. 987, 988 (2012); Anton R. Valukas, *White-Collar Crime and Economic Recession*, 2010 U. CHI. LEGAL F. 1, 12–19; Don Mayer et al., *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, 515–16 (2014); Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2023–29 (2014) (reviewing CONNAUGHTON, *supra* note 14); Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283 (2013); Henry N. Pontell & Gilbert Geis, *The Trajectory of White-Collar Crime Following the Great Economic Meltdown*, 30 J. CONTEMP. CRIM. JUST. 70 (2014); Sandra D. Jordan, *Victimization on Main Street: Occupy Wall Street and the Mortgage Fraud Crisis*, 39 FORDHAM URB. L.J. 485 (2011); Jeff Madrick & Frank Partnoy, *Should Some Bankers Be Prosecuted?*, N.Y. REV. BOOKS (Nov. 10, 2011), https://www.nybooks.com/articles/2011/11/10/should-some-bankers-be-prosecuted/. *But see* Gregory M. Gilchrist, *Individual Accountability for Corporate Crime*, 34 GA. ST. U. L. REV. 335 (2018). Securities law scholars too have stressed the importance of individual liability to the policing of financial markets. *See, e.g.*, Richard A. Booth, *The End of the Securities Fraud Class Action as We Know It*, 4 BERKELEY BUS. L.J. 1, 24–29 (2007); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2176 (2010); Donald C. Langevoort, *On Leaving Corporate Executives "Naked, Homeless and Without Wheels": Corporate Fraud, Equitable Remedies, and the Debate over Entity Versus Individual Liability*, 42 WAKE FOREST L. REV. 627 (2007).

17. *E.g.*, *The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 3 (2009) (statement of John S. Pistole, Deputy Dir., FBI); *Turmoil in the U.S. Credit Markets: The Genesis of the Current Economic Crisis*: *Hearing Before the S. Comm. on Banking, Hous. & Urb. Affs.*, 110th Cong. 28 (2008); *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 60, 64 (2008); Press Release, Sherrod Brown, U.S. Sen., Sens. Brown, Grassley Press Justice Department on "Too Big to Jail" (Jan. 29, 2013), https://www.brown.senate.gov/newsroom/press/release/sens-brown-grassley-press-justice-department-on-too-big-to-jail; Letter from Sen. Charles E. Grassley, Ranking Member, Comm. on the Judiciary, to Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Just. (Dec. 13, 2012), https://www.grassley.senate.gov/imo/media/doc/HSBC-12-13-12-letter-to-Holder-no-criminal-prosecutions.pdf; S.A. Miller, *Bernie Sanders Wants Wall Street Execs Jailed for 2008 Financial Crisis*, WASH. TIMES (Oct. 6, 2015), https://www.washingtontimes.com/news/2015/oct/6/bernie-sanders-wants-wall-street-execs-jailed-2008/; Jonathan Allen, *Read Hillary Clinton's Big Economic Speech*, VOX (July 13, 2015, 4:40 PM), https://www.vox.com/2015/7/13/8953349/Clinton-economic-speech-transcript; DEMOCRATIC PLATFORM COMM., 2016 DEMOCRATIC PARTY PLATFORM (2016), https://democrats.org/wp-content/uploads/2018/10/2016_DNC_Platform.pdf.

While there are ample reasons to study how the political economy of Congress, executive branch capture dynamics, and other forms of agency cost in government hamper the effort to prosecute corporate crime, a story of insufficient commitment is too simplistic. Indeed, this account has grown to impair understanding corporate crime and how to respond to it. The purpose of this Article is to show—through qualitative empirical examination of over a decade of criminal and civil litigation—that the more fundamental, and difficult, problem with the dominant model of how to attack corporate fraud is that convictions are much harder to obtain than observers believe.

In the years between Senator Kaufman's 2010 hearing and Senator Durbin's 2023 hearing, the government prosecuted many cases involving fraud in the trading of securities in large financial institutions, including multiple cases centered on the dealing of the mortgage-backed securities (MBS) products at the heart of the financial crisis that first propelled so much of the ongoing discussion about individual liability. A study of these cases, which this Article will supply, demonstrates that the government often fails, or nearly fails, to secure jury verdicts and appellate affirmances when proceeding against corporate actors for all but the most flagrant crimes.

In all, this Article will document over 100 enforcement actions, the majority criminal. Two groups of cases were selected from within this data for close examination. First, the Article describes a series of fully litigated prosecutions arising from the three largest scandals in the financial industry between 2008 and the early 2020s: trading in MBS before and during the Great Recession, the "Libor" interest rate benchmark manipulation affair, and the "Forex" currency benchmark collusion matter. Second, to consider how this Article's concern applies outside of fraud in the financial industry, four of the most egregious recent cases from other industrial sectors will be discussed: the British Petroleum spill in the Gulf, the General Motors ignition switch fiasco, the Volkswagen emissions cheating case, and the Boeing 737 MAX disaster.

In the finance cases, only 13 prison sentences were imposed out of nearly 60 criminal actions.[18] In the non-finance cases, only one prison sentence has been imposed out of over a dozen prosecutions to date.[19] These are starkly high failure rates in a federal criminal justice system that produces overall conviction rates approaching 100 percent.[20] In considering the financial sector cases, this Article

18. See *infra* Appendices A–C, for tables summarizing and individually reporting all civil and criminal enforcement actions in the three categories of finance cases.

19. *See infra* Subpart II.C.

20. John Gramlich, *Fewer Than 1% of Federal Criminal Defendants Were Acquitted in 2022*, PEW RSCH. CTR. (June 14, 2023),

includes civil enforcement actions to demonstrate that, where civil and criminal liability were both authorized, civil enforcers had no easy path to sanctioning when criminal prosecutors refrained from acting—even though civil liability could be imposed on proof by only a preponderance of the evidence and often could be premised on mere negligence.

This underappreciated litigation evidence challenges the model for deterring corporate crime that continues to dominate public discussion of the problem, particularly among policymakers and enforcers. It is beyond dispute that more convictions would enhance deterrence. But more cases, the evidence suggests, will not translate to a higher probability of conviction in any given case. After all, it would be surprising if, for well over a decade, prosecutors have been focusing their attentions on the least viable cases involving major corporate wrongdoing while leaving lots of easily convictable managers and executives undisturbed. A further concern is that some deterrence theory has suggested that visibly ineffective enforcement can be worse than nonenforcement.[21]

To be sure, there are strong retributive and expressive arguments for prosecuting serious cases of corporate wrongdoing, regardless of whether such prosecutions promise to change the behavior of other corporate actors—and perhaps even if such prosecutions will have a low success rate. To see the point incandescently, one need only juxtapose mass incarceration for illegal drug sales and low-level property crime with the treatment of those who built the legal opiate industry and became hugely rich off it.[22] This Article does not argue that the pursuit of individual corporate prosecutions should be de-emphasized in any way. Public resources could be much greater in the effort to deal with corporate crime. They should be.[23] The Article's intended audience is those—particularly in the policy, media, and scholarship realms—who argue that general deterrence can be enhanced, perhaps even easily, through more indictments of mid-level and senior personnel.[24]

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https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022/.

21. *See, e.g.*, Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 84–85 (2003); Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1796 (2000).

22. The government's documented misfeasance over many years in handling the investigation and prosecution of Purdue Pharma is a signal instance of unacceptably weak corporate enforcement, by any measure, at both the institutional and individual levels. *See* PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY 262–85 (2021).

23. Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 272–76 (2014).

24. The argument that corporate wrongdoers should be more often indicted to express public condemnation, to air revealing facts in litigation, or even to inflict the reputational and other costs of indictment for deterrent purposes runs

Moreover, this Article's treatment of the litigation record will show that the government's underappreciated failure rate in, so to speak, big-ticket corporate cases cannot be dismissed as the simple result of biases in favor of wealthy and often white criminal defendants harbored by judges and jurors. Such an explanation is discordant, after all, with the powerful and consistent public sentiment against corporate wrongdoers expressed in survey data.[25]

Close examination of litigation reveals both bad and good news. The bad news is that impediments to individual convictions in the corporate context are often structural and therefore cannot be easily surmounted. The application of existing criminal prohibitions, particularly anti-fraud laws and especially their mens rea requirements, to legal and productive economic activities presents difficult issues of line-drawing that allow room for arguments and doubts of the sorts ordinary criminal litigation rarely involves.[26] On top of that, the government often encounters a dilemma of needing to initiate individual corporate prosecutions at, roughly speaking, the line or working level where actus reus and mens rea are most amenable to proof. Jurors and judges, who are concerned only with the cases before them, often respond favorably to arguments that such lower-level actors were "just doing their job" or were "scapegoats" for misconduct and breakdowns properly attributed to the corporation as a whole and its senior managers. Problems in proving criminal intent and in ascribing responsibility within large organizations grow continuously as the size and complexity of multinational firms increase and their activities and personnel span more legal systems, economies, and cultures. These problems get more severe as examination of individual responsibility moves upward through the corporate ranks.[27]

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into the ethical constraint that prosecutors, at least in federal court, may not seek an indictment in the absence of proof sufficient to satisfy a jury beyond a reasonable doubt. Justice Manual, *supra* note 5, § 9-27.220. While the current Deputy Attorney General has told prosecutors to be less concerned about indicting cases that might be lost, she of course cannot intend relaxation of ethics. *See* DOJ Corporate Crime Memorandum, *supra* note 7.

25. *E.g.*, Mitchell Ogisi, *Majority Worldwide Sees Widespread Corruption in Businesses*, GALLUP (May 10, 2012), https://news.gallup.com/poll/154571/Majority-Worldwide-Sees-Widespread-Corruption-Businesses.aspx (finding that 60% of Americans believed corruption is widespread in business).

26. I have explored this phenomenon in prior theoretical work. *See, e.g.*, SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 58–65 (2016) [hereinafter BUELL, CAPITAL OFFENSES]; Buell, *Privileged?*, *supra* note 10, at 841. My objective in this Article is to demonstrate this problem empirically, rather than reworking theoretical ground covered elsewhere.

27. For a complete treatment of the seemingly yawning gap between enforcement of white-collar offenses and the nearly countless and expansive prohibitions on such conduct on the statute books, see BAER, *supra* note 12. For

The good news, if one can call it that, is that more clearly understanding the structural nature of corporate crime and corporate prosecutions can point legislators and policymakers in the direction of effective reform—and beyond repetitive calls for more prison for executives that have dominated discussion of American corporate scandals for two decades or more.

This Article's ambitions are primarily empirical. There will not be space for a full examination of instrumental alternatives. However, this Article will conclude by considering a variety of alternative interventions and their relative promise. Increases to prosecution and investigative personnel is an avenue limited by the structural obstacles this Article's evidence illuminates and with additional downsides associated with bureaucratic agency costs that have not been adequately appreciated. Reform of substantive white-collar criminal law is always an option but would require serious departures from core principles of criminal liability that debates in this field tend to minimize. Enhanced civil liability and enforcement is an easier path theoretically, provided that lawmakers are willing to beef up not just the size but also the form of civil sanctions. Whistleblowing regimes, ever more popular (except within the corporate sector), merit greater attention and experimentation. Corporate liability must continue to be emphasized, principally as a means of increasing the probability that individual crimes will be detected. The still young science of corporate compliance must continue to advance toward the cause of preventing crime in the first instance.

Most importantly, retreats from effective regulation must be halted and reversed in a wide variety of industries. These retreats have spurred the institutions of criminal prosecution—through ad hoc settlement policies and practices pursued while in an ex post litigation posture—to occupy the awkward role not only of designers of corporate compliance and governance systems but of judges in the first instance of what industrial practices should be tolerated or prevented.[28] This dynamic is practically guaranteed to accelerate because, as this Article will suggest and future work will explore, ineffective regulation produces corporate crime, often in forms that would not exist but for the shape of inapt regulatory structures and ineffective enforcement.

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a summary of the book's argument, see BUELL, CAPITAL OFFENSES, *supra* note 26, at 1–6. This Article stresses impediments in economic, industrial, institutional, and sociological form, while Baer focuses on crime definition and punishment rules. The story told here points to less ready solutions.

28. *See* Lisa Kern Griffin, *Inside-Out Enforcement*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 110–25 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); *see also* Arlen & Kahan, *supra* note 10, at 352–53; Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigations and Reform*, 66 FLA. L. REV. 1, 44 (2014).

Part I of this Article will lay out the evidence that demonstrates the limits of the dominant model for deterring corporate crime by focusing on prosecutions and civil enforcement actions concerning fraud in securities markets. Part II will address broader questions about the prospects of individual corporate prosecutions from industries outside the financial sector. Part III will compare the instrument of individual prosecutions to alternative tools for reducing or preventing corporate crime in light of the Article's findings. A conclusion and appendices displaying litigation results follow.

I. WHY "NO BANKERS IN JAIL"

This Part considers over 100 enforcement actions, most of them criminal, brought since 2008 in three major scandals in the finance industry: dealing in MBS before and during a historic real estate bubble collapsed, trading interest rate derivatives priced off benchmark rates such as "Libor," and trading currency derivatives priced off a benchmark known as "Forex" or "FX." Only 13 sentences of imprisonment have been imposed from these actions, which have spanned the United States and the United Kingdom. Studying the litigation record in a selection of these cases will demonstrate the difficulties in proving criminality of traders of financial products, especially on the dimension of intent, even when the government possesses seemingly damning documentation and enjoys the cooperation of co-conspirators—fruits of investigation almost always obtained because corporations are incentivized to cooperate by the threat of liability and the offer of reduced sanctions.[29]

A. *The MBS Catastrophe*

1. *Arguments for Criminal Conduct*

The current argument for more individual prosecutions has its genesis in the government's response to the financial crisis following the collapse of the market for mortgage-backed securities in 2008 and 2009. Thus, this Article first takes up enforcement actions related to that market.[30] While these cases might seem like old news, their full

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29. Notes accompanying the Article's appendices provide details about search methodology and the nature of all criminal and civil enforcement actions relating to these three scandals, including cases not discussed in the body of the Article. *See infra* Appendices A–C and accompanying notes. Cases discussed in the body of the Article were selected because they either (1) went to trial, produced an available transcript of the trial proceedings, and included what appeared to be strong government proof, or (2) left other significant records, such as appellate rulings or extensive media coverage of the trial, that allow for inferences about obstacles the government encountered in litigation.

30. This Article does not consider prosecutorial efforts to sanction mortgage fraud at the retail (homebuyer) level. *See* U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN. AUDIT DIV., AUDIT OF THE DEPARTMENT OF JUSTICE'S EFFORTS TO

litigation record has materialized only in the last few years, long after casual observers had firmly made up their minds on the merits.

Three theories of fraud have been advanced in public discussion of MBS practices and reflected, to varying degrees, in the cases that the government did bring involving MBS. The first theory, what we might call Fraud on the Buyer, describes the fraud as the conduct of the sellers in the MBS market toward the buyers of the securities.[31] On this theory, those profiting from selling to others positions that were long (bullish on) MBS—and thus, especially late in the market, long the ability of highly leveraged American homeowners to make their mortgage payments in a home-price bubble—defrauded those buyers because the long positions were, at a certain point, excessively risky investments that soon became nearly worthless.[32]

MBS deals on the scale that caused macroeconomic damage were conducted between large financial institutions. The buyers and sellers in these deals were typically traders at separate, and often competing, corporations in the financial markets.[33] Because MBS were traded over the counter in a sophisticated market, it is difficult or impossible to establish any special legal duty running between buyer and seller. It is black-letter law that even a common-law civil fraud claim cannot be based on the absence of a seller's disclosure unless the seller has a legal duty of candor toward the buyer, a duty that cannot be found without a fiduciary-type relationship.[34]

Any prosecution of an MBS seller for a Fraud on the Buyer thus had to be grounded on either (1) a false representation to the buyer or (2) a novel argument that heightened duties of disclosure did in fact apply in these relationships.[35] The material facts usually described as undisclosed in these deals had to do with either the riskiness of the mortgage loans underlying the securities ("stated income" loans, loans with no cash down payments, buyers with very low credit ratings, etc.) or the selling bank's own position with regard to the MBS product or the market generally (the seller was net short (bearish on) the market and believed the market was near collapse,

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ADDRESS MORTGAGE FRAUD (2014), https://oig.justice.gov/reports/2014/a1412.pdf. While growth in fraudulent acquisition of home purchase financing played an important role in producing the systemic crisis of 2008–09, loan origination was sufficiently separate from the securitization market that prosecution of originators for fraud could not realistically have led to prosecution of MBS traders and underwriters or their supervisors.

31. *See, e.g.*, Madrick & Partnoy, *supra* note 16.

32. *See id.*

33. *See id.*

34. *See* Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 545–47 (2011).

35. See United States v. Finnerty, 533 F.3d 143, 151 (2d Cir. 2008), and United States v. Dial, 757 F.2d 163, 171 (7th Cir. 1985), for analyses of which types of nondisclosures constitute fraud in securities trading markets.

the seller was invested on the other side of the same product being marketed in the deal, or the like).[36]

The second, related theory might be called Underwriting Fraud. On this theory, financial institutions packaging and selling large quantities of MBS products did not follow or insist upon underwriting procedures that were minimally adequate or consistent with representations or understandings about how underwriting would be conducted.[37] Some sellers—there were many of them, especially Countrywide—allowed huge quantities of home loans to be securitized without real scrutiny or application of standards about the riskiness of the loans.[38] They then knowingly foisted these egregious products upon their buyer counterparties without informing them of the fact that underwriting procedures were deficient, relaxed, or disregarded.[39] Buyers of these products, the argument goes, were victims not simply because they were induced to buy exceedingly risky derivatives but because they were misled about the safety processes sellers applied to those products before taking them to market.[40]

The third theory, which might be called Accounting Fraud, has to do with the books of the financial institutions themselves. Some were so deep into the MBS market, including on the long side, and were sufficiently expert in where that market stood, that at a certain point late in the bubble they knew their own firms were much riskier to their investors than their financial reporting conveyed.[41] By not disclosing the truth and, at least in the case of Lehman Brothers, taking steps to manage their books to conceal the true risk of loss and insolvency they bore, the institutions defrauded their investors in the debt and equity markets.[42] Or so it has been asserted.

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36. *See* BUELL, CAPITAL OFFENSES, *supra* note 26, at 59.

37. *See* Tomasz Piskorski et al., *Asset Quality Misrepresentation by Financial Intermediaries: Evidence from the RMBS Market*, 70 J. FIN. 2635, 2636 (2015) (reporting evidence that home loans underlying many MBS products were riskier than as described in disclosures to unwitting buyers, without addressing questions of legal liability); Press Release, U.S. Dep't of Just., 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), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading (describing the DOJ's civil case under FIRREA statute based largely on underwriting failures).

38. Piskorski, *supra* note 37, at 2658–59.

39. *Id.*

40. *See* Madrick & Partnoy, *supra* note 16.

41. *See* Report of Anton R. Valukas, Examiner at 732–1053, *In re* Lehman Bros. Holdings Inc., 433 B.R. 113 (Bankr. S.D.N.Y. 2010) (No. 08-13555).

42. *Id.* at 853–84.

2. *MBS-Related Cases*

These three theories were not extensively tested, of course. That is a pillar of the case against the government's handling of post-crisis enforcement. However, the theories were substantially more tested than many accounts have allowed. Some were even subject to trials.[43] Others were explored sufficiently to have left behind material that helps assess them.[44] In this section, the legal record will be canvassed to demonstrate that the dominant narrative around liability for conduct in the MBS markets of the aughts has misrepresented the barriers to widespread enforcement. That point, in turn, supports the main argument of this Article that individual liability is not the ready tool for deterring corporate fraud that many observers believe it to be.

The story that emerges is not only about wins and losses but also about the difficulty of persuading juries beyond a reasonable doubt that an individual actor—with a face and a story to tell—in a large, complex, and mostly legal process clearly acted with the knowledge and purpose to wrong others. Given the government's struggle to paint a clear picture of criminal intent at the trader level, individuals at more senior levels within financial institutions would have been even less plausible candidates for ascription of criminal liability, though they indisputably bore moral and professional responsibility for what happened on their watches.

a. Tourre (Goldman)

Start with the case that government enforcers appear to have believed was their best shot at establishing that large MBS deals could be fraudulent. In a case of the Fraud on the Buyer type, the SEC reached a $550 million settlement with Goldman Sachs, including a mild concession that the firm had made "a mistake," for Goldman's packaging and sale in 2007 of an MBS product called Abacus 07-AC1 (Abacus).[45] No individual was criminally prosecuted. The SEC sued one Goldman employee, a vice president on a trading desk named Fabrice Tourre, who was 28 at the time of the deal, in a civil case filed

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43. *See infra* Subpart I.A.2.

44. *See infra* Subpart I.A.2.

45. Press Release, SEC, Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO (July 15, 2010), https://www.sec.gov/news/press/2010/2010-123.htm. Among types of products in this market, Abacus was a credit default obligation (CDO). *See* Dan Wilchins & Karen Brettell, *Factbox: How Goldman's ABACUS Deal Worked*, REUTERS (Apr. 16, 2010, 4:32 PM), https://www.reuters.com/article/world/factbox-how-goldmans-abacus-deal-worked-idUSTRE63F5CZ/. The DOJ decided not to pursue Goldman criminally on this matter and took the unusual step of announcing that decision, explaining that there was insufficient proof of criminal liability. David Ingram & Aruna Viswanatha, *U.S. Justice Department Drops Goldman Financial Crisis Problem*, REUTERS (Aug. 9, 2012, 10:02 PM), https://www.reuters.com/article/idUSBRE879036/.

in the Southern District of New York.[46] Tourre, with Goldman funding his defense, chose to try the case and lost. He was ordered to pay $850,000 in fines and disgorgement.[47] The SEC had no easy path to this modest civil enforcement win, which the jury provided reluctantly even on a preponderance of the evidence standard.

Goldman, primarily in the person of Tourre, acted as the dealer on the transaction, constructing and marketing it for a $15 million fee.[48] The buyers—those going long on the portfolio of mortgages referenced by the securities—were a German bank, a Dutch bank, and another financial services company.[49]

At the same time, Goldman constructed and sold a short position on the same product to Paulson and Company, a hedge fund led by John Paulson, who is reported to have reaped $5 billion in 2010 from his strategy of shorting the late MBS market, including $1 billion from his short play on Abacus.[50] Because no such trade can be consummated without both a long and a short, and investment houses such as Goldman often profit from intermediating such deals rather than holding large positions in them, Goldman's dealing with a short investor was unexceptional. The home loans securitized in the deal were, as all involved knew and intended, high on the scale of default risk.[51] MBS products founded on such loans were common, especially late in the market's rise, and produced high profits for buyers with sufficient risk tolerance—but only so long as home values continued to increase across the United States.[52]

The SEC's theory of fraud was not that Goldman could not sell such long positions to willing buyers, of course. It was that Goldman did not disclose a highly material fact about the deal to the buyers

46. *See generally* Complaint, SEC v. Tourre, 4 F. Supp. 3d 579 (S.D.N.Y. 2014) (No. 10-CV-3229). An SEC lawyer later provided reporters with internal emails to explain that he had failed in his efforts to persuade superiors to bring broader allegations against both Tourre's Goldman Sachs supervisors and personnel of a hedge fund on the short side of the transaction. *See* Jesse Eisinger, *Why the S.E.C. Didn't Hit Goldman Sachs Harder*, NEW YORKER (Apr. 21, 2016), https://www.newyorker.com/business/currency/why-the-s-e-c-didnt-hit-goldman-sachs-harder.

47. Nate Raymond & Jonathan Stemple, *Big Fine Imposed on Ex-Goldman Trader Tourre in SEC Case*, REUTERS (Mar. 12, 2014, 2:53 PM), https://www.reuters.com/article/idUSBREA2B112/.

48. Complaint, *supra* note 46, at 3.

49. *Id.* at 15–19.

50. *See* Svea Herbst-Bayliss, *Paulson's $5 Billion Payout Shocks, Raises Questions*, REUTERS (Jan. 28, 2011, 8:17 PM), https://www.reuters.com/article/idUSTRE70R7CS/; Eisinger, *supra* note 46.

51. Complaint, *supra* note 46, at 5–9.

52. Zachary S. Gilreath, *The Culprit of the Great Recession: A Detailed Explanation of Mortgage-Backed Securities, Their Impact on the 2008 Financial Crisis, and the Legal Aftermath*, 13 J. BUS. & TECH. L. 319, 329 (2018).

and affirmatively acted to mislead them about that fact.[53] The German bank, which had been a heavy consumer of MBS products, knew well that the market was becoming riskier. The bank eventually decided that it would close more such deals only if the mortgages in a securitized portfolio had been blessed by a "selection agent," a credible third-party inspector paid a fee to review the products underlying the deal and lend its reputational capital to approving them, in the manner of a credit rating agency.[54] A firm named ACA was selected for this task.[55]

Meanwhile, Goldman extensively discussed with Paulson, the short investor, which types of loans would be included in the deal. Goldman allowed Paulson to review and alter the portfolio of loans so that it would be more to his firm's liking—that is, riskier of default.[56] Paulson's position as short investor, including his role in micromanaging the portfolio prior to approval by ACA and closing, was not disclosed to the buyers or ACA.[57] A metaphorical oversimplification of the SEC's theory might be that a bookie induced a gambler to bet on the Packers to beat the Bears without being told that the bookie could call the coach of the Packers and direct the coach to start second-string players.

The government's argument was that ACA would not have given its approval to the deal, and thus the German buyers would not have purchased the product, had ACA known that a massively short investor was permitted to hand-pick risky mortgages for the package of securities.[58] Goldman, the government believed, actively concealed the full nature of Paulson's involvement to ensure the success of the deal: in the framing of the SEC's counsel, Tourre "tricked" ACA into believing that Paulson was there only as a small equity investor on the long side.[59] Paulson's active selection role, in the short position, was not a common feature of MBS deal construction and was the critical fact that made the government believe it could prevail, at least civilly, on a fraud charge.

As the trial began, Tourre, whose Goldman compensation was $1.7 million in 2007,[60] faced a few bad facts. In the midst of the deal discussions, he had sent an email to his girlfriend about the MBS market, saying, "The whole building is about to collapse anytime now. [With Tourre] standing in the middle of all these complex highly-levered exotic trades that he created, without necessarily

53. Complaint, *supra* note 46, at 2.
54. *Id.* at 7–8.
55. *Id.*
56. *Id.* at 9–11.
57. *Id.* at 11–13.
58. *Id.* at 11–15.
59. Transcript of Trial at 68:3–22, SEC v. Tourre, 4 F. Supp. 3d 579 (S.D.N.Y. 2014) (No. 10-CV-3229) [hereinafter Tourre Transcript].
60. *Id.* at 55:8–57:14, 68:3–22, 71:3–5, 73:6–15, 76:3–10, 82:5–7.

understanding all the implications of those monstrosities."[61] He wrote another email in which he described the experience of sitting in a meeting on the deal that both Paulson and ACA attended as "surreal."[62] This comment seemed to indicate Tourre's understanding that ACA was oblivious about why a Paulson employee was really there. An important term sheet on the deal did not say anything about Paulson, only stating that the portfolio was selected by ACA.[63] With a "let's discuss," Tourre had forwarded to another employee at Goldman an email that seemed to indicate that ACA believed Paulson to be an equity investor (long) in the transaction.[64] "Let's discuss," the SEC argued, indicated that Tourre had read the email and worried that ACA was being misled.[65]

Tourre's defense stressed several points to the jury: (1) the purpose of a synthetic securities product like this credit default obligation (CDO) is to have a bet with two sides, and it is a zero-sum game "like playing fantasy baseball"; (2) everyone knew that Paulson was massively shorting the housing market, a fact that was all over the financial press; (3) everyone knew "storm clouds" were gathering over the market and the disagreement was only about when it would rain and how hard; (4) the parties to Abacus were "the most sophisticated financial institutions in the United States and around the world"; (5) it was "industry standard" to have investors for whom an MBS deal was constructed make suggestions about what to include; and (6) another division of ACA ended up taking a modest long position on the deal, evidence that ACA thought the structure was "bullet proof."[66] In his testimony, Tourre told the jury that he could not recall why he had described the Paulson-ACA meeting as "surreal" and that he did not believe he had read all of the forwarded emails reflecting ACA's belief that Paulson was a long investor.[67]

The ACA witnesses said they did not know about the short investor's role in portfolio selection and that fact would have killed the deal for them.[68] However, an ACA witness conceded on cross-examination that knowing about Paulson would not have affected ACA's "credit process" and that "ACA . . . did its collateral work the same regardless."[69] The information about Paulson, he said, would

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61. *Id.* at 57:1–6.
62. *Id.* at 2073:16–24.
63. *Id.* at 73:3–15.
64. *Id.* at 2576:12–13
65. *Id.* at 2576:11–25, 2577:5–25, 2578:1–25, 2579:1–3.
66. *Id.* at 84:5–85:8, 86:1–15, 87:22–25, 88:7–11, 91:15–23, 97:7–15, 1020:9–24.
67. *Id.* at 2074:2–25, 2575:4–2576:1, 2577:10–2579:3, 2583:4–11, 2590:13–2592:25.
68. *Id.* at 1470:4–1471:2.
69. *Id.* at 1626:1–17, 1676:12–25.

not have affected their "standards" but would have affected "whether we wanted to do the transaction."[70]

In summation, the defense described Tourre as "an easy mark, a scapegoat, the sole person here you can find because he wrote some immature emails late at night to his girlfriend."[71] His counsel argued to the jury, "[S]ophisticated investors who care about things, things that are material to them, should be expected to confirm them," and emphasized that Goldman retained $90 million of the long position after trying to sell it to others, something one would not do with a deal designed to fail.[72]

The SEC's complaint alleged fraud under both Rule 10b-5 and Section 17 of the Securities Act of 1933.[73] The jury was instructed, as SEC counsel emphasized in summation, that on a Section 17 claim, the SEC did not have to prove intent to defraud, only negligence.[74] Following the verdict, jurors recounted 13 hours of heated deliberations after an initially deep divide over liability.[75] They described Tourre as both a "scapegoat" and a "willing participant."[76] Jurors did say they saw "Wall Street greed" in the case, while one said Tourre was a lower-level employee who was pulled into the case, observing, "[T]he machine is made up of cogs and he was a willing part of that."[77] Defense arguments that it was "industry practice" not to disclose information about who was on the short side of this type of synthetic MBS deal resonated with some jurors.[78]

In the case that enforcers seemed to believe had the best fraud facts among all MBS deals that were examined, the government won a very close trial when facing only the civil burden of proof and being allowed to argue for liability based only on negligence. Once the evidence had been scrutinized in court, the unusual Paulson aspects of the deal did not seem so unambiguously damning. The defense did a competent job of pointing out that ACA not only had access to the

70. *Id.* at 1680:18–23. He further explained that knowing someone was both long and short would not have mattered but "when it's pure short, it was a direct bet against something ACA was working diligently on . . . a bet against something that was designed to fail." *Id.* at 1780:7–11.

71. *Id.* at 104:4–7.

72. *Id.* at 2705:12–14, 2731:1–14.

73. *See* Buell, *supra* note 34, at 540–65.

74. *Id.* at 2617:7–21. The jury found Tourre liable on the Section 17 claims and one of the Rule 10b-5 claims. *Id.* at 2845:9–2846:12. Only the SEC can prove securities fraud involving mere negligence, as Section 17 does not allow for either a private right of action or criminal liability. *See* Buell, *supra* note 34, at 540–65.

75. Susanne Craig et al., *In Complex Trading Case, Jurors Focused on Greed*, N.Y. TIMES: DEALBOOK (Aug. 2, 2013, 9:12 PM), https://archive.nytimes.com/dealbook.nytimes.com/2013/08/02/in-complex-trading-case-jurors-focused-on-greed/.

76. *Id.*

77. *Id.*

78. *Id.*

relevant information needed to assess the risk of default but also that ACA's risk assessment process would have been the same either way.

Thus, it is no surprise that the DOJ passed on the burden of proving both materiality and criminal intent to defraud beyond a reasonable doubt in the Goldman matter.[79] The Abacus-Tourre case is, with respect to its full record, strong evidence that fraud, much less criminal fraud, would have been very difficult if not impossible for the government to prove to the satisfaction of a jury in any MBS deal conducted between traders at large financial institutions.

On the basis of Abacus and other transactions, some asserted that Goldman Sachs had committed fraud in the MBS market by selling long positions, even as the firm began (prudently it turned out) to hedge its own MBS holdings with short positions, through products purchased largely from the insurer AIG.[80] These moves, together with government money that later became available to both Goldman and AIG, helped Goldman avoid worse fates than other firms after the crash.[81]

Of course, when Goldman traded derivative products with other financial institutions and intermediated such deals, it was dealing, at least in the legal sense of the words, with customers and not clients.[82] No theory of fraud would support the idea that a seller in an arm's length market, absent a fiduciary-type relationship, has an obligation to advise the buyer that the buyer should not do the deal. To state the obvious, there is no long-short trade in derivatives such as these MBS products unless the parties harbor differing views on the future of the market. There was plenty to be angry about in Goldman's involvement in the MBS market but little material, it turned out, to carry that anger over into criminal convictions.

b. Stoker (Citi)

The SEC filed an enforcement action in another MBS case that had Abacus-like facts and was also premised on a Fraud on the Buyer theory. This one involved a product constructed and marketed by

79. For further discussion of civil versus criminal intent, see Buell, *supra* note 34, at 540–65.

80. *SEC Charges Goldman Sachs with Fraud*, PBS NEWS HOUR (Apr. 16, 2010, 1:43 PM), https://www.pbs.org/newshour/economy/sec-charges-goldman-sachs-with-fraud.

81. Goldman CEO Lloyd Blankfein was called before a congressional hearing at which he and the firm were accused of misleading their own "clients" into buying products the firm knew were bad investments and often took the short side on. *Wall Street and the Financial Crisis: Hearing on the Role of Investment Before the Permanent Subcomm. on Investigations*, 111th Cong. 130–92 (2010).

82. *See* Steven M. Davidoff et al., *The SEC v. Goldman Sachs: Reputation, Trust, and Fiduciary Duties in Investment Banking*, 37 J. CORP. L. 529, 550 (2012).

Citigroup called Class V Funding III, a synthetic CDO.[83] Citigroup settled with the SEC for $285 million, neither admitting nor denying liability for the transaction, while the employee who captained the deal and was sued, Brian Stoker, tried the case with the help of Citi-funded counsel.[84] Stoker defeated the SEC.[85] The DOJ took no action in the matter.

This MBS deal did not include the behavior of an outside short investor allowed to pick loans for the reference portfolio, like Paulson in the Tourre case. Rather, the SEC's theory of fraud rested on the fact that Citi, having chosen a block of risky assets for the reference portfolio, took a $500 million short position on the product without disclosing that fact to the buyers who went long.[86] Citigroup earned a fee of $85 million for the deal, on top of winning on its short play.[87]

This was a bad look after the market collapse and bailout money, to be sure. But an examination of what happened at the trial is further revealing of the barriers to proving fraud in this context, much less criminal fraud. Stoker was the deal manager at Citi. Again, the deal included the participation of a portfolio manager with the job of arranging and reviewing the mortgage loan assets that would be referenced in the trade. CSAC, a component of Credit Suisse, performed this function to the buyers' satisfaction.[88] At some point in the deal, a trading component of Citigroup proposed 25 assets for inclusion in the securities, which CSAC accepted. Citi later bought a short position on those 25 assets. Stoker was clearly aware of these facts, although he denied knowing all the details.

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83. *See* Complaint at 1, SEC v. Stoker, No. 11-CIV-7388 (S.D.N.Y. Oct. 19, 2011).

84. Stoker's trial was somewhat lost in the noise from a kerfuffle in which the assigned judge in the Southern District of New York, Jed Rakoff, rejected the SEC's and Citigroup's proposed consent decree for failing to allege intentional fraud or requiring Citigroup to admit wrongdoing. SEC v. Citigroup Glob. Mkts. Inc., 827 F. Supp. 2d 328, 331 (S.D.N.Y. 2011). The Second Circuit reversed, ruling that Judge Rakoff had exceeded the limited purview of a trial court in deciding whether to approve a consent decree. SEC v. Citigroup Glob. Mkts. Inc., 752 F.3d 285, 295 (2d Cir. 2014).

85. *See* Brian Stoker Found Not Liable, SEC Litigation Release No. 22541, No. 11-Civ-7388 (Nov. 21, 2012), https://www.sec.gov/litigation/litreleases/lr-22541.

86. *See* Complaint, *supra* note 83, at 2; Trial Transcript at 43:19–45:3, SEC v. Stoker, 873 F. Supp. 2d 605 (S.D.N.Y. 2012) (No. 11-CIV-7388) [hereinafter Stoker Transcript]. Stoker's counsel asked almost every witness on cross-examination whether the witness believed that the product was "designed by Citi to fail" and, of course, all said no. *Id.* at 554:7–16, 721:10–19, 750:3–25.

87. Citigroup Global Markets Inc.: Brian Stoker, SEC Litigation Release No. 22134, No. 11-CV-7388 (Oct. 19, 2011), https://www.sec.gov/litigation/litreleases/lr-22134.

88. Stoker Transcript, *supra* note 86, at 1149:20–1150:3.

The proof was straightforward and the facts not much in dispute.[89] The SEC based its argument primarily on the offering documents stating that CSAC selected the assets without disclosing Citi's role in asset selection.[90] At the conclusion of the trial, the SEC's counsel told the jury the case rested on four points: the assets were not selected solely by CSAC, but also by Citi; Citi purchased protection (a short position) on the 25 assets it asked to be included; Citi believed those assets would perform poorly;[91] and Citi did not disclose these facts to the long investors.[92] The SEC also emphasized that its complaint, as in the Tourre action, was based on Section 17 of the Securities Act (which does not include criminal liability), and thus the jury needed only to find Stoker negligent to hold him liable.[93]

The SEC's best witnesses, naturally, were the buyers of the long positions, the major one being Ambac, a large financial institution with a focus on insurance markets that lost $305 million on the deal.[94] The Ambac witnesses were more helpful to the SEC, saying they cared whether the portfolio was "adversely selected" but saw no indication that it was, and that they believed CSAC selected the assets.[95] If Ambac had known that Citi selected 25 assets in the pool, an Ambac manager testified, he would not have recommended the deal to his firm's committee, and it would not have gone through.[96] However, the same witness testified that it would not have mattered to Ambac if Citi had asked CSAC to approve specific assets,[97] that Ambac was aware that Citi took a short position, and that it was not material to Ambac what Citi did with the risk on the other side of the transaction.[98] Ambac drew a fine line between the materiality of knowing in general that "adverse selection" was going on (problematic

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89. On the frequently asserted point that juries cannot be expected to understand sophisticated finance, which hampers the party bearing the burden of proof, the Tourre and Stoker trials produced reasonably comprehensible testimony and arguments, but not without exceptions. From a Citi witness at the Stoker trial:

> The conversations were around that assets and liabilities had been mismatched dramatically, the arbitrage was extreme in the capital structure, so the equity returns were higher. There was more cash flow to play with returns within the capital structure . . . . The difference was that the arbitrage now permeated from CDOs, synthetic CDOs, rather than from cash bonds.

Id. at 431:4–15.

90. *Id.* at 54:18–55:24.

91. *Id.* at 1359:11–1360:21.

92. *Id.* at 1874:14–25

93. *Id.* at 1901:18–1902:11, 1917:11–18.

94. *Id.* at 1164:15–1165:11, 1213:15–20

95. *Id.* at 1157:20–1160:15, 1189:9–1190:8, 1190:19–1192:9, 1193:6–11.

96. *Id.* at 1218:24–1219:13.

97. *Id.* at 1234:2–23.

98. *Id.* at 1311:9–16.

for doing the deal) and the quality of the assets themselves, with CSAC's approval, making all of the assets acceptable (not problematic for doing the deal).

Stoker's counsel argued that buyers such as Ambac were sophisticated players in the CDO market with as much access as Citi to information about the assets.[99] He urged the jurors not to allow hindsight bias to affect their assessment of what would have been negligent in the CDO market in 2007.[100] He called synthetic CDO transactions a form of "legal gambling" among "the most sophisticated bettors on Wall Street" that was well known to, and permitted by, the SEC and Congress.[101] He developed testimony showing that the arranging bank in a CDO is obligated to make payments to the buyer but can do lots of things with that risk, including holding it or hedging it, and that it was normal for the form of that position to vary.[102] Thus, he argued, there was no negligence by Stoker, much less intentional fraud.[103] Stoker's counsel also got before the jury that Citi, overall, was net long the MBS market by almost $40 billion at the time of the Class V Funding III transaction.[104]

Given the SEC's reliance, as in the Tourre matter, on Section 17, the judge instructed the jury on negligence only.[105] Nonetheless, the jury found Stoker not liable on both of the SEC's claims.[106] Unusually, the jury sent a telling note to the judge with its verdict, which the court read aloud: "This verdict should not deter the SEC from continuing to investigate the financial industry, to review current . . . regulations . . . and modify existing regulations as necessary."[107] In post-verdict interviews, a juror who authored the joint note said that he wanted to know why the CEO was not on trial, while another juror said it did not make sense to "pin the blame on one person" "given the crazy environment" of the market.[108]

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99. *Id.* at 59:7–25.

100. *Id.* at 60:11–22.

101. *Id.* at 62:15–17, 64:19–25, 1943:8–1944:17. Counsel said blaming a bank worker in the CDO market is like blaming a casino worker for the problems gambling causes. *Id.* at 1947:8–1948:23.

102. *Id.* at 62:18–64:6, 67:6–23, 1629:2–24.

103. *Id.* at 60:11–22, 76:1–20.

104. *Id.* at 617:2–619:22. And he pointed out that Citi took an equity position in the transaction as well, placing them in the riskiest long position as to one slice of the deal. *Id.* at 1474:13–1475:20.

105. *Id.* at 2009:10–22, 2012:6–2013:5.

106. *Id.* at 2036:23–2037:14.

107. *Id.* at 2037:9–14.

108. *See* Peter Lattman, *S.E.C. Gets Encouragement from Jury That Ruled Against It*, N.Y. TIMES: DEALBOOK (Aug. 3, 2021, 5:23 PM), https://archive.nytimes.com/dealbook.nytimes.com/2012/08/03/s-e-c-gets-encouragement-from-jury-that-ruled-against-it/. In light of the SEC's failure to establish even negligence by an actor who could be readily proven to have been aware of most or all material particulars of the Class V Funding III deal, it is

The Stoker trial, about a transaction that differed marginally, if at all, from routine large MBS deals, demonstrates the problem the government faced in proving fraud in this market. In arm's length trades between sophisticated financial corporations, a claim of fraud, at least criminal fraud, must be based on a false statement, a failure to disclose in the face of a fiduciary-like duty of disclosure (evidence of which was lacking in these cases), or a failure to state what would be necessary to prevent an otherwise truthful representation from being clearly misleading—plus proof of the high mens rea of intent to defraud.[109] In the Abacus and Class V Funding III transactions, the government thought it found two specific deals that varied enough from the norm of such trades to clear the lower civil bar. One did, but barely and only on a negligence standard. The other did not, for reasons that defense arguments and the jury's verdict made clear rested on the fundamental nature of the parties and the market.

c. Litvak

The government's most successful effort to secure a criminal conviction for fraud in the sale of MBS products was its prosecution in federal court in Connecticut of Jesse Litvak, a trader for Jeffries & Company. Perhaps ironically, Litvak was convicted in connection with the sale of distressed MBS traded post-collapse, when financial institutions were attempting to recover salvage value from heaps of broken products.[110]

Because the value of such securities was both low and highly debatable in 2010, price negotiation was freewheeling, enhancing opportunities for fraud. Litvak was convicted twice for telling fibs to his counterparties in post-crisis MBS trades about such things as how much he had paid for a security, whether he was trading for his own book or someone else's, or how much he expected to earn on a deal—to jawbone them into a better price for Litvak.[111] His conversations were a recorded matter of record, per brokerage house procedures. And, of course, Litvak's behavior occurred at a time when all involved knew that MBS, and sales practices around them, had come under enormous scrutiny.

Still, the Second Circuit Court of Appeals reversed Litvak's convictions both times—in long appellate opinions that followed complex, expensive trials. The court's opinions conceded that the

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implausible to think the government would have had more success, civilly or criminally, pursuing more senior officials at Citi. Of course, persons serving as jurors, even those who heard the evidence from Stoker's trial, could not be expected to understand what an actual trial of such a case would involve.

109. There is some question whether this third theory can support a criminal charge of securities fraud. *See* Buell, *supra* note 34, at 555–56.

110. United States v. Litvak (*Litvak I*), 808 F.3d 160, 165, 190 (2d Cir. 2015); United States v. Litvak (*Litvak II*), 889 F.3d 56, 59, 72 (2d Cir. 2018).

111. *Litvak I*, 808 F.3d at 167; *Litvak II*, 889 F.3d at 72.

government had a facial case against Litvak for securities fraud but quarreled both times with the trial court's handling of key evidentiary issues involving experts and other witnesses.[112] These evidentiary disputes mattered a great deal, and caused both reversals, because they went to whether Litvak was given a fair opportunity to air claims that his fabrications were not material in this market and that the routine use of them at his firm and in the market, when he was acting in no special agency or broker role on behalf of his counterparties, showed that he uttered his fibs in good faith, without intent to defraud.[113]

The appellate court clearly saw the question of what sharp traders in a kind of securities flea market—a novel, murky one at that—might do and say to gain marginal advantage over one another as borderline territory in which to situate a criminal prosecution for fraud. Despite considerable resources devoted to the prosecution, in jurisdictions not known to be hostile to securities enforcement, the government was unable to imprison Litvak even with recorded lies to show two juries. After the second reversal on appeal, the government dismissed its case.[114]

The government was able to secure and uphold one conviction of a post-crisis trader of distressed MBS, Michael Gramins of Nomura Securities, who negotiated sales using misrepresentations much like those Litvak employed.[115] It must have helped the government's case against Gramins a great deal that prosecutors could show both that Gramins acted after the indictment of Litvak and that Gramins had attended a compliance session at which the Litvak indictment and specific examples of Litvak's misrepresentations were discussed as things not to say—after which Gramins went back to lying to his counterparties.[116] The trial court set aside the jury's guilty verdict in Gramins for the same reasons Litvak's conviction was reversed the second time: admission of testimony that incorrectly suggested Gramins was performing an agency role while making these trades, and thus bore a heightened duty.[117] This time, the appellate court reversed the ruling below and reinstated the conviction, finding that

112. *Litvak I*, 808 F.3d at 167; *Litvak II*, 889 F.3d at 72.

113. The first opinion objected to the trial court's exclusion of expert testimony about how the distressed MBS market operated and what information traders relied on in determining prices. *Litvak I*, 808 F.3d at 182. The second opinion found reversible error in the trial court having allowed a counterparty to testify that Litvak was acting as his "agent" (and thus would have owed candor), a mischaracterization of a market involving arm's length dealing. *Litvak II*, 889 F.3d at 68.

114. *Litvak II*, 889 F.3d at 72.

115. United States v. Gramins, 939 F.3d 429, 436, 457 (2d Cir. 2019).

116. *Id.* at 439–40.

117. *Id.* at 452.

the disputed testimony had not portrayed Gramins as an agent.[118] Nonetheless, separate juries acquitted three other Nomura traders prosecuted for similar conduct during the same period.[119]

Consider the resources involved in convicting Litvak and Gramins, defending or losing those convictions on appeal, and trying the other cases to acquittals. Even with the much easier context for the government in proving fraud once MBS had cratered in value and issues of misconduct in the sale of MBS were front and center in the financial markets. And even with the ability to show that Gramins had been trained on how not to commit fraud based on the government's theory of fraud in Litvak. These cases do not suggest a winning path for prosecutors to have followed in a mistakenly abandoned campaign against fraud in pre-crash MBS trading. Rather, they show the improbability of securing more than a handful of, or fewer, convictions against traders, even with extensive resources and recorded false statements.

d. Bear Stearns

A familiar milepost in accounts of the DOJ's handling of the MBS fiasco is the prosecution in the Eastern District of New York of Ralph Cioffi and Matthew Tannin of Bear Stearns, an investment firm that famously collapsed during the financial crisis. Cioffi and Tannin managed a hedge fund portfolio for Bear Stearns that contained MBS-related assets.[120] The prosecutors' theory was that the defendants continued to recruit and accept investors into the fund even as they knew that the MBS market was teetering and the fund was not sound.[121] The government's case rested largely on emails in which Cioffi and Tannin shared alarming statements about their lack of confidence in the MBS market and their fear of impending collapse.[122]

A Brooklyn jury, not likely full of citizens admiring of bank traders and executives, acquitted Cioffi and Tannin.[123] In post-verdict

118. *Id.* at 449–50.

119. *See infra* Table A3. A jury could not reach a verdict on one count as to one of the Nomura defendants; the government chose not to retry that single charge.

120. *See* Indictment at 2–3, United States v. Cioffi, 668 F. Supp. 2d 385 (E.D.N.Y. 2009) (No. 08-CR-00415).

121. *See id.* at 7–8; Grant McCool, *Ex-Bear Stearns Men Lied, US Says in Trial Closing*, REUTERS (Nov. 5, 2009, 1:32 PM), https://www.reuters.com/article/id/USN05122946/; Zachery Kouwe, *Final Arguments Against 2 in Bear Stearns Fraud Case*, N.Y. TIMES (Nov. 5, 2009), https://www.nytimes.com/2009/11/06/business/06bear.html. Because both defendants were acquitted, negating further appeal, the transcript of their trial is not on file.

122. Kouwe, *supra* note 121.

123. Grant McCool & Michael Erman, *Jury Acquits Ex-Bear Stearns Hedge Fund Managers*, REUTERS (Nov. 11, 2009, 2:51 AM) https://www.reuters.com/article/idUSLNE5AA001/.

interviews, jurors reported that the government did not have a clear enough case to satisfy its burden of proof.[124] Defense counsel had done an effective, if perhaps obvious, job of showing other emails in which Cioffi and Tannin took different views about the market.[125] They were portrayed as uncertain actors debating risk in an uncertain market.[126] One juror observed that they had simply been chosen as scapegoats for the larger crisis, and another said that she saw nothing wrong in their conduct and would hire them to invest her own money.[127]

It is difficult to evaluate the standard claim in public discussion over post-crisis prosecutions that the Bear Stearns trial loss scared the DOJ away from pursuing more fraud cases against traders at large institutions. Prosecutors of course observed the result and thought about its implications. Prosecutors know that every jury and every courtroom is unique and are used to viewing a single outcome at the trial level reasonably and in context. Still, the Bear Stearns result seemed to rest on prosecutors having encountered a more ambiguous picture about fraud at trial than, at the indictment stage, they had anticipated being able to paint. If the lesson was that better evidence of intentional deceit would be needed to sustain convictions out of activities in the MBS market, that seemed a reasonable conclusion to draw. However, it seems far too much to conclude that the Bear Stearns result simply scared DOJ prosecutors away from spending any more resources on the question of whether there was fraud in MBS transactions. No person involved has said anything of the sort.

e. Underwriting Theory and FIRREA Settlements

The most financially impactful enforcement measure the government took in response to the MBS market collapse was when—after limited prosecution success and abundant criticism of its failure to act—the DOJ turned its efforts to a mostly forgotten statute called the Financial Institutions Reform, Recovery, and Enforcement Act

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124. *Id.*

125. *See* Roger Parloff, *Bear Stearns Case: Not So Simple*, CNN FORTUNE MAG.: LEGAL PAD (Oct. 15, 2009, 9:46 AM), https://money.cnn.com/2009/10/15/news/companies/bear_stearns_trial.fortune/index.htm.

126. *Id.*

127. McCool & Erman, *supra* note 123; Stacie-Marie Ishmael, *The* U.S. v. Cioffi *and Tannin, or How Not to Scare Would-Be Fraudsters*, FIN. TIMES (Nov. 11, 2009), https://www.ft.com/content/eb226849-e596-3f20-8c6c-8d9a240930b2. Professor Coffee, in his recent book criticizing the DOJ's approach to corporate prosecutions, also attributes the government's loss in the case to the ambiguity of the defendants' email communications and the fact that they were "trying to keep a sinking ship afloat" rather than filching from victims in the more classic manner of white-collar criminals. COFFEE, *supra* note 9, at 22–23.

(FIRREA).[128] This law, enacted at the time of the savings and loan banking crisis of the late 1980s, provides the DOJ with power to sue civilly, on a preponderance of the evidence standard, to recover financial penalties for violations of the criminal fraud statutes.[129] In other words, the government must prove the elements of criminal fraud, but only under a more likely than not standard. Also, of course, no one can be punished with imprisonment.[130]

The DOJ cleverly invoked FIRREA's application to MBS trading and underwriting practices as a vehicle to extract billions of dollars from the largest surviving financial institutions for their practices in packaging and marketing MBS products.[131] Nearly every institution chose to settle and move on without litigating the question of whether there had been fraud.[132] FIRREA provides no mechanism for individual criminal prosecution, and the DOJ did not seek civil penalties from any individual.[133]

However, not every FIRREA case settled. Bank of America (BOA) chose to contest its liability for some of the allegedly fraudulent underwriting practices of Countrywide, an entity that BOA acquired at the government's urging when the financial crisis was at its peak of systemic risk.[134] The government's civil case for fraud against BOA, as successor to Countrywide's liability, was based on the development and use at Countrywide of a program called the "High Speed Swim Lane."[135] This was a means of rushing very risky mortgages into

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128. 12 U.S.C. § 1833a.

129. *Id.* § 1833a(e)–(f).

130. *See id.* § 1833a(a)–(b).

131. *See, e.g.*, Press Release, U.S. Dep't of Just., Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages (Nov. 19, 2013), https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement.

132. *See, e.g.*, Press Release, U.S. Dep't of Just., Wells Fargo Agrees to Pay $2.09 Billion Penalty for Allegedly Misrepresenting Quality of Loans Used in Residential Mortgage-Backed Securities (Aug. 1, 2018) [hereinafter Press Release, *Wells Fargo*], https://www.justice.gov/opa/pr/wells-fargo-agrees-pay-209-billion-penalty-allegedly-misrepresenting-quality-loans-used; Press Release, U.S. Dep't of Just., General Electric Agrees to Pay $1.5 Billion Penalty for Alleged Misrepresentations Concerning Subprime Loans Included in Residential Mortgage-Backed Securities (Apr. 12, 2019), https://www.justice.gov/opa/pr/general-electric-agrees-pay-15-billion-penalty-alleged-misrepresentations-concerning-subprime.

133. *See* Press Release, *Wells Fargo*, *supra* note 132 (explaining that FIRREA authorizes the DOJ to "seek civil penalties against financial institutions that violate various predicate offenses").

134. United States *ex rel.* O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 653 (2d Cir. 2016).

135. *Id.*

securitized portfolios without following previous underwriting procedures that were more discerning on metrics of borrower risk.[136]

The government prevailed against BOA at a trial in the Southern District of New York but lost on appeal before the Second Circuit. The appellate court ruled that Countrywide had not defrauded purchasers of securities in the manner alleged, on simple logic.[137] At the time Countrywide entered into a master agreement with buyers (primarily government entities Fannie Mae and Freddie Mac), its representations about underwriting processes were not false, much less intentionally so, the court said.[138] The government had no proof that the seller (Countrywide) did not at that time intend to fulfill its contractual commitments. When Countrywide later relaxed underwriting procedures, it may have done so in breach of contract, but it made no representation to the buyers at the time that it was doing anything, one way or the other, with its underwriting procedures, much less did it make any false representation. Thus, there was no fraud either at execution of the contract or during its performance. The court saw this as a problem of breach in a course of dealing contract, not fraud.[139]

Whether the Second Circuit's analysis was right about the line between breach and fraud (there is an argument that the court was wrong), the government's theory about disregarded underwriting commitments and reckless underwriting practices failed as a vehicle for establishing even civil liability. For those who argued that the difficulties in convicting one MBS trader for defrauding another in a particular sale could have been avoided by turning to theories about bad underwriting (as most know, there was lots of evidence of shockingly weak practices late in the bubble), the Second Circuit's decision in the BOA matter, which was civil only and included no individual defendant, should be sobering.

f. Serageldin

Kareem Serageldin, a former Credit Suisse manager who supervised the bank's global "structured credit trading" operation,[140] warrants comment because he has been described as "the only Wall Street executive sent to jail for his part in the financial crisis."[141] Serageldin, like any trading desk boss, was principally concerned with the profit and loss numbers he showed the bank's top

136. *Id.* at 654–55.
137. *Id.* at 666.
138. *Id.* at 663–64.
139. *Id.* at 658.
140. *See* Joe McGrath, *The Making of a Mismarker: The Case of the Only Banker Jailed in the U.S. for His Role in the Financial Crisis*, 2020 U. CHI. L. REV. ONLINE 44, 44 (2020).
141. Eisinger, *Why Only One*, *supra* note 14.

management from the books under his supervision.[142] He had a record at Credit Suisse of running a shop that produced very well. In early 2007, as tremors began to roll across the U.S. housing market, Serageldin's division was heavily invested in credit instruments that were forms of MBS and were long the U.S. home loan market.[143]

As the books began to turn against his team, Serageldin made two bad decisions. First, he permitted his traders to begin marking their positions differently, and without solid basis, to conceal mounting losses.[144] This was possible because of the inherently subjective question of value associated with complex, often bespoke, MBS products traded over the counter, with no index or exchange mediating the question of book value. Second, Serageldin sent internal emails that landed in the hands of the SEC, in which he essentially stated that the team was engaged in mismarking and that it needed to be hidden from supervisors.[145] When the mismarking was discovered, Credit Suisse was compelled to restate its earnings downward, over two quarters of 2007, by over $1 billion.[146] The bank fired Serageldin and reported its findings to the government.[147]

Once the SEC had charged Serageldin and two others, the DOJ recognized low-hanging fruit.[148] Following the indictment, Serageldin decided not to attempt the kind of rationalization-based defenses that Fabrice Tourre and Brian Stoker used in their litigations with the SEC. He pled guilty to securities fraud, explaining to the judge that he decided to engage in wrongful conduct to protect and maintain his reputation within Credit Suisse.[149] The U.S. Sentencing Guidelines called for a term of approximately five years in prison.[150] The judge observed that Serageldin had been influenced by the culture within the bank, that the "financial world [had been going] rather berserk" at the time, and that the court could "infer" (the judge referenced no evidence) that Serageldin's crime "was duplicated by many others in

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142. *See* Indictment at 5–6, United States v. Serageldin, No. 12-CR-00090 (S.D.N.Y. 2013); Complaint at 15–18, SEC v. Serageldin, No. 12-CV-00796 (S.D.N.Y. Feb. 1, 2012); Transcript of Plea Proceeding at 15–22, *Serageldin*, No. 12-CR-00090; Transcript of Sentencing Hearing at 5–8, *Serageldin*, No. 12-CR-00090.

143. *See* McGrath, *supra* note 140, at 45.

144. *Id.*

145. *See* Indictment, *supra* note 142, at 12–14.

146. *See* McGrath, *supra* note 140, at 45.

147. See Eisinger, *Why Only One*, *supra* note 14.

148. It is not clear why the DOJ charged only Serageldin among those sued by the SEC. A reasonable inference is that Serageldin was the author of the most damning emails.

149. Transcript of Plea Proceeding, *supra* note 142, at 2, 15, 20–21.

150. *Id.* at 10.

many other departments."[151] The judge sentenced Serageldin to 30 months in prison.[152]

Two observations are relevant to this Article from the limited record of Serageldin's case. First, this case involved accounting fraud stemming from the marking of the value of a bank's MBS books, not fraud in the sale or purchase of any MBS instrument with a counterparty. Accounting misconduct may be a more tractable route to a fraud prosecution of corporate personnel than cases of trading fraud between sophisticated players in securities markets. Thus, the question is whether it is right to think that provably criminal mismarking of books, or other forms of financial reporting fraud, was widespread within financial institutions holding long positions in MBS, as the judge in Serageldin's case speculated. Second, Serageldin made the error of confessing to fraud in emails, doing so under the noses of senior management of a large public company that, given its SEC reporting and auditing obligations, had no choice but to report the fraud and sacrifice Serageldin once it discovered the mismarking.

It is reasonable to infer that Serageldin was approached by prosecutors, through his counsel, about whether he could testify that anyone above him at the bank was aware of the mismarking—something that could have earned him a further sentence reduction. Apparently Serageldin could not, and indeed emphasized his efforts to hide his conduct from his supervisors when he tried to express remorse to the sentencing judge. All things considered, Serageldin's case seems a poor vehicle for the argument alluded to by his judge, and pursued at length by one journalist,[153] that many more such cases were hanging low in the banking orchard if only prosecutors had been willing to pick them.

g. Lehman Brothers

To address the question of whether accounting fraud prosecutions might have been the winning law enforcement response to the collapse of the MBS market, it is necessary to take up the well-known case of bankrupted Lehman Brothers.[154] In short, the main vehicle for Lehman's misportrayal of itself was a deal structure called "Repo 105," which allowed Lehman to engage in over $100 billion of transactions that the rules (maybe) allowed Lehman to treat as income-generating sales but were in substance only more borrowing.[155]

Enron had used an analogous vehicle almost a decade earlier, which played a large role in the company's bankruptcy but no part in

151. Transcript of Sentencing Hearing, *supra* note 142, at 38–51.

152. *Id.* at 51.

153. EISINGER, THE CHICKENSHIT CLUB, *supra* note 14, at ix.

154. *See* BUELL, *supra* note 26, at 13–17.

155. Report of Anton R. Valukas at 732, 797–800, *In re* Lehman Bros. Holdings Inc., No. 08-13555 (S.D.N.Y. 2010).

the ensuing criminal prosecutions.[156] The problem for prosecutors in both the Lehman and Enron instances was that professional advisors blessed the deal structures and their accounting treatment, even if later forensic reviews proved those advisors to have been arguably wrong about the structures' permissibility.[157] These approvals presented a nearly absolute barrier to convicting of criminal fraud any executive who relied on them. Without evidence—a damning email or testimony about an overly candid meeting, for example—that a corporate manager in this context contemporaneously knew the advice to be bogus, intent to defraud is impossible to prove in the face of reliance on such advice, especially in a criminal case.[158]

In one way, accounting fraud is a more viable theory of prosecution than trading fraud, at least in the context of large public banking corporations. When the victims are shareholders and the math is a matter of an official record that the company and its management have owned—as a regulatory condition of offering shares on public markets—it is more straightforward for a prosecutor to prove deception than in the far murkier area around what sophisticated traders may or may not say or do when negotiating over-the-counter deals.[159] This distinction explains much about how the government's "Enron era" prosecutions arose and succeeded.[160]

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156. *See* Peter J. Henning, *In Lehman's Demise, Some Shades of Enron*, N.Y. TIMES: DEALBOOK (Mar. 12, 2010, 8:00 PM), https://archive.nytimes.com/dealbook.nytimes.com/2010/03/12/in-lehmans-demise-some-shades-of-enron/.

157. *See id.*; *see also* Report of Anton R. Valukas, *supra* note 155, at 794–95.

158. It is black-letter law in federal court that a good-faith belief in the propriety of one's conduct based on reliance on professional advice negates the required element of intent to defraud. *See, e.g.*, United States v. Dees, 34 F.3d 838, 842 (9th Cir. 1994); United States v. Dunn, 961 F.2d 648, 650 (7th Cir. 1992); United States v. Preston, 634 F.2d 1285, 1294 (10th Cir. 1980).

159. For extensive discussion of the problem of criminal fraud based on statements in negotiations, see the argument between majority and dissent in *United States v. Weimert*, 819 F.3d 351, 370–71 (7th Cir. 2016) (Flaum, J., dissenting).

160. Some ask why it has not been possible to send many more CEOs to prison given that the CEOs of both Enron and Worldcom, among others, received long sentences in the early 2000s. *Sarbanes-Oxley's Lost Promise: Why CEOs Haven't Been Prosecuted*, REUTERS (July 27, 2012, 5:45 PM), https://www.reuters.com/article/idUS3512973425/; *You Asked, We Answered: Why Didn't Any Wall Street CEOs Go to Jail After the Financial Crisis?*, MARKETPLACE, https://features.marketplace.org/why-no-ceo-went-jail-after-financial-crisis/ (last visited Aug. 2, 2024). Almost all of these cases were securities fraud prosecutions based on accounting fraud: misreporting quarterly and annual financial results and misleading shareholders and other investors when speaking publicly about those results. *See, e.g.*, United States v. Ebbers, 458 F.3d 110, 125–26 (2d Cir. 2006); United States v. Skilling, 554 F.3d 529, 534–35 (5th Cir. 2009). With public shareholders, including many retail investors and employees, as the victims of the misrepresentations and a clear numerical record

On the other hand, however, accounting and public financial reporting are thickly enmeshed in a process involving lawyers, auditors, and other gatekeepers and intermediaries. This process implicates the vast, thorny, and always contestable matter of what the highly detailed accounting and reporting rules allow. Repo 105 and structures like it are designed to achieve a result that chafes against the spirit of the reporting regime while hewing to its letter.[161] The idea is to bake in a defense to liability. An analogy is to sophisticated tax shelters. Sometimes the clever idea might turn out not to work legally. But proving beyond a reasonable doubt that a non-expert who paid for the idea knew it would not work is almost always a losing proposition for the government.[162]

It is thus not surprising that the collapse of the MBS market did not produce a wave of prosecutions of personnel from companies that were long the market for defrauding the companies' investors about how risky those firms were. One can assert that prosecutors might have found such cases if the DOJ had devoted more resources to the project. But this claim should be viewed skeptically given the ample incentives, including the availability of private class actions, for others to ferret out accounting fraud.

Lehman, with the massive tome of forensic work filed by an examiner appointed by the bankruptcy court, is a case in point. We

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based on the extensive reporting regime for large companies, crimes became provable high on the corporate ladder once C-suite level employees could be charged with cases that left them little choice but to cooperate and testify about closed-door meetings. *See* Jonathan M. Karpoff et al., *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581, 582–84 (2008). Still, large parts of what misled observers about the financial situation of Enron played no role in the criminal case because, like Lehman Brothers' Repo 105 borrowing stratagem, they had been approved—even if questionably—by lawyers and accountants, making proof of intent to defraud by senior executives almost impossible. *Enron's Lawyers: Eyes Wide Shut?*, FORBES, https://www.forbes.com/2002/01/28/0128veenron.html (June 6, 2013, 2:09 PM). Good faith belief in the propriety of an accounting treatment can negate proof of intent to defraud. *Ebbers*, 458 F.3d at 125–26; United States v. Simon, 425 F.2d 796, 805–06 (2d Cir. 1969).

161. *See* Jacob Goldstein, *Repo 105: Lehman's 'Accounting Gimmick' Explained*, NPR (Mar. 12, 2010, 11:55 AM), https://www.npr.org/sections/money/2010/03/repo_105_lehmans_accounting_gi.html.

162. For example, in the government's largest-ever criminal case involving fraudulent tax shelters, the defendants were the professional advisers who designed and sold the shelters, while the taxpayers were effectively treated as victims. *See* Letter from David N. Kelley, U.S. Att'y, S.D.N.Y., to Robert S. Bennett, Att'y for KPMG (Aug. 26, 2005), https://www.justice.gov/archive/usao/nys/pressreleases/August05/kpmgdpagmt.pdf; Indictment, United States v. Stein, No. 05-CR-888 (S.D.N.Y. 2005); TANINA ROSTAIN & MILTON C. REGAN, CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY (2016).

know what prosecutors likely would have found because much of the work was done for other reasons. Leaks to the *New York Times* later revealed that, after a major investigation, top SEC personnel heatedly debated whether to file civil charges in connection with Repo 105 and concluded that even a regulatory case was not winnable.[163] Lehman Brothers thus stands as better evidence for the claim that individual prosecutions following the MBS fiasco stood mostly out of reasonable reach for the government than as evidence, as it sometimes has been used,[164] for the argument that the government left plenty of prosecutable cases on the table.

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To summarize, the government prosecuted eight employees of financial institutions in connection with MBS dealing.[165] Five were acquitted, one pled guilty, and two were convicted at trial, with one conviction overturned on appeal.[166] The SEC tried two cases, losing one and winning the other. The agency settled with 32 persons, 20 of whom agreed to pay fines.[167] The average civil fine was just over $800,000.[168]

The preceding examination of MBS-related enforcement actions reveals a flaw in the argument that the government has failed to pursue readily achievable deterrence benefits from a much greater number of individual prosecutions. In its current form, that argument

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163. Ben Protess & Susanne Craig, *Inside the End of the U.S. Bid to Punish Lehman Executives*, N.Y. TIMES: DEALBOOK (Sept. 8, 2013, 8:57 PM), https://archive.nytimes.com/dealbook.nytimes.com/2013/09/08/inside-the-end-of-the-u-s-bid-to-punish-lehman-executives/. Jesse Eisinger has argued that there might have been another angle in Lehman, also parallel to Enron: prosecution based on public statements just prior to bankruptcy about the viability of the firm, particularly a statement by Lehman's chief financial officer that the firm "remains very strong." EISINGER, THE CHICKENSHIT CLUB, *supra* note 14, at 245. While some such qualitative statements were part of the prosecutions of former Enron Chairman Kenneth Lay and former CEO Jeffrey Skilling, the statements could be tied to underlying accounting fraud in which the executives were implicated. *See Skilling*, 554 F.2d at 554. It would be highly questionable for a prosecutor to bring a criminal securities fraud case based solely on a statement like "strong."

164. I thus disagree with Professor Coffee that "there was sufficient evidence of fraud by senior Lehman officers that a reasonably aggressive prosecutor might have brought the case under the circumstances." COFFEE, *supra* note 9, at 27. Coffee nods to the issue of professional advice but does not explain how a prosecutor could have surmounted that problem. *Id.* He mentions a prior prosecution that succeeded involving a failing liquidity situation in a banking institution. *Id.* However, the citation is not to the record of that case but to a brief passage in Jesse Eisinger's book. *See* EISINGER, THE CHICKENSHIT CLUB, *supra* note 14, at 242.

165. *See infra* Table A1.

166. *See infra* Table A1.

167. *See infra* Table A2.

168. *See infra* Table A2.

was greatly driven by reactions to the handling of MBS matters. It has been easy to assert that cases that were never brought could have been won, because those cases never existed to test the proposition. But enough MBS cases were brought or examined through other means, and a sufficient litigation record exists, to demonstrate that a greater will to charge more people criminally would have been unlikely to alter the deterrent effects of post-crisis enforcement.

B. Benchmark Frauds: Libor and Forex

The purpose of this Article is to advance debate about individual liability for corporate crime generally, beyond arguments about the housing-related financial crisis of 2008 and after. Staying within the realm of securities dealing, one can find an even more extensive record of telling prosecutions in the first big banking scandal to arise after the MBS meltdown. This was known as the Libor affair, though it is more accurately described as a collection of misconduct involving interest rate benchmark manipulation.[169]

These cases seemed to come to the DOJ as manna from heaven, at a time when the government had endured withering criticism for its prosecutorial response to the financial crisis.[170] Big bank traders were discovered, through recorded online chats, to have manipulated major market indices used to price trillions of dollars in transactions globally while saying things like "there's bigger crooks in the market than us guys!" and "i'm not setting libor 7 [basis points] away from the truth . . . i'll get [the bank] banned if i do that."[171] The record was awash in explicit discussions about manipulating data that was supposed to be objective, to make trading positions more profitable.

As it turned out, most of the Libor defendants avoided prison. They convinced judges and juries, as argued by some in the MBS

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169. Libor stands for the London interbank offered rate. *See* Miranda Marquit, *What Is Libor and Why Is It Being Abandoned*, FORBES (Feb. 16, 2023, 10:09 AM), https://www.forbes.com/advisor/investing/what-is-libor/. The most informative articles on the phenomenon in legal scholarship are Gina-Gail S. Fletcher, *Benchmark Regulation*, 102 IOWA L. REV. 1929 (2017), and Andrew Verstein, *Benchmark Manipulation*, 56 B.C. L. REV. 215 (2015).

170. *See* Fletcher, *supra* note 169, at 1932–34.

171. *See* Floyd Norris, *After the Fraud, the Fog Around Libor Hasn't Lifted*, N.Y. TIMES (Oct. 31, 2013), https://www.nytimes.com/2013/11/01/business/after-fraud-the-fog-around-libor-hasnt-cleared.html; Statement of Facts to Non-Prosecution Agreement between the United States Department of Justice, Criminal Division, Fraud Section and UBS AG (Dec. 18, 2012) [hereinafter UBS Non-Prosecution Agreement], https://www.justice.gov/iso/opa/resources/6942012121911725320624.pdf. Two book-length treatments of the facts of the Libor scandal reward the reader with interest in delving deeper. *See generally* LIAM VAUGHAN & GAVIN FINCH, THE FIX: HOW BANKERS LIED, CHEATED AND COLLUDED TO RIG THE WORLD'S MOST IMPORTANT NUMBER (2017); DAVID ENRICH, THE SPIDER NETWORK: HOW A MATH GENIUS AND A GANG OF SCHEMING BANKERS PULLED OFF ONE OF THE GREATEST SCAMS IN HISTORY (2017).

market, that they did not act with sufficient criminal intent and dealt with knowledgeable counterparties who were well aware the market was a shark tank.[172] From at least 42 prosecutions in the United States and the United Kingdom, only 11 persons were convicted at trial, while 9 pled guilty. Of the 20 convicted individuals, only 9 served any time in prison. There were 11 acquittals, 15 dismissals, and 4 appellate reversals.[173] British regulators brought 12 civil enforcement cases and the SEC none. In the UK, 12 individuals received industry bans and four were fined, with the average fine at £186,250.

Before turning to specific prosecutions, the modus operandi in these benchmark frauds worked as follows.[174] Many large financial institutions have trading desks that engage in derivative transactions known roughly as interest rate swaps. Traders across the world make deals—sometimes to help institutions hedge rate volatility risk, and sometimes to chase profits from betting on rate movements—constructed around four major components.[175] The first is the interest rate being traded on itself, which might be the benchmark rate in London (Libor), Europe (Euribor), or Tokyo (Tibor). The second is time (tenor), that is, the period after which the trade will settle, expressed in months. The third is the negotiated rate specific to the deal (e.g., "Libor plus 10 basis points," or hundredths of one percent). The fourth is the currency and market in which the interest would accrue (e.g., U.S. dollars on deposit in London).

In a common deal form, Sue at Bank Huge in London and Hal at Giant Bank in New York might enter into a swap agreement in which Sue will take the risk of a floating rate in the contract and Hal will be guaranteed a fixed rate up front—for example, over six months, on U.S. dollars in London, at Libor plus 10 basis points. Whether Sue makes out from taking the upside risk, or Hal ends up the winner by having taken the fixed position, depends on what happens over those six months to Libor, which is the one element of the deal that fluctuates.

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172. *See, e.g.*, Jason Breslow, *Lanny Breuer: Financial Fraud Has Not Gone Unpunished*, PBS: FRONTLINE (Jan. 22, 2013), https://www.pbs.org/wgbh/frontline/article/lanny-breuer-financial-fraud-has-not-gone-unpunished/.

173. A complete summary of the case dispositions is provided *infra* Tables B1 & B2. A full list of individuals against whom actions were brought, with specific results in each case, is provided *infra* Tables B3 & B4.

174. In addition to the sources cited in note 171 *supra*, good descriptions of the evidence in the cases and the modus operandi of the fraud are found in the statements of facts accompanying the DOJ's settlements with major banks in the Libor affair. *See, e.g.*, Letter from Denis J. McInerney, U.S. Dep't of Just. Att'y, to Gray Spratling, Esq., and David P. Burns, Esq. (Dec. 18, 2012) [hereinafter DOJ Letter], https://www.justice.gov/iso/opa/resources/13920121219117458457 57.pdf; UBS Non-Prosecution Agreement, *supra* note 171.

175. *See, e.g.*, UBS Non-Prosecution Agreement, *supra* note 171, at 8–9, 41.

The fraud comes when Sue realizes that, by virtue of working at Bank Huge, she can affect what number Libor will be on the day six months later when her deal with Hal settles—and that Hal won't know Sue plans to manipulate Libor or is doing so. Conveniently for a trader who earns profit-based bonuses, the risk for Sue in such deals begins to disappear. Sue could do this because of the way an independent organization called the British Banking Authority (BBA) administered Libor. The BBA set the rate daily by asking a panel of the biggest banks, including Bank Huge in the hypothetical, what they presently were paying in interest to borrow cash from each other in the London market in the short term (i.e., overnight loans). Each day, the BBA discarded the top and bottom quartiles and averaged the remaining banks' submissions to produce Libor.

All Sue needed was a way to influence Bank Huge's submissions to the BBA. This turned out to be easy. At bank after bank, the lowly "rate submitters" who sent the daily reports to the BBA were happy to please the highly compensated traders by moving the number to suit the traders' needs, depending on what interest rate derivative deals on the traders' books were maturing on any day. And all were happy to talk about doing so on recorded instant messaging systems within the banks.

Fraud prosecutions would seem to unfold easily from this. If Sue got Bank Huge's submitter to lower the daily submission by some basis points on the day her trade with Hal came up for settling—a little will do a lot in this market, because the deals have huge notional values totaling into the trillions of dollars—and Libor ended up lower that day, Sue made more money off her trade with Hal than she otherwise would have. And Sue's undisclosed manipulation of an ostensibly reliable and objective benchmark, without Hal's knowledge, defrauded Hal, putting riskless profits into Sue's pocket. One could argue that Sue affirmatively lied to Hal when she said let's do this deal at "Libor plus 10 basis points," knowing that Hal believed "Libor" to mean a credible independent benchmark when Sue knew that, in this context, it really meant "Libor as I later manipulate it in my favor."

This conduct seemed to involve clearer and more provable criminality than allegations of fraud in the MBS market. The manipulation could be shown easily from recordings and quantified to the dollar in how it benefited the perpetrators. The chats were full of incriminating statements about how the traders were getting away with a big, improper play and should be careful not to be too flagrant about it.[176] Despite all of this, prosecutors reaped very poor results.

176. *See id.* at 28, 34.

1. *Allen and Conti (Rabobank)*

Anthony Allen and Anthony Conti worked in London for Rabobank, a Dutch financial institution with U.S. operations. Conti was a rate submitter for Rabobank.[177] Allen, as head of the cash desk in London, was his supervisor.[178] Prosecutors in the Southern District of New York mostly used the bank's record of electronic communications to show that Conti frequently accommodated requests from traders to alter daily submissions to the BBA to favor positions coming due for settlement, and that Allen knew and approved this, sometimes doing it himself.[179] The government's theory of fraud was stated in terms of the defendants' "responsibility to act honestly and fairly" in setting LIBOR as a "good-faith estimate of borrowing" and to use "their honest, best estimate of Rabobank's borrowing costs" when reporting to the BBA.[180]

The government called as witnesses several co-conspiring Rabobank employees who pled guilty in hopes of receiving lower sentences. Most prominent among them was Paul Robson, a trader who, in a chat with another trader who pled guilty, wrote the best line in the vast trove of electronic communications from the Libor-related investigations: "There's bigger crooks in the market than us."[181] Allen, one of the two trial defendants, was on record saying to another trader, "I am fast turning into your Libor bitch," shortly followed by, "No worries, mate, glad to help."[182] Allen chose to take the stand. His testimony attempting to explain these communications, not surprisingly, lacked credibility even on the dry trial record.[183]

This picture would seem to show about the best evidentiary and legal case for fraud inside a major financial institution that a prosecutor in this era could hope to come across. Nevertheless, the case encountered obstacles and, ultimately, failed due to a defect of criminal procedure. The Allen and Conti prosecution remains telling because the procedural error was of a type that can easily reoccur in cross-border investigations. Moreover, an ensuing appellate opinion in a related case contradicted even the government's central theory of liability.[184]

The defense emphasized throughout the trial that, at the relevant time, the major banks engaged with each other in few or no short-term cash lending transactions.[185] The emergence of the

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177. *See* Trial Transcript at 62:5–20, United States v. Allen, No. 14-CR-00272 (S.D.N.Y. 2015).
178. *Id.*
179. *See id.* at 328:4–343:3, 357:19–360:14.
180. *Id.* at 63:16–23, 77:9–16.
181. *Id.* at 92:17–93:13.
182. *Id.* at 1449:9–25.
183. *Id.* at 1208:18–1209:6, 1211, 1219:8–1224:9.
184. United States v. Connolly (*Connolly II*), 24 F.4th 821 (2d Cir. 2022).
185. *See, e.g.*, Trial Transcript, *supra* note 177, at 82:1–8.

financial crisis, and a global credit squeeze, dried up that market. Daily Libor submissions, therefore, were only an "estimate" or a "rough number," and an answer to a "hypothetical question."[186] Robson conceded on cross-examination that, on his own initiative, he wrote to the BBA well before there was any investigation and complained that banks were submitting inaccurate numbers—that he had called the whole process "a charade."[187] Another cooperating trader testified that he understood that if numbers were kept within a reasonable range, the bank's submissions could account for the preferences of traders, but that he later viewed this as manipulation after he realized that he was getting "free money."[188]

The defense also stressed that requests by traders who were involved in submissions were routine and often stated out loud in groups, that no one said not to do it, and that Libor was widely considered within Rabobank to be a "made up number."[189] Defense experts argued that Rabobank's submissions were mostly in line with those of other banks and were what one would expect given its credit rating on most relevant days.[190] One expert testified that the credit structure of such banks is so complex that it would be impossible to tell from submission data alone whether there had been manipulation.[191] The defense received a jury instruction, based on settled law, that good faith in this context would negate criminal intent.[192]

Now perhaps the Libor affair begins to look a little more like the MBS cases. It turns out, as it so often does in the large corporate context, that fraud and similar offenses arise within and are incentivized by, if you will, wiggle room—room that exists due to legal, regulatory, cultural, and market contexts. That same room provides the foundation and framework for defenses that complicate or block prosecutors' paths to conviction.

Concededly, the jury convicted Allen and Conti. The trial judge, who called the case a "clear-cut and blatant fraud," sentenced both to modest prison terms.[193] Indeed, the judge described the case at the

186. *Id.* at 79:4–9, 81:20–82:8, 83:15–23, 97:8–17, 105:7–25, 1093:8–1094:11. Conti, who faced a less damning written record, argued in part that he may have told traders what they wanted to hear but that he did not join the scheme when it came to his submissions. *Id.* at 95:11–18.

187. *Id.* at 424–428:5, 517:21–518:7, 543:1–12. It was also brought out that Robson testified in a denial and obfuscation posture when examined by British authorities prior to the U.S. case. *Id.* at 470–72.

188. *Id.* at 741:14–23, 750:7–751:1, 800:14–801:9.

189. *Id.* at 262:1–23–263:7–20,

190. *Id.* at 991:1–23, 1122:9–21.

191. *Id.* at 1038–39:21.

192. *Id.* at 1634:13–24.

193. Sentencing Transcript at 51–52, United States v. Allen, No. 14 CR 00272 (Mar. 10, 2016) (No. 242) [hereinafter Allen Sentencing Tr.]. Four other Rabobank defendants pled guilty, and one remained a fugitive; none received

sentencing hearing as an example of how punishing individuals is a more effective deterrent than extracting penalties from companies.[194]

Yet, even after all the government expended in charging, preparing, and trying the case, Allen and Conti never served their sentences. The Second Circuit reversed their convictions and ordered the case dismissed on Fifth Amendment grounds.[195] Before the U.S. prosecution, Allen and Conti had been compelled to provide testimony to the United Kingdom's securities market regulator.[196] Under English law, the terms of this compulsion provided Allen and Conti with "use immunity" but not "derivative use immunity"—in other words, their statements could not be used against them as trial evidence, but their testimony could be used in any way to develop a case based on other evidence.[197]

Under U.S. law, mere "use immunity" does not provide the protection guaranteed by the Fifth Amendment and thus is insufficient to compel statements by a defendant invoking the right against self-incrimination.[198] Before he was charged in the United States, Robson, the government's key human source at both the grand jury and trial stages, heavily exposed himself, at his counsel's urging, to the transcripts of Allen's and Conti's compelled testimony in the United Kingdom.[199] For American prosecutors subsequently to use Robson as a witness was to make derivative use of Allen's and Conti's statements—because the government could not prove that Robson's testimony was unaffected by having studied the defendants' compelled statements. Therefore, Allen's and Conti's convictions were obtained in violation of their constitutional rights and were reversed.[200]

The Fifth Amendment issue in the Rabobank prosecutions has no substantive relation to the provability of the Libor fraud. Still, other than guilty pleas of several cooperating witnesses that resulted in little or no prison time, the government achieved nothing in its Rabobank prosecutions. And, as will be discussed next, even if there had been no Fifth Amendment issue, Allen and Conti likely would have won reversal of their convictions—on the more central argument that they committed no crime at all.

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more than three months in prison. Nate Raymond, *Ex-Rabobank Trader Turned U.S. Cooperating Witness Spared Prison*, REUTERS (Nov. 14, 2016, 3:00 PM), https://www.reuters.com/article/idUSKBN1392CL/.

194. Allen Sentencing Tr., *supra* note 193, at 54–55.

195. United States. v. Allen, 864 F.3d 63, 101 (2d Cir. 2017).

196. *Id.* at 68.

197. *Id.* at 91.

198. Kastigar v. United States, 406 U.S. 441, 462 (1972).

199. David Rundle, *Case Note:* Allen *and* Conti, WILMERHALE (Aug. 2, 2017), https://www.wilmerhale.com/en/insights/blogs/wilmerhale-w-i-r-e-uk/case-note-allen-and-conti.

200. *Allen*, 864 F.3d at 101.

2. *Connolly and Black (Deutsche Bank)*

Deutsche Bank was another prominent global financial institution caught going deep into the practice of using benchmark interest rate submissions to favor the books of its traders in the interest rate derivatives market. In April 2015, the bank settled with the DOJ, with its London subsidiary pleading guilty to wire fraud and the parent bank entering into a deferred prosecution agreement under which it admitted manipulating Libor and participating in a price-fixing conspiracy with other banks involving Libor manipulation.[201] Deutsche Bank agreed to pay a total of $1.7 billion in penalties and disgorgement to various prosecutors and regulators.[202] The DOJ charged four Deutsche Bank employees criminally, two of whom pled guilty while agreeing to testify, and two of whom took the government to trial in the Southern District of New York.[203]

The trial defendants were Matthew Connolly and Gavin Black. Connolly directed a trading desk in New York.[204] Black supervised two trading desks in London.[205] The jury convicted both defendants.[206] Given the fate of the case against Connolly and Black, it will not add value to this Article to expend space on the trial record. Suffice it to say that the recorded communications and cooperating witness testimony painted a similar picture to that in other Libor cases. As can be seen from the government's published allegations against Deutsche Bank, Connolly and Black participated in conversations in which traders asked for changes in the bank's Libor submissions and were accommodated, and the conduct was open and at least tacitly approved within the bank.[207]

The trial judge was not a fan of the government's case. At sentencing, without explaining who else she thought might have been prosecutable at Deutsche Bank, she called the defendants "very minor

201. *See* Press Release, U.S. Dep't of Just., Deutsche Bank's London Subsidiary Agree to Plead Guilty in Connection with Long-Running Manipulation of Libor (Apr. 23, 2015), https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation.

202. *Id.*

203. Stewart Bishop, *Ex-Deutsche Traders Rip Libor Fraud Claims as Trial Begins*, LAW360 (Sept. 18, 2018, 6:32 PM), https://www.law360.com/articles/1083988.

204. *Id.*

205. *Id.*

206. Stewart Bishop, *2 Ex-Deutsche Traders Convicted of Libor-Rigging*, LAW360 (Oct. 17, 2018, 3:25 PM), https://www.law360.com/articles/1092738/2-ex-deutsche-traders-convicted-of-libor-rigging.

207. *See* Statement of Facts at 9–10, United States v. Deutsche Bank AG, No. 3:15-cr-00061-RNC (D. Conn. Apr. 23, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/23/db_statement_of_facts.pdf.

participants" and "proxy wrongdoers," describing Black as "a bit player" and Connolly as "hardly a player at all."[208] She did not follow the Sentencing Guidelines and did not sentence either defendant to prison, while allowing Black to serve a term of home confinement at his residence in the United Kingdom.[209] Before sentencing, the judge issued an opinion in which she excoriated the government for what she described as its lazy reliance on Deutsche Bank's outside counsel to investigate the wrongdoing in the case.[210] The point of her opinion was to explain why she considered, but ultimately rejected, a ruling that the defendants' Fifth Amendment rights had been violated when they had been compelled by Deutsche Bank to make statements to the bank's counsel that, given the government's delegation of the investigation, were virtually induced by state action.[211] In other words, the prosecutors in the Deutsche Bank case narrowly avoided the Fifth Amendment fate of the prosecution in the Rabobank case.

While the trial judge was openly skeptical about the government's handling of the investigation and the relative culpability of the charged defendants, the appellate court concluded that Connolly and Black were innocent. On January 27, 2022, the Second Circuit reversed their convictions entirely, ruling that their manipulation of Libor was not fraud.[212] The court's reasoning suggested that it would have reversed virtually any conviction in the Libor matter.

The court concluded that Deutsche Bank's submissions to the BBA were not lies because the submitters gave reasonable answers to a hypothetical question.[213] Why they chose the specific answer they gave on any day was beside the point. The court relied heavily on the failure of the BBA—which was widely seen as weak, understaffed, and untalented[214]—to regulate its own process competently. The BBA instructed each bank on the panel to submit the "rate at which it could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size [at the specified time]."[215] This instruction, the court said, called for an estimate of a hypothetical transaction. If Deutsche Bank could have borrowed at the rate it submitted on a relevant day—a matter the government would not

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208. Stewart Bishop, *Ex-Deutsche Bank Traders Dodge Prison for Libor Rigging*, LAW360 (Oct. 24, 2019, 9:37 PM), https://www.law360.com/articles/1213252/ex-deutsche-bank-traders-dodge-prison-for-libor-rigging.

209. *Id.*

210. United States v. Connolly (*Connolly I*), No. 16 Cr. 0370 (CM), 2019 WL 2120523, at *13 (S.D.N.Y. May 2, 2019).

211. *Id.* at *15.

212. *Connolly II*, 24 F.4th 821, 824 (2d Cir. 2022).

213. *Id.* at 835.

214. VAUGHAN & FINCH, *supra* note 171, at 50.

215. *Connolly II*, 24 F.4th at 825.

have been able to disprove—then there was no false statement and, thus, no fraud.[216] (The government had shown that the submitters used a methodology for estimating the rate in the absence of trader requests and that the submitters believed they were acting wrongfully when they included the trader requests in calculating their estimates.)[217]

The Second Circuit's analysis in *Connolly* was, in my opinion, wrong.[218] But that is not material to this Article. Again, the government conducted a major investigation with the cooperation of a large financial institution and charged at least four individuals closest to the conduct at issue, obtaining the cooperation and testimony of two of them, and no one went to prison. The one case that proceeded to trial relating to Deutsche Bank was reversed on appeal, on a theory that calls into question the government's belief that benchmark manipulation, at least for Libor, could be a crime at all. Two additional Deutsche Bank employees who pled guilty have been permitted, based on the *Connolly* ruling, to withdraw their pleas, and their cases have been dismissed.[219]

3. U.K. Prosecutions ("Lord Libor" et al.)

Prosecutors had marginally more success in the Libor scandal in the Southwark Crown Court in London, where the United Kingdom's Serious Fraud Office (SFO) obtained eight convictions out of 24 prosecutions, all eight of which resulted in at least the issuance of a prison sentence. Of the remaining 16 individuals charged in the United Kingdom, 11 were acquitted and five defeated extraditions from Germany or France.[220] The most prominent convicted person was Tom Hayes, a trader for the Swiss bank UBS who became known

216. *Id.* at 835–37.

217. *Id.* at 830.

218. Samuel Buell, *The Second Circuit Was Wrong in Reversing Ex-Deutsche Bank Traders' Libor Convictions*, CLS BLUE SKY BLOG (Feb. 7, 2022), https://clsbluesky.law.columbia.edu/2022/02/07/the-second-circuit-was-wrong-in-reversing-ex-deutsche-bank-traders-libor-convictions/. *But see* Rupert Macey-Dare, Could, Would, Should—Should Not and Could Not—the Hypothetical Questions at the Heart of USA v. Connolly & Black, and All Libor Panel Interest Rate Submission Cases 8–22 (Jan. 4, 2023) (unpublished paper) (available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4317020).

219. *See* Erik Larson, *Ex-Deutsche Bank Trader Gets Guilty Plea Tossed Out, $1 Million Fine Returned*, BLOOMBERG (Aug. 5, 2022, 3:46 PM), https://www.bloomberg.com/news/articles/2022-08-05/ex-deutsche-bank-trader-gets-guilty-plea-tossed-1-million-back; Andy Verity, *Interest Rate "Rigger" Guilty Conviction Thrown Out*, BBC (Sept. 6, 2022), https://www.bbc.com/news/business-62801918.

220. *See supra* note 219; *see also* Richard Crump, *SFO Closes Libor-Rigging Probe Without More Charges*, LAW360 (Oct. 18, 2019, 1:29 PM), https://www.law360.com/articles/1210909/sfo-closes-libor-rigging-probe-without-more-charges.

in the press as "Lord Libor."[221] Hayes initially received a 14-year sentence.[222]

It is not possible in this Article to account for the effect in the Libor matter of differences between the American and British legal systems' procedural approaches to the investigation and prosecution of corporate crime.[223] In the Libor cases, efforts to obtain trial transcripts from the Crown Court were unsuccessful. However, Hayes's bank, UBS, did settle criminally in the United States with the DOJ.[224] One can see from the details of that settlement that Hayes, who worked for UBS in Tokyo, was a compulsive, legendary, and exceptionally successful manipulator of Libor.[225] Hayes was all over UBS's recorded chats telling the bank's submitters, who were highly obliging,[226] that he needed Libor "skewed" low or high from one day to the next.[227] Hayes and the submitters were explicit that they were discussing moving UBS's submissions away from "reality" and the "truth."[228] A cash broker outside the bank said in a chat with Hayes, "mate yur getting bloody good at this libor game . . . think of me when yur on yur yacht in Monaco wont yu."[229]

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221. *See infra* Table B3.

222. Kate Beioley & Joe Miller, *Lawyers' Six-Figure Bonuses Dry Up as Job Cuts Gather Pace*, FIN. TIMES (Feb. 12, 2023) https://www.ft.com/content/a7d2447c-d951-42b6-aedf-5769ce7d58bd.

223. For more extensive discussion of British procedure in corporate cases, as well as that in several European jurisdictions, see Arlen & Buell, *supra* note 10, at 728–52. Most observers believe that prosecutors and regulators in the United Kingdom have a harder, rather than an easier, time obtaining enforcement results than in the United States. *See* Chris Blackhurst, *The SFO Should be There to Pursue Major Cases of Fraud and Economic Crime, Not Make Money*, INDEPENDENT (Sept. 18, 2020, 5:49 PM), https://www.independent.co.uk/independentpremium/business/sfo-lisa-osofsky-uk-serious-fraud-office-economic-crime-us-fbi-b485236.html; Kirstin Ridley & Carolyn Cohn, *UK Regulator's Head of Enforcement to Step Sown in 2023*, REUTERS (Oct. 18, 2022, 2:02 PM), https://www.reuters.com/world/uk/uk-regulators-head-enforcement-step-down-2023-2022-10-18/; Lorna Emson et al., *Is the United States More Effective than the United Kingdom at Prosecuting Economic Crime?*, MACFARLANES (May 7, 2021), https://www.macfarlanes.com/what-we-think/in-depth/2021/is-the-united-states-more-effective-than-the-united-kingdom-at-prosecuting-economic-crime/; *see also* Anita Anand, *The Enforcement of Financial Market Crimes in the Canada and the United Kingdom*, *in* CORRUPTION AND FRAUD IN FINANCIAL MARKETS: MALPRACTICE, MISCONDUCT AND MANIPULATION (C. Alexander and D. Cummings eds., 2019).

224. *See* DOJ Letter, *supra* note 174, at 1.

225. *See, e.g.*, *id.* at 15.

226. Hayes said at one point, "They just set it where we ask." *Id.*

227. *Id.* at 10.

228. *Id.* at 11.

229. *Id.* at 24.

Exposing himself to liability in both the United States and the United Kingdom, Hayes took Libor manipulation to its highest level by developing a network of contacts both at other banks and at brokerage houses (which intermediate some trades in the interest rate derivatives markets) with whom Hayes conspired to trade favors.[230] Hayes agreed with traders at other banks to skew Libor submissions to assist each other's positions. He extensively bribed outside cash brokers, who were a source for data used in banks' Libor submissions, to alter their own reporting about Libor in his favor.[231] His bribing of the brokers included arranging meaningless trades so the brokers could pad their commissions.[232]

The case against Hayes based on the written record was exceptionally strong even within the Libor affair, no matter where or how it had been tried. Hayes, whose psychology was complex,[233] further damaged his legal situation by lying and minimizing when UBS commenced its internal investigation (UBS was the first bank to investigate and then negotiate with the DOJ), then confessing extensively to the SFO, after which he testified at trial once again maintaining his innocence.[234] Still, the defense appears to have effectively raised the relevant issues about the BBA's incompetence and the fuzziness of the Libor definition.[235] In a later, separate trial—to Hayes's disbelief—a London jury acquitted all six outside brokers with whom Hayes had conspired to manipulate Libor.[236]

Hayes's conviction was affirmed on appeal, but his sentence was deemed "excessive" given his age and mental condition and reduced from 14 to 11 years.[237] He served less than six years in custody.[238] Then, in July 2023, the United Kingdom's Criminal Case Review Commission referred Hayes's case to the Court of Appeal, in light of

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230. *Id.* at 20.

231. *See, e.g.*, *id.* at 9, 18, 23; ENRICH, *supra* note 171, at 175–76, 221.

232. ENRICH, *supra* note 171, at 175–76.

233. *See, e.g.*, VAUGHAN & FINCH, *supra* note 171, at 158; ENRICH, *supra* note 171, at 175–76. Both books dwell on Hayes's biography and profile.

234. *See* ENRICH, *supra* note 171, at 318–403, 419–44; VAUGHAN & FINCH, *supra* note 171, at 160–61.

235. ENRICH, *supra* note 171, at 244; VAUGHAN & FINCH, *supra* note 171, at 50–60.

236. VAUGHAN & FINCH, *supra* note 171, at 31, 67, 85, 148. The broker defendants argued that they had been duping Hayes and, despite their chortling in the recorded chats, took no action to help him. *See* David Enrich, *Six Ex-Brokers Acquitted of Libor Rigging in London*, WALL ST. J. (Jan. 27, 2016, 7:22 PM), https://www.wsj.com/articles/london-jury-acquits-six-brokers-of-libor-manipulation-frauds-1453908372.

237. VAUGHAN & FINCH, *supra* note 171, at 168.

238. Ellen Milligan & Harry Wilson, *Libor Trader Tom Hayes Set for Release After Nearly Six Years in Jail,* BLOOMBERG (Jan. 29, 2021, 9:48 AM), https://www.bloomberg.com/news/articles/2021-01-29/libor-trader-tom-hayes-set-for-release-after-nearly-six-years.

the U.S. ruling in *Connolly*, for reconsideration of whether the correct legal standard was applied in prosecuting Hayes.[239] While the Court of Appeal did not provide Hayes with relief from his conviction, it did grant Hayes permission to pursue his claims in the Supreme Court of the United Kingdom.[240] His conviction may yet be erased entirely. The SFO's other large share of the transatlantic Libor matter was a set of prosecutions involving 10 employees of Barclays that resulted in two trials, one producing convictions and the other ending in acquittals.[241]

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In whole, the prosecution record in London may have surpassed that in New York, but English prosecutors ran into obstacles and setbacks of their own, and their cases included the strongest one uncovered globally (Hayes). Still, a federal judge in New York granted the DOJ's motion to dismiss the DOJ's charges against Hayes, which were filed but never prosecuted, due to the Second Circuit's ruling in *Connolly*.[242] Hayes might have avoided prison altogether had he been able to navigate the risky path of arranging to be prosecuted in the United States first. Given the straightforward nature of the theory of fraud in Libor, and the extraordinarily explicit record of criminal conversations, the litigation results in both the United States and the United Kingdom stand as strong evidence that even the best-looking cases for prosecution of financial institution employees can turn out to be expensive failures.

4. Forex Trading Prosecutions

Before judges and juries had even begun to signal to the DOJ that the Libor cases were not the "slam dunks" they had seemed, major banks were caught manipulating another trading market governed by benchmarks. Global currencies produce a massive, multi-trillion-dollar market in derivatives trading—due to their size, influence, diversity, economic importance, and constant fluctuations.[243] The

239. Alistair Gray, *Tom Hayes Wins Right to Conviction for a Second Time*, FIN. TIMES (July 6, 2023), https://www.ft.com/content/8ad9ff51-cd0c-46ba-a67d-0235563cc750.

240. Sam Tobin, *UK Libor Trader Hayes Given Route to Appeal Rate-Rigging Conviction at Supreme Court*, REUTERS (May 21, 2024, 3:49 PM), https://www.reuters.com/world/uk/uk-libor-trader-hayes-given-route-appeal-rate-rigging-conviction-supreme-court-2024-05-21.

241. Simon Bowers, *Libor-Rigging Trial: Jury Finds No Defense in "Just Doing My Job,"* GUARDIAN (July 4, 2016, 2:08 PM), https://www.theguardian.com/business/2016/jul/04/barclays-libor-convictions-a-major-victory-for-sfo; Jane Croft & Caroline Binham, *Former Barclays' Traders Acquitted in SFO Libor Case*, FIN. TIMES (Apr. 6, 2017), https://www.ft.com/content/77d5a24a-1aae-11e7-bcac-6d03d067f81f.

242. *See* Order and Motion to Dismiss Charges, United States v. Hayes, No. 17-CR-00750 (S.D.N.Y. 2022).

243. *See* Verstein, *supra* note 169, at 235–36.

most important benchmark used to set deal terms in that market, known as the "FX" or "Forex" market, is the daily 4:00 p.m. "London Fix."[244] Corporate and securities scholar Andrew Verstein describes this benchmark as "derived from trades mostly executed by a dozen sophisticated intermediaries during a narrow band of time, that are consciously submitted or omitted based on the effect on the benchmark."[245] Verstein observes, "On the head of this pin dance all the angels of the world's largest financial market."[246]

Here was another opportunity for traders to secretly manipulate a benchmark, while working together, to get "free money" when deals with unwitting counterparties settled. Once again, large banks' compliance operations, and regulators and prosecutors in both the United States and United Kingdom, discovered the activity, which some participants at multiple banks referred to in recorded Bloomberg chats detailing their agreements as their "cartel."[247]

Enforcement actions ensued. Citibank, Barclays, JPMorgan Chase, UBS, and RBS all agreed to plead guilty and paid several billion dollars in penalties.[248] HSBC entered into a deferred prosecution agreement in a separate case.[249] The government's case was based on anti-competitive violations, primarily Sherman Act offenses, in which traders across multiple banks agreed to manipulate the London Fix.[250]

Fewer individuals were charged in the FX affair than in the Libor matter, perhaps because the chat record implicated a smaller number of traders and was not as extensive. Eight individuals across five banks faced criminal charges, with two more receiving nonprosecution agreements in exchange for cooperation.[251] Of the eight charged, two pled guilty (resulting in non-imprisonment sentences), one defeated extradition, and five went to trial.[252] The three resulting trials produced guilty verdicts against two traders tried separately,[253] who received prison terms of eight months and

244. *Id.* at 235.

245. *Id.*

246. *Id.*

247. Transcript of Record at 408:17–409:21, United States v. Usher, No. 17-CR-00019 (S.D.N.Y. 2018).

248. Press Release, U.S. Dep't of Just., Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015) [hereinafter Press Release, *Five Major Banks*], https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.

249. *See* Deferred Prosecution Agreement, United States v. HSBC Holdings PLC, No. 18-CR-00030 (E.D.N.Y. 2018).

250. Press Release, *Five Major Banks*, *supra* note 248.

251. *See infra* Tables C1 & C3.

252. *See infra* Tables C1 & C3.

253. *See* United States v. Aiyer, 33 F.4th 97, 104, 131 (2d Cir. 2022); Press Release, U.S. Dep't of Just., Former Global Head of HSBC's Foreign Exchange Cash-Trading Found Guilty of Orchestrating Multi-Million Dollar Front-Running Scheme (Oct. 23, 2017), https://www.justice.gov/opa/pr/former-global-

two years, respectively, and not guilty verdicts for three traders who were tried together.[254] In the United Kingdom, the SFO closed its Forex investigation in 2016 without bringing charges, stating that the evidence was insufficient to support convictions.[255] Civilly, in the United States, the Federal Reserve and Office of the Comptroller of the Currency pursued nine actions, obtaining seven industry bans and two fines averaging $612,500.[256]

As in the MBS and Libor matters, it is illuminating to examine what happened at the trial in the Southern District of New York at which a jury acquitted the three traders—one each from JP Morgan, Citibank, and Barclays.[257] The testimony of Matt Gardiner, the government's chief cooperating witness, who participated in the "cartel," was explicit that the co-conspirators at different banks discussed their trading books with each other and frequently took, or refrained from taking, positions in the market that would have affected the London Fix to help each other, while using coded language to reduce the risk that compliance personnel would detect their activity.[258]

Prosecutors walked Gardiner through recorded chats in which the group discussed altering their trading activities to manipulate the London Fix and chortled about how the activity was profiting their books, including one trader delightedly saying that he was "having my best week ever."[259] Gardiner testified that when the Libor investigations reached the news, the traders became concerned that compliance personnel would question their activities, and Gardiner's supervisor instructed him to stop using the word "fix" in Bloomberg

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head-hsbcs-foreign-exchange-cash-trading-found-guilty-orchestrating. The HSBC defendant, Mark Johnson, was not alleged to have been a participant in the benchmark manipulation "cartel," but rather was discovered having used confidential information to trade ahead of client positions. *Id.* The JP Morgan defendant, Akshay Aiyer, was convicted of a Sherman Act violation based on his participation in the manipulation conspiracy. Press Release, U.S. Dep't of Just., Former Foreign Exchange Trader Sentenced to Prison for Price Fixing and Bid Rigging (Sept. 17, 2020), https://www.justice.gov/opa/pr/former-foreign-exchange-trader-sentenced-prison-price-fixing-and-bid-rigging.

254. *See infra* Tables C1 & C3.

255. Press Release, Serious Fraud Off., SFO Closes Forex Investigation (Mar. 15, 2016), https://www.sfo.gov.uk/2016/03/15/sfo-closes-forex-investigation/.

256. *Id.*; Press Release, U.S. Dep't of Just., Former Global Head of HSBC's Foreign Exchange Cash-Trading Found Guilty of Orchestrating Multi-Million Dollar Front-Running Scheme (Oct. 23, 2017), https://www.justice.gov/opa/pr/former-global-head-hsbcs-foreign-exchange-cash-trading-found-guilty-orchestrating.

257. United States v. Usher, No. 17-CR-00019, slip op. at 2480–81 (S.D.N.Y. Oct. 26, 2018).

258. Transcript of Record at 463–509, 552:10–17, United States v. Usher, No. 17-CR-00019 (S.D.N.Y. Oct. 12, 2018).

259. *Id.*

chats to reduce the likelihood their conversations would be flagged.[260] Still, they continued to coordinate with each other.

However, cross-examination established that Gardiner had no idea that what he was doing might violate U.S. anti-competition law, on which he had never been trained. He said that his understanding that his conduct was illegal only "evolved" when he began talking to U.S. lawyers and negotiating with American prosecutors.[261] He said he did not consider himself to have been participating in a criminal conspiracy or that anything he was doing was wrong, or even constituted price-fixing, as opposed to sharing of information.[262] On the argument that it was relevant to Gardiner's state of mind, the defense was able to get before the jury that the SFO had issued a statement saying the evidence in the FX matter was insufficient to bring charges.[263]

The government, while opening its summation by playing a recording in which one defendant said, "in the cold light of day, it's going to look f-ing awful,"[264] emphasized to the jury that good faith was not a defense under the Sherman Act (as it is in a prosecution for fraud) and that the prosecution only needed to prove that the defendants intended to do what they did and that the conduct fit the definition of bid-rigging, not that they knew it was illegal.[265] The defense attorneys, who disclaimed to the judge that they were pursuing a defense of "everybody does it,"[266] emphasized over and again that the defendant traders did not think they were doing anything wrong and did not try to hide the essential facts about their trading activity.[267] The defense also argued that the government never introduced any evidence to prove that the defendants' conduct affected prices, and that the defendants shared information but did not coordinate on specific trades.[268] The jury acquitted all three defendants in less than a day.[269]

Speaking to the press after the verdict, the traders said they could not understand how the long arm of American law was able to pull them from London into a New York court to be tried for violating

260. *Id.* at 770–75

261. *Id.* at 1186:2–25, 1187:14–22.

262. *Id.* at 954:20–955:15.

263. *Id.* at 857:7–858:15.

264. *Id.* at 2281:13–25.

265. *Id.* at 2289:7–13, 2292:19–25.

266. *Id.* at 2015:13–20.

267. *Id.* at 2335:23–2344:14.

268. *Id.* at 2359:14–2360:11, 2368:15–2371:22, 2408:22–2409:3, 2415:9–15. It likely would have been impossible for prosecutors to prove a price effect in this context given the enormous size and complexity of the currency markets.

269. *Id.* at 2481:1–2483:21.

a statute that they had no knowledge of or training on.[270] They maintained that it had been routine for traders to share "market color" and that it made no sense that the three of them were plucked out of hundreds of traders for prosecution.[271]

Likely the DOJ selected these traders because they left behind the most probative record of recorded chats and made the terrible mistake of referring to themselves as a cartel. Still, it was not enough for convictions. Jury deliberations are of course secret, but a plausible inference given the trial record is that the defense—regardless of the court's instructions on mens rea—persuaded the jury that they should not impose a criminal conviction on traders who may have gamed the system but did not do so believing they were violating the law or even doing something aberrant or wrongful.

Previous work has examined why the idea of awareness of wrongdoing matters so much with the enforcement of many white-collar crimes—and why there is a substantial and often hidden normative foundation to the idea.[272] While mistake of law is not a legal defense to most white-collar offenses, the application of mens rea requirements such as intent to defraud, intent to obstruct justice, or willful violation of law frequently involve, at least in cases involving more novel commercial activities, consideration of whether a defendant chose to pursue a course of conduct known to be wrongful. Defense lawyers, juries, judges, and the public share this basic intuition. It thus presents a real consideration for prosecutors when determining whether they are likely to succeed with a case for fraud or similar offenses in a market where the conduct at issue was widespread and notorious. The Forex prosecutions, among others discussed in this Article, appear to support this point.

C. Generalizations

To summarize, across the three most prominent and widespread banking scandals since 2010—MBS, Libor, and Forex—prosecutors in the United States and the United Kingdom obtained and upheld only 19 convictions out of 58 prosecutions, with only 13 of the convicted individuals sentenced to imprisonment.[273] Prosecutors have both tried and struggled to impose criminal punishment on persons dealing in securities products within large institutions. The evidence

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270. Katie Martin & Caroline Binham, *Cleared British Traders Put US Justice on Trial*, FIN. TIMES (Nov. 25, 2018), https://www.ft.com/content/673237ba-ef22-11e8-89c8-d36339d835c0.

271. *Id.*

272. *See* Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 LAW & CONTEMP. PROBS. 133, 133–34 (2012); Samuel W. Buell, *Novel Criminal Fraud,* 81 N.Y.U. L. REV. 1971, 1973–76 (2006); Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 548–49 (2015).

273. *See infra* Appendices A–C.

of what occurred in litigation of these cases casts doubt on the idea that more determined and resourced investigative and prosecution campaigns in the financial sector could have produced significantly better results and much greater deterrent effects.

That is not to say that the government should not have pursued the cases it selected or that prosecutors should not continue to be active in the sector. A visible criminal and civil enforcement presence in the financial markets is essential to overall health of the markets. Prosecutions of serious miscreants, especially at the highest levels, can produce important expressive benefits—in terms of rule of law and equality—when cases arise that provide opportunities for wins. But observers and critics should be more realistic about how often such cases will arise and about the enormous resources and time that must be spent in pursuit of cases that may offer, as in the MBS and Libor affairs, well below even odds.

The difficulties the government encountered at trial and appeal in the cases discussed to this point stemmed from the nature of the conduct giving rise to litigation. With sophisticated dealing in complex financial products or the elaborate financing structures of major corporations, there are almost always questions about the line between fraud and what is normal, expected, misunderstood, not intended, done in good faith, common in the workplace, directed by someone else, and so on. Only rarely do the Bernard Madoffs of the world commit their crimes within the Goldman Sachs and JP Morgans of the world.

In contrast to media views and mass public opinion, persons required to act in the roles of judges and jurors respond to arguments that individuals working within large organizations and corporate cultures might not have meant to be doing something they understood to be seriously wrong, and thus might not deserve to be imprisoned, at least according to common moral intuitions. Without many successful prosecutions of lower and mid-level corporate personnel to produce inside witnesses, prosecutions of high-level personnel will almost always lie out of reach. When individuals are on trial, especially mid-level employees, jurors and judges seem drawn to the idea that it is really the corporations, with their incentives, cultures of greed, inattention, pressures and so on, that are responsible and at least some employees do not deserve to be made scapegoats.

II. INDIVIDUAL LIABILITY BEYOND SECURITIES MARKETS

This Article's close study of securities prosecutions does not leave space for a detailed treatment of whether difficulties in the government's enforcement efforts in the financial sector also characterize the litigation record with corporate crime outside that realm. Nonetheless, a brief discussion of a handful of prominent examples points to similar barriers standing between prosecutors and large numbers of individual convictions.

A. BP and the Gulf Spill

When the Deep Horizon drilling rig exploded in the Gulf of Mexico on April 20, 2010, killing 11 workers and devastating an economically critical ecosystem, the DOJ, with the eventual cooperation of British Petroleum (BP), undertook a massive investigation alongside other federal agencies.[274] From the outset of the disaster, a story took hold that BP's management carried out an aggressive strategy of pursuing deeper and more risky drilling sites, without sufficient attention to safety.[275] BP was eventually compelled to plead guilty, considered the sternest outcome at the corporate level short of a trial and sentencing.[276]

Despite massive forensic work, the DOJ was not able to tie events on the rig to senior management sufficiently to support a criminal charge.[277] This was not surprising, as events unfolded at Deep Horizon faster than would have allowed for extended involvement of corporate management. Indeed, the government's account of the disaster tied causation of the explosion to the failure of personnel on the rig to raise alarm bells soon enough for those onshore to intervene.[278] Absent evidence of micromanagement uncommon in a company so large, no theory would have permitted imposing liability on senior personnel for the specific events in the Gulf on the ground that they chose a generally riskier strategy for BP's offshore operations.

The government indicted four individuals in the Deep Horizon disaster. The DOJ fully lost two of the cases and mostly lost the other two, obtaining minor guilty pleas only.[279] Robert Kaluza and Donald Vidrine, the most senior BP employees working at the well site, were charged with homicide under an old federal maritime law, the Seaman's Manslaughter Act, which requires a showing of only negligence for conviction.[280] The district judge dismissed these charges before trial.[281] The Fifth Circuit affirmed, ruling that while a

274. *See* John M. Broder, *BP Shortcuts Led to Gulf Oil Spill, Report Says*, N.Y. TIMES (Sept. 14, 2011), https://www.nytimes.com/2011/09/15/science/earth/15spill.html.

275. *Id.*

276. *See* Guilty Plea Agreement at 1, United States v. BP Expl. & Prod., Inc., No. 12-CR-00292 (E.D. La. 2012).

277. *Id.* at 9–10.

278. *Id.* at 15.

279. Carrie Johnson, *Jury Acquits Ex-BP Exec of Lying in Oil Spill*, NPR (June 6, 2015, 2:59 PM), https://www.npr.org/2015/06/06/412314705/jury-acquits-ex-bp-exec-of-lying-in-oil-spill.

280. *See* Walter Pavlo, *Two Years After Ruling, BP Engineer Still Carries Burden of Prosecution*, FORBES, https://www.forbes.com/sites/walterpavlo/2018/01/08/two-years-after-ruling-bp-engineer-still-carries-burden-of-prosecution/ (Apr. 14, 2022, 2:05 PM).

281. *Id.*

platform such as the Deep Horizon is a seagoing craft, the statute applies only to personnel operating vessels in a navigational capacity (i.e., sailors), not to individuals on board to do jobs such as drilling for oil.[282] Kaluza and Vidrine additionally faced charges for violating the Clean Water Act (CWA), also a negligence offense.[283] Vidrine pled guilty to a single misdemeanor CWA count, which would not likely have resulted in prison time, and died a short time later.[284] Kaluza proceeded to trial and was acquitted of violating the CWA.[285]

David Rainey, BP's head of exploration for the Gulf region, was charged with a post-explosion crime: misleading the government about the scale of the spillage from the seabed during the lengthy remediation effort by BP and federal agencies.[286] A jury acquitted Rainey.[287] Kurt Mix, a BP engineer involved in the disaster response who helped cap the well, was charged with obstruction of justice for deleting text messages from his phone a year later.[288] The government dropped the obstruction charge when Mix agreed to plead guilty to a misdemeanor violation of the Computer Fraud and Abuse Act.[289] He was placed on six months' probation.[290]

These results make evident why prosecutors never got off square one in establishing criminal liability of any of BP's corporate managers. Even more easily satisfied theories of criminal liability could not be established for those closest to the explosion. The institutional size and structure of a massive corporation, as well as the nature of decision-making, delegation, and division of labor in such organizations, can frustrate the project of imposing individual responsibility under the core principles of criminal liability.

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282. United States v. Kaluza, 780 F.3d 647, 664 (5th Cir. 2015).

283. *See* Pavlo, *supra* note 280.

284. *Id.*

285. *Id.*

286. Press Release, U.S. Dep't of Just., BP Exploration and Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes, and Obstruction of Congress Surrounding Deepwater Horizon Incident (Nov. 15, 2012), https://www.justice.gov/opa/pr/bp-exploration-and-production-inc-agrees-plead-guilty-felony-manslaughter-environmental.

287. *See* Johnson, *supra* note 279.

288. Press Release, U.S. Dep't of Just., Former BP Engineer Arrested for Obstruction of Justice in Connection with the Deepwater Horizon Criminal Investigation (Apr. 24, 2012), https://www.justice.gov/opa/pr/former-bp-engineer-arrested-obstruction-justice-connection-deepwater-horizon-criminal.

289. Walter Pavlo, *Government Drops Obstruction Charges Against Former BP Engineer Kurt Mix*, FORBES, https://www.forbes.com/sites/walterpavlo/2015/11/06/government-drops-obstruction-charges-against-former-bp-engineer-kurt-mix/ (Nov. 6, 2015, 12:11 PM).

290. *Id.*

B. GM and the Ignition Switch

In 2014, General Motors (GM) recalled millions of passenger automobiles after it discovered that it had engineered and built them with a faulty ignition switch. The switch could rotate out of position during operation and, due to other design flaws, cause power steering to fail and prevent airbags from deploying.[291] Over 120 people died because of GM's faulty engineering and its years-long failure to discover and rectify the problem.[292] One woman in Texas was even charged with manslaughter when a passenger died after her GM vehicle failed during normal operation.[293] (The case was later dismissed.)

In one way, the GM ignition switch scandal was a prototypical corporate crime. The company killed people because it was trying too hard to drive down costs for cheap vehicles by finding manufacturing shortcuts, while it paid far too little attention to safety and internal communication and reporting systems.[294] In every sense, it was the organization and its culture that caused what happened and bore responsibility for it. In another way, the case was atypical in that the problem arose more from omission than commission. It was nearly impossible to identify GM employees who knew about both the switch defect and its role in causing accidents.[295] The heart of the disaster lay in the company's inability to have personnel with the relevant pieces of knowledge communicate with each other.[296] Using each hand to point at persons sitting on either side of someone in a meeting as the individuals responsible for an issue was known as "the GM salute"; "the GM nod" was everyone indicating in a meeting that something should be done and then no individual taking responsibility to follow up.[297]

In a widely criticized criminal settlement,[298] the DOJ permitted GM to enter into a deferred prosecution agreement and pay a $900

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291. *See* BUELL, *supra* note 26, at xi–xv.

292. David Shepardson, *GM Compensation Fund Completes Review With 124 Deaths*, DETROIT NEWS (Aug. 24, 2015, 5:13 PM), https://www.detroitnews.com/story/business/autos/general-motors/2015/08/24/gm-ignition-fund-completes-review/32287697/.

293. Jeff Glor, *Texas Woman Cleared of Death Linked to Defective GM Ignition Switch*, CBS NEWS (Nov. 24, 2014, 8:02 PM), https://www.cbsnews.com/news/texas-woman-cleared-in-death-linked-to-gm-defect/.

294. *See generally* ANTON R. VALUKAS, JENNER & BLOCK, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS (2014), https://www.aieg.com/wp-content/uploads/2014/08/Valukas-report-on-gm-redacted2.pdf.

295. *Id.* at 1.

296. *Id.*

297. *Id.*

298. *See, e.g.*, David M. Uhlmann, Opinion, *Justice Falls Short in G.M. Case*, N.Y. TIMES (Sept. 19, 2015), https://www.nytimes.com/2015/09/20/opinion/Sunda

million penalty.[299] If anything could be said for a lenient settlement other than the too-big-to-fail truth that "what is good for GM is good for America,"[300] it was that, once GM management finally realized the problem, the company conducted a thorough investigation through outside counsel and not only shared all of its findings with the government but also published them.[301] Although extensive civil litigation remains underway, forensic work identified only a single arguably culpable employee: a lower-level engineer who realized the problem with the switch and corrected it without filing the required paperwork, presumably to cover the original error, which made it harder for anyone at the company to tie the switch defect to accidents.[302] The government did not charge this person with a criminal offense, perhaps because a theory of federal criminal liability for such an internal cover-up was lacking.[303]

At least part of what would have impeded the government from making a big, multi-defendant prosecution out of the GM affair was the law. Even the legal theory in the deferred prosecution agreement at the corporate level, based in part on wire fraud involving the sale of the cars to retail customers, might have faced difficulties had it been litigated.[304] More broadly, federal criminal law, even with its thousands of provisions, includes neither an offense of careless automobile engineering nor one of failing properly to report vehicle

y/justice-falls-short-in-gm-case.html; Drew Harwell, *Why General Motors' $900 Million Fine for a Deadly Defect Is Just a Slap on the Wrist*, WASH. POST (Sept. 17, 2015, 3:31 PM), https://www.washingtonpost.com/news/business/wp/2015/09/17/why-general-motors-900-million-fine-for-a-deadly-defect-is-just-a-slap-on-the-wrist/.

299. *See* Harwell, *supra* note 298.

300. The oft-repeated quote turns out to be apocryphal. *See* Ellen Terrell, *When a Quote is Not Exactly a Quote: General Motors*, LIBR. OF CONG. BLOGS (Apr. 22, 2016), https://blogs.loc.gov/inside_adams/2016/04/when-a-quote-is-not-exactly-a-quote-general-motors/.

301. *See generally* VALUKAS, *supra* note 294.

302. *See id.* at 95–102; *see also* Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 289–90 (2020) (arguing that GM could have better identified red flags if they had taken steps such as aggregating settlement data).

303. Nathan Bomey & Kevin McCoy, *GM Agrees to $900M Criminal Settlement Over Ignition-Switch Defect*, USA TODAY (Sept. 17, 2017, 6:37 PM), https://www.usatoday.com/story/money/cars/2015/09/17/gm-justice-department-ignition-switch-defect-settlement/32545959/ ("U.S. Attorney Preet Bharara left the door open to prosecuting specific GM employees. But he said it's difficult to pin blame on an individual who may have had only partial knowledge of a backward bureaucratic process that led to tragedy.").

304. *See* Nick Werle, Note, *Prosecuting Corporate Crime When Firms are Too Big to Jail: Investigation, Deterrence, and Judicial Review*, 128 YALE L.J. 1366, 1411–12 (2019).

defects. And there is no general federal manslaughter statute.[305] As measured by the historical use of manslaughter doctrine, it would have been novel and aggressive for a state prosecutor to attempt to pin a far-flung death at the consumer level on engineers or managers in Michigan.[306] Ultimately it is not realistic to think that prosecutors had a viable path to imprisoning senior executives, or perhaps any employee, for the grave misdoings at GM.

C. VW and the Defeat Device

If one asked those who follow corporate crime which recent major case was most appropriate for criminal charges against senior executives, a common answer would be Volkswagen (VW). Between 2009 and 2015, the German automobile behemoth pursued a strategy of selling diesel cars in the United States intentionally built with software, called a "defeat device," that misled regulators and consumers about illegal levels of nitrous oxide emissions produced during normal operation.[307] This strategy, known to be unlawful from the beginning, was hatched and approved at the highest levels of the company.[308] Here was a corporation that outright decided to break the law and lie about it to achieve its competitive objectives. Even after a handful of enterprising researchers at West Virginia University uncovered the scheme, VW continued to mislead American regulators.[309]

Executives indeed were indicted.[310] But the international dimension of the VW case has complicated outcomes. The corporation pled guilty in the United States and paid a fine of $4.3 billion.[311] German prosecutors, toward whom American prosecutors have acted with comity, have charged 15 of the most culpable persons in the case, including former CEO Martin Winterkorn.[312] The wheels of German

305. *See* James W. Harlow, Note, *Corporate Criminal Liability for Homicide: A Statutory Framework*, 61 DUKE L.J. 123, 126–27 (2011).

306. *See generally* Samuel W. Buell, *Criminally Bad Management, in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 59, 62–65, 70 (Jennifer Arlen ed., 2018).

307. *See* Rule 11 Plea Agreement at Ex. 2-11, United States v. Liang, AG, No. 16-CR-20394, 2016 WL 5542730, at *5–7 (E.D. Mich. Sept. 9, 2016); JACK EWING, FASTER, HIGHER, FARTHER: THE VOLKSWAGEN SCANDAL 150 (2017).

308. EWING, *supra* note 307, at 150–51, 154.

309. *Id.* at 215–16, 223–24.

310. *Id.* at 334.

311. Press Release, U.S. Dep't of Just., Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests (Jan. 11, 2017), https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six.

312. Michael Nienaber, *German Prosecutors Charge More VW Managers in Emissions Scandal*, REUTERS (Apr. 24, 2021, 6:27 AM),

justice turn more slowly than those of German cars. And public access to the details of criminal proceedings is restricted. Several defendants are presently being tried in German proceedings expected to last months or more.[313] Winterkorn and others await trial and have won long delays.[314]

Because the approach of German law to white-collar crime has been more lenient than the American approach, in both offense definition and punishment,[315] it is difficult to predict whether serious prison terms will be imposed on anyone in the VW prosecutions. In the United States, the DOJ charged eight individuals in federal court.[316] Two individuals have been convicted and sentenced to 40 months and 60 months in prison respectively, with one permitted to serve his sentence in Germany.[317] The remaining six, including Winterkorn, stand beyond the government's grasp unless the DOJ successfully pursues extradition.[318]

One could see VW as an exception proving the rule. It was truly extraordinary for top executives of a major global firm to expressly agree to break the law and leave a record of their decisions to do so. Prosecutors cannot expect to encounter such cases with frequency, although even the VW prosecutions have not easily yielded prison sentences. Or perhaps VW is evidence of a newer rule for individual liability in corporate crime. With market developments continuing to globalize corporate wrongdoing, the DOJ has sought to prosecute

https://www.reuters.com/business/autos-transportation/german-prosecutors-charge-more-vw-managers-emissions-scandal-dpa-2021-04-24/.

313. Nathan Eddy, *Four Ex-VW Managers Stand Trial in Germany Over Diesel Fraud*, AUTO. NEWS EUR. (Sept. 16, 2021, 7:06 AM), https://europe.autonews.com/automakers/four-ex-vw-managers-stand-trial-germany-over-diesel-fraud.

314. *Id.*

315. *See* Thomas Weigend, *Sentencing and Punishment in Germany*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 188, 198 (Michael Tonry & Richard S. Frase eds., 2001).

316. Press Release, U.S. Dep't of Just., IAV GmbH to Pay $35 Million Criminal Fine in Guilty Plea for Its Role in Volkswagen AG Emissions Fraud (Dec. 18, 2018), https://www.justice.gov/opa/pr/iav-gmbh-pay-35-million-criminal-fine-guilty-plea-its-role-volkswagen-ag-emissions-fraud; *see also* Second Superseding Indictment at 8–10, United States v. Dorenkamp, No. 2:16-cr-20394 (E.D. Mich. Jan. 11, 2017).

317. *See* Court Docket, United States v. Liang, No. 2:16-CR-20394 (E.D. Mich. 2016).

318. Press Release, U.S. Dep't of Just., Former CEO of Volkswagen AG Charged with Conspiracy and Wire Fraud in Diesel Emissions Scandal (May 3, 2018), https://www.justice.gov/opa/pr/former-ceo-volkswagen-ag-charged-conspiracy-and-wire-fraud-diesel-emissions-scandal (stating that Winterkorn and five others are "believed to be . . . German citizen[s] and to reside in Germany").

more corporate wrongdoing across international borders.[319] In such cases, the DOJ may increasingly find obstacles to the ordinarily routine first step of taking defendants into custody.

D. Boeing and the 737 MAX

The deadliest corporate crime of recent vintage was the fiasco of the Boeing Company's rollout of its 737 MAX aircraft. On October 29, 2018, a 737 MAX operated by Indonesian carrier Lion Air crashed into the Java Sea after takeoff, killing all 189 persons on board.[320] Several months later, on March 20, 2019, an Ethiopian Airlines 737 MAX crashed near Ejere, Ethiopia on takeoff, killing all 157 on board.[321] In both cases, causation of the crashes and deaths lay with Boeing. The company had designed the aircraft to accommodate a larger engine that required changes in the 737's operating system that confused pilots whom the company deliberately chose not to provide with adequate instruction on how to handle the new system.[322]

In the Boeing case, the trouble for prosecutors was that it is not a federal crime to cause an airline crash by failing to properly train a pilot. The theory of criminal liability in Boeing had to be based on the company's interactions with the Federal Aviation Administration (FAA), a weak, arguably captured agency that Boeing persuaded to permit the company to distribute the aircraft without providing pilots of previous 737 models with in-person simulator training on the altered flight control system.[323] (Pilots were certified for the MAX by completing a program installed on an iPad.)[324] In a deferred prosecution agreement with the DOJ, harshly criticized for its

319. Nicole M. Argentieri, Acting Assistant Att'y Gen., Crim. Div., Remarks at the American Bar Association 10th Annual White Collar Crime Institute (Oct. 10, 2023), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-remarks-american-bar.

320. David Schaper, *Boeing 737 Max Software Fix and Report on Fatal Crash Expected This Week*, NPR (Mar. 26, 2019, 10:09 PM), https://www.npr.org/2019/03/26/707050572/boeing-737-max-software-fix-and-report-on-fatal-crash-expected-this-week.

321. *Id.*

322. *See generally* PETER ROBISON, FLYING BLIND: THE 737 MAX TRAGEDY AND THE FALL OF BOEING 137–39 (2021). Robison's account is comprehensive and fully situates the causes of the disaster within the corporate history, structure, and culture of Boeing. *See id.* at 132–33 (discussing pressure applied by Boeing management to decrease costs and increase efficiency, often at the expense of quality).

323. *See* Deferred Prosecution Agreement at A-6, United States v. Boeing Co., No. 4:21-CR-005-O (N.D. Tex. 2022); *see also* United States v. Boeing Co., No. 4:21-CR-5-O, 2022 WL 13829875, at *6 (N.D. Tex. 2022).

324. *See Boeing Co.*, 2022 WL 13829875, at *2.

leniency and subject to ongoing litigation,[325] Boeing admitted that it conspired to defraud the FAA by concealing the extent and implications of innovations in the aircraft's operating system.[326] The company wanted to ensure that the FAA would not require expensive in-person retraining of pilots that would have raised the plane's price to a level inconsistent with Boeing's marketing strategy.[327]

The DOJ prosecuted a single individual: Mark Forkner, Boeing's lead technical pilot for the 737 MAX project.[328] Under the DOJ's theory, Forkner could be proven to have (1) understood the company's intense desire to persuade the FAA not to require in-person retraining, (2) understood the danger of pilots not reacting in a fully informed way to the new operating system, and (3) interacted directly with the FAA while minimizing the impact of the new system.[329] In one email, Forkner said to a colleague, "so I basically lied to the regulators (unknowingly)"; in another, he described FAA personnel as "dogs watching TV."[330] A jury in Fort Worth acquitted Forkner after less than two hours of deliberations, likely because his defense raised doubts about whether Forkner, who was not an engineer, realized the extent and implications of the changes to the aircraft.[331]

Some—including, of course, Forkner's lawyer—have argued that Forkner was a "scapegoat" or a "fall guy" served up by the company

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325. *See, e.g.*, John C. Coffee, Jr., *Nosedive: Boeing and the Corruption of the Deferred Prosecution Agreement*, HARV. L. SCH. F. CORP. GOVERNANCE (May 25, 2022), https://corpgov.law.harvard.edu/2022/05/25/nosedive-boeing-and-the-corruption-of-the-deferred-prosecution-agreement/; *Boeing Gets Prosecution Deferred Families Get Justice Denied*, CORP. CRIME REP. (Jan. 11, 2021, 9:47 PM), https://www.corporatecrimereporter.com/news/200/boeing-gets-prosecution-deferred-families-get-justice-denied/. For recent developments, see Benjamin Mullin, *Boeing Violated Settlement Over 737 Max Problems, Justice Dept. Says*, N.Y. TIMES (May 14, 2024), https://www.nytimes.com/2024/05/14/business/boeing-justice-department-settlement.html; David Shepardson, *Boeing 737 Max Plea Deal Withstands Challenge from Victims' Families*, REUTERS (Feb. 10, 2023, 1:07 PM), https://www.reuters.com/legal/us-judge-rejects-family-members-bid-reopen-boeing-737-max-plea-deal-2023-02-10/; Michael Laris, *Judge Rules DOJ Violated Rights of Boeing Max Victims in Prosecution Deal*, WASH. POST (Oct. 21, 2022, 10:28 PM), https://www.washingtonpost.com/transportation/2022/10/21/boeing-max-justice-department/.

326. Deferred Prosecution Agreement, *supra* note 323, at A-1, A-5.

327. *See id.* at A-6.

328. *See* Indictment at 4–5, United States v. Forkner, No. 4:21-CR-268-O (N.D. Tex. 2021).

329. *See id.* at 5–7.

330. Dominic Gates, *Why Boeing Pilot Forkner Was Acquitted in the 737 MAX Prosecution*, SEATTLE TIMES (Mar. 26, 2022, 11:12 AM), https://www.seattletimes.com/business/boeing-aerospace/why-boeing-pilot-forkner-was-acquitted-in-the-737-max-prosecution/.

331. *See id.*

to appease compliant prosecutors.[332] While there might be something to that, it is not clear how a more determined prosecutor could have established the level of knowledge and intent that would have been required to convict anyone else at Boeing of defrauding the FAA. A prosecutor would have needed to prove, beyond a reasonable doubt, knowledge and understanding of the details of the engineering problem and its training implications, along with knowledge of and participation in specific discussions with the FAA about pilot certification requirements. As in the GM and BP cases, connecting engineering details to senior, non-engineer management personnel within an extremely large corporation can be difficult, even with visibility into all internal records and access to all witnesses. Ironically, the frightening January 5, 2024, midair blowout on an Alaska Airlines 737, and subsequent reporting on the incident, pointed again to failures of systems and engineering controls and seems to offer no further support for theories of criminal liability of individuals within Boeing.[333]

The SEC's later administrative settlement with Boeing, in which the company neither admitted nor denied negligence liability under Section 17 of the Securities Act, was based on the effect on Boeing's stock price of statements made by its CEO about how the company was responding to the crashes and government investigation.[334] The SEC alleged that it was fraud for the CEO in a press release to call the aircraft "as safe as any airplane that has ever flown the skies" when the company knew that re-evaluation of the software system was underway.[335] To put it mildly, that statement would not have been a compelling basis on which to transform a case about engineering failures and deaths into a criminal prosecution of Boeing's CEO for defrauding the company's shareholders.[336]

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The objective of the preceding part has been to suggest—anecdotally, of course—that it may be unrealistic to expect successful prosecutions of significant numbers of individuals in large corporate scandals, even outside the context of fraud within financial institutions. While financial fraud presents special problems due to

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332. *Id.*

333. *See* James Glanz et al., *How Did a Boeing Jet End Up With a Big Hole?*, N.Y. TIMES (Jan. 23, 2024), https://www.nytimes.com/interactive/2024/01/23/business/boeing-alaska-airlines-door-plug.html.

334. Boeing Co., Securities Act Release No. 11105 (Sept. 22, 2022), https://www.sec.gov/files/litigation/admin/2022/33-11105.pdf.

335. *Id.* at 2.

336. *See* Emily Strauss, *Is Everything Securities Fraud?*, 12 U.C. IRVINE L. REV. 1331, 1333–34 (2022) (documenting and questioning practice of sanctioning a nearly limitless variety of corporate misconduct as securities fraud on theories of price impact flowing from nondisclosure of later revealed misconduct).

the nature of the crimes, as explored in Part I, obstacles to individual prosecution can arise from the realities of the large corporate form, even in instances of risks and harms associated with consumer products or industrial processes that do not involve complex securities. This Article now turns to the implications of its argument that increased individual prosecutions are as readily available a means of dealing with corporate wrongdoing as many have believed them to be.

III. What Is to Be Done?

The goal of this Article has been to marshal evidence to dissuade the reader from believing that increased commitment of prosecutors to indicting more individuals is a simple path to significantly reducing levels of corporate crime. Reform of corporate regulation is far too complex and broad a topic for adequate treatment in an already lengthy article. However, a reader moved, or perhaps even persuaded, by the preceding argument will want to have in view where else attention might be placed in the important project of reducing corporate wrongdoing. This Part will briefly address the comparative prospects of alternative tools for controlling corporate crime.

A. More Prosecutors and Agents

Start within current institutions of criminal prosecution. It is undeniable that the number of federal investigators (primarily FBI, IRS, Postal Service, and Treasury agents) and prosecutors is extremely small in relation to the massive size of the modern corporate economy.[337] More personnel should be urged and welcomed by anyone concerned with the incidence of fraud, bribery, and environmental and consumer harms in large corporations, and the continued attractiveness of those behaviors within the incentive systems in which corporate personnel work.[338]

This Article's findings should be concerning, however, for those who might think that more enforcers would translate naturally into more punishment—at least of the sorts of behaviors that produce sophisticated, sustained, and harmful corporate crime. More agents and prosecutors would not have reversed the outcome in any case discussed in this Article. Elbow grease is not going to get past barriers to criminal liability that this Article has shown arise from the nature of transactions in many markets and industries, and the complexity of decision-making within very large corporations.

More assets would produce more cases, because government actors need to show they are doing the job they were hired to do. The question is, what kinds of cases? A likely product would be more cases that are relatively unimportant to systemic deterrence, rather than

337. *See* Richman, *supra* note 23, at 273.
338. *See id.* at 276.

more deep digging at the highest levels followed by more convictions of senior personnel of the largest corporations. A thrust of Parts I and II of this Article was to expose the difficulties prosecutors run into even when they select what look like the most provable cases within corporate scandals and competently present evidence obtained through corporate cooperation. The project of dealing with corporate crime would not advance if it followed a path comparable to the one that has characterized the federal government's decades-long approach to narcotics control: the addition of agents and prosecutors who, needing to compile records and justify funding, select lower-level, easier cases that add prisoners but make little dent in the overall problem.

B. New Substantive Criminal Law

In many of the cases discussed in this Article, prosecutors encountered problems associated with proving that individuals engaging in what might broadly be described as misconduct on the job acted with sufficient knowledge of relevant facts and improper intent to be found liable. This difficulty increases as enforcement scrutiny rises the corporate ladder to examine the conduct of managers who are often several steps removed from the knowledge and action that comprise ground-level misconduct. Lowering this bar for prosecutors could be expected to ease paths to conviction, producing more frequent punishment and greater deterrence.

Exploring how to redefine business crimes is beyond the ambit of this Article. To have a significant impact, such moves would need to be relatively radical, would have to be accomplished legislatively, and would amount to an admission that more effort toward individual prosecutions under present legal regimes will not be sufficient to accomplish deterrence objectives.[339]

There are two major challenges for a criminal law reform agenda in this field. First, the most obvious path to easing conviction, given this Article's findings, would be to lower the mens rea for serious corporate crimes by, for example, making it a felony for a corporate manager to be reckless (to disregard known serious risks) or negligent (to fail to consider serious risks) about whether a firm's sales

339. I have engaged with the question previously in more depth. *See, e.g.*, Samuel W. Buell, *The Responsibility Gap in Corporate Crime*, 12 CRIM L. & PHIL. 471, 473–77 (2018); Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 547 (2015) [hereinafter Buell, *Culpability*]; Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1973 (2006); Buell, *Criminally Bad Management*, *supra* note 306, at 70; Samuel W. Buell, *Fraud*, *in* PALGRAVE HANDBOOK OF APPLIED ETHICS AND CRIMINAL LAW 265 (L. Alexander & K. Ferzan eds., 2019). For a detailed argument that *clarification* and *rationalization* of federal white-collar crimes, rather than expansion of offenses, would produce more publicly satisfying enforcement processes, see BAER, *supra* note 12, at 174–200.

personnel are causing customers to be materially misled or engineers are signing off on dangerous industrial processes. Such moves would challenge longstanding commitments in Anglo-American criminal law about the level of individual moral fault required to justify imprisoning a person for any substantial period.[340] Maybe such a debate is due, but its stakes should be fully faced.

Second, substantially altering crime definitions changes the nature of what is being deterred. If making crimes easier to prove is the path to more deterrence, one must consider whether broader offense definitions would end up deterring conduct well beyond the undesirable activities that motivated law reform. Criminalizing negligent or reckless management has the downside of discouraging many forms of risk-taking, including possibly the sorts of acceptable risks that businesses take when pursuing socially valuable profits and innovations.[341] As this Article has shown, one of the reasons that it can be difficult to prove criminal fault in the business context is that employees act in an environment largely consisting of legal and socially approved conduct. This makes line-drawing difficult, and accurately identifying who has crossed lines even harder. Moving the lines would require rethinking the fundamental question of what is socially desirable. New lines will also turn out to be hard to draw and police, because most industrial activities will not be relegated to the status of prohibited black markets.

C. Stronger Civil Liability

If individual prosecutions involving many corporate crimes are difficult due to the high criminal burden of proof and frequently demanding mens rea requirements, then civil regulatory enforcement may be a more promising route to the imposition of wider liability.[342] The burden of proof is lower in civil cases, and some regimes, including securities regulation, allow for liability on a showing of only recklessness or negligence, or in some instances strict liability.[343]

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340. *See* Buell, *Culpability*, *supra* note 339, at 549.

341. A striking post-financial-crisis statute in the United Kingdom, which does not appear to have been enforced against anyone, makes it a serious crime to (1) be a senior manager of a financial institution, (2) participate in a decision or fail to prevent a decision, (3) which decision caused the failure of the institution, (4) while aware that the decision risked the failure of the institution, and (5) having acted below what can reasonably be expected of a person in one's position. United Kingdom Financial Services Act 2013 § 36.

342. *See* Vikramaditya S. Khanna, *What Rises from the Ashes?*, 47 J. CORP. L. 1029, 1041–42 (2022).

343. *See, e.g.*, 15 U.S.C. § 77q (Section 17(a) of the Securities Act of 1933); 33 U.S.C. § 1319 (Clean Water Act enforcement); *see also* Miriam Baer, *The Information Shortfalls of Prosecuting Irresponsible Executives*, 70 DEPAUL L. REV. 191, 197 (2022) (discussing and critiquing strict liability for corporate managers).

Corporate actors arguably can be motivated through economic incentives provided by fines; these incentives, after all, often explain decisions to engage in misconduct in the first instance.

This Article has provided some evidence, however, that imposition of even civil liability in contested cases can be difficult for the government. This, coupled with inexperience in the field of trial lawyering, may partly explain why civil regulators are so conditioned to negotiate settlements with both firms and individuals across so many cases and industries.[344] Settlements, of course, produce lower penalties. The question of whether civil regulatory sanctions are high enough to deter has long loomed over civil enforcement, especially in the financial sector.[345] Problems include whether individuals are frequently insolvent in relation to a sufficiently deterrent sanction; whether laws and markets concerning insurance and indemnification defang the effect of monetary sanctions; whether Congress has provided steep enough statutory penalties; and whether the probability of successful enforcement is high enough to influence individuals who may have succeeded at work because of high appetite for risk and consistent over-confidence. The civil settlement data in the financial industry cases detailed in the Appendices to this Article show individual fine levels that intuitively do not appear large enough to have potent deterrent effects.[346]

Opportunities surely remain for redesign of civil enforcement regimes and institutions that might produce a greater level of fear among corporate actors about severe or total loss of wealth and livelihood from decisions to commit fraud and other offenses. If a deficit from too infrequent success in salient individual prosecutions is a public sense of insufficient accountability for misconduct within corporations, perhaps civil enforcement regimes could be fortified with types of penalties—such as wider availability of individual suspensions and debarments within industries—that would produce greater expressive effects from enforcement as well as more effective deterrence.

D. Whistleblowing Regimes

The best instrument for increasing the probability of sanctions, and thus deterrence, is to increase the frequency with which corporate crimes are detected. More instances of detection would not change the probability of conviction and punishment in any given

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344. *See* Speech from Luis A. Aguilar, Comm'r, SEC, A Stronger Enforcement Program to Enhance Investor Protection (Oct. 25, 2013), https://www.sec.gov/news/speech/2013-spch102513laa (stating that SEC settles roughly 98 percent of its enforcement cases); *see also* Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. CIN. L. REV. 505, 509 (2013).

345. *See, e.g.*, Buell, *supra* note 344, at 517.

346. *See infra* Appendices A–C.

case. But collecting more cases at the input end of the criminal enforcement process could, following investigation and sorting, yield a greater number of winnable cases at the output end.

The currently most popular idea for enhancing the detection of corporate crime is whistleblower incentives.[347] Corporate conduct cannot be surveilled by law enforcement in the manner used to investigate, for example, narcotics trafficking or organized crime. Large corporations are complex, opaque, and generally engaged in lawful activity. The government most often obtains its leads through the following means: (1) voluntary corporate self-reporting, provided in return for leniency in corporate settlements; (2) routine surveillance activities of certain markets, like securities exchanges and banking systems, by civil regulators; (3) investigative journalism; and (4) disclosure of corporate crimes by individuals seeking leniency who happen to be charged for other offenses.[348] If limited to these avenues, the government is forced into a mostly passive role in searching for cases to investigate. When statutes grant agencies the power to offer financial rewards to those who can lead investigators to corporate crimes, agents and prosecutors have more leverage for surfacing misconduct.

While the False Claims Act is old,[349] the whistleblower award regime under federal securities laws is still fairly new.[350] There is much more to be learned about the balance of costs and benefits in whistleblower regimes and the optimal design and administration of such systems. To return to the idea of adding more prosecutors and agents, enhancing enforcement personnel may be most effective if coupled with greater incentives for persons inside corporations to reveal crimes.[351] Again, without better means of detecting serious offenses, the addition of prosecutors and agents may only produce

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347. *See, e.g.*, Usha R. Rodrigues, *Optimizing Whistleblowing*, 94 TEMP. L. REV. 255, 265 (2022); Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Protections for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 97 (2007).

348. *See, e.g.*, *How Investigations Work*, SEC, https://www.sec.gov/enforcement/how-investigations-work (May 14, 2024).

349. *See* 31 U.S.C. § 3729; Jacob T. Elberg, *Health Care Fraud Means Never Having to Say You're Sorry*, 96 WASH. L. REV. 371, 373 (2021) (examining recent false claims act enforcement practice).

350. *See* 15 U.S.C. § 78u-6; Jennifer B. Poppe & Joe K. O'Connell, *Whistleblower Protection Under the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 45 SEC. REG. L.J. 391, 393 (2017); Philip G. Berger & Heemin Lee, *Did the Dodd-Frank Whistleblower Provision Deter Accounting Fraud?*, 60 J. ACCT. RSCH. 1337, 1338 (2022).

351. A related avenue is to consider how law enhances or reduces incentives for outsiders to uncover fraud. *See, e.g.*, Peter Molk & Frank Partnoy, *The Long-Term Effects of Short Selling and Negative Activism*, 2022 U. ILL. L. REV. 1, 58–59.

increased case filings that do not address the most serious and higher-level corporate behaviors that too often evade legal control.

E. Corporate Liability

A main theme in the case for greater imposition of individual liability has been a belief that corporate criminal liability does not adequately deter because it does not sufficiently affect managers and employees of public companies and because the government has been unwilling to impose sufficiently harsh or crippling penalties on corporations.[352] This view somewhat misses the current objective with which corporate criminal liability is practiced, for better or worse.[353] The DOJ's primary use of corporate criminal liability is as a lever to extract from corporations evidence that otherwise would be difficult and expensive for prosecutors to acquire.[354] Relatedly, the DOJ uses the threat of corporate liability to incentivize firms to take measures to prevent employee crime before it occurs.[355] The more direct criticism is thus that the DOJ has not been following through on its use of corporate criminal liability to produce more individual convictions and punishment.[356]

This Article has raised questions about how easily prosecutors can be expected to secure individual convictions even when corporations have cooperated and assisted prosecutors in locating, acquiring, organizing, and understanding often far-flung and complex evidence. Still, prosecutors would play a much weaker hand with corporate crime if they lacked the lever of corporate liability to enhance their investigative capabilities. The Yates Memo's direction to prosecutors to show their work on translating corporate cooperation into individual sanctioning was a welcome development.[357] The DOJ should continue to monitor and disclose whether corporate criminal settlements produce individual cases. However, observers should be realistic about how reliably the government, even with full corporate cooperation, can convert settlements into individual convictions.[358]

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352. For recent articles canvassing debates and sources on corporate criminal liability, a starting point is the collection at 47 J. CORP. L. 861 (2022).

353. *See* Arlen & Buell, *supra* note 10, at 705–09.

354. In its recent policy announcement emphasizing the centrality of corporate self-reporting and timely cooperation to leniency in sanctioning, the Biden DOJ could not have been more explicit about its commitment to this theory. *See* Monaco, *supra* note 7, at 6–9.

355. *See id.* at 2, 9–10.

356. *See* Garrett, *supra* note 9, at 1790–91.

357. Yates Memo, *supra* note 7, at 6.

358. There remain deterrent reasons for imposition of corporate criminal liability even if individual prosecutions cannot be achieved. *See* Samuel W. Buell, *A Restatement of Corporate Criminal Liability's Theory and Research Agenda*, 47

F. Advanced Compliance Management

Law need not concern itself with deterring corporate crimes that do not occur because they have been prevented by non-legal instruments. If law never intervenes, no sanctions are imposed, and both individuals and corporations have avoided the costs of enforcement. This is the primary reason why all large corporations operate compliance programs and why corporate law imposes a duty of care on officers and directors to monitor and prevent employee crime.[359]

Compliance is all the rage.[360] The field is still young, perhaps promising that management science may evolve to a point of greater effectiveness in operating firms within the confines of the law. As exceedingly important as this instrument is in understanding how to deal with corporate crime, one should not get carried away. The reason corporations must worry so much about compliance is that there are powerful incentives—which one can see abundantly in the cases discussed in this Article—for individuals to commit corporate crimes. Those incentives, just like the compliance programs that try to deal with their consequences, are products of corporate management. A corporation engaging in compliance efforts, particularly in industries like finance and pharma that run on high levels of bonus-driven compensation, can be a bit like an owner who trains an attack dog and then constantly struggles up and down the street with the leash to keep the dog from biting.[361]

Integration of the legal field of compliance studies and fields of management science have a long way to go before we can understand how to effectively reconcile profit incentives with controls against law violations. Indeed, the present consensus around the need for wider imposition of individual criminal liability has grown over the same

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J. CORP. L. 937, 941 (2022); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 500 (2006).

359. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968–70 (Del. Ch. 1996); *In re* Boeing Co. Derivative Litig., No. 2019-0907, 2021 WL 4059934, at *24 (Del. Ch. 2021).

360. *See, e.g.*, Martinez, *supra* note 302, at 254–56; Miriam H. Baer, *Compliance Elites*, 88 FORDHAM L. REV. 1599, 1600–02 (2019); Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2138–40 (2019); James A. Fanto, *The Professionalization of Compliance: Its Progress, Impediments, and Outcomes*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 183, 184–86 (2021); Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1858–59 (2021); John Armour et al., *Taking Compliance Seriously*, 37 YALE J. ON REG. 1, 10–11 (2020).

361. The DOJ has made a recent move to try to alter incentives by providing corporations with greater rewards for clawing back compensation from wrongdoers and bonusing employees who devote efforts to compliance. *See* Memorandum from the U.S. Dep't of Just., The Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks 1–3 (Mar. 2, 2023), https://www.justice.gov/criminal-fraud/file/1571941/download.

decades that compliance studies, compliance engineering, and legal incentives for strong compliance have boomed.[362] The modern conception of corporate compliance has been helping but not exactly working. The DOJ's recent enforcement actions are replete with stories of weak and ignored compliance systems even at the largest brand-name firms that should have the greatest incentives to manage prudently. This is not a reason for pessimism on the project of internal prevention of corporate crime, but rather cause to urge that the field of compliance needs more study, more experimentation, and more thinking about how to deal with its basic structural challenge.

G. Ex Ante Regulation

When I teach a survey course in corporate crime each year, a recurring theme in class discussion is the relationship between each scandal under study and the background regulatory framework that applies to the industry in question. It is not just that the regulations and regulators failed to prevent the problem. It is that, over and over, regulation explains the problem—by constituting the target zone and motivation for the misconduct.

Boeing hit its price target for the 737 MAX by steamrolling FAA personnel whose job it was to require pilots to undergo sufficient training on a new flight system. Volkswagen cheated thousands of buyers about the performance of its diesel engines by easily deceiving the EPA's robotic and predictable emissions testing system. Traders exploited manipulable benchmark indices to generate easy profits in interest rate and currency markets. Other traders used their freedom to play with mark-to-market accounting to hide severe book losses in over-the-counter deals involving bespoke derivative instruments. The story repeats over and over when a corporate scandal erupts, and the backward-looking examination of causation follows.

It is an obvious point, but one that cannot be repeated too often. Good regulation, reliably enforced, is a far more desirable way to referee the line between corporate profit-making and corporate misconduct than a federal prison. Perhaps corporate criminal law has grown so much as a field in the last several decades because regulation has been pummeled by a long, massively funded attack on "big government," "the regulatory state," "wasteful regulation," and the like.[363] It is much harder politically for corporations to say they

362. *See, e.g.*, Gadinis & Miazad, *supra* note 360, at 2138–40; Fanto, *supra* note 360, at 184–86.

363. *See, e.g.*, Peter M. Shane, *The Quiet GOP Campaign Against Government Regulation*, ATLANTIC (Jan. 26, 2017), https://www.theatlantic.com/politics/archive/2017/01/gop-complicates-regulation/514436/; Michael Waldman, Opinion, *Supreme Court's Next Target: The Regulatory State*, BRENNAN CTR. FOR JUST. (May 2, 2023), https://www.brennancenter.org/our-work/analysis-opinion/supreme-courts-next-target-regulatory-state.

find crime acceptable than to say that "regulations" (some of which carry criminal penalties) are stifling economic growth. If the project of managing corporate activity to keep Americans safe from fraud, pollution, corruption, and other abuses has turned to criminal punishment while beating a retreat from ex ante regulation, that is a shame. Valuable ground may have been lost. But no one should be under the illusion that indicting more individuals when corporate scandals erupt is a winning strategy for taking back that ground. Future work should more closely examine the relationship between regulatory regimes and corporate crime with the goal of shaping regulations to be more effective, or at least not criminogenic.

CONCLUSION

This Article has sought to persuade the reader that individual prosecutions are not as readily available a means of reducing the incidence of corporate crimes as believed, at least within large corporations and especially in financial markets. The current contrary belief, which has its origins in the potent politics of the financial crisis of 2008 to 2009 and the Great Recession, has been enduring. The impulse is understandable, in part because deterrence theory has pointed for so long, and so strongly and intuitively, to the power of threatening profit-and-loss-motivated individuals with meaningful risks of imprisonment.

Yet few corporate miscreants seem to land in prison in relation to the size of the corporate sector and the incidence of corporate scandals. The objective in Parts I and II of this Article was to show, through a close study of litigation on the ground, how that results at least as much from the difficulty of obtaining convictions as from the government's taste for seeking indictments. Structurally, corporate crime involves problems of criminal intent and individuation of responsibility for corporate actions that institutional design in criminal enforcement cannot alone solve. Thus, as Part III of the Article explored, debate about how to deal with corporate crime should take that difficulty more seriously and treat it as cause for paying greater attention to alternative means of control, especially projects of ex ante regulation that have lost influence and are too often motivators for corporate crime rather than the barriers those projects ought to be.

APPENDIX A[364]
MORTGAGE-BACKED SECURITIES CRIMINAL & CIVIL OUTCOMES

TABLE A1: MBS CRIMINAL PROSECUTION SUMMARY

	GUILTY PLEA	TRIAL CONVICTION	ACQUITTAL	OVERTURNED	TOTAL
Overall Outcomes	1	2	5	1	8
Subject to Imprisonment	1	1	—	1	2
Average Sentence	30 mo.	0 mo.*	—	—	10 mo.
Average Time in Custody	26 mo.	4 mo.†	—	—	11 mo.

* Michael Gramins was sentenced to two years' probation.
† Jesse Litvak spent eight months in custody before the Second Circuit overturned his conviction; Gramins was never in federal custody.

TABLE A2: MBS CIVIL ENFORCEMENT SUMMARY

	LIABLE	NOT LIABLE	SETTLED	TOTAL
Overall Outcomes	1	1	32	34
Fines	1	0	20	21
Average Fine	$650,000	—	$813,324	$805,547
Disgorgements	1	0	12	13
Average Disgorgements	$175,463	—	$4,452,851	$4,123,821

364. Comprehensive data on all MBS-related civil-enforcement actions was gathered by searching the SEC's list of financial crisis-related civil enforcement actions centered on individuals charged with fraud related to mortgage-backed securities. *See, e.g.*, *SEC Enforcement Actions Addressing Misconduct That Led to or Arose From the Financial Crisis*, SEC, https://www.sec.gov/spotlight/enf-actions-fc.shtml (July 5, 2019) (listing every enforcement action brought by SEC in response to the 2008 Financial Crisis). While there is no central repository for DOJ criminal prosecutions, a search of "mortgage-backed securities" prosecutions on www.justice.gov generated press releases indicating five criminal prosecutions had been brought by the DOJ. Searching "mortgage-backed securities individual prosecutions" on news databases *Bloomberg*, *The Wall Street Journal*, and *Thomson Reuters*, those five prosecutions were identified and were then further researched by reference to their criminal docket entries.

TABLE A3: MBS MAJOR CRIMINAL PROSECUTIONS

DEFENDANT	INSTITUTION	GOV. AGENCY	RESOLUTION	RESOLUTION DATE	SENTENCE
R. Cioffi	Bear Stearns	D.O.J.*	Not Guilty	Nov. 10, 2009	None
M. Tannin	Bear Stearns	D.O.J.	Not Guilty	Nov. 10, 2009	None
K. Serageldin	Credit Suisse	D.O.J.	Guilty Plea	Apr. 12, 2013	30 mo.
J. Litvak	Jeffries	D.O.J.	Conviction O.T.†	Apr. 26, 2017	24 mo.
R. Shapiro	Nomura	D.O.J.	Not Guilty	June 15, 2017	None
T. Peters	Nomura	D.O.J.	Not Guilty	June 15, 2017	None
D. Demos	Cantor Fitzgerald	D.O.J.	Not Guilty	May 10, 2018	None
M. Gramins	Nomura	D.O.J.	Trial Conviction	Dec. 30, 2020	2 yrs. probation

* Department of Justice
† Conviction overturned on appeal

TABLE A4: MBS CIVIL ENFORCEMENT ACTIONS

DEFENDANT	INSTITUTION	GOV. AGENCY	RESOLUTION	RESOLUTION DATE	BAN/FINE
C. Crittenden	Citigroup	S.E.C.*	Penalty Imposed	July 29, 2010	$100k fine
A. Tildesley Jr.	Citigroup	S.E.C.	Penalty Imposed	July 29, 2010	$80k fine
B. Morrice	New Century	S.E.C.	Penalty Imposed	July 30, 2010	$791k†
P. Dodge	New Century	S.E.C.	Penalty Imposed	July 30, 2010	$550k
D. Kenneally	New Century	S.E.C.	Penalty Imposed	July 30, 2010	$188k

DEFENDANT	INSTITUTION	GOV. AGENCY	RESOLUTION	RESOLUTION DATE	BAN/FINE
A. Mozilo	Countrywide	S.E.C.	Penalty Imposed	Oct. 15, 2010	$67.5MM, ban
D. Sambol	Countrywide	S.E.C.	Penalty Imposed	Oct. 15, 2010	$5.52MM, ban
E. Sieracki	Countrywide	S.E.C.	Penalty Imposed	Oct. 15, 2010	$130k fine, ban
J. Kelsoe Jr.	Morgan Keegan	S.E.C.	Penalty Imposed	June 22, 2011	$500k fine
J. Weller	Morgan Keegan	S.E.C.	Penalty Imposed	June 22, 2011	$50k fine
R. Merk	Charles Schwab	S.E.C.	Penalty Imposed	Nov. 21, 2011	$150k fine
R. Cioffi	Bear Stearns	S.E.C.	Penalty Imposed	June 18, 2012	$800k
M. Tannin	Bear Stearns	S.E.C.	Penalty Imposed	June 18, 2012	$250k
K. Daifotis	Charles Schwab	S.E.C.	Penalty Imposed	July 17, 2012	$325k
B. Stoker	Citibank	S.E.C.	Not Liable	Aug. 6, 2012	None
S. McMurty	Wells Fargo	S.E.C.	Penalty Imposed	Aug. 14, 2012	$25k fine, susp.
L. Premo	Evergreen	S.E.C.	Penalty Imposed	Jan. 7, 2013	5 yr. ban
K. Serageldin	Credit Suisse	S.E.C.	Penalty Imposed	Jan. 21, 2014	$1MM Disg.
D. Higgs	Credit Suisse	S.E.C.	No Penalty	Jan. 21, 2014	None
F. Siddiqui	Credit Suisse	S.E.C.	No Penalty	Jan. 21, 2014	None
S. Siddiqui	Credit Suisse	S.E.C.	No Penalty	Jan. 21, 2014	None

DEFENDANT	INSTITUTION	GOV. AGENCY	RESOLUTION	RESOLUTION DATE	BAN/FINE
F. Tourre	Goldman Sachs	S.E.C.	Liable	Mar. 27, 2014	$857k
R. Syron	Freddie Mac	S.E.C.	Penalty Imposed	Apr. 9, 2015	$250k donation
P. Cook	Freddie Mac	S.E.C.	Penalty Imposed	Apr. 9, 2015	$50k donation
D. Bisenius	Freddie Mac	S.E.C.	Penalty Imposed	Apr. 9, 2015	$10k donation
E. Dallavecchia	Fannie Mae	S.E.C.	Penalty Imposed	Sept. 21, 2015	$25k fine
T. Lund	Fannie Mae	S.E.C.	Penalty Imposed	Sept. 21, 2015	$10k fine
J. Flannery	State Street	S.E.C.	Penalty O.T.⚑	Dec. 9, 2015	$6.5k fine, ban
J. Hopkins	State Street	S.E.C.	Penalty O.T.	Dec. 9, 2015	$65 fine, ban
D. Mudd	Fannie Mae	S.E.C.	Penalty Imposed	Aug. 11, 2016	$100k fine
W. Morales	Commonwealth	S.E.C.	Penalty Imposed	Feb. 15, 2016	$130k fine
R. Shapiro	Nomura	S.E.C.	Penalty Imposed	Oct. 3, 2018	$200k fine
T. Peters	Nomura	S.E.C.	Dismissed	Nov. 6, 2019	None
M. Gramins	Nomura	S.E.C.	No Penalty	Apr. 26, 2022	None

∗ Securities and Exchange Commission

† Where "fine" is not specified, the total refers to total fine + disgorgement + interest owed.

⚑ Penalty Overturned on Appeal

APPENDIX B[365]
LIBOR CRIMINAL & CIVIL OUTCOMES

TABLE B1: LIBOR CRIMINAL PROSECUTION SUMMARY (UNITED STATES & UNITED KINGDOM)

	GUILTY PLEA	TRIAL CONVICTION	ACQUITTAL	OVERTURNED	DISMISSED / UNRES.	TOTAL
Overall Outcomes	6	10	11	4	15	42
Subject to Imprisonment	3	6	0	0	0	9
Average Sentence	14 mo.	46 mo.	—	—	—	33 mo.

365. Comprehensive data on all Libor criminal prosecutions was gathered by referencing DOJ and SFO press-release references to the number of prosecutions brought and Thomson Reuters' investigation summary chart. Next, those cases were identified by searching "Libor criminal prosecutions" and "Euribor criminal prosecutions" in various media databases, including *Bloomberg*, *The Wall Street Journal*, and *Thomson Reuters*. *See SFO Concludes Investigation into LIBOR Manipulation*, SERIOUS FRAUD OFF. (Oct. 18, 2019), https://www.sfo.gov.uk/2019/10/18/sfo-concludes-investigation-into-libor-manipulation/ (stating SFO brought criminal charges against 13 individuals); *DOJ LIBOR Manipulation Investigation Chart*, THOMSON REUTERS 1–7 (Dec. 31, 2023), https://uk.practicallaw.thomsonreuters.com/w-001-0975?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&ppcid=8997b4ac1790465b99579163e37f39b2&comp=pluk&firstPage=true (detailing the DOJ's Libor prosecutorial and investigative activity); *see, e.g.*, Nate Raymond, *Ex-Deutsche Bank Trader Pleaded Guilty in U.S. to Libor Scheme: Records*, REUTERS, (June 22, 2016, 12:50 PM), https://www.reuters.com/article/us-deutsche-bank-libor-crime/ex-deutsche-bank-trader-pleaded-guilty-in-u-s-to-libor-scheme-records-idUSKCN0Z81X5 (chronicling the prosecutions of Matthew Connolly and Gavin Black). Comprehensive data on all Libor civil-enforcement actions was gathered by referencing the Commodity Futures Trading Commission's (CFTC's) press release on Libor fines and by searching the U.K. Financial Conduct Authority's (FCA's) website for all individuals banned and fined in connection with the Libor scandal. *See* Press Release, Commodity Futures Trading Comm'n, CFTC Orders the Royal Bank of Scotland to Pay $85 Million Penalty for Attempted Manipulation of U.S. Dollar ISDAFIX Benchmark Swap Rates (Feb. 3, 2017), https://www.cftc.gov/PressRoom/PressReleases/7527-17 (listing all Libor-related fines, none of which were levied against individuals); *see, e.g.*, Press Release, Fin. Conduct Auth., FCA Decides to Ban Tom Hayes (Aug. 11, 2017), https://www.fca.org.uk/news/press-releases/fca-decides-ban-tom-hayes; Press Release, Fin. Conduct Auth., FCA Fines and Bans Former RBS Trader, Neil Danziger (Aug. 1, 2018), https://www.fca.org.uk/news/press-releases/fca-fines-and-bans-former-rbs-trader-neil-danziger.

TABLE B2: LIBOR CIVIL ENFORCEMENT SUMMARY

	LIFETIME BAN	FINE	BOTH	WITHDRAWN	TOTAL
Overall Outcomes	12	4	4	0	12
Average Fine	—	£186,250*	—	—	—

* All 12 major Libor enforcement actions were undertaken by the U.K.'s Financial Conduct Authority (FCA).

TABLE B3: LIBOR CRIMINAL PROSECUTIONS (UNITED STATES & UNITED KINGDOM)

DEFENDANT	INSTITUTION	GOV. AGENCY	RESOLUTION	RESOLUTION DATE	SENTENCE
T. Hayes	UBS	S.F.O.*	Tr. Conviction	Aug. 2015	11 yr.
D. Read	ICAP	S.F.O.	Tr. Conviction	Jan. 28, 2016	None
C Goodman	ICAP	D.O.J.	Not Guilty	Oct. 26, 2018	None
D. Wilkinson	ICAP	S.F.O.	Jury Acquittal	Jan. 28, 2016	None
T. Farr	ICAP	S.F.O.	Jury Acquittal	Jan. 28, 2016	None
J. Gilmour	ICAP	S.F.O.	Jury Acquittal	Jan. 28, 2016	None
N. Cryan	ICAP	S.F.O.	Jury Acquittal	Jan. 28, 2016	None
J. Merchant	Barclays	S.F.O.	Tr. Conviction⚑	July 2016	6.5 yr.
P. Johnson	Barclays	S.F.O.	Guilty Plea	July 2016	4 yr.
J. Mathew	Barclays	S.F.O.	Tr. Conviction	July 2016	4 yr.
A. Pabon	Barclays	S.F.O.	Tr. Conviction	July 2016	21 mo.

DEFENDANT	INSTITUTION	GOV. AGENCY	RESOLUTION	RESOLUTION DATE	SENTENCE
P. Robson	Rabobank	D.O.J.†	Guilty Plea	Nov. 2016	T.S.°, 2 yr. S.R.✦
P. Thompson	Rabobank	D.O.J.	Guilty Plea	Nov. 2016	3 mo.
L. Stewart	Rabobank	D.O.J.	Guilty Plea	Feb. 2017	T.S., 2 yr. S.R.
T. Yagami	Rabobank	D.O.J.	Guilty Plea	Mar. 2017	T.S., 2 yr. S.R.
S. Contogoulas	Barclays	S.F.O.	Jury Acquittal	Apr. 29, 2017	None
R. Reich	Barclays	S.F.O.	Jury Acquittal	Apr. 29, 2017	None
A. Allen	Rabobank	D.O.J.	Conviction reversed	July 2017	1 yr., 1 day
A. Conti	Rabobank	D.O.J.	Conviction reversed	July 2017	1 yr., 1 day
A. Kraemer	Deutsche	S.F.O.	Not Guilty	June 29, 2018	None
C. Bittar	Deutsche	S.F.O.	Guilty Plea	July 19, 2018	64 mo.
T. Parietti	Deutsche	D.O.J.	Plea Withdrawn; Dismissed	Aug. 5, 2022	None
S. Bohart	Barclays	S.F.O.	Not Guilty	Mar. 26, 2019	None
M. Curtler	Deutsche	D.O.J.	Plea Withdrawn; Dismissed	Sept. 6, 2022	None
A. Hauschild	Deutsche	S.F.O.	Not Guilty	July 5, 2019	None
J. Vogt	Deutsche	S.F.O.	No Extradition	June 10, 2020	None
A. Gharagozlou	Deutsche	S.F.O.	No Extradition	June 10, 2020	None
K. Kappauf	Deutsche	S.F.O.	No Extradition	June 10, 2020	None

DEFENDANT	INSTITUTION	GOV. AGENCY	RESOLUTION	RESOLUTION DATE	SENTENCE
C. Bermingham	Barclays	S.F.O.	Tr. Conviction	Dec. 9, 2020	5 yr.
C. Palombo	Barclays	S.F.O.	Tr. Conviction	Dec. 9, 2020	4 yr.
M. Connolly	Deutsche	D.O.J.	Conviction Reversed☆	Jan. 2022	None
G. Black	Deutsche	D.O.J.	Conviction Reversed	Jan. 2022	None
T. Motomura	Rabobank	D.O.J.	Fugitive	Unresolved	None
M. Bescond	SocGen	D.O.J.	Lit. Ongoing**	Unresolved	None
D. Sindzingre	SocGen	D.O.J.	Lit. Ongoing	Unresolved	None
T. Hayes	UBS	D.O.J.	Dismissed	Oct. 27, 2022	None
R. Darin	UBS	D.O.J.	Indicted, no trial	Not Tried	None
D. Read	ICAP	D.O.J.	Dismissed	Not Tried	None
C. Goodman	ICAP	D.O.J.	Dismissed	Not Tried	None
D. Wilkinson	ICAP	D.O.J.	Dismissed	Not Tried	None
S. Esper	SocGen	S.F.O.	No Extradition††	Unresolved	None
P. Moryoussef	Barclays	S.F.O.	No Extradition	Unresolved	8 yr.

* U.K. Serious Fraud Office
† U.S. Department of Justice
⚑ Conviction Obtained at Trial
** Case Not Closed or Resolved
º Time Served
✦ Supervised Release
☆ Conviction Overturned on Appeal
†† France Refused to Extradite to the U.K.

TABLE B4: LIBOR CIVIL ENFORCEMENT ACTIONS

DEFENDANT	INSTITUTION	GOV. AGENCY	RESOLUTION	RESOLUTION DATE	BAN/FINE
M. Gardiner	R.P. Martin	F.C.A.*	Penalty Imposed	2015	£210k fine, ban
M. Johnson	R.P. Martin	F.C.A.	Penalty Imposed	2016	£105k fine, ban
S. Scott	RBS	F.C.A.	Penalty Imposed	2016	Ban
J. Katz	Barclays	F.C.A.	Penalty Imposed	Aug. 26, 2016	Lifetime Ban
C. Ashton	UBS	F.C.A.	Penalty Imposed	Aug. 11, 2017	Lifetime Ban
M. Weston	Deutsche	F.C.A.	Penalty Imposed	2018	£180k fine, ban
P. Little	RBS	F.C.A.	Penalty Imposed	Jan. 2018	£250k fine, ban
R. Usher	UBS	F.C.A.	Penalty Imposed	June 2018	Lifetime Ban
R. Ramchandani	Deutsche	F.C.A.	Penalty Imposed	Sept. 14, 2018	Lifetime Ban
J. Mathew	Barclays	F.C.A.	Penalty Imposed	Oct. 30, 2018	Lifetime Ban
T. Farr	ICAP	F.C.A.	Penalty Imposed	May 29, 2019	Lifetime Ban
C. Bermingham	Barclays	F.C.A.	Penalty Imposed	Sept. 27, 2021	Lifetime Ban

* U.K. Financial Conduct Authority

APPENDIX C[366]
FOREX CRIMINAL & CIVIL OUTCOMES

TABLE C1: FOREX CRIMINAL PROSECUTION SUMMARY

	GUILTY PLEA	TRIAL CONVICTION	ACQUITTAL	NO EXTRADITION	TOTAL
Overall Outcomes	2	2	3	1	8
Subject to Imprisonment	0*	2	0	0	2
Average Sentence	2 yr. S.R.	16 mo.	—	—	8 mo.
Average Time in Custody	0 days	10 mo.	—	—	5 mo.

* Jason Katz and Christopher Cummins were both sentenced to time served plus supervised release and were not imprisoned before pleading guilty.

366. Comprehensive data on all Forex criminal prosecutions was gathered by first referencing DOJ and SFO's Forex wrap-up press releases detailing the number of prosecutions brought. Next, "Forex individual prosecutions" were searched in media databases *Bloomberg*, *The Wall Street Journal*, *Thomson Reuters*, and *Law360*, the cases referenced in the agency press releases were found, and further research was done by reference to each case's docket number. *See* Press Release, Serious Fraud Off., SFO Closes Forex Investigation (Mar. 15, 2016), https://www.sfo.gov.uk/2016/03/15/sfo-closes-forex-investigation/ (explaining that zero Forex criminal prosecutions were brought in the UK); Press Release, U.S. Dep't of Just., Three Former Traders for Major Banks Indicted in Foreign Currency Exchange Antitrust Conspiracy (Mar. 9, 2017), https://www.justice.gov/opa/pr/three-former-traders-major-banks-indicted-foreign-currency-exchange-antitrust-conspiracy (stating that the DOJ criminally had charged six individuals to that point); Stewart Bishop, *HSBC FX Exec Said, 'I Think We Got Away with It,' Jury Hears*, LAW360 (Oct. 6, 2017, 10:39 PM), https://www.law360.com/articles/972351/hsbc-fx-exec-said-i-think-we-got-away-with-it-jury-hears (covering four additional DOJ Forex criminal prosecutions); *see generally* Docket, United States v. Usher, No. 1:17-CR-00019 (S.D.N.Y. 2018) (showing dockets for Richard Usher, Rohan Ramchandani, and Christopher Ashton). Comprehensive data on all Forex civil-enforcement actions was gathered by referencing FCA's list of Forex fines as well as the OCC and Federal Reserve's civil-enforcement actions from 2013 through May 2022. *See* Press Release, Fin. Conduct Auth., FCA Fines Barclays €284,432,000 for Forex Failings (Nov. 17, 2021), https://www.fca.org.uk/news/press-releases/fca-fines-barclays-%C2%A3284432000-forex-failings (listing every Forex fine imposed, which included only banks and zero individuals); *see, e.g.*, Final Decision at 1, *In re* Ashton, FRS Docket No. 16-015-CMP-1 (May 19, 2017) (banning and fining Christopher Ashton).

TABLE C2: FOREX CIVIL ENFORCEMENT SUMMARY

	LIFETIME BAN	FINE	BOTH	DISMISSED	TOTAL
Overall Outcomes	7	2	2	2	9
Average Fine	—	$612,500	—	—	—

TABLE C3: FOREX CRIMINAL PROSECUTIONS

DEFENDANT	INSTITUTION	GOV. AGENCY	RESOLUTION	RESOLUTION DATE	SENTENCE
S. Scott	HSBC	D.O.J.*	No Extradition†	July 31, 2018	None
R. Usher	JPMorgan	D.O.J.	Not Guilty	Oct. 26, 2018	None
R. Ramchandani	Citibank	D.O.J.	Not Guilty	Oct. 26, 2018	None
C. Ashton	Barclays	D.O.J.	Not Guilty	Oct. 26, 2018	None
J. Katz	Barclays	D.O.J.	Guilty Plea	Oct. 14, 2020	T.S.⚑, 2 yr. S.R.º, fine
C. Cummins	Citibank	D.O.J.	Guilty Plea	Oct. 22, 2020	T.S., 2 yr. S.R., fine
M. Johnson	HSBC	D.O.J.	Tr. Conviction✦	Nov. 2, 2020	2 yr., 3 yr. S.R., fine
A. Aiyer	JPMorgan	D.O.J.	Tr. Conviction	May 5, 2022	8 mo., 2 yr. S.R., fine
F. Cahill	HSBC	D.O.J.	N.P. Agreement☆	Not Tried	None
D. Khot	HSBC	D.O.J.	N.P. Agreement	Not Tried	None

* Department of Justice
† U.K. Refused to Extradite to the U.S.
⚑ Time Served
º Supervised Release
✦ Conviction Obtained at Trial
☆ Non-Prosecution Agreement

TABLE C4: FOREX CIVIL ENFORCEMENT ACTIONS

DEFENDANT	INSTITUTION	GOV. AGENCY	RESOLUTION	RESOLUTION DATE	BAN/FINE
M. Gardiner	UBS	Fed. Reserve*	Penalty Imposed	July 2016	Lifetime Ban
M. Johnson	HSBC	Fed. Reserve	Penalty Imposed	Oct. 5, 2016	Lifetime Ban
S. Scott	Barclays	Fed. Reserve	Penalty Imposed	Oct. 5, 2016	Lifetime Ban
J. Katz	Barclays	Fed. Reserve	Penalty Imposed	Jan. 4, 2017	Lifetime Ban
C. Ashton	Barclays	Fed. Reserve	Penalty Imposed	May 19, 2017	Lifetime Ban
M. Weston	Barclays	Fed. Reserve	Penalty Imposed	July 21, 2017	Lifetime Ban
P. Little	Barclays	Fed. Reserve	Penalty Imposed	Apr. 2021	Lifetime Ban, Fine
R. Usher	JPMorgan	O.C.C.†	Dismissed	No Penalty	None
R. Ramchandani	Citibank	O.C.C.	Dismissed	No Penalty	None

* U.S. Federal Reserve
† U.S. Federal Office of the Comptroller of the Currency