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Opacity, Fragility, & Power: Lessons from the Law Enforcement Response to the Financial Crisis

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OPACITY, FRAGILITY, & POWER

LESSONS FROM THE LAW ENFORCEMENT RESPONSE TO THE FINANCIAL CRISIS

Gregory M. Gilchrist†

Review of MARY KREINER RAMIREZ & STEVEN A. RAMIREZ, THE CASE FOR THE CORPORATE DEATH PENALTY: RESTORING LAW AND ORDER ON WALL STREET (New York 2017)

INTRODUCTION

The institutional aggregation of wealth and opposition to it are woven into our nation's history like the wild grapevines and clematis competing in my backyard. Neither seems to prevail with any permanence, but in their ongoing seasonal contest they sometimes threaten the trees on which they climb.

Andrew Jackson decried the Second Bank of the United States as a "hydra of corruption."[1] In the years following the 2008 financial crisis, the phrase was eerily echoed[2] by Rolling

† Professor of Law, University of Toledo College of Law. J.D., Columbia. A.B., Stanford. I would like to thank Miriam Baer, Geoff Rapp, Lee Strang, and Evan Zoldan for insightful comments on earlier versions of this review. I would also like to thank the authors, Mary and Steve Ramirez, for inviting me to the 2016 Annual Institute for Investor Protection Conference at the Loyola Chicago School of Law, where we debated and developed many of the issues addressed herein. Finally, I would like to thank Anne Conroy, Alexa Bordner, and the editorial staff at the *Brooklyn Law Review* for their excellent work on this review.

1 *See* JON MEACHAM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE 256 (2008); *see also* S. G. HEISKELL, ANDREW JACKSON AND EARLY TENNESSEE HISTORY 614 (1920) (letter to Rev. H. M. Cryer dated Apr. 7, 1833) ("I have no hesitation to say, if they can recharter the bank, with its hydra of corruption, they will rule the nation, and its charter will be perpetual, and its corrupting influence destroy the liberty of our country."). Jackson "thought that the Second Bank's monopoly over government finances gave Biddle and his friends undue profits and power." Charles W. Murdock, *The Big Banks: Background, Deregulation, Financial Innovation, and "Too Big to Fail"*, 90 DENV. U. L. REV. 505, 509 (2012).

2 The echo is of course imperfect. Whereas Taibbi expressed concerns about the aggregation of wealth and power in America's largest banks, the source of Jackson's concern is both more nuanced and controversial. Jackson's rhetoric about corruption sounds akin to Taibbi's, albeit about an institution that was itself a quasi-government entity with regulatory authority over state banks. Some have argued Jackson was an "instrument of the private banks" that faced and opposed regulation by the national

Stone reporter Matt Taibbi who described Goldman Sachs as a "great vampire squid wrapped around the face of humanity, relentlessly jamming its blood funnel into anything that smells like money."[3] Concerns about the manner in which wealth is channeled, the power that accompanies it, and the impact of both on the rule of law are never far from the surface in American politics.

The fight, which might be understood as a specific iteration of the tension between liberty and equality, continues.[4] The financial crisis of 2008 provided a critical, if undesired, moment to consider the status of banks in America. The aftermath of that crisis, including the limited law enforcement response, provides another. *The Case for the Corporate Death Penalty*, a new book by Mary Kreiner Ramirez and Steven A. Ramirez, gathers copious evidence and makes the case that the size and power of our largest financial institutions has rendered them effectively above the law.[5] The nation suffered greatly during and after the 2008 financial crisis. The effects continue to reverberate through industries as disparate as technology, automotive, education, and law. Understanding what caused the crisis and how it might be avoided is in both the national interest and the personal interest of almost every American. *The Case for the Corporate Death Penalty* is a vital resource for developing a more fulsome understanding.[6]

The story is well written and clear. The authors' central thesis is that the law enforcement response to one of the worst

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bank. *See* Bray Hammond, *Jackson, Biddle, and the Bank of the United States*, 7 J. ECON. HIST. 1, 8 (1947). Others suggest that "the entire debate was powerfully shaped by tensions between agrarian debtor interests and the interests of entrepreneurs and financiers." Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 421 (2011). Nuances aside, however, the Bank of the United States' power, corruption, and the populist reaction to each, fueled the dispute. *Id.* ("Many of the most outspoken supporters of the Bank were in fact on the dole of Nicholas Biddle; Jackson plainly saw political advantage in using the Bank as an easy target upon which to play out his populist agenda . . . .").

[3] Matt Taibbi, *The Great American Bubble Machine*, ROLLING STONE (Apr. 5, 2010), https://www.rollingstone.com/politics/news/the-great-american-bubble-machine-20100405 [https://perma.cc/7ZZ9-MB83].

[4] *See, e.g.*, Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1470 (2016) (describing an array of normative theories that differ on the question of whether "elite economic domination" is even a problem). Steve Ramirez, one of the authors of the reviewed book, is not new to this fight. *See generally* STEVEN A. RAMIREZ, LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW (2014).

[5] *See generally* MARY KREINER RAMIREZ & STEVEN A. RAMIREZ, THE CASE FOR THE CORPORATE DEATH PENALTY: RESTORING LAW AND ORDER ON WALL STREET (2017) [hereinafter RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY].

[6] As we pass a series of ten-year anniversaries from the financial crisis, interest in the causes of and fallout from the crisis, as well as the weak law enforcement response to it, continues. *See, e.g.*, JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017).

financial crises in the nation's history cannot be excused. They contend that the failure to more vigorously prosecute those responsible for the crisis not only deeply undermines respect for the criminal justice system, but also represents a historic, and possibly unique, breakdown in the rule of law. Firmly rejecting the official explanations as to why there were not more prosecutions, the authors ultimately conclude that the "DOJ's behavior can be explained only as an exercise of discretion in favor of the most wealthy and powerful individuals in our society."[7]

The book opens with a brief history of white collar prosecutions in America, making the case that power and influence have not always protected wrongdoers.[8] The core of the book, five chapters each dedicated to an exemplar of fiscal malfeasance, provides an outstanding overview of the financial crisis. These chapters begin with Countrywide's creation and sale of toxic mortgages,[9] following the path through Wall Street's repackaging the mortgages into securities,[10] Lehman's dubious accounting,[11] AIG's reckless overextension into credit default swaps,[12] and Goldman's duplicity in selling securities.[13] Each chapter further explains the nonexistent or limited law enforcement response to the malfeasance, and presents arguments that prosecutions were possible. A final substantive chapter introduces a series of crimes committed by banks after the financial crisis, arguing that the enforcement failure during the crisis led to greater misconduct in its wake.[14]

It's now an oft-repeated and bemoaned fact that the federal government brought very few individual criminal prosecutions in the wake of the crisis.[15] *The Case for the Corporate Death Penalty* argues that there could have and should have been a more vigorous law enforcement response, that law enforcement's failures stem from the corrupting power

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7 RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 201.

8 *Id.* at 29–59.

9 *Id.* at 59–85.

10 *Id.* at 86–108.

11 *Id.* at 109–32.

12 *Id.* at 133–54.

13 *Id.* at 59–177.

14 *Id.* at 178–202.

15 *See* Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*, 46 STETSON L. REV. 41, 66 (2016) ("Public opinion polls consistently showed broad support for more prosecutions after the 2008 financial crisis. The majority of the public—seventy-nine percent in one survey—wanted prosecutors to find the people who were responsible for the financial crash and send them to jail." (footnotes omitted)).

of large banks, and that this entire situation poses grave risks to our legal system and the legitimacy of government.[16]

In this essay, I examine both the book's method and conclusions. In each I find much to admire and some to dispute. A central question posed by the book is *why* were there so few prosecutions? On this question, I part ways with the authors, arguing that there are likely good explanations for much of what looks like a law enforcement failure. Our differences on this point, however, are limited and arguably immaterial. In the end, the *reasons* for a limited law enforcement response are less important than the *fact* that the response was so limited. The harms identified by the authors are real and ought to be addressed. The question that remains is how best to do so. The authors favor more prosecutions; I would prefer better regulation. Our difference on this point is significant; however, whether one favors prosecution or regulation, *The Case of the Corporate Death Penalty* provides critical tools to understand the problem and assess potential solutions.

I. METHODOLOGY: SOURCING AND TELLING THE STORY

The book makes a compelling case. People will differ on specific issues and the overall conclusions,[17] but few would argue that the law enforcement response to the crisis was exemplary. The dominant impression remains that the crisis was spawned of, and generated, fraud, yet very little effort went into punishing those frauds.[18]

A. A Scholarly Effort to Engage the Public

The Case for the Corporate Death Penalty seeks to engage the public, while maintaining scholarly rigor. The authors have correctly concluded that, if there are to be any changes to

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[16] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 3-4.

[17] *See generally* Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265 (2014) (arguing that assertions of widespread law enforcement failure following the crisis are overstated and describing why the macro-level conclusions of the Financial Inquiry Commission bear little relation to the sorts of specific evidence needed to support specific charges); *see also* Miriam H. Baer, Book Review, *Too Vast to Succeed*, 114 MICH. L. REV. 1109, 1134 (2016) (reviewing BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014)) ("[M]uch of the behavior that produced the 2008 financial crisis, although irresponsible and risky, was not necessarily criminal fraud."); Beale, *supra* note 15, at 67. ("[I]t is questionable how much of the conduct that led to the 2008 crisis can be properly called criminal, rather than actionable solely under civil law theories.").

[18] *See* Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. OF BOOKS, (Jan. 9, 2014), http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/ [https://perma.cc/M2U5-EAMF].

address what they describe as the power, influence, and lack of accountability on Wall Street, it will only be because the public demands them. The book's audience is thus no narrower than the informed citizenry.

The crisis certainly revealed failures of policy and leadership. In the immediate aftermath of the crisis, few individuals suffered as significant a loss of face as Alan Greenspan.[19] As the engines of civilization teetered on a precipice, people began to suggest that better regulation and fraud prevention in the financial sector might have served as a sort of trail marker to prevent society from marching to that dangerous edge.[20] And there was no more-powerful and high-profile advocate against such measures than the former Chairman.[21] One can only hope that those who would follow Greenspan's path will read this book and at least moderate their trust in utterly unfettered markets.

The book aspires, however, to an even higher goal than informing those in charge. It seeks to inform the public by

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[19] *See, e.g.*, Martin Wolf, *The Man in the Dock: Was Alan Greenspan to blame for the financial crisis?*, ECONOMIST, (Sept. 29, 2016), https://www.economist.com/news/books-and-arts/21707908-was-alan-greenspan-blame-financial-crisis-man-dock [https://perma.cc/6HBB-J4QP] ("The former chairman of the Federal Reserve was once a hero. Now he is being called a villain."). Of course, this view is not undisputed, and even the quoted source continues, "[y]et it is too soon to be sure what history will say about him." *Id.* But it remains correct that few were more closely associated with and revered for the booming economy that preceded the crash, and thus few more obviously positioned for tragic readjustment.

[20] *See* Edmund J. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES, Oct. 23, 2008, at B1, http://www.nytimes.com/2008/10/24/business/economy/24panel.html?mtrref=www.google.com&gwh=B083EBBE1469E076943DF5E9F6D1BDCF&gwt=pay [https://perma.cc/YZ25-859R] ("Now 82, Mr. Greenspan came in for one of the harshest grillings of his life, as Democratic lawmakers asked him time and again whether he had been wrong, why he had been wrong and whether he was sorry."). The article adds:

> Critics, including many economists, now blame the former Fed chairman for the financial crisis that is tipping the economy into a potentially deep recession. Mr. Greenspan's critics say that he encouraged the bubble in housing prices by keeping interest rates too low for too long and that he failed to rein in the explosive growth of risky and often fraudulent mortgage lending.

Id.

[21] The former chairman consistently opposed regulation and favored a laissez-faire approach to the financial sector. *See* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 34 (2011) [hereinafter FCIC FINAL REPORT], http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf [https://perma.cc/PFC9-WMNW] ("Those of us who support market capitalism in its more competitive forms might argue that unfettered markets create a degree of wealth that fosters a more civilized existence. I have always found that insight compelling."); *see also id.* at 94 ("If there is egregious fraud, if there is egregious practice, one doesn't need supervision and regulation, what one needs is law enforcement." (quoting Alan Greenspan in DAVID FABER, AND THEN THE ROOF CAVED IN: HOW WALL STREET'S GREED AND STUPIDITY BROUGHT CAPITALISM TO ITS KNEES, 53–54 (2009))).

adopting a sourcing methodology that favors transparency; not transparency just for lawyers, judges, and scholars, but one that serves the public as a whole. In describing these events and arguing for a stronger response by law enforcement, the authors do not ask the reader to accept or reject the book's conclusions only on intuition or emotion. "[W]e have strived to make the basis of our conclusion as transparent as possible. Therefore, whenever possible we employed Internet-based sources that are easily accessible to as many citizens as possible."[22]

This claim will generate some skepticism, as Internet sourcing is notoriously problematic. The book fortunately overcomes the skepticism, but the concern is worth acknowledging. As Suzanna Sherry describes the problem in terms of Wikipedia, "[w]ith the general public rather than experts as the source of (and primary check on) Wikipedia's content, misinformation is bound to creep in."[23] Recent trends exacerbate this concern.[24] Yet the concern is not realized in this book. The sourcing is, for the most part, either primary (e.g., an opinion by Judge Rakoff in the case alleging fraud against Countrywide[25]) or expert-authority secondary (e.g., the Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States,[26] authored by an "independent, [ten]-member panel . . . composed of private citizens with experience in areas such as housing, economics, finance, market regulation, banking, and consumer protection"[27]). True, some sources are not available online and some online sources are less compelling than primary or expert-authored secondary sources, but the balance works. Key contentions are supported by strong sources, and much of the source material is readily available to the reader.

This effort is admirable. The marketplace of ideas has become cluttered. There is too much information and too little curation, and one can find support for almost anything. On the

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[22] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at xii. Lest a reliance on Internet-based sourcing appear somehow un-serious to academic readers, I should clarify that the sourcing is excellent and that many of the "best primary sources," dealing with the events leading up to and following the financial crisis are available on the Internet. *Id.*; *see, e.g.*, FCIC FINAL REPORT, *supra* note 21.

[23] Suzanna Sherry, *Democracy and the Death of Knowledge*, 75 U. CIN. L. REV. 1053, 1055 (2007).

[24] Nabiha Syed, *Real Talk About Fake News: Towards A Better Theory for Platform Governance*, 127 YALE L.J. F. 337, 337 (2017) ("Following the 2016 U.S. presidential election, 'fake news' has dominated popular dialogue and is increasingly perceived as a unique threat to an informed democracy.").

[25] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 64 (citing United States *ex rel.* O'Donnell v. Countrywide Home Loans, Inc., 33 F. Supp. 3d 494 (S.D.N.Y. 2014), *rev'd and remanded* 822 F.3d 650 (2d Cir. 2016)).

[26] FCIC FINAL REPORT, *supra* note 21.

[27] *Id.* at xi.

other hand, ever-increasing levels of specialization render our best sources of information unintelligible to the lay person. The reader may have some understanding of HDL and LDL cholesterol, Saturn's moons, and ice melt in Greenland, but her understanding is almost certainly predicated on secondary and tertiary sources (at best). Comprehending the primary sources is reserved for a small subset of specialists, and replicating or confirming conclusions remains the province of a handful of people,[28] few if any of whom could shift readily even between these three examples.

As the scope of knowledge has grown, our grasp of it is ever-more attenuated. And the financial sector is no exception. Indeed, opacity of information within fragmented systems was a contributing factor leading to the financial crisis.[29] So few people could understand the forces at play, that the entire nation and much of the world walked unaware into jeopardy.[30]

The Ramirezes' book aims to shift this dynamic, by inviting and empowering the reader to check the authors' conclusions.[31] Why? Because, as the authors write, "our ultimate conclusion—that an unprecedented breakdown in the rule of law occurred in our nation after the greatest financial collapse in

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[28] *See* Sherry, *supra* note 23 at 1054 ("expertise (especially scientific expertise) is the deepest and most specialized that it has ever been").

[29] *See* GILLIAN TETT, THE SILO EFFECT: THE PERIL OF EXPERTISE AND THE PROMISE OF BREAKING DOWN BARRIERS at ix–xi (2015) (attributing fragmentation and its accompanying limits on the exchange of information as a reason for the crisis).

> [A]s I dug into the 2008 crisis I also saw a world where different teams of financial traders at the big banks did not know what each other was doing, even inside the same (supposedly integrated) institution. I heard how government officials were hamstrung by the fact that the big regulatory agencies and central banks were crazily fragmented, not just in terms of their bureaucratic structures, but also their worldview.

Id. at x.

[30] This failing continues unabated. As "Kevin Warsh, an ex–Morgan Stanley banker and a former Federal Reserve Board member appointed by George W. Bush," describes the problem:

> Investors can't truly understand the nature and quality of the assets and liabilities. They can't readily assess the reliability of the capital to offset losses. They can't assess the underlying sources of the firms' profits. The disclosure obfuscates more than it informs, and the government is not just permitting it but seems to be encouraging it.

Frank Partnoy & Jesse Eisinger, *What's Inside America's Banks?*, ATLANTIC, Jan. 2013, https://www.theatlantic.com/magazine/archive/2013/01/whats-inside-americas-banks/309196/ [https://perma.cc/3PHF-UMBK].

[31] Not literally or perfectly, of course. The authors are academic experts on corporate governance, financial regulation, and criminal law, and the value of their book comes from not only their curation but their ability to explain the material in an informed way. That said, by directing the reader to accessible source material, the authors have made their book more useful to those who wish to inquire further.

history—is something that every citizen must reflect upon."[32] The stakes could not be larger: the book contends that the failure to prosecute individuals for fraud or other crimes in the aftermath of the crisis is nothing short of a grant of immunity by the U.S. government to the most politically and economically powerful who control large financial institutions.[33]

For most of us, the financial sector is out of our hands. What little consumer influence we have is as inconsequential as our respective investments, and even that influence we surrender to index or mutual funds.[34] Of course, we can *hope* that future leaders will chart a wiser course, but we also can vote. The democratic check is limited and indirect, but it exists, and there is no more reliable method to introduce fiscal responsibility on Wall Street than for the people to demand it.[35]

The complexity of the financial system might lead some to give up on the prospect of a democratic check. This would be a mistake. To get lost amidst complexity is to ignore human capacity to identify larger, simpler patterns. The Ramirezes' book recognizes this potential and invites the reader to do just that. By writing an accessible book, and sourcing it in an accessible way, the authors invite and empower the public to join

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[32] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at xii.

[33] *Id.* at 1 (describing "[a] [n]ew [c]riminal [i]mmunity for a [n]ew [e]conomic [r]oyalty"). It is too soon to measure the degree to which the public lost confidence in the financial sector and the rule of law as a result of the crisis and the law enforcement response. It is also probably too soon to identify the impacts of any such loss of confidence with much precision. However, some have begun associating the recent electoral shift toward populism, on both sides of the Atlantic, with the financial crisis. *See* Martin Wolf, *The Economic Origins of the Populist Surge*, FIN. TIMES, June 27, 2017, https://www.ft.com/content/5557f806-5a75-11e7-9bc8-8055f264aa8b [https://perma.cc/SZ6Z-K2NB] ("This, I suggest, is why Mr. Trump is US president and the British chose Brexit. Cultural change and the economic decline of the working classes increased disaffection. But the financial crisis opened the door to a populist surge.").

[34] Investor influence over a particular entity is limited to the scope of ownership. "[G]overnance, for the vast majority of companies, is based on a proportional relationship between voting power and economic ownership: one share, one vote." Henry T. C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. PA. L. REV. 625, 632 (2008). Investor influence over an entire industry is even more diluted. And, the influence of individual investors has been eroded by institutional investing. *See* Alfred F. Conard, *Beyond Managerialism: Investor Capitalism?*, 22 U. MICH. J.L. REFORM 117, 127 (1988) ("By 1980, the effective mobilization of individual shareholders had become mathematically impossible in many corporations because of the shift of shareholdings from individuals to institutions.").

[35] Of course, such a democratic check, were it to succeed, could do so only through the channeled mechanics of republican government. Pure populist control over the financial system would be far worse than any and all of the problems posed by Wall Street; classic republicanism offers promise of balance between an unregulated financial system and one subject to the whims of popular prejudice. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (University of North Carolina Press 1998) (1969). That said, in this era of agency capture and/or a laissez-faire philosophy dominating banks and their regulators alike, functional republicanism—and hence a functional regulatory system—will likely be reliant on popular pressure.

the discussion about how the financial sector ought to be governed. The push for sensible regulation of the industry cannot succeed absent popular demand, and understanding what happened is necessary to any such demand.

B. A Powerful Narrative

The 2008 financial crisis involves tragedy, greed, angst, and drama; *The Case for the Corporate Death Penalty* captures these well. To avoid the emotion and human cost of the crisis would be to tell only a partial story. The risk, however, is that the more emotional aspects of telling could influence policy conclusions.

A push for sensible regulation should not be conflated with a push for prosecution. As Dan Richman wrote, "I suspect (but cannot prove) that the loudest calls for corporate executive prosecutions come from those who would have preferred more regulatory controls on corporate behavior before 2008 and who aren't satisfied with the regulatory response since then."[36] Some who read this book will leave convinced that more individuals ought to have been prosecuted following the financial crisis. Others who read this book will leave convinced that, at least in the financial industry, there ought to be "more regulatory controls on corporate behavior."[37] I find myself in the latter camp.

The Case for the Corporate Death Penalty amplifies its voice by presenting a compelling and fascinating read. At times, however, the book risks undercutting its case by overstating it. For example, the book contends that the law enforcement response, or lack thereof, to the financial crisis was historically anomalous.

> The recent legal indulgences granted to financial elites for financial crimes stand *without precedent* in the modern American economy. Between the end of World War II and the 2008 financial crisis, in the United States even the most powerful business leaders faced criminal accountability for significant financial crimes.[38]

The premise, however, is problematic. The history of law enforcement is complex, and while it includes instances of prosecuting the powerful, it is difficult to imagine that power, privilege, and wealth never thwarted financial investigations before 2008.[39]

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36 Richman, *supra* note 17, at 280.

37 *Id.* In part because the former is basically a subset of the latter.

38 RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 29 (emphasis added).

39 A fair response would be to point to my absence of examples where power, privilege, and wealth thwarted criminal investigations before 2008. I offer none. Here I run into a foundational challenge that the authors also confronted. In the absence of a

Indeed, one of the book's central examples of vigorous law enforcement against the powerful—following the S&L Savings and Loan Crisis—was not always so understood. "[T]o celebrate the S & L Crisis response as the epitome of a white-collar crackdown is to rewrite history. The Justice Department was similarly excoriated for its lameness back then."[40]

The book also relies on the Enron prosecutions as an example of power falling before blind justice. The reason for this choice is clear: those prosecutions successfully reached to the Olympian heights of Kenneth Lay—not only the former chairman and CEO, but also a close friend and supporter of the then-sitting President and his two predecessors.[41] Arguing that the Enron prosecutions represent the norm, the book contends that through most of our nation's history, power, privilege, and access were impotent against the rule of law.

Enron, however, is a weak proxy for the aftermath of the financial crisis as it involved the failure of a single entity predicated on plain financial misstatements.[42] The process of identifying wrongdoers and allocating blame was far simpler than it could ever have been for wrongdoing that spanned not only multiple firms, but also many industries and even the private and public sectors.

To the extent these examples are offered in support of the claim that power does not necessarily provide immunity, they work. However, the claim that power has *never* provided immunity as it did following 2008 is more questionable.

In this way, the book arguably errs in favor of the powerful narrative, and this has the tendency to shift the emphasis from regulation to prosecution. The book's "ultimate conclusion—that an unprecedented breakdown in the rule of law occurred in our nation after the greatest financial collapse in history,"[43] lends itself to the conclusion that more prosecutions

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criminal prosecution it is difficult to identify a particular non-prosecution as a failure. First, there is no process. Second, and more critically, the best tools for gathering evidence are controlled by the government. *See id.* at xii–xiii. Accordingly, those who would criticize a non-prosecution are generally at a distinct informational disadvantage. The authors earn significant credibility by acknowledging this limit clearly in the preface to the book, and bolster that credibility by their careful and painstaking aggregation of the best available evidence.

[40] Richman, *supra* note 17, at 266–67.

[41] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 31.

[42] Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1233–34 (2003) ("[M]arket faith collapsed when Enron acknowledged that the transactions with the related-party partnerships allowed Enron to inflate its earnings for the last five years and keep billions of dollars of contingent liabilities off its balance sheet.").

[43] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at xii.

were necessary. But, one can fairly ask—even while bothered by the limited consequences for misconduct on Wall Street—did we *really* experience an unprecedented breakdown in the rule of law? Maybe instead we witnessed the failure of regulators and regulations to govern the massive aggregation of wealth and the power that accompanies it.

A book contending that there ought to be more civil regulation of bankers could never capture public attention like a book arguing law enforcement bowed before power. The public clamors for indictments following a crisis, but that does not mean prosecutions are preferable.[44] Elsewhere, I have argued that there are good reasons to prefer civil regulation of banks and bankers over criminal prosecutions.[45] No doubt, for the vast majority of Americans who suffered as a result of the crisis, it wouldn't be as cathartic. But it might be better policy.

II. EXPLAINING THE LACK OF PROSECUTIONS STEMMING FROM THE CRISIS

The Case for the Corporate Death Penalty maintains that the tepid law enforcement response to the financial crisis can only be explained by the power and wealth of Wall Street. "Only raw economic and political power can account for [the] gross injustice" of failing to seek criminal sanctions against individuals in the wake of the financial crisis.[46]

The financial crisis was built on greed and misrepresentations.[47] Lenders pushed home buyers into riskier

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[44] The public demand for prosecutions is powerful and cannot be discounted. Sara Beale has written about how public demand—not a recognized theory of punishment—has crept into the DOJ explanations of the Yates Memorandum that nudges prosecutors toward more prosecutions of individuals. *See* Beale, *supra* note 15, at 65 (In describing the rationales for the new DOJ policy, "Yates' separate emphasis on holding the proper parties 'responsible' seems to strike a retributive note, and it is difficult to connect her final comment about public confidence in the justice system with any of the standard theories of punishment."). Beale's essay ends with a series of challenging questions about interaction, both functional and normative, between public opinion and the prosecutorial function. *Id.* at 67.

[45] Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, 85 COLO. L. REV. 1 (2014).

[46] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 6.

[47] It was also built on hope and aspiration. It is important to remember how embedded the ideal of home ownership was in American culture and how that ideal was reflected in government policy. As the FCIC explained: "All these factors" contributing to the problematic growth of nontraditional mortgages "were supplemented by government policies, many of which had been in effect for decades, that subsidized homeownership but created hidden costs to taxpayers and the economy. Elected officials of both parties pushed housing subsidies too far." FCIC FINAL REPORT, *supra* note 21, at 424. Moreover, it is probably no accident that these years of real estate excess followed the dot-com bubble of the late 1990s. The push to move money into real estate and away from the speculative and ephemeral might be understood as a laudable effort to diversify.

and riskier mortgages,[48] including no-document loans and "liar's loans."[49] The same lenders failed to disclose to their own investors or the purchasers of the mortgages the increasing toxicity of the underlying product.[50] Wall Street firms then packaged the mortgages into securities and sold them, without disclosing the underlying risks and sometimes covering up the method of packaging the security, which itself would have revealed the risks.[51] As the house of cards began to collapse, institutions holding the riskiest assets issued misleading assurances and engaged in unduly creative accounting.[52] Ratings agencies added to the crisis,[53] as did, arguably, any number of government officials and employees.[54] It's an ugly story and few escape it untarnished.

It is therefore understandable that so much abuse has been heaped on banks and the financial industry generally. Understandable, but also unfortunate. Under the present circumstances, it is too easy to forget that the financial industry serves the public, introducing liquidity without which all but the wealthiest would be subject to the whims of their financial superiors. As Nicholas Biddle argued before the Pennsylvania legislature in defense of the Bank of the United States: banks represent "'the most natural way of protecting the poorer classes of society' from oppression by the rich."[55] That banks benefit society ought not be controversial, and it probably isn't. However, it is a testament to the public anger at the largest and

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As with any cultural trend, there is no one explanation for the excess that occurred in the mortgage industry; but as with most forms of excess, it fed off of greed and misrepresentations.

48 RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 24.

49 Charles W. Murdock, *Why Not Tell the Truth?: Deceptive Practices and the Economic Meltdown*, 41 LOY. U. CHI. L.J. 801, 843 (2010). These are not terms of art, but they seem to have entered the lexicon in the 2000s and become more common following the crisis. Both refer to loans without sufficient verification of assets. "Stated income" loans had long been available to small business owners who lacked simple documentation to establish income. *Id.* These loans were made more widely available in the 2000s, allowing people to misstate their assets and income, and in some cases avoiding any stated assets or income altogether. *See Id.*; *see also* Mark Ireland, *After the Storm: Asymmetrical Information, Game Theory, and an Examination of the "Minnesota Model" for National Regulation of Mortgage Brokers and Tomorrow's Predatory Lenders*, 36 WM. MITCHELL L. REV. 1, 21 (2009) ("Even after the loans acquired the nickname 'liar's loans' and it was well known that the stated information was very likely to be false, such loans continued to be originated based upon an applicant's high credit score.").

50 RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 24.

51 *Id.* at 86, 162.

52 *Id.* at 25.

53 *Id.* at 103.

54 *Id.* at 119, 149.

55 THOMAS PAYNE GOVAN, NICHOLAS BIDDLE: NATIONALIST AND PUBLIC BANKER 1786–1844 31 (1959) ("Credit provided by these institutions, either directly or through merchants, enabled farmers, Craftsmen, and manufacturers to reserve their products for an advantageous market instead of sacrificing them to meet immediate needs . . . .").

most powerful financial institutions that Biddle's simple admonition sounds so odd today.

This real and well-founded anger has led many to demand criminal consequences for the harm caused by the financial crisis. Few such consequences followed. More problematic, according to *The Case for the Corporate Death Penalty,* is that the law enforcement response as a whole—from the investigation stage and on—was limited. For example, whereas the law enforcement response to Enron was swift and dramatic, there was nothing comparable following the financial crisis. The costs of financial improprieties were both severe and incredibly widespread. Indeed, the 2008 financial crisis by almost any measure inflicted far greater harms than Enron's failure.[56] Were justice meted out in accord with demand, the consequences of the more recent crisis should have been quite severe. They weren't.

There are three most likely explanations for this lack of individual prosecutions. First, there was insufficient evidence of wrongdoing on behalf of individuals to justify prosecution. Second, uncertainty surrounding the financial sector in a time of crisis caused regulators and prosecutors to fear using their more powerful tools to punish misconduct. Third, times had changed such that power—at least in the financial sector—was sufficient to insulate the powerful from prosecution.[57] The book leans heavily on the third of these explanations.

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[56] *See* FCIC FINAL REPORT, *supra* note 21, at xv (Three years after the crisis, "there are more than 26 million Americans who are out of work, cannot find full-time work, or have given up looking for work. About four million families have lost their homes to foreclosure and another four and a half million have slipped into the foreclosure process or are seriously behind on their mortgage payments. Nearly $11 trillion in household wealth has vanished, with retirement accounts and life savings swept away.").

[57] I am omitting here a fourth possible explanation: government involvement in the conduct leading to the financial crisis may have made the government reluctant to investigate and prosecute potential crimes. Judge Rakoff has suggested that one "reason for not bringing such cases is the government's own involvement in the underlying circumstances that led to the financial crisis." Rakoff, *supra* note 18. The book also touches on this explanation by noting that Lehman's CEO actually offered as a sort of defense in his testimony before Congress the presence and review by Fed and SEC agents in the months leading to bankruptcy. RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 119. By omitting this rationale, I do not mean to discount the possibility that government involvement played a role in the limited response of law enforcement; rather, this explanation is both more limited in scope and more subtle in effect than the others. For example, the presence of government agents at Lehman could have a number of different impacts on law enforcement decisions: it might dissuade some from investigating for fear of embarrassing their own; alternatively, it might dissuade some from investigating because it suggests a lack of mens rea on the part of Lehman personnel who interpreted government presence as "tacit approval." *Id.* The book returns to this question of government involvement with regard to AIG. *Id.* at 150.

I have argued otherwise.[58] The first possible explanation for the lack of individual prosecutions is lack of evidence. The complexity and opacity of the large financial institutions coupled with the difficulty of white collar prosecutions led to sound prosecutorial declinations.

Simply put, it is one thing to show that "[m]oney laundering, lying to federal agents, perjury, market manipulation, and bid rigging . . . unquestionably occurred in the run-up to the crash of 2008 and continued in its aftermath."[59] It is quite another, however, to prove in a court of law that a particular individual committed even one of these crimes in a particular way at a particular time. For example, with regard to the sale of mortgage-backed securities the book states that "there can be no dispute that Wall Street sold hundreds of billions in fraudulent mortgage-backed securities," and "[t]he only remaining issue is which individuals at which megabanks acted with scienter—or intent to defraud."[60] These lines are densely packed, but it's worth pausing to consider a few points. Fraudulent modifies the mortgage-backed securities (MBS), not the act of selling.[61] The MBS's were "fraudulent," in that they were comprised of assets originated by Countrywide and others through a scheme designed to mask risky mortgages as prime.[62] But for the *sale* to be fraudulent, the seller would need to act with intent to defraud, requiring at least recklessness with regard to the veracity of claims regarding the sale.[63] Accordingly, "the only remaining issue" is everything.

Proving that a particular individual at one institution sold securities with intent to defraud because of a scheme at a different institution is no small task. Scienter is often the most challenging, and often the only contested, issue in white collar cases.[64] So, the absence of clear evidence on this key issue is no small thing. Having said this, I will add that I do not doubt the

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[58] *See* Gilchrist, *supra* note 45, at 41; *see also* Kathleen F. Brickey, *Enron's Legacy*, 8 BUFFALO CRIM. L. REV. 221, 275 (2004) ("Contrary to what skeptical observers often say, these cases do not reflect prosecutorial footdragging. They demonstrate the complexity of the work required to build a solid case against top executives of corporations that engaged in elaborately concealed, long-term schemes to defraud.").

[59] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 5.

[60] *Id.* at 88.

[61] *Id.*

[62] *Id.* at 61–62 (describing the High Speed Swim Lane, or Hustle, program at Countrywide).

[63] *See* 1A FED. JURY PRAC. & INSTR. § 16:08 (6th ed.) ("A statement, claim or document is 'fraudulent' if it was falsely made or made with reckless indifference as to its truth or falsity and made or caused to be made with an intent to deceive.").

[64] Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the "Culture of Compliance"*, 2012 WIS. L. REV. 689, 695 (2012) ("[I]ssues of mens rea are often the most difficult elements in FCPA and other white-collar crime cases to prove.").

authors' contention; indeed, the book's catalogue of misconduct leaves little room for doubt that fraud occurred in the sale of MBS's, if only from the overall weight of evidence. But that is different than what is needed to convince a jury to return a guilty verdict in a particular case against a particular individual. Therefore, I would have difficulty concluding there was a nefarious explanation for the lack of prosecutions simply because there almost surely were frauds that went unprosecuted.

So too, the second possible explanation should not be discounted. The stakes were nigh unprecedented. The FCIC described its charge in investigating the crisis as follows: "*how did it come to pass that in 2008 our nation was forced to choose between two stark and painful alternatives*—either risk the total collapse of our financial system and economy or inject trillions of taxpayer dollars into the financial system and an array of companies, as millions of Americans still lost their jobs, their savings, and their homes?"[65] *Total collapse of our financial system*. This was on the table. Timothy Geithner wrote that "[w]e had slipped into an economic black hole," and worried that "we were looking at another global depression that would hurt billions of people."[66] The FCIC Report plainly concluded that this crisis was avoidable, and that it was rooted in regulatory and ethical failures.[67] But once it was upon us, the scope and danger of the crisis was every bit as massive as apologists for the government claim.

The book catalogues the extensive powers of U.S. regulators—including the FDIC, OCC, Federal Reserve Board, and SEC—over financial institutions.[68] These powers extend to what might be described as the power to effectively impose a corporate death penalty, and that power could have been leveraged to generate individual prosecutions.[69] But one must wonder, would *anyone* really have been willing to use these powers in 2008 or 2009 if given the opportunity to do so?[70] The

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[65] FCIC FINAL REPORT, *supra* note 21, at xvi (emphasis in original).

[66] Robert Lenzner, *The 2008 Financial Collapse Was Worse Than 1929, Geithner Insists*, FORBES (June 22, 2014, 11:05 AM), https://www.forbes.com/sites/robertlenzner/2014/06/22/the-2008-financial-collapse-was-worse-than-1929/#212e28fd5f35 [https://perma.cc/F6A8-JNPM] (reviewing TIMOTHY GEITHNER, STRESS TEST: REFLECTIONS ON FINANCIAL CRISES (2014)).

[67] FCIC FINAL REPORT, *supra* note 21, at xvii–xxii.

[68] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 11–13.

[69] *Id.*

[70] In fairness, the authors are careful to describe the applicable limitations period for each alleged crime and would contend that prosecutions could have been brought well after the uncertainty of the crisis had subsided. Still, one wonders about the viability (or desirability) of existential threats against one or more of the largest, most interconnected financial institutions in the world even today.

book, noting the negative economies of scale inherent in SIFI's, concludes that "[t]he mega-banks offer no offsetting economic benefit."[71] There is strong support for this claim;[72] however, it does not follow from the fact that the biggest banks suffer from dis-economies of scale, that shuttering them by regulatory fiat would be a net benefit. Indeed, the costs of imposing the corporate death penalty on these institutions would be massive. We know this, because we have witnessed the impact of the failure of large financial institutions.[73]

Indeed, the book draws on two examples where criminal prosecutions were pursued "with little regard for the collateral consequences on a corporate defendant—including the essential demise of the corporation's business viability."[74] The authors invoke these examples to emphasize that Wall Street following the financial crisis was treated with kid gloves compared to other institutions in other instances. The first of these examples, Arthur Andersen, is problematic. While the example is useful to illustrate that even one of the then-big 5 accounting firms would face the full force of criminal prosecution, it arguably proves too much. The demise of this firm is rarely cited as an example of government getting it right. Tens of thousands of innocent employees lost their jobs. Countless transactions were disrupted. And power in the accounting world was consolidated from a big-5 to a big-4.[75] Peter Henning has argued that Arthur Andersen's demise was itself the anomaly,[76] and many have suggested that the failure of Arthur Andersen itself made

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[71] *Id.* at 15.

[72] *See* Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 1008 (1992) ("[S]tudies find decreasing returns to scale (i.e., scale diseconomies) for very large banks (i.e., banks with assets greater than $25 billion and possibly those with assets of $10 to $25 billion)." (emphasis omitted)).

[73] DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 21 (2009), http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf [https://perma.cc/4PBS-285Y]. ("The sudden failures of large U.S.-based investment banks and of American International Group (AIG) were among the most destabilizing events of the financial crisis. These companies were large, highly leveraged, and had significant financial connections to the other major players in our financial system . . . .").

[74] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 42.

[75] *See* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1097 (2006). (The prosecution "effectively put the eighty-nine-year-old firm out of business and forced tens of thousands of people to find new jobs. It also had a dramatic effect on the accounting industry, by turning the 'Big 5' into the 'Big 4.'").

[76] *See* Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1418–19 (2009) ("[T]here have been no other instances of a large firm suffering the same fate since then, even though other companies have been charged with crimes and appear to have survived the ordeal, albeit quite a bit worse for wear.").

federal prosecutors reluctant to take actions that could lead to similar results.

The conduct of many in the financial industry has ranged from unacceptably selfish to reprehensible. But I cannot with any confidence predict what would happen were a regulator to impose a corporate death penalty, and what we hear from those in government during the crisis is that they worried about the harm they might cause if they reacted to the crisis too severely.[77] Mega-banks function in a wildly complex industry that spans the globe and touches almost every person on the planet.[78] This uncertainty is almost surely a factor in explaining the reticence of prosecutors and regulators to act more aggressively in the wake of the crisis.

III. THE CASE FOR THE LESS INNOCENT EXPLANATION

If lack of evidence and uncertainty about how to deal with a historically unprecedented financial crisis are part of the explanation, it does not follow that power and corruption cannot factor in also.[79] The authors' careful compilation of known and suspected frauds goes a long way toward convincing even the skeptical reader that more ought to have been done. One can quibble—and I have—with whether we can be confident that there was sufficient evidence in any single case. And one can raise concerns—as I have—about vengeance supplanting justice and due process. But the facts are the facts, and the authors have gathered more than enough to suggest that reference to

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77 *See* Robert Litan, *Financial Policy in A Trump Administration*, 35 BANKING & FIN. SERVS. POL'Y REP. 30, 34 (2016) ("As two academic scholars, Professors Morgan Ricks of Vanderbilt Law School and Professor Hal Scott of Harvard Law School have outlined in their respective books on the topic, and as the memoirs of the leading decision-makers during the 2008 financial crisis (Hank Paulson, Ben Bernanke, and Tim Geithner) make clear, these short-term liabilities and the fear that they could spark a 'run' on all like instruments and the institutions that issued them were the real reasons that the losses embedded in securities backed by subprime mortgages nearly caused the financial system to freeze up and induced policy makers then to hastily arrange mergers of large failing institutions with one another and ultimately to protect uninsured bank creditors and MMF account holders, and to inject hundreds of billions of dollars in capital into the nation's banks (including all of the nine largest).").

78 *See* Gilchrist, *supra* note 45, at 32.

79 Indeed, the book points to an intriguing shift in law enforcement between the Bush and Obama administrations. Under President Bush, as late as fall 2008, there were "three grand jury proceedings into the bankruptcy of Lehman Brothers, and the press reported that DOJ issued dozens of subpoenas." RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 129. President Obama took office in January 2009, and the authors were able to find "no indication of any material activity since then." *Id.* Of course, grand juries are somewhat protected by secrecy rules, and they certainly do not publish reports when they fail to find sufficient evidence to bring charges, but this shift between administrations does at least raise questions about the role of politics and influence on the law enforcement response to the financial crisis.

epistemic challenges alone cannot explain the lack of more aggressive law enforcement actions following the crisis.[80]

In the case of Countrywide, a jury heard evidence and returned a verdict that the company engaged in fraud.[81] Judge Rakoff, during the damages phase, described the fraud as "brazen," and concluded it "more than warrant[ed] a penalty" in excess of $1 billion.[82] Of course, this was a civil action, with a lower standard of proof, but as the authors note, the findings in the civil action were more than sufficient to establish probable cause on which to pursue a criminal indictment. And more than enough to justify a criminal investigation.[83] "Yet, we have not found any public indication of a grand jury inquiry, and no criminal charges or pleas have been filed."[84]

The SEC settlement with the former chief executives of Countrywide is more troubling. The SEC action against the former CEO, Angelo Mozilo, was settled for nearly $70 million in fines and disgorgement, and a lifetime ban from serving as an officer or director of a publicly traded company.[85] Settlements were also reached with the chief operating officer and chief financial officer.[86] These penalties are by any measure significant, and would seem to undercut the argument that the government failed to aggressively target those responsible for

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[80] Indeed, the authors are cautious throughout the book to note that they do not know exactly which conduct by which people should have resulted in prosecutions; only the government has the tools to gather the best information to resolve these questions. *See id.* at xiii. The primary failure of law enforcement, according to the authors, was not the lack of specific prosecutions, it was the federal government's failure to seriously investigate using the powerful tools at its disposal. *Id.* at 107. ("Given the scale of the transactions tainted by strong indicia of fraud, criminal accountability *or at least investigations* and trials should follow." (emphasis added)).

[81] *Id.* at 64.

[82] *Id.*

[83] Criminal investigations are not matters of public record, so one cannot make a confident conclusion about what law enforcement resources were devoted to investigations. However, the little we do know about investigative efforts is not comforting. *See* Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAG., Apr. 30, 2014, https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html [https://perma.cc/YAC8-93VP] (reporting that "to those closest to the Lehman probe, the government's case was seemingly conducted by one lawyer, Bonnie Jonas, an assistant U.S. attorney for the Southern District"; this characterization was disputed by the Southern District but specifics were not provided).

[84] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 68. As the authors acknowledge, the Countrywide judgment was reversed on appeal. *Id.* at 65; *see also* United States *ex rel.* O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 653 (2d Cir. 2016) ("[T]he evidence at trial shows at most an intentional breach of contract . . . and is insufficient as a matter of law to find fraud."). This judgment itself does not undermine the authors claim that more investigation would have been welcome. On the other hand, that even the civil case failed to survive appeal does little to bolster the contention that there should have been criminal prosecutions.

[85] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 66.

[86] *Id.*

the crisis. The book, however, maps a detailed timeline suggesting that, even accounting for the penalties imposed, crime may have paid.

In 2005, Countrywide established an internal policy of "match[ing] the underwriting standards of any competitor."[87] The chief risk officer objected that this strategy was unacceptably dangerous, and by 2006, as evidence of that prediction mounted, he complained that Countrywide was "ceding its risk policies to competitors."[88] Mozilo was cognizant of the risks inherent in products like no-down-payment loans, and he demanded corrective action.[89] Yet the company made no disclosures as to the level of risk it was taking on through risky mortgages.[90] As late as 2007, when the dangers were increasingly evident, the risk officer actually drafted and circulated (internally) language for the company's Form 10-K outlining the risks.[91] Not only was this language rejected, no disclosure of the enhanced lending risk was made.[92] The book's conclusion: "The SEC's investigation, in short, provided sufficient evidence of probable cause to seek the indictment of CEO Mozilo, COO Sambol, and CFO Sieracki."[93]

Of course, it does not follow that indictments would have been proper. Probable cause is necessary, but not sufficient, to support a federal indictment,[94] and the presence of probable cause is not itself a basis to dispute a declination decision. That said, given the background outlined in the book, one cannot ignore the distasteful similarities between the Keating Five scandal[95] during the S&L crisis and the Friends of Angelo program at Countrywide. In both cases, powerful congressmen received benefits from financial institutions and the financial institutions avoided rigorous regulatory oversight.[96] The difference, of course, is that unlike Countrywide, the financial institutions responsible for the S&L crisis, and their leaders,

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[87] *Id.* at 68.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 69.

[91] *Id.* at 70.

[92] *Id.*

[93] *Id.* at 71.

[94] *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL §§ 9-27.200, 9-27.220, https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution [https://perma.cc/HB8X-P6RE].

[95] *See* Archibald Cox, *Ethics in Government: The Cornerstone of Public Trust*, 94 W. VA. L. REV. 281, 282 (1992) (The Keating Five Scandal refers to the five U.S. Senators who accepted "financial favors totaling almost $1,800,000 for their election campaigns from Charles Keating, the political and financial promoter, and brought their combined power and prestige to bear upon federal regulatory officials on his behalf.").

[96] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 40, 79–81.

were prosecuted and convicted.[97] Certainly part of the explanation for this difference lies in the size of the institutions and scope of the problem.[98] But the book contends it is something more: "One lurking explanation for the government's indulgence of such severe criminality here involves Countrywide's political influence."[99]

The congressional inquiry into the Friends of Angelo program found favorable loans were made to hundreds; however—in part because there has been no more rigorous criminal investigation—no complete list exists.[100] We know Countrywide enjoyed influence with the political elite, but we don't know its extent.[101] We also know Countrywide and its leadership escaped the more severe treatment seen following the S&L Crisis.[102] The open question is whether these facts are connected.

The answer to this question, I would suggest, is less important than the pendency of the question itself. Failing to answer this type of question is itself corrosive to our government and our legal system. Yes, the 2008 financial crisis was unique, and dwarfed the S&L crisis. Yes, securing evidence for a white collar criminal prosecution is difficult, and in any particular case it may be that the evidence was simply insufficient. But, allowing to linger the question of whether the government's tepid response might be in part connected to the political influence of elite banks and bankers cannot help but undermine the perceived legitimacy of the legal system.

And the question is fueled only partially by programs like Friends of Angelo. One would need to be naïve to ignore the realities of campaign finance in considering whether political favoritism is a factor in creating what appears to be a different set of rules for Wall Street. Between the 1990s, through the financial crisis, and continuing thereafter, the financial industry represented the single largest source of federal campaign contributions to both parties, and by a large margin.[103] During

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97 *Id.* at 40–41.

98 *See supra* text accompanying notes 65–78.

99 RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 84.

100 *Id.*

101 *See* STAFF REPORT OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 111TH CONG., FRIENDS OF ANGELO: COUNTRYWIDE'S SYSTEMATIC AND SUCCESSFUL EFFORT TO BUY INFLUENCE AND BLOCK REFORM 4 (2009), https://oversight.house.gov/wp-content/uploads/2012/02/20090319FriendsofAngelo.pdf [https://perma.cc/79GN-F8MK] ("To augment its voice in the GSE-reform debate, Countrywide dispensed favors to VIPs who it believed might be worthwhile to the company. This group of borrowers included legislators, congressional staffers, lobbyists and other opinion leaders. Countrywide also distributed benefits to business partners, local politicians, homebuilders, entertainers and law enforcement officials.").

102 *See supra* note 84 and accompanying text.

103 *See* Arthur E. Wilmarth, Jr., *Turning A Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1363 (2013); *see also* RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 96.

the same period, the industry ranked third highest in lobbying expenditures.[104] Even without considering whether corporations are people, whether money is speech, or whether people really seek office to serve the public, it's easy to see how the failure of government to act against its greatest benefactor might undermine public confidence in the justice system.

The authors set out to argue that there was a fundamental breakdown in the rule of law in the wake of the financial crisis.[105] Given the plurality of possible reasons for the lack of enforcement actions—some of which would be not only entirely legitimate, but also consistent with the rule of law—one need not accept this conclusion. The authors, however, make such a strong case for their thesis that it would be difficult to come away from this book without a renewed concern that the *credibility* of the rule of law has suffered gravely.

IV. THE COST

The authors claim that "[c]itizens must now accept that the government allowed the persons behind the most costly fraud in our history to shirk all criminal and regulatory responsibility."[106] It may seem petty to hinge so much on an active verb, but as I've discussed above, the conclusion that the government *allowed* this to occur is not inescapable. That said, the real power of the authors' claim remains unavoidable: citizens must now accept that most of the persons behind the most costly fraud in our history have avoided all criminal and regulatory responsibility. And this avoidance of responsibility sets a dangerous precedent. The accumulated wisdom from the 2008 crisis and its aftermath in the financial sector may not be to exercise greater care; it may be that riskier conduct is more lucrative because downsides like criminal and regulatory penalties can be discounted. Or, as the authors write, "for the most powerful financial elites at the apex of our economic system, crime pays."[107]

A brief review of post-crisis conduct by systemically important financial institutions suggests cause for concern. HSBC aided the laundering of hundreds of millions of dollars by drug cartels and willfully committed serial violations of Office of Foreign Assets Control sanctions.[108] In what is perhaps an even

[104] *See* Wilmarth, Jr. *supra* note 103, at 1363.
[105] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at xii.
[106] *Id.* at 88.
[107] *Id.* at 132.
[108] *Id.* at 194.

more brazen scheme, five global banks "pleaded guilty to felony charges arising from their manipulation of currency exchange markets," stemming from the LIBOR manipulations.[109] Conduct by the big banks seems to have gotten worse, not better. And isn't this what we'd expect if the external threat of penalties for potentially profitable misconduct is shown to be toothless? Perhaps it doesn't matter so much *why* the financial crisis resulted in so few prosecutions; the fact that it did generates the costs.

Of course, it does matter why. If the authors are correct that a lack of political courage best explains the failure of prosecutors and regulators to more aggressively respond in the wake of the crisis, then we may need to fix the prosecutors and regulators. Maybe. It is possible, however, that even if a lack of political courage is the culprit, the fix should not be with those who lacked courage, but rather with those who inspired the cowardice.

The best fix to the harms addressed by this book will always rest with the banks. There may be innovative ideas about how to further insulate prosecutors and regulators from industry influence. However, if there is any part of our government with a reason to be proud of its ability to resist industry and political influence, it is our federal prosecutors.[110] The authors demonstrate as much in the first chapter of their book where they detail a history in which "even the most powerful business leaders face[] criminal accountability for significant financial crimes."[111] If anything changed between the S&L crisis and the 2008 crisis, it wasn't the independence or will of our prosecutors; it was the target. In 2008, banks were bigger, more interconnected, more systemically important, and more powerful than they had been in the past, and the trend has not

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109 *Id.* at 191–93.

110 I intentionally have elided the question of regulators here. There is significantly more reason to question the independence and diligence of financial regulators. *See, e.g.*, U.S. SENATE, PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, U.S. VULNERABILITIES TO MONEY LAUNDERING, DRUGS AND TERRORIST FINANCING: HSBC CASE HISTORY 282–335 (2012) (describing the failure of the OCC to meaningfully regulate HSBC during its recent compliance failures). Nor is the failure of regulators limited to a single incident. *See* OFFICE OF COMPTROLLER OF CURRENCY, OFFICE OF ENTERPRISE GOVERNANCE & THE OMBUDSMAN 4 (2017), LESSONS LEARNED REVIEW OF SUPERVISION OF SALES PRACTICES AT WELLS FARGO, https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-wells-fargo-supervision-lessons-learned-41917.pdf [https://perma.cc/P2YV-M24X] (finding that "the OCC did not take timely and effective supervisory actions after the bank and the OCC identified significant issues with complaint management and sales practices"). A more fulsome discussion of the problems of regulatory capture or impotence is beyond the scope of this review.

111 RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 29.

abated.[112] Prosecutorial reticence, if that is a problem, can best be addressed by confronting that which is causing the reticence: institutions that are too big.

The sheer size and importance of banks is the problem that leads to all three possible causes of the failure to prosecute after the 2008 financial crisis. These institutions are massive and opaque, and gathering evidence about individual actors within them is particularly challenging.[113] The risks of failure are so great that any law enforcement or regulatory action that generates these risks must be discounted.[114] And, the power of these institutions—whether in the form of revolving doors, campaign influence, or sheer political might—may itself hinder investigations and prosecutions.[115]

The end result may be a sense of immunity among some in the financial industry and a loss of public confidence in law enforcement. The authors describe this breakdown by illustrating the "dimensions of lawlessness."[116] Describing four post-crisis banking scandals, the authors contend that the failure to prosecute has so diluted the deterrence effect of criminal law as to render criminality increasingly common.[117]

According to the authors, the absence of prosecutions is best explained by the influence that these organizations have over our economy and government.[118] Yet, even if we accept that the failure to prosecute is explained by good reasons—lack of evidence to establish scienter in individual cases, proper exercise of prosecutorial discretion, prosecuting based on evidence rather than outrage—the appearance of a soft response by law enforcement generates costs. By this I do not mean to suggest that prosecutions can be supported for purely instrumental reasons absent evidence and desert. They cannot. However, the popular perception of law enforcement's response to the financial crisis

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[112] *See* John Crawford, Essay, *A Better Way to Revive Glass-Steagall*, 70 STAN. L. REV. ONLINE 1, 1 (2017), https://www.stanfordlawreview.org/online/a-better-way-to-revive-glass-steagall/ [https://perma.cc/S9NA-AJYG] ("Nearly a decade after the onset of the crisis, the major financial conglomerates in the United States are in many cases larger than they were in 2007.").

[113] *See supra* text accompanying notes 60–63.

[114] *See supra* text accompanying notes 65–76.

[115] *See supra* Part III.

[116] RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 178.

[117] *Id.; see also* 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, 871 (2013) ("Just as the belief that punishment restores order to society or communicates messages that may deter future wrongdoing, affirmance stands for the proposition that not pursuing or not punishing elite crime adequately can undermine the rule of law, diminish confidence in government, and promote further costly criminality." (emphasis omitted) (internal footnotes omitted)).

[118] *See* RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 203.

is that it cowed before Wall Street. The seeming lack of investigations, not the lack of convictions, is the problem. It's the appearance that no one really tried. That perception persists, and it undermines public confidence in the fairness of our justice system.

The book illustrates this cost well: the anemic law enforcement response to the financial crisis and subsequent misconduct by large financial institutions generates a public perception that these institutions, and the elite who run them, are above the law. A legal system that prosecutes based on status does so at grave risk to its continued legitimacy.

The solution may be similar to, yet importantly different than, that suggested by the book's title. *The Case for the Corporate Death Penalty* begins its conclusion with a quote from Thomas Jefferson that "[l]egislators cannot invent too many devices for subdividing property."[119] The authors write that "[c]oncentrated power threatens the rule of law and therefore individual liberty."[120] The big banks have become extremely big and extremely powerful. Indeed, by some measures, large financial institutions have become larger since the financial crisis.[121] The book notes that at the end of 2014 just five institutions accounted for over 44 percent of the financial industry in the United States.[122]

It is worth remembering that before "too big to fail" became an epithet hurled by opponents of large financial institutions, it was a widely embraced policy.[123] Too big to fail was the federal bank regulators' policy, established in the 1980s, of protecting "both insured and uninsured depositors in large failing banks."[124] In the decades preceding the 2008 crisis, the dispute was generally not about whether this informal federal insurance was a good idea; rather, the question was whether the trend toward consolidation within the financial industry would increase the costs of this policy.[125] Those who favored

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[119] *Id.* at 203 (quoting Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), *reprinted in* 8 THE PAPERS OF THOMAS JEFFERSON 681, 632 (Julian P. Boyd ed., 1953)).

[120] *Id.*

[121] *See* Partnoy & Eisinger, *supra* note 30 ("Banks today are bigger and more opaque than ever, and they continue to behave in many of the same ways they did before the crash.").

[122] *See* RAMIREZ & RAMIREZ, CORPORATE DEATH PENALTY, *supra* note 5, at 108.

[123] The purpose of the policy was to prevent instability within one large bank from spreading to other large banks, or even further throughout the regional or national economy, as well as to mirror the regulatory policy of other industrial nations allowing U.S. banks to compete for international deposits. *See* Wilmarth, Jr., *supra* note 103, at 997–1002.

[124] *Id.* at 994.

[125] *Id.*

consolidation prevailed, leaving the opponents with only cassandran validation.[126]

The sheer size and importance of the largest banks has rendered them not only too big to fail but also too big to police. Too big to police because in all but the most unusual scenarios even fulsome, expensive, and intrusive investigations are likely to return evidence of scienter against relatively low-level employees. This problem is not limited to banks, but it is true of large banks. Simply as a matter of corporate hierarchy and function, actual decisions and awareness of conditions necessary to commit a crime will be aggregated at lower levels of management.[127] So, efforts like the Yates Memorandum[128] that call for more individual prosecutions are unlikely to have much impact, except, possibly, undermining the corporate function by poisoning the relationship between senior management and employees[129] and generating inconsequential cases against lower-level employees.[130]

The death penalty is not a realistic option for these largest banks, nor is it one we ought to hope prosecutors exercise at times of crisis. A better option may be a compelled diet. Neither line prosecutors nor even DOJ leadership are situated to restructure our economy by breaking up the biggest banks; this is a political project that ought to be handled with care. "Killing" large banks might feel good, but it would be reckless. If the large banks are to end, it will and ought to be through the relatively gentle and thoughtful mechanics of politically imposed limits.

CONCLUSION

The political battle over the financial industry continues to be waged—not between Democrats and Republicans or right and left, but between those who worry about the consequences

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126 *Id.* at 1081 ("[I]t is clear that a consolidated banking industry dominated by nationwide banks would impose greater risks on the FDIC in view of the 'too big to fail' policy.").

127 *See generally* Gregory M. Gilchrist, *Accountability for Corporate Crime*, 34 GA. ST. L. REV. 335 (2018).

128 *See* U.S. Dep't of Justice Memorandum from Sally Quillian Yates, Deputy Att'y Gen., to All U.S. Attorneys et al., (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download [https://perma.cc/RZN9-TUZQ].

129 *See* Sharon Oded, *Coughing Up Executives or Rolling the Dice?: Individual Accountability for Corporate Corruption*, 35 YALE L. & POL'Y REV. 49, 53 (2016) (describing the conflict between corporations and their employees generated by the Yates Memo).

130 *See* Gilchrist, *supra* note 127 ("Simply put, the hierarchy and structure of corporations mean that most corporate acts occur at levels many steps removed from central management."); *see also* Peter J. Henning, *A New Crime for Corporate Misconduct?*, 84 MISS. L.J. 43, 51 (2014) ("Many corporate officials are far removed from the day-to-day company decisions that can turn out to be fraudulent, so it is difficult to find evidence to establish their knowledge in the circumstantial evidence.").

of the largest banks' great size, wealth, and power, and those who defend the status quo. There is no avoiding the fact that many of the defenders of large banks in this battle are themselves subject to an obvious conflict of interest. Their campaigns, and hence their livelihood and power, are funded in significant part by contributions from large financial institutions and the culture that surround them.

The fight over the control of wealth, and all that accompanies it, continues. We ought to expect that those who control and profit from the flow of money will continue to innovate. Some innovations will help the nation and the people, while others will serve only the banks and bankers. Some innovations will be morally sound, while others will teeter toward recklessness and sometimes outright fraud.

This is not new. It's worth remembering that after President Jackson prevailed in his war against the Second Bank of the United States, its president, Nicholas Biddle, morphed the institution to a private corporation chartered by Pennsylvania.[131] When that bank failed, Biddle and other officers were indicted for fraud.[132] The cases were dismissed, but not before the court took the opportunity to comment on "'the singularly loose method' by which the directors had conducted the business of the corporation."[133]

The Case for the Corporate Death Penalty adds powerful support to the arguments in favor of breaking up the largest banks. Whatever the reason—be it corruption, opacity, importance to the economy—history has demonstrated that large banks are less subject to external norms. There is just way too much room for clever people buried in the corporate form to identify new means of profit that, while untoward, immoral, and possibly illegal, will never face a real risk of prosecution.

Fraud is notoriously difficult to define, and this is almost surely by design.[134] The line between brilliantly making money and breaking the law can be hazy, and in some cases impossible to discern *ex ante*. For these reasons, criminal law is often not an effective or just mechanism for confronting financial misconduct. That said, there is a line and it will be crossed.

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[131] *See* Hammond, *supra* note 2, at 11.

[132] *See* THOMAS PAYNE GOVAN, *supra* note 55, at 411–12; Hammond, *supra* note 2, at 15.

[133] Hammond, *supra* note 2, at 16 n.49 (quoting the PHILA. PUBLIC LEDGER, Apr. 30, 1842).

[134] *See* Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 520 (2011) ("Fraud can have fixed meaning only at a very general level. If one attempts to key one's definition of fraud to descriptions of behaviors, new behaviors will inevitably be invented, or will simply arise, that expose the definition as faulty and underinclusive.").

When it is, there need be consequences. The authors urge more criminal consequences. I would urge more regulatory protections and consequences. But we agree consequences are necessary, and as *The Case for the Corporate Death Penalty* makes clear, on Wall Street, too often, there are none.