PROSECUTORIAL DISCRETION ADVISED: ANALYZING THE PROPER ROLE OF "ECONOMIC CONSEQUENCES" AS A FACTOR IN FEDERAL PROSECUTORIAL DECISIONS NOT TO SEEK CRIMINAL CHARGES

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The 2008 housing and financial crisis produced numerous books, documentaries, and legal works around the term "Too Big to Jail." Though the United States Justice Department claimed that the term's applicability to the financial crisis was mostly conjecture, the past few years has indicated it is—for the most part—true. While other legal and scholarly works have discussed the term and its validity, this article argues that prosecutors should be entirely barred from considering "economic consequences" of their decisions whether or not to bring criminal charges against a person or other legal entity in order to uphold justice within the criminal system.

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INTRODUCTION

Academics, government officials, and Wall Street companies continue to draft a thorough and accurate response to the 2008 housing crisis and financial meltdown.[1] Reforms of many different kinds have been proposed.[2] Others, like the Dodd-Frank Act, have already been enacted into law and are making their way through the regulatory codification process.[3] However, one aspect of the housing and financial crisis and the subsequent response is not readily subject to quick change or reform. The Criminal Division of the Department of Justice (DOJ), for the past few years, has been the subject of strong criticism for what appears to be to many a lack of will and inability to bring federal criminal charges against executives in their personal capacities of the major financial institutions whose policies, many believe, are clear violations of federal criminal law.[4] The same concerns extend to charging the corporations in their capacity as a legal, separate entity.[5]

In January 2013, Lanny Breuer, as the then Assistant Attorney General for the DOJ's Criminal Division, spoke to reporters from PBS

[1] *See e.g.*, CHARLES V. BAGLI, OTHER PEOPLE'S MONEY: INSIDE THE HOUSING CRISIS AND THE DEMISE OF THE GREATEST REAL ESTATE DEAL EVER MADE (2013); THOMAS SEWELL, RECKLESS ENDANGERMENT: HOW OUTSIZED AMBITION, GREED, AND CORRUPTION LED TO ECONOMIC ARMAGEDDON (2011).
[2] SECURITIES AND EXCHANGE COMMISSION, IMPLEMENTING THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2013).
[3] *Id.*
[4] *See, e.g.,* David Dayen, *Why I Let Wall Street Walk*, SALON (Mar. 1, 2013, 10:57 PM), http://www.salon.com/2013/03/01/why_i_let_wall_street_walk/; Richard Eskow, *As Federal Prosecutors Cash In, Big Bankers Go Unpunished*, The Huffington Post (Jan. 27, 2013, 11:13 PM), http://www.huffingtonpost.com/rj-eskow/as-federal-prosecutors-ca_b_2564522.html. The DOJ also has the ability to bring federal charges against corporate entities, but that is not the subject of this article.
[5] *Id.*

about his opinions on the housing and financial crisis.[6] When questioned about why no one on Wall Street has been charged with federal crimes, Breuer responded:

> I think I am pursuing justice. And I think the whole entire responsibility of the Department is to pursue justice. But in any given case, I think I and prosecutors around the country, being responsible, should speak to regulators, should speak to experts, because if I bring a case against institution "A," *and as a result of bringing that case there's some huge economic effect,* it affects the economy so that employees who had nothing to do with the wrongdoing of the company...may lose their jobs.[7]

Several weeks later, Breuer retired.[8] A popular phrase coined by those in opposition to Breuer's statement is that the companies involved and their executives have become "Too Big to Jail."[9] However, from an outsider's point of view, it is difficult to criticize from a legal standpoint the decisions that Breuer and his colleagues have made because the notion and principle of federal prosecutorial discretion has deep constitutional roots and is a well-settled area of federal criminal procedure under the Constitution.[10]

Nonetheless, it may be the case that the application of prosecutorial discretion with respect to the crimes perpetrated during the 2008 housing crisis has not been uniform and has ignored professional and ethical standards to which federal prosecutors hold themselves accountable. This Article attempts to identify whether consideration of the "economic effects" of bringing charges is an abuse of federal prosecutorial discretion. This Article takes the position that collateral "economic effects" should not be a factor in the federal prosecutor's decision of whether or not to charge. To help illustrate that position, Part I will provide a brief background of the development of federal prosecutorial discretion and why it is generally supported. Part II will survey relevant guidelines and procedures federal prosecutors must follow in executing their public duty to promote justice. Parts III and IV will review other major financial and corporate crimes, and examine the DOJ's response. Part V will provide analysis as to whether the

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[6] Frontline, *Lanny Breuer: Financial Fraud Has Not Gone Unpunished*, PBS, (Jan. 22, 2013, 9:22 PM), http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/lanny-breuer-financial-fraud-has-not-gone-unpunished/.

[7] *Id* (emphasis added).

[8] Frontline, *Report: DOJ Criminal Chief Lanny Breuer Stepping Down*, PBS (Jan. 23, 2013, 6:04 PM), http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/report-doj-criminal-chief-lanny-breuer-stepping-down/.

[9] This is a play on the phrase popularized during government bailout discussions, "Too Big to Fail."

[10] *See infra* Part I.

notion of considering "economic effects" has been consistently applied to other cases and events similar to the 2008 housing and financial crisis. Further, Part V discusses whether justice has been served for crimes arising out of the 2008 housing and financial crisis. Because, as this Article will argue, the issue of "economic consequences" is not a factor that has been uniformly applied to federal prosecutorial decisions to charge executives of corporations, it should not apply to the executives of the companies involved in the most recent crisis.

I. THE SOURCE OF FEDERAL PROSECUTORIAL DISCRETION

The source of the federal prosecutor's power to charge an individual comes from Article II, Section 3 of the Constitution. It provides that the President "shall take Care that the Laws be faithfully executed."[11] Today, this phrase has come to mean that the prosecutorial power is vested in the executive branch of government.[12] This is different from civil cases where those who are harmed must bring a complaint on their own initiative with their own resources. The role of a federal prosecutor, whose primary purpose it is to punish crime, comes from the notion that this power be vested in prosecutors because there is more crime than there are resources to prosecute them.[13]

As crime in society grew more prevalent, the idea of dedicated, full-time prosecutors took form.[14] Several arguments are often advanced in favor of the full-time federal prosecutor. The first is that these prosecutors are needed because of the complexity of the cases, including concerns of affordability and expertise.[15] Punishment for crimes could be administered more effectively if it was a part of the government's responsibility to do so via a full-time prosecutor. Second, any crime committed came to be seen as harmful to society as a whole, and not just a single party or individual who may be the victim of that crime.[16] This notion frames many other rules of our federal criminal justice system. With this newfound role for prosecutors, rules governing their decision-making authority came under scrutiny.

Today, prosecutorial discretion can be defined as the near absolute and unreviewable power under American law for prosecuting attorneys to

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[11] U.S. CONST. art. II, § 3.
[12] *See generally,* Steven G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 545 (1994).
[13] *Id*.
[14] *See* ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2009).
[15] RONALD ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 961 (3rd ed. 2011).
[16] *Id*.

(1) choose whether or not to bring charges and (2) select what charges to bring.[17] There are two Supreme Court cases, discussed below, that have solidified both aspects of prosecutorial discretion.

A. THE DECISION TO CHARGE

In 1971, there was a large prison revolt at the Attica Correctional Facility in which prisoners overtook the facility.[18] State officials planned to recapture the prison.[19] At the end of the event, thirty-two inmates were killed, and many others were injured.[20] The plaintiffs in *Inmates of Attica v. Rockefeller* were the mother of an inmate who was killed and a member of a New York State Subcommittee on Prisons.[21] The plaintiffs asked the Supreme Court to compel federal and state officials to investigate and prosecute potential defendants like the Governor, State Commission of Correction Services, corrections officers, and many other government officials involved with planning the recapture of the prison for, *inter alia*, conspiring to commit cruel and inhumane treatment upon the prisoners.[22]

The Court refused to compel such action.[23] The Court's primary reasons for refusing to mandate or review actions of the federal prosecutors when deciding whether or not to charge were based on separation of powers concerns.[24] It consequently refused to substitute its judgment for that of the U.S. Attorney not to prosecute.[25] In its decision, the Court also mentioned other practical concerns of review.[26] This law is well settled: prosecutorial decisions whether or not to file charges are unreviewable for practical and constitutional concerns. Even in a case like *Inmates of Attica,* where there were gross violations of prisoner safety and rights, the prosecutorial decision to not bring charges will be enforced.[27]

B. SELECTING THE CHARGE

Milton Batchelder had a felony record.[28] He was later found in possession of a firearm in violation of 18 U.S.C. 922(h).[29] However, there

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[17] *Id*. at 987.
[18] Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (1973).
[19] *Id*.
[20] *Id* at 377.
[21] *Id*.
[22] *Id* at 378.
[23] *Id*.
[24] *Id*.
[25] *Id*. at 379.
[26] *Id*.
[27] *Id* at 380.
[28] United States v. Batchelder, 442 U.S. 114 (1979).

was also a separate federal statute that provided for punishment of the same crime.[30] This statute, 18 U.S.C. 1202(a), provided for a maximum punishment that was significantly less than the punishment authorized under 922(h).[31] Batchelder appealed his conviction and asked for resentencing on the grounds that Congress did not intend for his conduct to be punishable under both statutes.[32]

The Court recognized that these two statutes were "redundant."[33] However, it made clear that it had no ambiguities before it to resolve.[34] The Court stated that "the Government may prosecute under either [statute] so long as it does not discriminate against any class of defendants."[35] In other words, even though a prosecutor might be influenced by the existence of two different statutes providing different punishment for the same action, that fact alone is not enough to give rise to a violation of the defendant's rights under the Eighth Amendment.[36]

There are Due Process and Eighth Amendment arguments against federal decisions to prosecute, such as "cruel and unusual punishment" or "vindictive prosecution" claims that can be made in response to prosecutorial decisions to charge.[37] They are not examined here. Though decisions to prosecute or not are generally unreviewable, they are not shielded from public critique. It is quite common for even local, state level prosecutors to bear the brunt of criticism when they decide not to charge people with crimes despite community sentiment.[38] Nonetheless, before levying a similar critique of the decision not to charge within the context of the 2008 housing and financial crisis, the rules that govern federal prosecutorial discretion should first be examined to identify any potential guidance on the question of whether "economic consequences" is a proper factor to consider.

II. RULES THAT GOVERN PROSECUTORIAL DISCRETION

Throughout the past two decades, there has been much academic debate surrounding the question of regulating the *ethics* of federal

[29] *Id*.
[30] *Id*.
[31] *Id* at 115.
[32] *Id*.
[33] *Id*.
[34] *Id* at 116.
[35] *Id* at 117.
[36] *Id*.
[37] ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 972.
[38] Lacey Crisp, *Derek Williams' Family Speaks Out About Prosecutor's Decision Not to File Charges*, TODAY'S TMJ4 (Mar. 28, 2013), http://www.todaystmj4.com/news/local/200520941.html.

prosecutors.[39] In 1994, the legal community divided itself on this question when then-Attorney General Janet Reno adopted an administrative, formal rule for the DOJ that U.S attorneys were allowed to communicate with persons or entities that were represented by counsel in the course of an investigation or proceeding.[40] Academics questioned whether the DOJ had the ability to supersede national and state level ethics guidelines through the use of a federal regulation.[41]

However, material on potential "violations" of the United States Attorneys' Manual (USAM) section on Principles of Federal Prosecution is not available nor is it commonly discussed. This may be because the USAM itself provides that the rules are "cast in general terms with a view to providing guidance rather than to mandating results," and that the intent of the USAM "is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing necessary flexibility."[42] The rules in this section of the USAM also provide that prosecutors "may modify or depart from the principles set forth herein as necessary."[43] The rules are also, expressly, not enforceable at law.[44]

For purposes of this Article, there are still several relevant guidelines to evaluate. First is 9-27.260, "Initiating and Declining Charges—Impermissible Considerations." This section only provides three categories of factors that prosecutors are not allowed to consider: (1) The person's race, religion, sex, national origin, or political association, activities or beliefs; (2) the attorney's own personal feelings concerning the person, the person's associates, or the victim; or (3) the possible affect of the decision on the attorney's own professional or personal circumstances.[45]

Second, the rules provide grounds for other situations where prosecutors do not have to bring charges: (1) no substantial Federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.[46] The comments to both of these rules reinforce the principle that prosecutors have vast amounts of discretion.

There is a portion of the USAM that addresses charges against corporations. This section, entitled "Principles of Federal Prosecutions of

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[39] Allen Samelson, *State Ethics Rules Now Apply to Federal Prosecutors*, ROGERS JOSEPH O'DONNELL, *http*://www.rjo.com/publish22.html (emphasis added).
[40] 28 C.F.R. § 77 (1995).
[41] *See generally* Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators: Response to Little*, 65 FORDHAM L. REV. 429 (1996).
[42] U.S. ATTORNEYS' MANUAL § 9.27.
[43] U.S. ATTORNEYS' MANUAL § 9-27.140.
[44] U.S. ATTORNEYS' MANUAL § 9-27.150.
[45] U.S. ATTORNEYS' MANUAL § 9-27.260.
[46] U.S. ATTORNEYS' MANUAL § 9-27.220.

Business Organizations," does refer to "collateral consequences."[47] It limits the considerations and states: "Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect *is not sufficient to preclude prosecution of the corporation*."[48] This section also adds that the federal prosecutor should consider whether there are alternative means of punishment.[49] The section was edited and authored in 2008 by the then Deputy Attorney General Mark Filip.[50] Though other parts of the memo have been changed or adopted, the views in that memo are what make up the Principles of Federal Prosecutions of Business Organizations Section. The rules here also point out that "it should be the rare case where prosecutors do not pursue provable individual culpability, even in the face of offers of corporate guilty pleas."[51]

It is clear that though there are standards and guidelines for federal prosecutors to follow, there are no means of enforcing those standards. For that reason, this Article can only critique and analyze past and present DOJ practice when it comes to the prosecution of corporate crime. For one last governmental opinion on the issue, consider statements made by Attorney General Eric Holder before a Senate Judiciary Committee:

> "I am concerned that the size of some of these institutions becomes so large that it does become difficult to prosecute them. When we are hit with indications that if you do prosecute, if you do bring a criminal charge it will have a negative impact on the national economy, perhaps world economy, that is a function of the fact that some of these institutions have become too large. It has an inhibiting impact on our ability to bring resolutions that I think would be more appropriate. That is something that you all need to consider."[52]

[47] U.S. ATTORNEYS' MANUAL § 9-28.
[48] *Id*.
[49] *Id*.
[50] Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memo].
[51] *Id*.
[52] Frontline, *Holder: Big Banks' Clout Has an Inhibiting Impact on Prosecutions*, PBS (Mar. 6, 2013, 2:15PM), http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/holder-big-banks-clout-has-an-inhibiting-impact-on-prosecutions/.

III. THE HANDLING OF PAST CORPORATE CRIMES

A. THE GREAT DEPRESSION

After the stock market crash of 1932, a Senate committee, the Pecora Commission, began to investigate responsibility for the crash.[53] Its investigation led to indictments of many different banking chief executive officers.[54] One of those CEOs was Charles Mitchel, then president of National City Bank.[55] Charles Mitchel's bank sold many shoddy investments.[56] After his resignation, he admitted to the Pecora Commission that he knew his bank was advertising and selling these bad investments.[57] However, banking laws at the time were not sufficient for federal prosecutors to bring charges.[58] CEOs like Mitchel were not prosecuted, but paid civil fines instead.[59]

B. SAVINGS & LOAN CRISIS

Congressional response to the Savings and Loan Crisis of the 1980s and 1990s was much more aggressive than the response to the Stock Market Crash of 1932.[60] More than 1,000 bankers were convicted by the Justice Department.[61] Charles Keating Jr. was the CEO of Lincoln Savings and Loan, and David Paul was the CEO of Centrust Bank.[62] The short version of the Savings and Loan Crisis involves specialized banks that used low-interest, federally insured, deposits in savings accounts to fund mortgages.[63] Because investors could get higher interest rate returns from other marketable securities as opposed to depositing their money with a savings bank, the banks lobbied Congress to remove restrictions on the interest rates they could distribute.[64] After Congress caved, savings and

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[53] Frontline, *Were Bankers Jailed in Past Financial Crises?*, PBS (Jan. 22, 2013, 9:43PM), http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/were-bankers-jailed-in-past-financial-crises/.
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] Becky Quick, *Why No Jail Time for Wall Street?*, CNN MONEY (Jan. 23, 2010, 4:21AM), http://money.cnn.com/2010/06/23/news/companies/prosecutors_ignoring_wall_street.fortune/index.htm.
[61] *Id*.
[62] Frontline, *supra* note 51.
[63] Kimberly Amadeo, *Savings and Loan Crisis*, ABOUT.COM GUIDE, http://useconomy.about.com/od/grossdomesticproduct/p/89_Bank_Crisis.htm.
[64] *Id*.

loans banks were able to raise their interest rates on deposits and even let these savings banks make commercial and consumer loans.[65] These banks tried to raise capital, and invested in risky commercial loans of their own.[66] Quickly though, consumers wanted their money back and this started to bankrupt the banks.[67] A federal bailout soon followed so that customers would not lose all of their savings.[68]

During the length of this crisis, over 1,000 banks with total assets of over $500 billion failed.[69] CEOs Paul and Keating Jr. spent ten years in prison for their knowledge as well as their pursuit of bad loans and fraud on the market.[70] One interesting tool that federal prosecutors used to avoid going after the banks and other CEOs that they were not confident they had a strong case against were "referrals."[71] Government regulators would work closely with government prosecutors to share information and analysis on potential charges.[72]

C. ENRON

The collapse of Enron is considered to be one of the biggest corporate downfalls in U.S. history.[73] Kenneth Lay and Jeffrey Skilling are two of almost one dozen Enron corporate executives who were prosecuted for federal crimes such as fraud and conspiracy.[74] Prosecutors claimed that these executives all took steps to hide the financial troubles of the company from its balance sheet, income statement, and cash flow sheets.[75] The collapse of the company caused the loss of over 5,000 jobs and a billion dollars in retirement savings.[76]

Some of the charges listed on the indictment against both of the executives include the following: (1) conspiracy to commit securities and wire fraud, as both executives approved the production of annual and quarterly reports that were submitted to the SEC with gross misstatements of revenue and earnings; (2) securities fraud for treating a *de facto* subsidiary off the Enron's books, to hide mass amounts of debt and

[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] Frontline, *supra* note 51.
[72] *Id*.
[73] Wade Goodwyn, *Enron: On the Prosecution's List*, NPR (Apr. 5, 2006, 5:15PM), http://www.npr.org/templates/story/story.php?storyId=5249786.
[74] *Id*.
[75] *Id*.
[76] *Id*.

knowingly keeping it off the books; (3) wire fraud for stating via telephone and video conferences that Enron's financial condition was "looking great" and that the company "will hit its numbers;" (4) false statements to auditors; (5) insider trading; and (6) bank fraud for making false statements to banks.[77] There were forty-one counts listed on the indictments.[78] Other executives like Mark Koenig, Andrew Fastow, Sherron Watkins, Kenneth Rice, Ben Gislan Jr., and David Delaney also faced federal charges.[79]

Other corporate entities like Arthur Anderson, Enron's auditing company, and Merrill Lynch and Co., the investment bank for Enron, were also charged.[80] Below is a table of the results of the federal prosecutions against those involved with the Enron collapse.[81]

TABLE I. OUTCOMES OF FEDERAL PROSECUTIONS AGAINST ENRON, MERRILL LYNCH, AND ARTHUR ANDERSON

Party	Role	Outcome
Arthur Anderson	Enron's Auditor	Conviction overturned on appeal.
Merrill Lynch & Co.	Enron's Investment Arm	Conviction vacated and remanded on appeal; government did not retry.
Daniel Boyle	Enron Executive	Convicted of obstruction; no appeal.
James Brown	Merrill Lynch	Conviction vacated and remanded on appeal; government did not retry.
Christopher Calger	Enron Executive	Successfully withdrew plea; charges later dismissed.
David Duncan	Arthur Anderson	Successfully withdrew plea; charges later dismissed.
William Fuhs	Merrill Lynch	Conviction vacated on appeal.
Robert Furst	Merrill Lynch	Conviction partially vacated on appeal; later entered into deferred prosecution agreement.
Joseph Hirko	Enron Executive	Conviction vacated and remanded on appeal; later pled to reduced charges.
Kevin Howard	Enron Broadband Services	Conviction vacated and remanded on appeal; later pled to reduced charges.
Sheila Kalanek	Enron	Acquitted at trial.
Michael Krautz	Enron Executive	Mistrial at first trial; acquitted at second trial.
Kenneth Lay	Enron Executive	Conviction vacated due to death.
Rex Shelby	Enron	Hung jury and partial acquittal at first trial; later pled to reduced charges.
Jeffrey Skilling	Enron Executive	25 years in prison.

[77] Associated Press, *The Enron Trials: Charges Against Lay and Skilling*, USA TODAY – MONEY (Jan. 30, 2006, 12:21PM), http://usatoday30.usatoday.com/money/industries/energy/2006-01-27-charges_x.htm.
[78] *Id*.
[79] Goodwyn, *supra* note 73.
[80] Linda Chatman Thomsen, *Enron: 10 Years Later*, LAW 360, http://www.davispolk.com/files/Uploads/Documents/Law360.Thomsen.Enron.pdf.
[81] *Id*.

Enron filed for bankruptcy in December of 2001.[82] The Justice Department began its investigation *after* the company went bankrupt. Unlike the Great Depression, the Savings and Loan crisis, or the 2008 housing crisis, the impact of the Enron collapse was much more limited in scope (though extremely unfortunate and devastating for the employees of the company).

IV. THE 2008 HOUSING AND FINANCIAL CRISIS

A. FACTS AND THE GOVERNMENT'S RESPONSE

Many different financial entities were involved in the 2008 housing and financial crisis.[83] For purposes of this Article, only a brief background of the relevant facts for different entities will be given.

1. Bank of America

Bank of America (BOA) sold many different mortgages and loans to financial institutions including Fannie Mae and Freddie Mac.[84] Eventually, executives of BOA planned a new business model in an attempt to streamline the sale of mortgages.[85] Part of this plan involved eliminating various checks on the quality of the loans that served as the underlying asset for securitized mortgages before selling them to third parties.[86] The elimination of this credit check is what BOA and many other financial institutions did, but marketed the mortgage-backed securities as healthy when they no longer had a means of verifying that quality. This new business model was named "The Hustle."[87]

On October 13, 2013, a jury found Rebecca Mairone, a manager of a Bank of America subsidiary during the time of the 2008 housing and financial crisis (and who now works at JP Morgan Chase), liable for its sale

[82] Canadian Broadcasting Corporation, *The Rise and Fall of Enron: A Brief History*, CBC NEWS – BUSINESS, (May 28, 2006, 4:44PM), http://www.cbc.ca/news/business/story/2006/05/25/enron-bkgd.html.
[83] Gene Kirsch, *Historical Prospective of the 2008 Financial Crisis*, WEISS RATINGS (Apr. 26, 2012), http://weissratings.com/news/articles/historical-perspective-of-the-2008-financial-crisis/.
[84] United States District Court - Southern District of New York, 12 Civ. 1422 (JSR) (S.D.N.Y. Oct. 12, 2012), *available at* https://www.documentcloud.org/documents/484018-bofa-complaint.html.
[85] *Id*.
[86] *Id*.
[87] *Id*.

of defective mortgages.[88] Prosecutors in the case have asked Bank of America to pay nearly $900 million dollars in fines and penalties, but the final amount of the penalty will be decided by the presiding judge.[89] The Manhattan U.S. Attorney has sued Bank of America in a civil action for the same fraudulent activity, and the bank is reportedly prepared to pay thirteen billion dollars in fines and fees to settle any other claims which other governmental agencies may have.[90]

2. Citigroup

Though Citigroup was not directly involved in the sale or securitization of poor quality mortgages, the company did make a series of moves that may have misled shareholders and other investors.[91] As the 2008 housing crisis unfolded, Citigroup attempted to reassure its investors and shareholders that its liability and potential losses were minimal, to the tune of $13 billion dollars.[92] However, it failed to disclose on its balance sheet that it was also liable for another $43 billion dollars involving investments in another set of mortgage-backed securities.[93] Balance sheets and other reports are the only documents that investors have rights of access to and rely on when making investment decisions.[94] These documents are also filed with the SEC, per SEC rules. Citigroup, as a corporate entity, settled with the SEC for $75 million. Two executives were also fined $100,000 each.[95] No criminal charges against Citigroup have been brought.[96]

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[88] Landon Thomas Jr., *Jury Finds Bank of America Liable in Mortgage Case*, NY TIMES (Oct. 23, 2013), http://dealbook.nytimes.com/2013/10/23/jury-finds-bank-of-america-liable-in-mortgage-case-nicknamed-the-hustle/?_php=true&_type=blogs&_r=0.

[89] *Id*.

[90] US DOJ, *After Collapse of Subprime Lending Market in 2007, Countrywide Started Alleged Fraudulent Mortgage Origination Program Called the "Hustle" Designed to Sell Defective Loans to Fannie Mae and Freddie Mac*, UNITED STATES ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK (Oct. 24, 2012), http://www.justice.gov/usao/nys/pressreleases/October12/BankofAmericanSuit.php.

[91] Securities and Exchange Comm. v. Citigroup Inc., 1:10-CV-01277, (D.C. 2010), *available at* http://www.sec.gov/litigation/complaints/2010/comp21605.pdf.

[92] *Id*.

[93] *Id*.

[94] Investopedia Staff, *Knowing Your Rights as a Shareholder*, INVESTOPEDIA (Jan. 02, 2010), http://www.investopedia.com/articles/01/050201.asp.

[95] *Id*.

[96] Svea Herbst-Bayliss, *Citigroup Fined $30 Million after Analyst Sent Report to SAC, Others*, REUTERS (Oct. 3, 2013), http://www.reuters.com/article/2013/10/03/us-citigroup-massachusetts-idUSBRE9920I820131003.

3. Fannie Mae and Freddie Mac

Fannie Mae and Freddie Mac are two "government sponsored entities" designed with the purpose of helping to keep the mortgage market stable.[97] Their eventual bailout cost American taxpayers $188 billion dollars.[98] Most of the malicious conduct on behalf of Fannie Mae and Freddie Mac mirrors that of Citigroup.[99] Both entities misrepresented their liabilities and losses on the balance sheets and other documents eventually disclosed to investors and the SEC.[100] The corporate entities admitted responsibility for their conduct in a statement apologizing to investors, but no criminal or civil charges were sought by the SEC.[101] These cases are also ongoing. No criminal charges against Fannie Mae and Freddie Mac have been brought.[102]

4. Goldman Sachs

The questionable conduct of Goldman Sachs involved executive approved plans to sell a new type of mortgage-backed security.[103] It was called the Abacus 2007-AC1.[104] John Paulson was the hedge fund manager that helped create this new type of security.[105] Goldman Sachs did not disclose to investors who wanted to purchase or invest in the Abacus 2007-AC1 that John Paulson was betting against the success of the Abacus 2007-AC1 on the market.[106] Goldman Sachs has not admitted any wrongdoing, but only that the marketing materials for the security contained "incomplete information."[107] To avoid SEC suits or criminal charges, Goldman Sachs in its corporate capacity agreed to a $555 million settlement.[108] The SEC's charges against Fabrice Tourre, a Goldman Sachs executive involved with

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[97] David John, *Eight Steps to Eliminate Fannie Mae and Freddie Mac—Permanently*, Heritage Foundation, (Apr. 10, 2013), http://www.heritage.org/research/reports/2013/04/eight-steps-to-eliminate-fannie-mae-and-freddie-mac-permanently.
[98] Securities and Exchange Comm. v. Mudd, 11 Civ 9202, (S.D.N.Y. Dec. 18, 2011) *available at* http://www.sec.gov/litigation/complaints/2011/comp-pr2011-267-fanniemae.pdf.
[99] *Id*.
[100] *Id*.
[101] *Id*.
[102] David Hilzenrath, *SEC Charges Former Fannie Mae, Freddie Mac Executives with Fraud*, WASHINGTON POST (Dec. 16, 2011), http://www.washingtonpost.com/business/economy/six-former-fannie-freddie-execs-charged-with-fraud/2011/12/16/gIQAz4FSyO_story.html.
[103] Securities and Exchange Comm. v. Goldman Sachs & Co., 10-CV ECF Case, (S.D.N.Y. Apr. 26, 2013), *available at* http://www.sec.gov/litigation/complaints/2010/comp-pr2010-59.pdf.
[104] *Id*.
[105] *Id*.
[106] *Id*.
[107] *Id*.
[108] *Id*.

the Abacus 2007-AC1, is set for trial in July.[109] No criminal charges have been brought against Goldman Sachs.[110]

5. JPMorgan Chase

Executives at JPMorgan Chase evaluated the quality of underlying mortgage loans that were eventually securitized and marketed by its brokers. When executives noticed that some of the underlying loans were not performing well, they called them "sh*t breathers."[111] Regardless, those loans were still packaged into securities to pass to investors. JPMorgan also told its investors that only thirty or so of the mortgages were in default, when in reality over 600 were.[112] JPMorgan settled with the SEC for $417 million dollars.[113] No criminal charges have been sought against JPMorgan Chase. JPMorgan Chase recently settled with the DOJ to pay thirteen billion dollars in fines to absolve itself of any civil or criminal liability.[114] JPMorgan Chase also expects half of that fine to be tax-deductible.[115] However, a recent consumer protection watchdog group has sued the DOJ claiming that its settlement with JPMorgan Chase violated federal law and constitutional mandates.[116]

6. Bear Stearns

Federal prosecutors did bring charges against two Bear Stearns executives, Ralph Cioffi and Matthew Tannin, for conspiracy and securities fraud.[117] Their trial took place in 2009 on the basis of the same conduct that JPMorgan and Bank of America are alleged to have committed.[118] Both of

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[109] *Id*.
[110] David Ingrahm, *Goldman Sachs Will Not Face Criminal Charges: Justice Department*, REUTERS (Aug. 09, 2012), http://www.huffingtonpost.com/2012/08/09/goldman-sachs-justice-department_n_1762455.html.
[111] *Id*.
[112] *Id*.
[113] *Id*.
[114] Bill Chappell, *JPMorgan Chase Will Pay $13 Billion In Record Settlement*, NPR (Nov. 19, 2013), http://www.npr.org/blogs/thetwo-way/2013/11/19/246143595/j-p-morgan-chase-will-pay-13-billion-in-record-settlement.
[115] *Id*.
[116] Carey Biron, *Justice Department Sued Over Secretive JPMorgan Settlement*, MINT PRESS NEWS (Feb. 13, 2014), http://www.mintpressnews.com/justice-department-sued-secretive-jpmorgan-settlemen/179535/.
[117] Dealbook, *Bear Stearns Trial: How the Scapegoats Escaped*, NY TIMES (Nov. 12, 2009 6:58AM), http://dealbook.nytimes.com/2009/11/12/bear-stearns-trial-how-the-scapegoats-escaped/.
[118] *Id*.

the defendants were acquitted of every charge.[119] However, this result may not be the consequence of inadequate evidence, but poor trial strategy.[120]

First, federal prosecutors relied on snippets of an email between the two executives.[121] These excerpts, when viewed alone, did seem somewhat damning.[122] For example, Mr. Tannin wrote that the "subprime market looks pretty damn ugly," and added that if things were as bad as everyone thought they were, "we should close the funds now [as the] entire subprime market is toast."[123] These statements referred to storing away funds that would have to be paid out to investors in the case of defaults if those funds were available. However, the jury would eventually see the entirety of these emails which included lengthy discussions about how to make sure that the company would make the best financial choice in the situation.[124]

Additionally, the prosecution failed to admit potentially damning evidence.[125] For example, there was a talking points memo authored by the defendants that told Bear Stearns brokers to tell investors if asked about their exposure to bad mortgage backed securities that it was only 3% when it was really 60%.[126] Federal prosecutors called a former Bear Stearns broker to discuss the malicious nature of a memo like this, but did not rebut claims of bias and a lack of impartiality made by the defense. Nor did prosecutors do a sufficient job of using this evidence to argue fraud in their closing argument.[127]

The failure of this trial may be the catalyst for the lack of criminal charges against the corporate executives in their personal capacities of many of the major financial institutions discussed above. However, it is still important to analyze whether justice has been properly administered by the DOJ, or some other governmental entity.

V. ANALYZING WHETHER JUSTICE HAS BEEN UPHELD

Even the Supreme Court has commented that achieving perfect justice in the criminal context is extremely difficult.[128] As a consequence, those charged with the responsibility of administering justice in response to crime should make sure that their policies, procedures, and practice effectuates this justice with some degree of uniformity. Considering the

[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *See generally,* Strickland v. Washington, 466 U.S. 668 (1984).

history of major financial corporate crimes, it is apparent that "economic consequences" as a part of the decision whether or not to bring charges has been absent in most cases, but for some reason is prevalent in the 2008 housing and financial crisis. This Section will analyze that issue. Furthermore, because the DOJ has effectively closed the door on bringing federal charges against other corporate executives, this Section will also analyze alternative means of punishment and question how effectively these entities and persons have been punished for the sake of justice.

A. ECONOMIC CONSEQUENCES

The fall of Enron caused 5,000 people to lose their jobs and almost a billion dollars worth of retirement savings to vanish.[129] Federal charges were not brought against Enron corporate executives until *after* the company went under. In this context, the timing seems appropriate as federal prosecutors found out about the commission of corporate crime at the same time the public did. Enron collapsed as a consequence of fraud and other financial crimes that threatened the safety of the corporation. It was most likely very easy for federal prosecutors, once the company collapsed and effectively ceased to exist as a corporate entity, to bring charges against Enron executives without having to worry about what the "economic consequences" of bringing those charges would be. Without this concern, there was nothing to deter federal prosecutors from convicting former CEOs of a defunct company.

The collapse of several savings and loan banks in the late 80s and early 90s, however, does mirror events of the 2008 housing and financial crisis.[130] Banks and financial institutions started to fail one by one.[131] To triage the damage, Congress provided bailouts in both instances.[132] Nonetheless, at least two different major corporate executives were charged with federal corporate crimes during the savings and loan crisis while hundreds of other small-scale bankers were charged. There were no devastating economic consequences. Those executives were simply replaced by other successful corporate managers. The SEC was not timid in levying fines against other corporations and their CEOs. The consideration of "economic consequences" is difficult to find in that context, considering public outrage and a demand to charge at least *somebody* with a crime that caused the failure of many different banks.

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[129] *See supra* Section III.B.
[130] *See supra*, Part III.
[131] *Id*.
[132] Jesse Nankin & Krista Schmidt, *History of U.S. Gov't Bailouts*, PROPUBLICA (Apr. 15, 2009), http://www.propublica.org/special/government-bailouts.

Though the concern about "economic consequences" was hardly present in past decisions to bring federal charges in corporate crimes, it is extremely prevalent today. Considering the similarities between the 2008 housing financial crisis and the savings and loan crisis, it is difficult to understand why the consideration of "economic consequences" has halted the prosecution of major executives involved in the 2008 housing and financial crisis.

1. Potential Market Consequences

One possible reason against bringing charges against corporate executives is that it would negatively affect the markets. However, assuming that two or three major executives from each different institution were charged with a crime and sent to prison, that would not be enough to damage the health or success of a company in the long term. Corporate takeovers, poison pills, tender offers, mergers, and the election of a new board of directors (and consequently, appointment of new CEOs) take place far too often on Wall Street. In other words, corporate shakeups happen quite often. These CEOs are easily replaceable and newer, crime-free CEOs might fare better with the warning that would come with the prosecution of those former CEOs for their fraudulent conduct. Regardless, this *potential* economic consequence is not sufficient to outweigh seeking criminal charges against executives behind the 2008 housing and financial crisis.

After all, that decision should be left to a grand jury of twenty-three members. There is enough information for a prosecutor to seek an indictment through a grand jury. This plan is also symbolic considering the grand jury's role of representing the people. It would be much easier for the DOJ to deflect criticism for the lack of charges if the department could say it had tried to seek charges but a grand jury of twenty-three Americans did not feel as though there was enough evidence to move forward. Instead, DOJ department heads have consistently relied upon possible "economic consequences" when discussing the issue, and that simply is not as credible as mentioning that an indictment received a "no bill" from a grand jury.

On the other hand, there may be an "economic consequence" worth noting if charges were to be brought against corporate executives. Depending on the persons appointed to replace prosecuted CEOs, the market may not respond well. Wall Street runs off what is known as an "efficient capital market" hypothesis.[133] This means that information in the

[133] Jason Van Bergen, *Efficient Market Hypothesis: Is The Stock Market Efficient?*, FORBES (Jan. 12, 2011), http://www.forbes.com/sites/investopedia/2011/01/12/efficient-market-hypothesis-is-the-stock-market-efficient/.

investment and financial world travels freely and instantly. Any changes in a corporation's policy or structure will have an almost immediate effect on the company's stock price and worth to investors that have judged the change. Wall Street may not respond well to the replacement of CEOs, especially if those replaced CEOs had been in place since the crisis, and are in the middle of recovery. For this reason, "economic consequences" seem somewhat apparent.

The odd thing, however, is that this is another reason not made apparent by DOJ officials. The average American watching the DOJ's response and plan may not recognize the issue with replacing CEOs, and for that reason the DOJ should be more explicit in explaining which "economic consequences" it is referring to. As more and more time passes, it becomes increasingly difficult to bring charges for practical and statute of limitations concerns. Furthermore, many of these banks and financial institutions are significantly connected to other institutions across the country and on an international level. These CEOs were not only in charge of fighting through the crisis they may have caused, but were also handed the responsibility of overseeing government bailout funds and finding a way to see their institution to economic recovery. Replacing them could indeed cause a negative economic consequence.

However, this only proves the point that considering "economic consequences" causes an injustice or at the very least a breach of the duty to administer justice blindly. As a matter of principle, it is a misapplication of justice that, for example, a husband and father of three children can be sentenced to a prison term causing severe "economic consequences" to his family, while a corporate executive can avoid punishment because of the same "economic consequence" concern. Of course, factors like those in the example are considered in the sentencing phase after conviction. What happened in the case of CEOs of financial institutions during the 2008 housing and financial crisis is that they were not even charged *in the first instance*. This policy sends the message that, if a citizen can position himself or herself in a way that makes the U.S. economy dependent on their role and existence, they may be able to avoid punishment for their crimes.

Some research has shown that defense counsel for many of these corporate entities have been able to avoid federal charges against their clients by making presentations to federal prosecutors on the possible economic consequences of a guilty verdict.[134] This can only undermine the metaphor that justice is meant to be blind, and does not take into account what a person's status may be before the law.

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[134] David Sirota, *Are Banks Too Big to Jail?*, SALON (Jan 23. 2013), http://www.salon.com/2013/01/23/are_banks_too_big_to_jail/.

2. Secondary Avenues of Punishment

DOJ statements, that "economic consequences" are worth worrying about, may be a means of sweeping under the rug concerns about the likelihood of success of bringing criminal charges. In a criminal trial, the standard is "proof beyond a reasonable doubt." Lanny Breuer commented on how difficult a standard this is to prove at trial, when compared to "clear and convincing evidence." Some commentators have noted that the failure of the DOJ to win the case against former Bear Stearns executives prevents DOJ prosecutors from bringing additional charges. However, the prosecutor should not be concerned with winning at trial, but only make sure that justice is done. The question of guilt in this case is not for the prosecutor to predetermine or estimate, but for a jury to decide. Though there are no ways of enforcing these arguments, as a matter of practice, it seems as if there is enough evidence to at least attempt a trial as a means of satisfying the public.

Furthermore, the DOJ has not failed at *every* attempt of bringing charges at trial against these CEOs. Two former brokers of Credit Suisse have been imprisoned for five to ten years for their part in selling bad securities.[135] Both of them were ordered to pay nearly 5 million dollars in fines.[136] Furthermore, six executives from Taylor Bean & Whitaker pleaded guilty to securities fraud charges.[137] Most of them were sentenced to 30 years in prison. However, this may be another example of how size matters. Both of these financial entities are relatively small, and any corporate shakeups with respect to these companies are not likely to have a significant effect on the market.

Even if it is not a good principle to stand by, nothing prevents federal prosecutors from considering "economic consequences" of a decision to charge. What is clear is that this factor was not much of a concern during earlier financial meltdowns, but has been for the 2008 housing and financial crisis - mostly likely because of the stature and position of those corporations. As lawmakers scramble for attempts at reform, they should keep in mind whether or not some executives who specifically authorized plans to sell shaky mortgage backed securities were handed a free pass. However, the DOJ has not been completely silent on the issue of seeking justice.

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[135] Chris Isodore, *Credit Suisse Banker Sentenced to 30 Months in Prison*, CNN MONEY (Nov. 22, 2013), http://money.cnn.com/2013/11/22/news/companies/credit-suisse-sentencing/.
[136] *Id*.
[137] Esther Cho, *Former Taylor, Bean and Whitaker CFO Sentenced to 60 Months in Prison*, DS NEWS (June 15, 2012), http://dsnews.com/former-taylor-bean-and-whitaker-cfo-sentenced-to-60-months-in-prison-2012-06-15/.

B. DEFERRED PROSECUTION AGREEMENTS

In the 2008 memorandum authored by Mark Filip to United States Attorneys discussed above, he called for consideration of "alternative" methods of punishment.[138] In practice, and as so far applied to different Wall Street corporations, prosecutors can enter into deferred prosecution agreements with entities they believe need some reform. If companies investigate and reform their own wrongdoings, federal prosecutors can enter into agreements with the corporations and their executives to cancel bringing charges if the corporation promises to fix its behavior.[139]

Because the DOJ has effectively decided not to bring charges, this may be the next best option in the pursuit of justice. These deferred prosecution agreements, though they are no real incentive to quit white-collar crime, are a means of holding these corporations accountable to change and reform. Most of these agreements require the payment of penalties, fines, restitution, and correction of the behavior the DOJ and other regulatory entities consider problems, before charges will be cancelled or dismissed.

Federal prosecutors have also used another tactic. When federal prosecutors believe that there is some indication of wrongdoing by a corporation, they will pay them a visit. Federal prosecutors will visit these companies early on during an investigation, inform the corporation of their findings and concerns, and ask that the corporation conduct an internal investigation to figure out if there is any ongoing illegal activity. Those companies will then use in-house and outside counsel to investigate their internal affairs and report back to federal prosecutors.

On one hand, since the DOJ seems unlikely to bring federal charges against corporations, these deferred agreements and active cooperation with corporations seems to be an effective option. If the DOJ can save its resources and manpower by stopping crimes before they occur by forcing corporations to correct their behavior, then it should do so. There is little reason to go to trial to effectuate some corporate policy change when informing the corporations of its missteps can cause the same effect. These agreements and cooperation plans can correct malicious behavior without any negative "economic consequences" taking place.

On the other hand, despite its effectiveness, these options are just more examples of a privilege extended to corporations and their executives that are not extended to smaller scale criminals. During the course of a

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[138] *See supra* note 50, Part II.

[139] Louise Story, *As Wall St. Polices Itself, Prosecutors Use Softer Approach*, NY TIMES (July 7, 2011), http://www.nytimes.com/2011/07/08/business/in-shift-federal-prosecutors-are-lenient-as-companies-break-the-law.html?pagewanted=all&_r=1&.

grand jury investigation, prosecutors do not have an obligation to present or provide exculpatory information for the jury's consideration nor for the defendant to be made aware of.[140] Additionally, a subject of a grand jury investigation does not have the right to present exculpatory information.[141] However, it seems odd that federal prosecutors are more than willing to make exceptions for corporate entities and their executives. It would be very odd for federal prosecutors investigating, for example, the activities of a violent motorcycle gang involved in the drug trade, to tell the subject of its investigation that if it looked into its activities and reported back to the government, charges could be avoided. Undoubtedly, these two situations are not the same, but the contrast does speak to unequal treatment of certain types of crimes, when all crimes should be punished equally and justly.

C. SEC LAWSUITS AND FINES

Aside from the DOJ, the Securities and Exchange Commission (SEC) has the responsibility of making sure that corporations and its officers follow SEC regulations. Independent of DOJ action or inaction, the SEC has been vigorously pursuing suits against the corporations involved in the 2008 housing and financial crisis discussed above. The SEC has brought cases against at least fourteen different parties including former executives at Countrywide Financial, Goldman Sachs, Citigroup, Ernst & Young, Washington Mutual, Wells Fargo, and Citigroup.[142]

In total, the SEC has won judgments for almost $880 million against individual executives as well as corporations.[143] It is difficult to categorize these fines as punishment for crimes since SEC suits are considered civil, not criminal actions. However, this seems to be the only means of punishment that has been administered so far. An interesting aspect of this litigation is that a majority of the funds awarded to the SEC have to be paid back to investors by the corporations. The lawsuits initiated and led by the SEC should be taking place conjunction with, and not as a substitute for, criminal charges brought by the DOJ.

CONCLUSION

It is very apparent that new rules and guidelines have been crafted as a consequence of worrying about "economic concerns" stemming from

[140] *See generally* ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE.
[141] *Id*.
[142] Louise Story, *Tracking Financial Crisis Cases*, NY TIMES (Feb. 2, 2011), http://www.nytimes.com/interactive/business/financial-crisis-cases.html?ref=business.
[143] *Id*.

potential prosecutions of corporate entities and their executives. It is also apparent that these guidelines would rarely be, and have not been, utilized in relation to any other type of crime. The reason for this is clear: the stature and position of these corporations in relation to the health and prosperity of the American and international economies means that federal government officials should be cautious about upsetting the economic health of the corporations.

This is a new form of the corporate veil. Before, the corporate veil referred to protecting the owner of a corporation from liability in the event that the corporation got into some sort of financial trouble. Today, certain corporations have the ability to protect not only themselves from criminal liability, but their executives too. Instead of normal means of punishment, these high profile, white-collar crimes are afforded the luxury of things like "economic consequences" factors, deferred prosecution agreements, and orders to conduct a good faith internal investigation without federal prosecutors giving a serious threat of answering for corporate crimes.

The limits of what the DOJ knows and does not know, and why it has decided not to bring charges, is difficult for any outsider, student, or media member to know for certain. However, at the very least, the DOJ has not been explicit or forthcoming in its decision making process and thus it is understandable why members of the public continue to demand the prosecution of corporations and executives. Even if the DOJ's reasons for not seeking prosecutions are prudent, the use of deferred prosecutions and internal investigations are perceived, justifiably, as if the DOJ believes these entities are "too big to jail."

It is hard to predict how the DOJ will handle future financial crises, but hopefully it can avoid the consideration of "economic consequences" and only consider what the most just outcome could be. Though corporations and executives involved in the 2008 housing and financial crisis have not gotten away completely unpunished, most have not had to deal with the full force of the law through the criminal justice system. The "economic consequences" of charging these entities will not be known, and ideally it is something that federal prosecutors will not have to consider in the future.