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THE SPECIAL PROBLEM OF BANKS AND CRIME

GREGORY M. GILCHRIST*

Federal prosecutors face increasing criticism for their failure to indict large banks and bankers for serious criminal conduct, including allowing violent drug cartels to launder hundreds of millions of dollars, willfully conducting business with rogue nations and terrorists, and manipulating the LIBOR to defraud investors. This Article argues that the non-prosecution of banks is often justified by proper consideration of externalities and that the non-prosecution of bankers is often explained by lack of evidence or the difficulty of white-collar prosecutions generally. Nevertheless, the result is that extremely serious criminal conduct is penalized by mere fines and negotiated terms of probation, and this introduces deterrence and expressive costs to the legal system. These costs are significant and ought to be addressed, but the criminal law may not be the most effective tool for confronting criminal conduct by banks and bankers; rather, powerful regulatory tools already exist could resolve the deterrent and expressive shortcomings of the criminal law in this area. Presently, the regulators are not using these tools; they ought to.

INTRODUCTION	2
I. HSBC	6
A. HSBC Corporate Structure.....	7
B. Money Laundering.....	7
C. Evasion of United States Sanctions	12
II. THE COSTS OF THE FAILURE TO PROSECUTE BANKS AND	

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INDIVIDUALS FOR SERIOUS CRIMES	15
A. <i>The Problem of Under-Deterrence</i>	15
B. <i>The Expressive Problem</i>	17
III. THE SPECIAL REASONS NOT TO PROSECUTE BANKS AND A POSSIBLE REASON NOT TO PROSECUTE BANKERS.	21
A. <i>The Special Problem of Prosecuting Banks</i>	25
1. Externalities are a Concern with all Corporate Prosecutions	25
2. Bank Prosecutions Present Unique Externalities	28
a. <i>The Fragility of Banks</i>	28
b. <i>The Importance of Banks</i>	32
c. <i>Prosecutors Must Consider the Fragility and Importance of Banks in Making Charging Decisions</i>	33
B. <i>It Is Less Clear Why Bankers Have Not Been Prosecuted Individually</i>	38
C. <i>Criminal Law May Be the Wrong Tool for Governing Large Banks</i>	44
IV. LOOKING BEYOND THE CRIMINAL LAW	45
CONCLUSION	51

INTRODUCTION

Banks are special. They serve a unique role in the economy and are governed by distinct rules. The special status of banks is widely recognized; less widely recognized is how that status influences prosecutors' charging decisions.

In the last year, commentators and media sources have increasingly criticized prosecutors' apparent unwillingness to charge large banks engaged in serious criminal wrongdoing. This Article contends that criticism of these prosecutorial charging decisions is largely misplaced, and that more attention should be paid to regulators' decisions and omissions (which are more difficult to justify).

At the end of 2012 and early 2013, the United States Department of Justice (DOJ) announced a host of settlements with large banks for severe criminal conduct. To note just three instances, UBS resolved allegations that it manipulated the London Interbank Offered Rate (LIBOR),¹ HSBC resolved

1. See Mark Scott & Ben Protess, *As Unit Pleads Guilty, UBS Pays \$1.5*

allegations that it aided narco-terrorists' laundering of hundreds of millions of dollars and willfully committed serial violations of Office of Foreign Assets Control (OFAC) sanctions,² and Standard Chartered resolved allegations that it ran its New York branch as a front for dealing with Iran in violation of OFAC sanctions.³ New settlements continue to be announced on a frequent basis.⁴ This is not the stuff of taking too many government-employed engineers to lunch⁵ or encouraging pharmaceutical reps to market drugs for purposes not-yet-approved by the FDA.⁶ Violations like those alleged against UBS, HSBC, and Standard Chartered go to the very core of criminal wrongdoing, threatening the market economy and national security. Yet, each was resolved without the target banks being indicted and, with one exception,⁷ no

Billion over Rate Rigging, N.Y. TIMES, Dec. 19, 2012, available at <http://dealbook.nytimes.com/2012/12/19/as-unit-pleads-guilty-ubs-pays-1-5-billion-in-fines-over-rate-rigging/>.

2. See Press Release, U.S. Dep't of Justice, HSBC Holdings PLC and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html>.

3. See Press Release, U.S. Dep't of Justice, Standard Chartered Bank Agrees to Forfeit \$227 Million for Illegal Transactions with Iran, Sudan, Libya, and Burma (Dec. 10, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-crm-1467.html>.

4. On February 6, 2013, DOJ announced that the Royal Bank of Scotland settled an investigation into LIBOR manipulation for \$612 million and a RBS Japanese subsidiary would plead guilty. See Press Release, U.S. Dep't of Justice, RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Libor Benchmark Interest Rates (Feb. 6, 2012), available at <http://www.justice.gov/opa/pr/2013/February/13-crm-161.html>. That same day, the New York Times reported that Deutsche Bank, Citigroup, and JPMorgan Chase might be headed toward their own LIBOR-related settlements. See Ben Protess & Mark Scott, *Guilty Plea and Big Fine for Bank in Rate Case*, N.Y. TIMES, Feb. 6, 2013, available at <http://dealbook.nytimes.com/2013/02/06/as-unit-pleads-guilty-r-b-s-pays-612-million-over-rate-rigging/>.

5. See, e.g., SEC Files Settled Action Against Lucent Technologies Inc. in Connection With Payments of Chinese Officials' Travel and Entertainment Expenses; Company Agrees to Pay \$1.5 Million Civil Penalty, SEC Litig. Release No. 20414, (Dec. 21, 2007), available at <http://www.sec.gov/litigation/litreleases/2007/lr20414.htm>.

6. See, e.g., Press Release, U.S. Dep't of Justice, GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data (July 2, 2012), available at <http://www.justice.gov/opa/pr/2012/July/12-civ-842.html>.

7. Two UBS employees have been charged for their role in rate fixing. See David Enrich & Jean Eaglesham, *UBS Admits Rigging Rates in 'Epic' Plot*, WALL ST. J., Dec. 20, 2012, <http://online.wsj.com/article/SB10001424127887324407504578188342618724274.html>. In the vast majority of bank cases, however, no

bankers have been prosecuted.

The absence of convictions in the wake of such serious criminal conduct by large financial institutions generated significant criticism. Concern about “too big to fail” morphed into concern about “too big to jail.”⁸ Much of this concern is fueled by the sense that the penalties imposed on these banks through settlements do not match the severity of the criminal conduct.⁹ This conclusion is correct, but criticism of these non-prosecutions fails to recognize that banks represent a special problem for prosecutors: banks are more fragile and more interconnected with other institutions than most large corporations.¹⁰ A bank’s fragility heightens the risk that prosecuting a bank might undermine its viability. A bank’s interconnectedness increases the cost to innocent third parties should the viability of the bank be undermined. Banks are both more delicate and more costly to break than corporations. As a result, the recent bank settlements in lieu of indictment and conviction have been prudent.

In fairness, much of the public anger stems not from the failure to prosecute banks, but rather from the failure to prosecute bankers—the employees of banks who caused the banks to engage in criminal conduct. Prosecuting bankers does not generate the same external costs as prosecuting banks.¹¹ So why haven’t the bankers been prosecuted? While it is difficult to answer this question definitively in any one case, the dearth of prosecutions against individual bank employees can often be explained by reference to the complexity of white-collar prosecutions and evidentiary challenges in establishing mens rea.¹² If there is not enough evidence to meet their burden, prosecutors are correct not to indict—even when serious crime occurred.¹³

This Article contends that the recent non-prosecutions of banks and bankers in the face of serious criminal violations

individuals have been charged.

8. See e.g. Andrew Ross Sorkin, *Realities Behind Prosecuting Big Banks*, N.Y. TIMES, Mar. 11, 2013, available at <http://dealbook.nytimes.com/2013/03/11/big-banks-go-wrong-but-pay-a-little-price/> (“Are banks too big to jail? . . . Yes, they are.”).

9. See *infra* Part II.A.

10. See *infra* Part III.A.2.

11. See *infra* Part III.B.

12. *Id.*

13. *Id.*

may be justified, but that it still represents a problem for the criminal justice system. Indeed, recent bank settlements represent at least two failures. First, each represents a deterrence failure: to the extent the benefit of the wrongdoing outweighs the costs of settlement—especially when the settlement is discounted for the *ex ante* possibility that the wrongdoing will not be detected—there is insufficient deterrent effect. Second, each represents an expressive failure: to the extent the penalty is perceived as insufficient, the legal system is sending the message that banks and bankers are above the law. Simply put, it looks like our legal system treats crime differently when perpetrated by the relatively powerless and disenfranchised than it does when perpetrated by or on behalf of big banks.

These problems must be addressed, but calls for more prosecutions are misplaced because, in the context of banks and crime, criminal law generally will be less effective than civil law.¹⁴ This Article urges that more attention be paid to the role of regulators and the powerful tools currently available to regulators. Public anger classically seeks expression through the criminal justice system; however, when it comes to punishing bank employees for criminal conduct, regulators are better situated and have access to more useful tools than prosecutors. Recognizing the role of regulators in addressing bank crime will redirect attention from the prosecutors to the regulators. And that would be a good thing: people are asking why prosecutors haven't done more to prosecute banks and bankers; they should be asking what the regulators are doing.

Part I begins by reviewing the recent investigation and settlement with HSBC as an example of severe criminal conduct within a bank that resulted in no formal prosecutions. Part II examines the deterrence and expressive costs of not prosecuting banks or bankers in cases of severe criminal conduct. Part III illustrates why these non-prosecutions of banks and bankers are often appropriate or inevitable as a practical matter. Finally, Part IV suggests that we might better address the problem of banks and crime by looking beyond the criminal law. Enforcing existing regulations against individual bankers may provide better deterrence while avoiding the expressive costs of the status quo.

14. See *infra* Parts III.B. and IV.

I. HSBC

In December 2012, HSBC entered a deferred prosecution agreement (DPA) with DOJ resolving investigations into a wide array of criminal conduct.¹⁵ The HSBC matter provides a concrete example to evaluate both the potential harms and justification for non-prosecution of large banks and bankers.

Pursuant to its DPA, HSBC acknowledged permitting some of the world's most violent and powerful drug cartels to launder over \$881 million in drug trafficking proceeds through its accounts.¹⁶ By the same agreement, HSBC also admitted to knowingly and willfully processing \$660 million worth of transactions with rogue states Cuba, Iran, Libya, Sudan, and Burma, in violation of Office of Foreign Assets Control (OFAC) sanctions.¹⁷ Despite the severity of HSBC's criminal conduct, DOJ let HSBC off with fines, forfeiture, and negotiated remedial measures. In other words, HSBC avoided indictment and prosecution.¹⁸

The HSBC case presents an example of a bank engaged in very serious criminal wrongdoing involving policies and practices that were widely known throughout the organization. Accordingly, this is a core case of corporate criminality, where it makes sense to talk about blaming the entity itself.¹⁹ Yet, the entity and its managers were penalized lightly, if at all. This Part first will describe HSBC's corporate structure, which is necessary to understand how the criminal conduct occurred and who might be responsible for it. Then it describes the specific criminal conduct by and within HSBC, looking first at the money laundering crimes and then at the OFAC violations.

15. See Deferred Prosecution Agreement, *United States v. HSBC Bank*, 2013 WL 3306161 (E.D.N.Y. Dec. 11, 2012) (No. 12-763) 2012 WL 6120512 at 1 [hereinafter HSBC DPA].

16. See Statement of Facts, Attachment A to Deferred Prosecution Agreement, ¶ 9, *United States v. HSBC Bank*, 2013 WL 3306161 (E.D.N.Y. Dec. 11, 2012), (No. 12-763) 2012 WL 6120512 [hereinafter HSBC Statement of Facts].

17. See *id.* ¶ 63.

18. See HSBC DPA, *supra* note 15, ¶ 16 (HSBC could be prosecuted, at the discretion of DOJ, should it breach the DPA; however, for the same reasons that DOJ did not prosecute the bank in the first instance, such prosecution is unlikely).

19. See Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 9–14 (2012) (arguing that people blame corporations when the corporation, either through policies, culture, or leadership, influenced the wrongdoing).

A. HSBC Corporate Structure

HSBC is not a single company—it is a tangled thicket of affiliated entities.²⁰ The conduct detailed in the HSBC Statement of Facts is spread across various companies that collectively make up HSBC Group.²¹ To understand that conduct, a brief summary of HSBC's corporate structure is helpful.

The HSBC entities comprise “one of the world's largest banking and financial services groups with approximately 6,900 offices in over 80 countries.”²² The ultimate parent of all the HSBC entities is HSBC Holdings PLC (HSBC Holdings), which is incorporated and headquartered in England.²³ HSBC North America Holdings, Inc. (HSBC North America) is indirectly held by HSBC Holdings, and it holds HSBC Bank USA, N.A. (HSBC Bank USA), a federally chartered bank.²⁴

The United States bank, HSBC Bank USA, violated the anti-money-laundering laws; the ultimate holding company, HSBC Holdings, violated the OFAC sanctions.²⁵

B. Money Laundering

Money laundering describes any process for concealing the source or ownership of criminally-tainted money.²⁶ According to the settlement documents, HSBC Bank USA processed at least \$881 million of drug trafficking money in violation of anti-money laundering (AML) laws.²⁷ The money laundering violations involve yet another HSBC entity, Grupo Financiero

20. For a sense of the complexity of the HSBC corporate structure, see *Principle Entities in Home and Priority Growth Markets*, HSBC, <http://www.hsbc.com/about-hsbc/~media/HSBC-com/about-hsbc/structure-and-network/pdfs/group-structure-chart.ashx> (last visited Aug. 8, 2013).

21. See HSBC Statement of Facts, *supra* note 16, ¶ 3.

22. *Id.*

23. *Id.*

24. *Id.*

25. See Information, *United States v. HSBC Bank*, 2013 WL 3306161 (E.D.N.Y. Dec. 11, 2012) (No. 12-763) 2012 WL 6120591 ¶¶ 19, 22, 25, 27 [hereinafter HSBC Information] (counts 1 and 2 alleging money laundering violations against HSBC Bank USA and counts 3 and 4 alleging OFAC violations against HSBC Group).

26. See JULIE R. O'SULLIVAN, *FEDERAL WHITE COLLAR CRIME* 727 (4th Ed. 2009).

27. See HSBC Statement of Facts, *supra* note, 16 ¶ 9.

HSBC, S.A. de C.V. (HSBC Mexico), a Mexican bank that—like HSBC Bank USA—is an indirect subsidiary of HSBC Holdings.²⁸

HSBC Mexico allowed drug proceeds to be laundered through its accounts in a number of different ways. First, it failed to maintain basic “know-your-customer” (KYC) information, such as address, reason for maintaining an account, expected activity, and source of U.S. dollars for customers with U.S. dollar accounts.²⁹ Maintaining KYC information is an important safeguard against money laundering because it introduces a challenge to would-be launderers: they must actively disguise the owner and source of the money from the bank. Second, even when suspicious accounts were identified, HSBC Mexico failed to terminate them.³⁰ Third, HSBC Mexico exported a volume of U.S. dollars to the United States that was “significantly larger than its market share would suggest.”³¹

Much of the money laundered through HSBC accounts involved the use of clearly high-risk, albeit legal, Cayman Island U.S. dollar accounts.³² Mexico forbade most individuals from maintaining U.S. dollar accounts; however, under Mexican law, a Mexican citizen otherwise forbidden from maintaining a Mexican U.S. dollar account could maintain a U.S. dollar account based in the Cayman Islands.³³ HSBC Mexico provided a large number of such accounts; in 2006 it had 1,500 Cayman Island U.S. dollar accounts that originated in Mexico, and by 2008 it had 35,000 such accounts.³⁴ These accounts represented clear AML risks. First, it was widely known that transactions initiated in Mexico represented a high risk for money laundering.³⁵ This risk was enhanced by the fact

28. See *id.* See also *Grupo Financiero HSBC Quarterly Report 3Q12*, HSBC (Oct. 31, 2012) http://www.hsbc.com.mx/1/PA_esf-ca-app-content/content/home_en/investor_relations/financial_information/infinancial/3rd_quarter_2012_group_results_v1.pdf (“Grupo Financiero HSBC is a 99.99% directly owned subsidiary of HSBC Latin America Holdings (UK) Limited, which is a wholly owned subsidiary of HSBC Holdings PLC, and a member of the HSBC Group.”).

29. See HSBC Statement of Facts, *supra* note 16, ¶ 31.

30. *Id.* ¶ 34.

31. *Id.* ¶ 36.

32. *Id.* ¶ 32.

33. *Id.*

34. *Id.* ¶ 33.

35. See *id.* ¶¶ 18a–18e (listing publicly-available government statements and investigations describing the risk).

that the transactions were in U.S. dollars.³⁶ Add to that unexplained, exponential growth in the popularity of these accounts and it is more than a red flag—it's the money-laundering equivalent of a Super Bowl ad.

Notwithstanding the obvious risks presented by these accounts, HSBC Mexico lacked basic KYC information for over half of the Cayman Island accounts as of 2006.³⁷ Banks are required by law to maintain effective anti-money laundering compliance programs,³⁸ and KYC protocols are a part of an effective compliance program.³⁹ KYC protocols are not perfect and they can be circumvented. However, where a bank fails to obtain basic KYC information such as nominal owner, beneficial owner, address, expected activity, and source of funds, it opens itself to the possibility of money laundering. Where such failures occur in high-risk areas, the bank practically *invites* money laundering through its accounts. By 2008, HSBC designated at least 2,200 Cayman Island accounts high risk because of suspicious activity or lack of KYC information, and these accounts alone had a balance of over \$200 million.⁴⁰

None of this went unnoticed at HSBC Mexico. A compliance officer reported “the massive misuse of [the HSBC Mexico Cayman Island U.S. dollar accounts] by organized crime,” and the HSBC Group Head of Compliance identified “significant [U.S. dollar] remittances being made by a number of [HSBC Mexico’s Cayman Islands U.S. dollar] customers to a US company alleged to be involved in the supply of aircraft to drug cartels.”⁴¹ Even when these problems came to light, according to DOJ, HSBC Mexico “failed to take action to close the accounts.”⁴² However, this quote really fails to capture to extent of wrongdoing within HSBC Mexico because it implies an omission rather than the active criminality suggested by the

36. See *id.* ¶ 18.b (quoting the U.S. State Department International Narcotics Control Strategy Reports that the large volume of U.S. currency in Mexico derived from illicit drug trade in the U.S. causes Mexico to “remain[] one of the most challenging money laundering jurisdictions for the United States”).

37. *Id.*

38. See 12 U.S.C. § 1818(s) (2006).

39. See 31 C.F.R. § 1020.220 (2013).

40. See HSBC Statement of Facts, *supra* note 16, ¶ 33.

41. *Id.*

42. *Id.* ¶ 34.

facts. As one senior compliance officer at HSBC Group⁴³ told HSBC Mexico's Chief Compliance Officer, "[t]he AML committee just can't keep rubber-stamping unacceptable risks merely because someone on the business side writes a nice letter. It needs to take a firmer stand. It needs some *cojones*. We have seen this movie before, and it ends badly."⁴⁴ This observation suggests that people "on the business side" (i.e., bankers, not compliance personnel) were actively aiding the effort to maintain the accounts, notwithstanding poor controls and known risks, and that some people on the compliance side were, at best, willfully blind to these problems.

None of this, in turn, went unnoticed by drug cartels, which came to rely on HSBC Mexico as the bank through which they could launder large volumes of U.S. dollars in cash derived from the illegal sale of narcotics.⁴⁵ In fact, the cartels came to prefer HSBC for their banking needs—which included moving huge volumes of cash to the bank—so much that "drug traffickers designed specially shaped boxes that fit the precise dimensions of the teller windows."⁴⁶

Finally, none of this went unnoticed at HSBC Group:

Senior HSBC Group executives, including the CEO, Head of Compliance, Head of Audit, and Head of Legal, were all

43. The Statement of Facts defines "HSBC Group" to refer to HSBC Holdings and its direct and indirect subsidiaries, collectively. *Id.* ¶ 3. It is therefore somewhat confusing that the Statement of Facts then refers to a senior compliance officer at "HSBC Group." According to the defined term, this could refer to a senior compliance officer at HSBC Holdings, or one at HSBC Bank USA, or one at HSBC Mexico, or, indeed, one at any of the "6,900 offices in over 80 countries." Outside of the Statement of Facts, HSBC Group generally refers to HSBC Holdings. 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, 2 (July 17, 2012) [hereinafter HSBC AML Senate Report] ("HSBC Holdings PLC, called 'HSBC Group,' is headquartered in London, and its Chief Executive Officer is located in Hong Kong."). Although it remains ambiguous in the text of the statement of facts, I assume that references to senior personnel at HSBC Group are really references to senior personnel at HSBC Holdings, consistent with the general use of that term, notwithstanding the specific definition in the DPA.

44. See *id.* ¶ 34. See also HSBC AML Senate Report, *supra* note 43, at 63.

45. See Press Release, U.S. Dep't of Justice, HSBC Holdings PLC and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html>.

46. See HSBC Statement of Facts, *supra* note 16, ¶ 50.

aware that the problems at HSBC Mexico involved U.S. dollars and U.S. dollar accounts, but did not contact their counterparts at HSBC Bank USA to explain the significance of the problems or the potential effect on HSBC Bank USA's business.⁴⁷

The Statement of Facts is curiously circumspect about this fact—and perhaps this is to state the obvious—but anyone who was “aware that the problems at HSBC Mexico involved U.S. dollars and U.S. dollar accounts,” was necessarily aware of *the problems at HSBC Mexico*.

The most obvious effect on HSBC Bank USA's business was to generate profits. The U.S. dollars laundered through HSBC Mexico accounts were sold to HSBC Bank USA through a division of HSBC Bank USA called Banknotes.⁴⁸ Banknotes bought and sold physical currency wholesale and earned commissions associated with “trading, transporting and storing the physical currency.”⁴⁹ Buying wholesale U.S. currency presents a high risk of money laundering because black markets generate and rely on large volumes of physical U.S. currency.⁵⁰ The risk was particularly pronounced with U.S. currency derived from Mexico, as stated in a Financial Crimes Enforcement Network (FinCEN)⁵¹ advisory distributed to HSBC Bank USA and all Banknotes personnel in 2006.⁵²

47. See *id.* ¶ 44.

48. *Id.* ¶ 51.

49. *Id.* ¶ 20.

50. *Id.* ¶ 21.

51. FinCEN is part of the United States Department of Treasury tasked with, among other things:

Furnish[ing] research, analytical, and informational services to financial institutions, appropriate Federal regulatory agencies with regard to financial institutions, and appropriate Federal, State, local, and foreign law enforcement authorities, in accordance with policies and guidelines established by the Secretary of the Treasury or the Under Secretary of the Treasury for Enforcement, in the interest of detection, prevention, and prosecution of terrorism, organized crime, money laundering, and other financial crimes.

31 U.S.C. § 310(b)(2)(E).

52. See HSBC Statement of Facts ¶ 23 (“U.S. law enforcement has observed a dramatic increase in the smuggling of bulk cash proceeds from the sale of narcotics and other criminal activities from the United States into Mexico. Once the U.S. currency is in Mexico, numerous layered transactions may be used to disguise its origins, after which it may be returned directly to the United States or further transshipped to or through other jurisdictions.”).

Notwithstanding these obvious and explicitly declared risks, Banknotes had no automated monitoring system and relied on one, and sometimes two, compliance officers.⁵³ These two compliance officers were the thin line of protection available to monitor over \$7 billion U.S. dollars in currency purchased from Mexico each year.⁵⁴ Between 2006 and 2008, "Banknotes purchased over \$9.4 billion in physical U.S. dollars from HSBC Mexico, including over \$4.1 billion in 2008 alone."⁵⁵

This is to say that HSBC conducted over \$9 billion in commission-based business over the course of three years with a known high-risk country, all while lacking basic AML controls. Compliance failed. Moreover, compliance was structured to fail, and HSBC Bank USA profited from this.⁵⁶ Adding to the controversy, no bank employees have been charged with any crimes as a result of HSBC's extensive AML violations.

C. Evasion of United States Sanctions

HSBC's OFAC sanction violations were even more brazen than the money laundering violations. HSBC Group affiliate banks "knowingly and willfully mov[ed] or permitt[ed] to be moved illegally hundreds of millions of dollars through the United States financial system on behalf of banks located in Cuba, Iran, Libya, Sudan, and Burma and persons listed as parties or jurisdictions sanctioned by [OFAC] in violation of U.S. economic sanctions."⁵⁷ These described "persons" are known as Specially Designated Nationals (SDNs) sanctioned by OFAC as "terrorists, financial supporters of terrorism, proliferators of weapons of mass destruction, and narcotics traffickers."⁵⁸

OFAC rules are simple: trade with prohibited nations or persons is prohibited.⁵⁹ The simplicity of the rules allows

53. *Id.* ¶ 22.

54. *Id.* ¶ 24.

55. *Id.*

56. *Id.* ¶¶ 20, 51.

57. *Id.* ¶ 52.

58. *Id.* ¶ 55.

59. See 50 App. U.S.C. § 3(a) ("It shall be unlawful . . . to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is

effective compliance measures to be similarly simple: banks in the United States employ computer software with OFAC filters to screen all wire payments against an official OFAC list of sanctioned entities.⁶⁰ “When the filters detect a possible match to a Sanctioned Entity, the payment is stopped and held for further review.”⁶¹ Where a party is identified as SDN, “then the payment must be frozen (or ‘blocked’) and the bank must notify OFAC.”⁶²

HSBC Bank USA had OFAC filters, but HSBC Bank PLC (HSBC Europe)—a wholly owned subsidiary of HSBC Group—systematically processed forbidden payments in a manner designed to subvert the OFAC filter by disguising the nature of the transaction.⁶³ HSBC processed international transactions through the Society for Worldwide Interbank Financial Telecommunications (SWIFT), of which HSBC Group and its affiliates are members.⁶⁴ SWIFT provides members with an electronic messaging system by which payment messages can be received and delivered in a standardized format.⁶⁵ Normally, the SWIFT format would identify the parties to the payment, and the OFAC filter at HSBC Bank USA would automatically review those parties to identify sanctioned entities or SDNs.⁶⁶ HSBC Europe circumvented the filter by instructing sanctioned parties to note on the SWIFT payment message: “care sanctioned country”; “do not mention our name in NY”; or, “do not mention Iran.”⁶⁷ HSBC Europe redirected these flagged messages to a “repair queue,” so that HSBC Europe employees could manually scrub all references to the sanctioned entity before forwarding the message to HSBC Bank USA.⁶⁸ Using

conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy.”).

60. See HSBC Statement of Facts ¶ 64.

61. *Id.*

62. *Id.*

63. *Id.* ¶ 65.

64. *Id.* ¶ 65, n.4.

65. George A. Schneider, *Article 4A: Developments at the Crossroad of Law and Foreign Bank Compliance (Part II)*, 114 *BANKING. L. J.* 429, 433 n.27 (1997) (SWIFT is “a private interbank telecommunications network for conveying messages between members by means of both free and standardized message formats. . . . Standardized formats have a number of ‘fields,’ or blank spaces, in which certain specified information—and only that information—is to be entered.”).

66. See HSBC Statement of Facts ¶ 64.

67. *Id.* ¶ 65.

68. *Id.*

this method, HSBC Europe employees intentionally defeated HSBC Bank USA's OFAC filters and HSBC was able to process about \$660 million in OFAC-prohibited transactions through the United States between 2000 and 2006.⁶⁹

By 2000, HSBC Group was aware of this ongoing deception and criminal conduct.⁷⁰ "In 2003, HSBC Group's Head of Compliance acknowledged that amending payment messages 'could provide the basis for an action against [HSBC] Group for breach of sanctions.'"⁷¹ As would be expected, HSBC Group ordered HSBC Europe to cease the practice, but HSBC Europe appealed this order.⁷² Incredibly, "due to the 'significant business opportunities' offered by the Sanctioned Entities, HSBC Group's Head of Compliance granted HSBC Europe an extension to continue processing payments in the same manner."⁷³ Not only HSBC Europe, but also HSBC Middle East Limited, obtained additional permissions in subsequent years, and continued the practice until 2006.⁷⁴

It seems, therefore, that after the HSBC Group Head of Compliance discovered that HSBC Europe was engaging in a subterfuge to conduct business in direct violation of OFAC sanctions, he authorized the practice to continue because it generated significant business opportunities.

As with the money laundering, no bank employees have been prosecuted as a result of these crimes.

Fundamentally, the HSBC settlement is subject to two basic criticisms: first, HSBC got off too easy by not being indicted and convicted for its crimes; second, the real people at HSBC who engaged in the criminal conduct got off too easy by not being prosecuted. As I will argue in Part III, the first of these criticisms misses the big picture. The second is probably correct, but it does not necessarily represent a failure by prosecutors. First, however, Part II will consider the harm caused by these non-prosecutions.

69. *Id.* ¶ 63.

70. *Id.* ¶ 66.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

II. THE COSTS OF THE FAILURE TO PROSECUTE BANKS AND INDIVIDUALS FOR SERIOUS CRIMES

That DOJ appears reluctant to aggressively prosecute banks, even in cases of such brazen criminal conduct as that described in the HSBC DPA, generates significant criticism. Indeed, the failure to prosecute significant crimes entails two clear costs. First, the resolution of the investigation likely fails to deter future criminality at and by banks. Second, the perceived absence of serious consequences for the bank generates an expressive harm.⁷⁵

A. *The Problem of Under-Deterrence*

Former United States Customs Agent Robert Mazur wrote in a recent New York Times opinion piece critical of the HSBC settlement:

The Justice Department has signed similar agreements, withholding prosecution in exchange for bank promises to tighten oversight, with Wachovia, Union Bank of California, Lloyds, Credit Suisse, ABN Amro Holding (now owned by Royal Bank of Scotland), Barclays and Standard Chartered. All admitted to criminal offenses; all were handed the equivalent of traffic tickets—pay a fine on your way out the door.⁷⁶

HSBC settled for combined fines and forfeitures of over \$1.9 billion, which hardly seems the equivalent of a traffic ticket, until you realize that this figure amounts to “roughly ten percent of the pretax profits it earned in just 2010, one of the more than five years during which it admitted to criminal conduct.”⁷⁷ Of course, whether the fines are sufficient penalty

75. By expressive harm, I am referring to harm to the perceived legitimacy of the legal system caused by the communicative aspects of legal functions that are contrary to widely- and strongly-held social norms. I describe this further, below. See *infra* Part II.B.

76. Robert Mazur, *How to Halt the Terrorist Money Train*, N.Y. TIMES, Jan. 2, 2013, available at <http://www.nytimes.com/2013/01/03/opinion/how-bankers-help-drug-traffickers-and-terrorists.html>.

77. *Id.* This figure is compelling, but one cannot read too much from it, as the pre-tax profits referred to are the bank's total profits, not just those derived from criminal conduct.

for the wrongful conduct, depends on whether the fines, discounted by what HSBC perceived *ex ante* to be the chance of not getting caught, were greater than the benefit HSBC enjoyed from criminal conduct. For this, one would need additional information (i.e., how much HSBC profited from this conduct and how likely it was, or was perceived to be, that HSBC would not be caught and fined for the conduct). But, quite likely, Mazur is right—the fines imposed, though large, are probably insufficient to deter similarly lucrative activities in the future. Senators Brown and Grassley voiced a similar view, writing “many of the settlements between large financial institutions and the federal government involve penalties that are disproportionately low, both in relation to the profits which resulted from those wrongful actions as well as in relation to the costs imposed upon consumers, investors and the market.”⁷⁸ The penalties imposed by settlement may be insufficient to deter future criminal conduct.

The occasional failure of even very large fines to deter criminal conduct by corporations has been described by John Coffee as arising “from the fact that the maximum meaningful fine that can be levied against any corporate offender is necessarily bounded by its wealth.”⁷⁹ Deterrence theory imagines rational potential offenders calculating the “expected punishment cost” as the cost of punishment discounted by the chance it will be imposed.⁸⁰ This discount is necessary to account for the possibility—generally a significant possibility—that the misconduct will go unpunished because it is undetected, subject to a declination, insufficiently supported by evidence, *et cetera*.⁸¹ For high-profit crimes, the discount can quickly render the penalty required to deter a rational

78. See Letter from Sherrod Brown, U.S. Senator, and Charles Grassley, U.S. Senator, to Eric Holder, U.S. Attorney General (Jan. 29, 2013) [hereinafter Brown-Grassley Letter], available at <http://www.grassley.senate.gov/about/upload/01-29-13-Letter-to-Holder-on-Wall-Street-Prosecutions.pdf>.

79. John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 390 (1981).

80. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1209 (1985) (“the murderer will not be comparing the gain from the crime with the loss if he is caught and sentenced; he will be comparing it with the disutility of the sentence discounted by the probability that it will actually be imposed”).

81. See *id.*

corporation higher than the corporation's ability to pay.⁸² At this point, "our ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation's resources."⁸³ As will be addressed below, setting adequate punishment for high-profit crimes conducted by banks is even more difficult because banks are highly leveraged.⁸⁴ A bank's resources that *are actually available to pay a fine* will likely be a fraction of the value of the bank, and a fine exceeding those limited resources could render the bank undercapitalized and unsound. Putting aside the practical problem that it may be impossible to set fines high enough to adequately deter, it still may be correct that the fines imposed on HSBC are inadequate deterrence to prevent future wrongdoing.

B. The Expressive Problem

All legal actions can be perceived as non-linguistic, symbolic expressions. The expression in a legal act or omission can influence how people perceive the legal system, and ultimately, the stability and efficacy of the legal system.⁸⁵ Where the expression associated with legal action is in conflict with a person's values, the expression may negatively influence the degree to which the person believes the legal system is legitimate. The most common form of expression in criminal law is the condemnation or moral opprobrium that accompanies punishment.⁸⁶ However, the failure to prosecute may also generate an expression that the violation is tolerated. Depending on how this tolerance is understood, it might entail significant costs. Professor Mary Kreiner Ramirez has recently written about the harm caused by the failure to prosecute banks and other elites, describing the expression generated by non-prosecution as "affirmance":

82. *See id.*

83. *See id.*

84. *See infra* Part III.A.2.a.

85. *See* Gregory M. Gilchrist, *Condemnation Without Basis: An Expressive Failure of Corporate Prosecutions*, 64 HASTINGS L.J. 1121, 1128–37 (2013).

86. *See* JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 98 (1970) (identifying the "symbolic significance" and the "expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation" as distinctive aspects of punishment).

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.⁸⁷

The same concern has been voiced in the political arena. Senators Brown and Grassley wrote Attorney General Holder of the recent settlements with banks:

The nature of these settlements has fostered concerns that “too big to fail” Wall Street banks enjoy a favored status, in statute and in enforcement policy. *This perception undermines the public’s confidence in our institutions and in the principal that the law is applied equally in all cases.*⁸⁸

The perception that law is not applied equally or fairly is dangerous. The perception of procedural fairness is particularly important to the perception of legitimacy,⁸⁹ and depends on some common sense factors including: “judgments about the neutrality of the decision-making process”; judgments about whether the decision makers are “honest and reach their decisions based on objective information about the case”; “inferences about the motives of the authorities”; and “whether the procedures produce fair outcomes.”⁹⁰ The perception of legitimacy is itself important to the efficacy and stability of a legal system: people who believe a legal system to be legitimate are more likely to accept an obligation to comply with the rules of the system and less likely to directly oppose the legal system.⁹¹

87. 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).

88. Brown-Grassley Letter, *supra* note 78, at 1 (emphasis added).

89. See Tom R. Tyler, WHY PEOPLE OBEY THE LAW 104 (2006) (“The results of the Chicago study support the finding of earlier research that procedural justice is generally important [to perceptions of legitimacy].”).

90. *Id.* at 163–64.

91. See Gilchrist, *supra* note 85, at 1127 (“Perceived legitimacy matters, because when people believe a legal system to be legitimate, they accept an obligation to comply with the requirements of the legal system, and the system is accordingly more stable and more efficient than it would be were it to rely on force alone.”).

In HSBC's case, the government announced that the bank:

- (1) was responsible for "stunning failures of oversight—and worse;"⁹²
- (2) had an astonishing record of dysfunction;⁹³
- (3) "facilitated the laundering of at least \$881 million in drug proceeds through the U.S. financial system;"⁹⁴
- (4) "willful[ly] flout[ed] U.S. sanctions laws and regulations."⁹⁵

And yet the bank avoided conviction, and to date no employees have been charged.

Consider that from 1994 to 2001, according to DOJ statistics, the average sentence for all individual convictions where money laundering was the most serious offense charged was over four years in federal prison.⁹⁶ This number probably is low in that it includes not only the more serious § 1956 convictions, but also § 1957 convictions. Indeed, one might expect money laundering sentences to have increased still further in the decade of September 11th, the War on Terror, and increased violence in Mexico, if only because of heightened attention on the connection between money and terrorism.⁹⁷ Whatever the current average sentence, money-laundering offenses are severely punished.

The severity of money-laundering offenses is illustrated by Jimmie Goodgame's case. Mr. Goodgame was convicted in the Northern District of Ohio after pleading guilty to "conspiracy to

92. Press Release, U.S. Dep't of Justice, *supra* note 2.

93. *Id.*

94. *Id.*

95. *Id.*

96. MARK MOTIVANS, U.S. DEP'T OF JUSTICE, MONEY LAUNDERING OFFENDERS, 1994-2001, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, NCJ 199574, 9, Table 5 (July 2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mlo01.pdf>.

97. An example of the thinking that might be expected to increase criminal penalties in money laundering cases is in Robert Mazur's recent Op-Ed:

As long as drug traffickers can wash the stain from 99 percent of their ill-gotten gains, as long as terrorists can move their cash freely around the world, we'll have no chance to halt their deadly trades. We can help put an end to both of these scourges by putting the bankers who facilitate them in jail.

Mazur, *supra* note 76.

launder money derived from drug proceeds.”⁹⁸ According to prosecutors, over the course of two years, Mr. Goodgame laundered over \$1.5 million in drug proceeds through several front businesses and bank accounts.⁹⁹ There was no allegation Mr. Goodgame was otherwise involved in the drug distribution conspiracy.¹⁰⁰ Mr. Goodgame conducted financial transactions with funds he knew came from the sale of drugs, knowing the transactions were designed to conceal the source of the money.¹⁰¹ Mr. Goodgame helped drug dealers launder their money, much as HSBC did. For his crime, Mr. Goodgame was sentenced to seventy months in federal prison.¹⁰² Noting the importance of punishing not only those who commit serious crimes, but also those who conduct the financial transactions that fund those crimes, the United States Attorney for the Northern District of Ohio said of the Goodgame conviction: “This case shows beyond a shadow of a doubt that law enforcement in our region will work together to not only follow the drug flow, but also the money trail.”¹⁰³

Yet while law enforcement followed Mr. Goodgame’s \$1.5 million money trail, there is no comparable result for HSBC’s \$881 million money trail. Unless one concludes that the civil penalties and forfeiture imposed on HSBC, along with its probation conditions, are a sufficient and just penalty in light of its conduct, there is a disparity between the results that suggests unfairness. When Jimmie Goodgame launders money for local drug dealers, the government builds a case using “wiretaps, surveillance, vehicle stops and document analysis,” and Goodgame is locked up for six years;¹⁰⁴ when a big bank

98. See Press Release, U.S. Dep’t of Justice, Jimmie Goodgame was Sentenced to Nearly Six Years in Prison for Laundering More than \$1.5 Million in Drug Proceeds Through Numerous Bank Accounts and the Purchase of More than 50 Luxury Automobiles (Feb. 2, 2012), *available at* <http://www.justice.gov/usao/ohn/news/2012/02FebruaryGoodgame.html>.

99. See *id.*

100. See Unsealed Superseding Indictment at 30–58, *United States v. Wells*, No. 1:11-CR-109, 2011 WL 3862014 (N.D. Ohio, May 11, 2011).

101. See *id.*; see also 18 U.S.C. § 1956 (2012).

102. Press Release, U.S. Dep’t of Justice, *supra* note 98.

103. *Id.*

104. See Regina Garcia Cano, *Jimmie Goodgame Gets 70 Months in Federal Prison for Money Laundering*, THE PLAIN DEALER, (Feb. 2, 2012), *available at* http://blog.cleveland.com/metro/2012/02/jimmie_goodgame_gets_70_months.html. Additionally, Goodgame’s wife pled guilty to conspiracy to launder money and drug violations, and she was sentenced to eighteen months. *Id.*

systematically launders vast sums for international narco-terrorists, it receives a fine. To the extent the expression inherent in these resolutions is viewed as unfair, it will inure to the detriment of the perceived legitimacy of the legal system as a whole.¹⁰⁵

III. THE SPECIAL REASONS NOT TO PROSECUTE BANKS AND A POSSIBLE REASON NOT TO PROSECUTE BANKERS.

As the bank DPAs were being announced, Frontline ran a documentary reviewing the DOJ failure to prosecute senior Wall Street executives for fraud in the review, packaging, and sales of mortgage-backed securities that led to the financial crisis.¹⁰⁶ The documentary presents Assistant Attorney General Lanny Breuer's remarks before the New York Bar Association, in which he described the consideration he (and the rest of the Criminal Division) gives to external harms to the economy before deciding to indict a large entity:

To be clear, the decision of whether to indict a corporation, defer prosecution, or decline altogether is not one that I, or anyone in the Criminal Division, take lightly. We are frequently on the receiving end of presentations from defense counsel, CEOs, and economists who argue that the collateral consequences of an indictment would be devastating for their client. In my conference room, over the years, I have heard sober predictions that a company or bank might fail if we indict, that innocent employees could lose their jobs, that entire industries may be affected, and even that global markets will feel the effects. Sometimes—though, let me stress, not always—these presentations are compelling. In reaching every charging decision, we must take into account the effect of an indictment on innocent employees and shareholders, just as we must take into account the nature of the crimes committed and the

105. See Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 920 (2013) ("If laws are perceived as being applied unfairly so that persons of wealth or power are permitted to operate above the law, the rule of law is undermined.").

106. *Frontline: The Untouchables* (PBS television broadcast Jan. 22, 2013), available at <http://www.pbs.org/wgbh/pages/frontline/untouchables/>.

pervasiveness of the misconduct. I personally feel that it's my duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if we indict the corporation. In large multinational companies, the jobs of tens of thousands of employees can be at stake. *And, in some cases, the health of an industry or the markets are a real factor. Those are the kinds of considerations in white collar crime cases that literally keep me up at night, and which must play a role in responsible enforcement.*¹⁰⁷

The Frontline documentary was critical of Mr. Breuer's statements, as others also have been.¹⁰⁸

Much of this criticism is misplaced. DOJ is forthright about the fact that sometimes it elects not to charge entities because it determines that prosecution will do more harm than good.¹⁰⁹

107. Speech by Lanny A. Breuer, Assistant Attorney General, to the New York City Bar Association, U.S. Dep't of Justice (Sept. 13, 2012), *available at* <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html> (emphasis added).

108. The Frontline episode includes the following exchange with Breuer:

MARTIN SMITH: You gave a speech before the New York Bar Association. And in that speech, you made a reference to losing sleep at night, worrying about what a lawsuit might result in at a large financial institution.

LANNY BREUER: Right.

MARTIN SMITH: Is that really the job of a prosecutor, to worry about anything other than simply pursuing justice?

LANNY BREUER: Well, I think I am pursuing justice. And I think the 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—if it creates a ripple effect so that suddenly, counterparties and other financial institutions or other companies that had nothing to do with this are affected badly—it's a factor we need to know and understand.

See Transcript of *Frontline: The Untouchables* (PBS television broadcast Jan. 22, 2013) [hereinafter Frontline Transcript], <http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/transcript-37/>.

109. Senators Brown and Grassley's letter to Holder quoted Holder and Breuer on this matter and requested information about whom, outside of DOJ, prosecutors consult with about the potential external costs of prosecuting a bank. See Brown-Grassley Letter, *supra* note 78 (quoting Holder: "We reach out to experts outside of the Justice Department to talk about what are the

Attorney General Holder made similar comments testifying before the Senate Judiciary Committee:

I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if we do prosecute—if we do bring a criminal charge—it will have a negative impact on the national economy, perhaps even the world economy. . . . I think that is a function of the fact that some of these institutions have become too large.¹¹⁰

While Holder's comments illustrate real concerns about the size of financial institutions, it should not be controversial that DOJ considers harm to innocent parties in deciding whether to bring charges against an entity. Look back at Breuer's comments to the New York Bar Association: he is right and really, not even in a controversial way.¹¹¹

consequences of actions that we might take, what would be the impact of those actions if we want to make particular prosecutive decisions or determinations with regard to a particular institution.”). DOJ has since confirmed, by letter to the House Committee on Financial Services Subcommittee on Oversight and Investigations, that it is “not currently aware . . . of any consultations with private, non-governmental third party entities on the potential collateral consequences of prosecutorial actions the Department might take with respect to any large, complex financial institutions” and that the Department has from time to time “contacted relevant government agencies to discuss such issues,” including domestic and foreign regulators. See Memorandum from FSC Committee Majority Staff to Members of the Committee on Financial Services 3–4 (May 17, 2013), *available at* http://financialservices.house.gov/uploadedfiles/052213_oi_memo3.pdf. Although it would have been surprising, and possibly troubling, were DOJ consulting with non-governmental persons in making charging decisions, the sort of intra-governmental dialogue described by DOJ is to be expected. It seems entirely sensible that, if a prosecutor is broadly considering the economic impacts of prosecuting a financial institution, she would seek the counsel of the regulators tasked with regulating that institution and staffed with personnel more expert on financial markets. Indeed, this is the answer DOJ gave in response to the letter: “In analyzing the collateral consequences of any particular corporate prosecution, it is entirely appropriate for prosecutors to hear from subject matter experts at relevant regulatory authorities.” Letter from Judith C. Appelbaum to Senator Sherrod Brown (Feb. 27, 2013), *available at* http://www.grassley.senate.gov/about/upload/02-27-2013-DOJ_CriminalProsecutions.pdf.

110. Andrew Ross Sorkin, “Realities Behind Prosecuting Big Banks,” *N.Y. TIMES*, Mar. 11, 2013, *available at* <http://dealbook.nytimes.com/2013/03/11/big-banks-go-wrong-but-pay-a-little-price/>.

111. At least one commentator has called for congressional hearings to “smoke out the truth” “that [prosecutors] let economic policy considerations color their law enforcement decisions,” noting that “[o]fficials are going to be reluctant to admit [this truth].” Matthew Yglesias, *Are Banks Too Big to Prosecute?*, *SLATE*, *available*

It is well established that prosecutors ought to consider the broad consequences of indicting a corporation.¹¹² The United States Attorneys' Manual has long included Principles of Federal Prosecution of Business Organizations, which requires prosecutors deciding whether to charge a business entity to consider "collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution."¹¹³ It further urges them to:

[T]ake into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it.¹¹⁴

To do otherwise would be to promote formalisms about "pursuing justice"¹¹⁵ above the reality that prosecuting entities is a fundamentally consequentialist task that cannot be justified if the costs outweigh the benefits.¹¹⁶ These consequential considerations are particularly important when considering whether to charge a large financial institution. On

at http://www.slate.com/blogs/moneybox/2013/01/30/too_big_to_prosecute_can_the_government_bring_serious_criminal_charges_against.html. In reality, prosecutors will not be reluctant to admit this truth; it is the express written policy of DOJ.

112. See U.S. Attorneys' Manual, U.S. Dep't of Justice, §§ 9-28.300, 9-28.1000 [hereinafter U.S.A.M.], available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

113. *Id.*

114. *Id.*

115. See Frontline Transcript, *supra* note 108 (Reporter Martin Smith asking Lanny Breuer: "Is [losing sleep at night, worrying about what a lawsuit might result in at a large financial institution,] really the job of a prosecutor, to worry about anything other than simple pursuing justice?").

116. Indeed, the U.S. Attorneys' Manual explicitly recognizes that:

[N]ature and seriousness of the crime, including the risk of harm to the public from the criminal misconduct, are obviously primary factors in determining whether to charge a corporation. . . . [C]orporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, tax, and criminal law enforcement policies.

U.S.A.M., *supra* note 112, § 9-28.400. The manual instructs prosecutors to keep these broader policies in mind. See *id.*

the other hand, the potentially valid utilitarian reasons to not prosecute banks for plain and serious criminal wrongdoing have no bearing on the decision whether to prosecute the individuals within the banks who permitted or engaged in the wrongdoing. The next section considers each point in turn.

A. *The Special Problem of Prosecuting Banks*

This section addresses the special nature of banks and how it influences charging decisions. It first reviews the reasons that externalities must be considered by prosecutors deciding whether to charge any entity before illustrating why those considerations are particularly salient with respect to large banks.

1. Externalities are a Concern with all Corporate Prosecutions

Saddling any corporation with a criminal conviction can generate unintended consequences. Most obviously, because the penalty for corporate criminal liability is ultimately monetary, shareholders directly bear the cost.¹¹⁷ This is obviously true of the primary corporate criminal penalty: fines. However, it is equally true of more nuanced penalties like probation and imposed monitors, because the cost of probation and monitors will be monetized by the entity.¹¹⁸ At large, publicly-held corporations, these external costs fall largely to innocent shareholders. Some of the people who caused the corporation to incur criminal liability may own stock, but the overwhelming majority of owners generally have no connection to the wrongdoing. Indeed, this is only the first of the unintended, and undesirable, consequences of corporate criminal liability. Bondholders and creditors “suffer a diminution in the value of their securities which reflects the

117. See Coffee, *supra* note 79, at 401 (“[S]tockholders bear the penalty [imposed on the corporation] in the reduced value of their securities.”).

118. See Gilchrist, *supra* note 19, at 32–33 (“Fundamentally, though, for a corporation, any penalty should be translatable to money. A fine of X dollars to be paid immediately is a loss of X dollars. Being barred from an aspect of the business for two years, where that aspect of the business generates Y dollars, is a loss of at least Y dollars. Reporting requirements have at minimum a transaction cost that is a loss of Z dollars. Whatever it is, it’s money to the corporation.”).

increased riskiness of the enterprise.”¹¹⁹ Employees may be penalized in any number of ways, including lower compensation, harsher supervision, and termination (where, for example, a firm closes a branch in order to pay a fine).¹²⁰ Even consumers may be harmed if the cost is passed on to them.¹²¹

That imposing penalties on corporations generates externalities does not mean corporations should not be punished. There are plenty of consequentialist reasons to favor corporate punishment, even where that punishment generates some negative consequences. Deterrence can be a reason to hold corporations criminally liable, as can the expressive function of criminal penalties.¹²² The reality of external costs caused by prosecuting a corporation is one factor to be assessed in deciding whether to indict, and the United States Attorneys’ Manual explicitly requires prosecutors to consider this factor in making a charging decision.¹²³ In the end, there will be costs and benefits to any corporate prosecution, and ideally corporate prosecutions would proceed only where the benefits outweigh the costs.

The prosecution of Arthur Andersen is frequently held out as an example of how prosecuting an entity can do more harm than good. The conviction of Arthur Andersen “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.’”¹²⁴ The destruction of one of the Big Five accounting firms and the accompanying loss of tens of thousands of jobs were massive externalities of the criminal prosecution. The lesson of Arthur Andersen is a matter of some controversy. Some suggest it illustrates that federal prosecutors hold an overwhelming threat over corporations that effectively coerces corporations into accepting whatever settlement terms the

119. Coffee, *supra* note 79, at 401.

120. *Id.*

121. *Id.* at 402 (“If the corporation competes in a product market characterized by imperfect competition (a trait of most of the ‘real world’), then the fine may be recovered from consumers in the form of higher prices.”).

122. See Gilchrist, *supra* note 19; see also *supra* Part II.

123. See Coffee, *supra* notes 117–19, and accompanying text.

124. 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).

government demands in order to avoid indictment.¹²⁵ Others argue that the risk of a corporate indictment generating Andersen-like consequences is overstated.¹²⁶ Gabriel Markoff offers empirical support for this position.¹²⁷ Finally, others argue that fear of causing Andersen-like consequences has made prosecutors too timid.¹²⁸

While prosecuting any large corporation represents a risk of costs to innocent third parties, the potential costs of prosecuting banks are heightened by the nature of our banking system: banks are both more fragile and more interconnected with other institutions than most large corporations. The prosecutorial decision not to prosecute a bank because of external costs is qualitatively different than the analogous decision not to prosecute a large corporation. There are good arguments that, in cases of serious criminal wrongdoing, prosecutors should be *less* reluctant than they seem to be to prosecute large corporations; however, those arguments are less persuasive with regard to banks.

125. See Andrew Weissman & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 426 (2007) (“[A] corporation has little choice but to accede to the government’s demands.”); Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 86–87 (2007) (“[S]o long as there is a hint of criminality by even a single lowly employee, the corporation’s counsel has no leverage and no bargaining power. Only the prosecutor can be merciful, and for his mercy the corporation rationally chooses to cooperate in any way demanded.”).

126. 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.”).

127. See Gabriel H. Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797 (2013) (reviewing fifty-four publicly traded companies convicted between 2001 and 2010, confirming thirty-seven are still active, twelve merged under favorable conditions, and five suffered some sort of business failure, where none of those five business failures could be attributed to the conviction).

128. See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 321–22, 379 (2007) (“[DPAs] popularity with prosecutors has increased since the public opprobrium that followed the Arthur Andersen case, in which the conviction of the accounting firm was ultimately overturned, but not before the stigma of indictment drove it out of business entirely. . . . Prosecutors should make more up-or-down decisions concerning charges against corporate entities rather than relying on threats alone and seeking flawed intermediate solutions in DPAs.”).

2. Bank Prosecutions Present Unique Externalities

Banks differ from other corporations in two ways. First, banks are more fragile. Second, banks are more interconnected, so harms to banks tend to reverberate throughout the economy more broadly. Prosecutors would be remiss to ignore these differences.

a. The Fragility of Banks

Too often in the ongoing discussion about how federal prosecutors ought to deal with criminal banks, the business of banks is ignored altogether. This is perhaps not surprising: banking law and criminal law are not closely associated, and there is little reason to believe that criminal lawyers are experts in banking law or that banking lawyers are experts in criminal law. It is helpful, therefore, to review some basics of banking.

Consider how banks work in simple terms: banks accept deposits and make loans. They profit, in part, from the margin between the interest rate earned on loans and that is paid on deposits. For example, a bank that accepts \$100 in deposits earns money by lending that \$100 at a higher rate of interest than it pays to the depositing party. But what if the depositing party tries to withdraw the money before the loan is due? Most bank deposits must be paid on demand.¹²⁹ The bank would not have sufficient funds to pay back the liability incurred when it accepted the deposit (because it had loaned those funds to someone else). When a depositor found that the bank could not return what belongs to her—what the bank is obligated to pay on demand—she would be angry, worried, or unhappy; moreover, she would lose trust in the bank going forward.

In reality, banks do not operate with a single deposit and a single loan, and handling deposits and loans in volume ameliorates the risk of the depositor demanding a withdrawal before the loan is due.¹³⁰ With a large enough volume, when

129. See CARNELL, MACEY & MILLER, *THE LAW OF BANKING AND FINANCIAL INSTITUTIONS* 40 (4th ed. 2009) (“[T]he traditional checking account involves *demand deposit* because you have a legal right to withdraw the money on demand.”).

130. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 476 (16th ed. 1998) (the development of modern banking occurred when “[p]rofit-maximizing

one depositing party seeks to withdraw money, money will likely be available from one of the many loans coming due.¹³¹ Some loans default, of course, but with large enough volumes, banks should be able to calculate in the normal course how much money X volume of depositors will seek to withdraw and how much money Y volume of loans will produce. The bank can thus balance X and Y and avoid the problem of being unable to pay deposit money that it legally owes on demand.

As is often the case, the problem arises when things deviate from “the normal course.” When depositing parties worry about their future ability to withdraw their money, they may proceed to withdraw their money more quickly than they otherwise would.¹³² And if all of the deposited money were loaned out, banks would have no margin of error. Even slight miscalculations as to how much money is likely to be demanded in a particular period would generate failures to pay on demand. These failures, in turn, exacerbate the problem, diminishing confidence and accelerating demands for withdrawal. A decrease in depositor confidence that accelerates demands for withdrawal to a point where the bank cannot accommodate all the demands (thus further undermining confidence and further accelerating demands for withdrawal) is called a run.¹³³

goldsmith-bankers . . . recognized that although deposits are payable on demand, they are not all withdrawn together.”).

131. *See id.*

132. *See* CARNELL, MACEY & MILLER, *THE LAW OF BANKING AND FINANCIAL INSTITUTIONS* 40 (4th ed. 2009) at 46–47 (describing a hypothetical run in which a few hyper-cautious depositors withdraw money, causing observers to fear the bank will be unable to pay everyone and to withdraw their own money; this process of observed withdrawals generating fear and additional withdrawals becomes cyclical, eventually rendering the bank unable to meet demand for withdrawals).

133. Professor Coffee has described bank fragility as follows:

Put simply, the core problem is that banks are inherently fragile. Banks and similar financial institutions are subject to a fundamental mismatch between the short-term character of their liabilities and the longer-term character of their assets. Depositors expect and receive high liquidity, while borrowers expect to repay their loans over a longer, multiyear period. In good times, banks profit from this maturity transformation, realizing the spread between the lower rates paid to depositors and the higher rate charged to borrowers. But, in bad times, banks have been classically subject to “runs” when depositor confidence is shaken.

John C. Coffee, Jr., *The Political-Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1061 (2012).

Banking law provides two primary mechanisms to mitigate the risk of runs. First, banks are subject to capital reserve requirements.¹³⁴ Second, consumer (depositor) confidence is bolstered by federally insuring bank deposits.¹³⁵ The capital reserve requirements are actually quite complex, but, in simple terms, banks generally need to maintain a 4 percent leverage ratio (i.e. the bank's capital divided by its assets must equal at least 4 percent).¹³⁶ Because the bank need not keep sufficient capital to pay all deposits (as would be the case with 100 percent leverage ratio), the capital reserve requirements are known as "fractional reserves."¹³⁷ So, a bank with \$100 in deposits could hold \$4 in reserves and could lend \$96, while maintaining a 4 percent leverage ratio.¹³⁸ Put differently, the capital reserve requirements limit the bank to lending only \$96 of the \$100 accepted in deposits. Assuming there is a market for loans at higher rates of interest than parties demand for their deposits, reserve requirements restrain bank profits to some degree.

Reserve requirements decrease, but do not eliminate, the risk of bank failures. "Banks have a large proportion of their liabilities in very short-term debt that is shorter on average than their assets and that can easily be withdrawn."¹³⁹ The

134. See Julie Andersen Hill, *Bank Capital Regulation by Enforcement: An Empirical Study*, 87 IND. L.J. 645, 647 (2012) ("By law, banks must maintain specific ratios of capital to assets."). For purposes of this Article, detail beyond this simplistic account is not important. However, Professor Hill provides significantly more detail on the rules requiring banks to maintain certain capital ratios in her article, citing 12 C.F.R. § 325.2(m) (2011) (FDIC), 12 C.F.R. pt. 208, app. B (Federal Reserve), 12 C.F.R. §§ 3.6, 6.2(d) (OCC), and 12 C.F.R. §§ 565.7, 567.5(a) (OTS). *Id.* at 650–51.

135. See CARNELL, MACEY & MILLER, *supra* note 129, at 47 ("Federal deposit insurance has made bank runs rare."); see also SAMUELSON & NORDHAUS, *supra* note 130, at 502 ("To instill confidence in the banking system, the government insures bank deposits . . .").

136. See Hill, *supra* note 134. The Basel standards are actually much more complex than this, weighing different kinds of capital differently. However, the simplified 4 percent reserve ratio is sufficient to understand the unique aspect of banks.

137. See CARNELL, MACEY & MILLER, *supra* note 129, at 42 ("Financial intermediaries offering transaction accounts use *fractional reserves*; they do not keep enough cash on hand to repay all depositors at once.").

138. In this example, the bank has \$100 in assets comprised of the \$4 reserves and \$96 in outstanding loans. Its leverage ratio is calculated by dividing the capital reserves (\$4) by the total assets (\$100), yielding 0.04.

139. Robert R. Bliss & George G. Kaufman, *Resolving Insolvent Large Complex Financial Institutions: A Better Way*, 128 BANKING L.J. 339, 342 (2011).

greatest catalyst to start a run would be a loss of confidence in the integrity of the bank.¹⁴⁰ Once people lose confidence in the integrity of the bank, they perceive themselves to be in a race with the other depositors to get their money back out of the limited reserves kept on hand.¹⁴¹ The bank's short-term debt would be due more quickly than its long-term assets could satisfy.¹⁴² While reserve requirements do mitigate risk, banks remain highly leveraged compared to other industries, which renders them inherently more fragile than most other businesses.¹⁴³

Deposit insurance serves to maintain confidence. The race is less urgent once depositors know everyone will get their money—even if the bank does not have it.¹⁴⁴ Notably, insurance also means that banks operate in a realm of moral hazard, reliant on the customer confidence that is bolstered by the fact of insurance.¹⁴⁵ Indeed, this moral hazard itself suggests a reason to be more vigorous, rather than less so, when regulating banks (whether civilly or criminally).¹⁴⁶ So in at least this regard, that banks are “special” may suggest more aggressive prosecutions.¹⁴⁷

While insurance preserves consumer confidence to some degree against volatility, runs remain a risk for banks;¹⁴⁸ and

140. *Id.*

141. *Id.*

142. *Id.*

143. See CARNELL, MACEY & MILLER, *supra* note 129, at 45 (“Banks use much greater leverage than industrial firms. The latter tend to have leverage of roughly 2:1: debt funds some 65–70 percent of total assets. Banks have leverage of roughly 10:1: debt funds some 91 percent of assets.”).

144. See *id.* at 47 (“Federal deposit insurance has made bank runs rare.”).

145. See Edward R. Morrison, *Is the Bankruptcy Code an Adequate Mechanism for Resolving the Distress of Systemically Important Institutions?*, 82 TEMP. L. REV. 449, 458 (2009) (“Insurance dulls the incentives of the insured parties—the bank and its creditors and depositors—to monitor and, if necessary, reduce the riskiness of the bank’s activities.”).

146. See *id.* (“This moral hazard problem necessitates vigorous monitoring by the insurer.”).

147. In Part III.A.2.c below, I suggest that a well-founded fear of destroying systemically important financial institutions underlies much of the hesitancy in bringing more aggressive prosecutions. It is worth balancing against this, however, the exacerbation of moral hazard that is generated with a federally insured business where the government is reluctant and/or unable to hold the insured party responsible in a meaningful way for serious violations of criminal law.

148. That runs are possible is true; whether convicting a bank of serious crimes would undermine confidence in the integrity of the institution sufficiently to

more directly, runs remain a risk for the federal government insuring banks, taxpayers who fund the federal government, and, ultimately, the economy as a whole.

b. The Importance of Banks

In addition to being fragile, banks are important in the sense that their success or failure is widely consequential. This “importance” is really a matter of interconnectedness. “Bank deposits (debt) are held by a large proportion of the population, including households of limited financial means and expertise, and in a wide range of amounts, including very small amounts.”¹⁴⁹ Where a bank is harmed—particularly a large bank—many, many people are harmed (absent effective deposit insurance). “Bank deposits collectively comprise the largest share of the country’s money supply and are the primary medium of exchange,” so loss of those deposits reduces the money supply, limits liquidity, and harms the economy.¹⁵⁰ Because banks “operate much of the payments system,” banks are highly interconnected with all businesses that rely on basic banking services to buy goods, meet payroll, and function on lines of credit.¹⁵¹ Finally, banks are widely “interconnected with each other through interbank deposits, loans, and derivative transactions,” so harm to one bank may reverberate to other banks as well.¹⁵² This is particularly true of large banks. As the Department of Treasury writes about the 2008 financial crisis:

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, yet they were ineffectively supervised and regulated. As a consequence, they did not have sufficient capital or liquidity buffers to withstand the deterioration in

generate a run is a different question that is addressed below. *See infra* Part II.A.2.c.

149. Bliss & Kaufman, *supra* note 139, at 342.

150. *Id.*

151. *Id.*

152. *Id.*

financial conditions that occurred during 2008.¹⁵³

Whether the failure of HSBC would be *as* destabilizing as the failure of Lehman Brothers or the near failure of AIG, its failure would be widely felt.

c. Prosecutors Must Consider the Fragility and Importance of Banks in Making Charging Decisions

This is where we started: banks are special. And prosecutors are told to consider the collateral consequences that might result from prosecuting business organizations, including banks.¹⁵⁴ It would be improper and imprudent for a prosecutor to make charging decisions about banks—especially about some of the world's largest banks that are highly interconnected with other banks and other aspects of the US and world economy—without recognizing the consequences that might follow an indictment, trial, or conviction. This section, returning to the specific example of HSBC, reviews some of the factors prosecutors would have properly considered in deciding whether to pursue more aggressive action against the bank.

First, prosecutors would consider the most severe consequence for HSBC, its creditors and depositors, the FDIC and ultimately the taxpayer—namely, a run that threatened the bank's viability, and in turn posed a threat to the economy as a whole. The failure of a systemically important bank would generate significant costs. "If Bank of America or Citigroup were to approach the brink of insolvency, a 'run' on the institution could accelerate its failure, weaken other financial institutions, and ultimately constrict the flow of credit to worthy businesses."¹⁵⁵

Whether indictment, trial, and conviction of HSBC would undermine confidence in the bank sufficiently to threaten its viability is a more difficult question. Prosecutors would consider the risk that, if they convicted HSBC of widespread

153. DEPT OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 21 (2009), available at http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf.

154. See *supra* notes 112–14, and accompanying text.

155. John Crawford, *Predicting Failure*, 7 VA. L. & BUS. REV. 171, 173 (2012).

and systemic violations of AML laws benefitting large drug cartels and willful trading with enemies of the United States government, including terrorists, it might undermine the people's confidence in the bank. As described above, the combined reliance on demand debt and fractional reserves renders banks uniquely susceptible to runs,¹⁵⁶ and such a serious conviction that goes to the core of the bank's business would give reason to worry about the viability of the bank. So, this *possibility* is a real and proper concern for a prosecutor. As Lanny Breuer said while announcing the settlement with HSBC: "The goal is not to bring HSBC down."¹⁵⁷ This statement reflects not timidity, but reality. Destroying HSBC would generate massive harm to innocent parties with little accompanying benefit.

Of course, one might be skeptical that a conviction would undermine confidence to a degree that would risk a run. After all, the settlement resolution has been widely publicized. The details of HSBC's criminal conduct are set forth with clarity in the public DPA and accompanying Statement of Facts.¹⁵⁸ Indeed, there is even more detail in the public record available in the lengthy Senate report on the United States' vulnerability to money laundering that uses HSBC's conduct as a case study.¹⁵⁹ Moreover, the financial penalties—assuming they remained in the same range as the settlement—certainly would not cause the bank to "approach the brink of insolvency."¹⁶⁰ The CEO of HSBC Group publicly stated that HSBC's reputation has been "crushed" by the Mexican money laundering.¹⁶¹ Whether it is true that HSBC's reputation has

156. See CARNELL, MACEY & MILLER, *supra* note 129, at 47.

157. Mike Scarcella, *Justice, Delayed: DOJ Bank Settlements Renew Debate over Deferred Prosecutions*, NAT'L L. J., Dec. 17, 2012, at 1.

158. Prosecuting HSBC would entail additional risks. A trial would generate its own costs in terms of the days or weeks of testimony from high-level bank employees, and that would generate even more publicity than that which followed the settlement. Moreover, the settlement amounts to a statement that this admittedly serious problem is fixed, and this is good for public confidence in the bank; the uncertainty of a trial would not be. Finally, a conviction might draw attention to the inefficacy of bank regulators, which itself would do little to bolster confidence in banks. For more on the inefficacy of regulators governing HSBC, see *infra* text accompanying notes 206–08.

159. HSBC AML SENATE REPORT, *supra* note 43, AT 2. ("HSBC Holdings plc, called 'HSBC Group,' is headquartered in London, and its Chief Executive Officer is located in Hong Kong.")

160. Crawford, *supra* note 155, at 173.

161. See Howard Mustoe, *HSBC Reputation 'Crushed' by Mexican Money*

been crushed by these revelations, its business has not. Indeed, two days after the widely-publicized and much-criticized settlement was announced, HSBC stock was up 31 percent for the year.¹⁶² HSBC's business has continued to thrive as profits before tax in the first quarter of 2013 were up 95 percent compared to profits before tax in the first quarter of 2012.¹⁶³

Perhaps aggressive prosecution and conviction would not cause the bank to fail. We do not really know, because there is not an extensive record of large, systemically important financial institutions being convicted of extensive criminal conduct that relates directly to their integrity as a bank. There is a record of smaller banks failing, even after a mere settlement for AML violations, and the conduct to which HSBC admitted has been, in other cases, sufficient to rescind a bank's charter. When Standard Chartered was discovered to have engaged in conduct similar to the OFAC violations at HSBC, its state regulator threatened to revoke its charter entirely.¹⁶⁴ Similarly, less than a month before the HSBC settlement, First Bank of Delaware entered a fifteen million dollar settlement to resolve allegations that it "entered into risky lines of business and chose to disregard its Bank Secrecy Act

Laundering, CEO Says, BUS. WK., Feb. 6, 2013, available at <http://www.businessweek.com/news/2013-02-06/hsbc-reputation-crushed-by-mexican-money-laundering-ceo-says> ("We've crushed our reputation with the Mexican events.").

162. See Nathan Vardi, *Forget The Drug Dealers And Iran, HSBC Is Having A Great Year*, FORBES, Dec. 12, 2012, available at <http://www.forbes.com/sites/nathanvardi/2012/12/12/forget-the-drug-dealers-and-iran-hsbc-is-having-a-great-year/>. Of course, the increased share price could be caused by any number of factors. However, that HSBC's business has only continued to improve in the months following the settlement with DOJ suggests, at very least, that the release of information about criminal activity on the part of the bank did not undermine the viability of the bank as a going concern. See *id.* ("HSBC's underlying pre-tax profits rose by 125% to \$5 billion in its most recently reported quarter.").

163. See HSBC HOLDINGS PLC, INTERIM MANAGEMENT STATEMENT – 1Q 2013, at 3 (May 7, 2013), available at <http://www.hsbc.com/financialresults> ("Reported profit before tax ('PBT') for the first quarter of 2013 ('1Q13') was \$8.4 billion USD, up 95% compared with the first quarter of 2012 ('1Q12').").

164. See Jonathan Stempel & Carrick Mollenkamp, *Standard Chartered may Lose NY License over Iran Ties*, REUTERS, Aug. 6, 2012, available at <http://www.reuters.com/article/2012/08/06/us-standardchartered-iran-idUSBRE8750VM20120806> ("[I]n a rare move, New York's top bank regulator threatened to strip the state banking license of Standard Chartered Plc, saying it was a 'rogue institution' that hid \$250 billion in transactions tied to Iran, in violation of U.S. law."). The charter was not revoked, likely for the same reasons that HSBC was not put into receivership.

responsibilities,”¹⁶⁵ the FDIC suspended insurance, the bank’s state regulator revoked its charter, and the bank assets and liabilities were purchased by another bank.¹⁶⁶

But no one wants to rescind HSBC’s charter, suspend its insurance, or otherwise cause the bank to fail. Imposing an orderly shift of assets and liabilities—as was done in First Bank of Delaware’s case—is not practical. Whereas First Bank of Delaware was not a big bank,¹⁶⁷ HSBC is one of the largest banks in the world¹⁶⁸ and there are probably only a handful of other banks that could possibly acquire its assets and liabilities (to say nothing of whether they would want to or whether that would have its own negative impact on the state of the financial system).¹⁶⁹ A conviction for serious criminal conduct followed by no meaningful regulatory response looks worse than a settlement that purports to resolve the issue followed by no meaningful regulatory response.

In the end, we really cannot know what would have happened had HSBC been indicted and convicted, but we can know this: if the goal was to avoid destroying the bank, the DPA worked; the best one can say of indictment and conviction is that it might not have been worse. But then again, it might have been.

165. Press Release, Federal Deposit Insurance Corporation & Financial Crimes Enforcement Network, FDIC and FinCEN Assess Civil Money Penalty Against First Bank of Delaware (Nov. 19, 2012), available at <http://www.fincen.gov/newsroom/nr/pdf/20121119.pdf>.

166. See Samuel Rubinfeld, *First Bank of Delaware Loses Charter Over AML Problems*, WALL ST. J. (Nov. 19, 2012, 3:23 PM), available at <http://blogs.wsj.com/corruption-currents/2012/11/19/first-bank-of-delaware-loses-charter-over-aml-problems/>.

167. The company that acquired First Delaware, The Bryn Mawr Trust Co., did so for only \$8.7 million in cash. See *id.* By way of comparison, HSBC has total assets valued at \$2.7 trillion at the end of 2012. See Laura Stevens, *Meet Europe’s New Biggest Bank—HSBC*, WALL ST. J. (Mar. 4, 2013, 10:57 AM), available at <http://blogs.wsj.com/deals/2013/03/04/meet-europes-new-biggest-bank-hsbc/>.

168. See HSBC Statement of Facts, *supra* note 16, ¶ 3 (HSBC Holdings PLC “is the ultimate parent company of one of the world’s largest banking and financial services groups with approximately 6,900 offices in over 80 countries.”).

169. To understand the limited number of institutions that could even conceivably acquire the assets of a systemically important financial institution (SIFI) like HSBC, it is worth noting that the international Financial Stability Board, as of the end of 2011, counted a total of twenty-nine SIFIs worldwide, including HSBC. See *Policy Measures to Address Systemically Important Financial Institutions*, FINANCIAL STABILITY BOARD, Nov. 4, 2011, at 4, available at http://www.financialstabilityboard.org/publications/r_111104bb.pdf.

In deciding whether to aggressively prosecute¹⁷⁰ HSBC, or any other systemically important financial institution, for criminal conduct, prosecutors will consider the harms such a prosecution might generate. This is a good thing, and prosecutors should be praised, not criticized, for it.¹⁷¹ Corporations, and non-natural persons generally, should only be prosecuted when there is a net benefit to doing so.¹⁷² The only way to assess that is to consider the possible costs. Some banks are too big to prosecute,¹⁷³ and this fact supports calls to limit the size of banks.¹⁷⁴ Prosecutors and regulators can more effectively punish and remedy smaller criminal banks. There is something deeply troubling about institutions that are large enough, powerful enough, or important enough to be effectively beyond the criminal law. Limiting the size of banks would resolve the problem that prosecutors are unable to confront significant criminality within the largest financial institutions

170. Prosecutors may also resolve the matter through a negotiated DPA or NPA.

171. This Article has argued that criticizing prosecutors for considering the consequences of potential prosecutions is wrong. It has not addressed the fact that many have linked what they perceive to be an industry-friendly approach to prosecution decisions with the lucrative employment opportunities for high-ranking government officials after their time of service. See, e.g., Ryan Chittum, *Revolving Door Spins for Schapiro and Breuer*, COLUMBIA J. REV., Apr. 3, 2013, available at http://www.cjr.org/the_audit/regulators_pass_back_through_t.php. The possible costs of the revolving door between industry and governance are beyond the scope of this Article and are accordingly not addressed herein.

172. See Gilchrist, *supra* note 19, at 26–30 (2012) (discussing the inapplicability of retributivism as a justification for punishing corporations, and identifying consequentialism as the only possible justification).

173. The phrase “too big to jail,” although catchy, is actually a bit overstated. See, e.g., Andrew Ross Sorkin, *Realities Behind Prosecuting Big Banks*, N.Y. TIMES, Mar. 11, 2013, available at <http://dealbook.nytimes.com/2013/03/11/big-banks-go-wrong-but-pay-a-little-price/>. Large banks are too big to prosecute for serious crimes where extended attention to the malfeasance might jeopardize confidence in the bank as a going concern. On the other hand, one could imagine, for example, HSBC being indicted and convicted for entertainment expenses that happened to violate the Foreign Corrupt Practices Act without the conviction causing significant concern among investors and depositors about the continued viability of the bank.

174. See Craig Torres & Cheyenne Hopkins, *Too Big to Fail Too Hard to Fix Amid Calls to Curb Banks*, BLOOMBERG, Feb. 4, 2013, available at <http://www.bloomberg.com/news/2013-02-04/too-big-to-fail-too-hard-to-fix-amid-calls-to-curb-banks.html> (“Federal Reserve Governor Daniel Tarullo, Dallas Fed President Richard Fisher and Senator Sherrod Brown [are leading the debate to consider] legislation that would cap the size of big banks or make them raise more capital to regulatory actions to discourage mergers or require that financial firms hold specified levels of long-term debt to convert into equity in a failure.”).

for fear of generating external consequences that greatly outweigh the benefits of the prosecution. Senators Brown and Vitter recently introduced legislation that would increase the capital reserve requirement for large banks, with the intended effect of limiting the size of these financial institutions.¹⁷⁵ Senator Brown repeatedly has introduced similar bills to limit the size of banks but none has become law.¹⁷⁶ Some banks do appear to be too big to prosecute, and that generates deterrence and expressive failures for the criminal justice system. While there may be good reasons to push for smaller banks, the status quo demands a better enforcement mechanism.

Unless and until banks are smaller and less interconnected, the risks of failure must be considered by prosecutors deciding how to address criminal banks. HSBC's conduct was egregious, but at the end of the day, Breuer is right; the goal should not be to bring the bank down. That would help no one.¹⁷⁷

B. It Is Less Clear Why Bankers Have Not Been Prosecuted Individually

Banks may be large, systemically important, and fragile in a way that counsels against prosecution, but bank employees are not. The failure to prosecute individuals in recent cases—particularly HSBC—is difficult to understand. As one critic of

175. See Danielle Douglas, *Brown-Vitter Bill Seeks to End 'Too Big to Fail'*, WASH. POST, Apr. 24, 2013, available at http://articles.washingtonpost.com/2013-04-24/business/38791119_1_more-capital-community-banks-big-banks.

176. See, e.g., Safe, Accountable, Fair, and Efficient Banking Act of 2012, S. 3048, 112th Cong. (2d Sess. 2012); Safe, Accountable, Fair, and Efficient Banking Act of 2010, S. 3241, 111th Cong. (2d Sess. 2010).

177. This is not to say it would have no benefits. Prosecution resulting in the destruction of HSBC would help the expressive function of the legal system, and consequently, the perceived legitimacy of the legal system. Or, put differently, it would avoid the expressive harm inherent in treating certain institutions as effectively above the law through systemic non-prosecution. See *supra* Part II. Indeed, this is why Professor Ramirez has proposed “that prosecutors must exercise their discretion to decline prosecutions, accept plea bargains, or offer non-criminal alternative sanctions, all the while bearing in mind the affirming effect of that decision, particularly in elite crimes.” 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, 873 (2013). In the final calculus, however, the incremental expressive harm caused by failing to prosecute one systemically important financial institution would likely be dwarfed by the harm to innocent parties associated with destruction of the institution.

the recent settlements has written, “[t]he only way to stop the flow of this dirty money is to get tough on the bankers who help mask and transfer it around the world. Banks themselves do not launder money, after all; people do.”¹⁷⁸ So long as individuals who cause the bank to commit the crime are not penalized, there is limited incentive for future bank employees to avoid criminal conduct on behalf of the bank where that conduct is lucrative enough.

Why were executives at HSBC not prosecuted? Presumably, the answer is that prosecutors found insufficient evidence to prove individual crime beyond a reasonable doubt. When asked why no bankers were charged with fraud for creating and selling securities comprised of defective mortgages, Lanny Breuer replied: “[I]n reality, in a criminal case, we have to prove beyond a reasonable doubt—not a preponderance, not fifty-one percent—beyond any reasonable doubt that a crime was committed. If we cannot establish that, then we can’t bring a criminal case.”¹⁷⁹

That prosecutors have been unable to piece together any individual cases is somewhat surprising. According to the Statement of Facts,

the CEO, Head of Compliance, Head of Audit, and Head of Legal [of HSBC Group] were all aware that the problems at HSBC Mexico involved U.S. dollars and U.S. dollar accounts, but did not contact their counterparts at HSBC Bank USA to explain the significance of the problems or the potential effect on HSBC Bank USA’s business.¹⁸⁰

As noted above,¹⁸¹ awareness that the problems involved U.S. dollar accounts requires an awareness of the problems. The people identified are in positions of authority with the power and responsibility to address the Mexico problems. Consider also that HSBC Bank USA’s primary involvement with the illicit funds arose through its profitable Banknotes program.¹⁸² HSBC Bank USA’s Banknotes program reported to the Head of

178. Mazur, *supra* note 76.

179. See Frontline Transcript, *supra* note 106.

180. HSBC Statement of Facts, *supra* note 16, ¶ 44.

181. See *supra* text accompanying note 49.

182. See HSBC Statement of Facts, *supra* note 16, ¶ 20.

Global Banknotes who was based in New York.¹⁸³ Even recognizing the size and complexity of HSBC's global operations, it is difficult to imagine that the HSBC Global personnel who were aware of the money laundering problems in Mexico were not also aware of the Banknotes program, and that part of HSBC Bank USA's business was buying and selling physical currency. There probably are reports and emails that would establish as much. It even seems likely that, representing over \$9 billion of business in three years, the HSBC Bank USA's Banknotes business with HSBC Mexico would have come to their attention. It is therefore difficult to imagine how the people who knew of HSBC Mexico's problems would not have been in a position to recognize that HSBC Mexico's problems were HSBC Bank USA's problems.

Ultimately, what could or could not be proven remains unknown to the public. HSBC has produced over nine million pages of documents to DOJ as part of the investigation,¹⁸⁴ but that production is not available to the public and, even if it were, nine million pages are not readily reviewed. It is worth considering, however, the challenges of proof inherent in a case like this.

First, the relevant statutes (properly)¹⁸⁵ contain real mens rea requirements. HSBC itself was not charged with money laundering; it was charged with failure to maintain an effective anti-money laundering program and due diligence failures regarding correspondent accounts involving foreign persons.¹⁸⁶ Each of these is a violation of 31 U.S.C. § 5318.¹⁸⁷ To charge an individual with failure to maintain an effective AML program or to conduct required due diligence, DOJ would need to proceed under 31 U.S.C. § 5322(a) or (b), either of which requires a "willful violation" of the AML or diligence requirements.¹⁸⁸ A willful violation occurs only where the defendant had "knowledge of the [regulatory] requirement

183. *Id.*

184. *Id.* ¶ 78.

185. See *infra* text accompanying notes 196–200.

186. See HSBC Information, *supra* note 25, ¶¶ 20–23.

187. Failing to maintain an effective AML program is a violation of 31 U.S.C. § 5318(h) (2013) and 31 U.S.C. § 5322(b) (2013). The due diligence failure is a violation of 31 U.S.C. §§ 5318(i) and 31 U.S.C. § 5322(d). See HSBC Information, *supra* note 25, ¶¶ 20–23.

188. See 31 U.S.C. § 5322(a), (b).

and . . . a purpose to disobey the law.”¹⁸⁹ Similarly, a successful prosecution for international money laundering must establish a high level of *mens rea*.¹⁹⁰

That the required proof is demanding does not mean no case could be brought. Rather, proving a criminal case of a willful violation of the law against an individual beyond a reasonable doubt is considerably more difficult than might be suggested from a cursory review of DOJ press releases accompanying a settlement with a big bank. Substantive statutes aside, the nature of white-collar crime presents challenges to prosecutors. Kathleen Brickey explains that “building a complex corporate fraud case often takes time, patience, and ingenuity.”¹⁹¹ Noting the delay inherent in even successful prosecutions of high-level corporate officers, Brickey concludes:

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. But developing the evidence needed to charge the CEOs first required building solid cases against other key executives who were privy to what their superiors knew and when their superiors knew it. Simply put, cooperation up the chain of command was critical to reaching the top.¹⁹²

It is, therefore, perhaps not surprising that United States Attorney’s Offices do not devote the massive resources required to develop criminal cases against individual bankers.¹⁹³ The

189. See *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994).

190. See 18 U.S.C. § 1956(a)(2) (criminalizing, among other things, moving funds into or out of the U.S., with knowledge that the funds were from an unlawful activity and that the movement was designed to conceal the source of the funds).

191. Kathleen F. Brickey, *Enron’s Legacy*, 8 BUFF. CRIM. L. REV. 221, 274 (2004).

192. *Id.* at 275.

193. As Brickey notes, cooperation up the chain of command is often critical to successful prosecutions against senior executives; however, that cooperation is secured by building cases against more junior employees. In the case of HSBC, the natural starting point to building such cases—themselves only precursors to the potential of successful cases up the chain of command—involves some level of review of nine million pages of potential evidence. See *id.*

odds of success are better in cases with powerful evidence, like wiretaps.¹⁹⁴ Most white-collar cases are difficult to build, challenging to prosecute, and full of uncertainty. A billion-dollar deferred prosecution agreement with a massive bank involves considerably less uncertainty while still netting the kind of headlines that make careers. Corporate settlements represent low-hanging fruit for prosecutors; the corporation and its counsel gather the evidence, the risk of trial is averted, and the prosecution claims a win.¹⁹⁵ Whether there actually is insufficient evidence in any one case, at the very least, the challenges inherent in marshaling that evidence will tend to explain the relative dearth of individual prosecutions.

The difficulty of securing individual convictions is a consequence of the constitutional burden of proof beyond a reasonable doubt, meaningful mens rea standards, and the challenges inherent in white-collar cases. Nonetheless, even

194. By way of example, compare the challenge of building a case against any number of unknown employees within HSBC, starting from the position of reviewing nine million pages of documents, with that of building the case against Raj Rajaratnam. See Peter Lattman and Azam Ahmed, *Hedge Fund Billionaire Is Guilty of Insider Trading*, N.Y. TIMES, May 11, 2011, available at <http://dealbook.nytimes.com/2011/05/11/rajaratnam-found-guilty/?hp> ("The government built its case against Mr. Rajaratnam with powerful wiretap evidence. Over a nine-month stretch in 2008, federal agents secretly recorded Mr. Rajaratnam's telephone conversations. They listened in as Mr. Rajaratnam brazenly and matter-of-factly swapped inside stock tips with corporate insiders and fellow traders.").

195. Indeed, corporate settlements themselves can represent a benefit to many individual white-collar offenders. Professor Samuel Buell argues that white-collar defendants do not really enjoy systemic privileges in the legal system. See Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. (forthcoming 2013). While the article makes compelling arguments that corporate offenders are not unfairly privileged in many aspects of our criminal justice system, my concern is that it does not fully address advantages in charging decisions, and in particular, the powerful influence that corporate settlements can have on charging decisions related to individual offenders. Buell points out that many who believe that "prosecutors feel compelled to level some sort of charge and get some sort of conviction once they have been tasked with any major investigation." *Id.* The availability of corporate settlements would represent a real advantage for white-collar offenders confronting this mentality among prosecutors. While an individual target cannot control whether a corporate settlement is reached, in those cases where it is, the prosecutor will claim a win. The settlement may go a long way toward sating the bureaucrat's need to tie a result to expended investigative resources, and in turn may diminish fervor for additional prosecutions (with their attendant risks and costs). Indeed, the dearth of individual prosecutions following recent settlements with large banks suggests this is exactly what is happening. As such, it seems that white-collar offenders enjoy a privilege at least at the pre-charging stage.

were one to conclude that criminal prosecutions of high-level bank employees ought to be more common, it would not justify changing any of these fundamental tenets of criminal law.¹⁹⁶ First, and most simply, the “use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.”¹⁹⁷ Second, our nation is already plagued by overcriminalization;¹⁹⁸ there are too many laws, on too many matters, with too few meaningful mens rea requirements.¹⁹⁹ Diluting meaningful mens rea requirements will exacerbate these problems; moreover, given the sheer breadth of federal criminal law, it is quite likely that if prosecutors wanted to target individual employees for the crimes within HSBC, they could find the tools to do so within existing law.²⁰⁰ Finally, the

196. See Buell, *supra* note 195 (“Those who suggest corporate criminal law is weak are, in essence, arguing for a fundamental shift in conceptions of criminality.”).

197. *In re Winship*, 397 U.S. 358, 364 (1970) (“It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”).

198. See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749 (2005) (“[C]ommon features of overcriminalization include the following: (1) excessive unchecked discretion in enforcement authorities, (2) inevitable disparity among similarly situated persons, (3) potential for abuse by enforcement authorities, (4) potential to undermine other significant values and evade significant procedural protections, and (5) misdirection of scarce resources (opportunity costs).”).

199. As Ellen Podgor has put it:

[Overcriminalization and overfederalization] make[] [the law] unwieldy, impossible for the lay person to understand what is criminal and what is not, and [they] grow[] the power of prosecutors – who can then pick and choose the crime of their choice. Punishment, the centerpiece of American criminal law, can lose its deterrent, educative, rehabilitative, and even retributive qualities when you have overly broad statutes, superfluous statutes . . . , and a system that is uncoordinated and illogical.

Ellen S. Podgor, *Introduction Overcriminalization: New Approaches to A Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 530 (2012).

200. Efforts to identify all federal criminal laws are hindered by the breadth and imprecision of the substantive law, but counts tend to be over four thousand federal criminal laws. See, e.g., John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, 5 ENGAGE, Oct. 1, 2004, at 23 (explaining the methodology underlying the study’s count of 4,000 federal crimes), available at http://www.fed-soc.org/doclib/20080313_CorpsBaker.pdf. As Podgor notes:

One also needs to recognize that there are many administrative regulations with criminal ramifications. In addition, there are statutes like the Lacey Act that allow for incorporation of laws from other jurisdictions—even when these jurisdictions cannot provide a clear

evidentiary challenges of a large paper case, such as the HSBC case, are not subject to any easy fix. Fundamentally, most would agree natural persons should not be held criminally liable absent, at least, moral desert.²⁰¹ While there are instrumental reasons to worry about the infrequency of individual prosecutions—i.e., weak deterrence and expressive harms—these reasons themselves are insufficient to support the criminal punishment of real people.

The reasons not to try and convict not to HSBC are pragmatic and utilitarian: the harm stemming from such a prosecution would likely outweigh the benefits. The reasons not to try and convict the individual HSBC employees are entirely different: there may just not be enough evidence, the evidence may be too hard to get, or the prosecutors may be insufficiently incentivized.

C. Criminal Law May Be the Wrong Tool for Governing Large Banks

The criminal law is a very blunt tool, powerful but imprecise.²⁰² Civil law affords more options, as Breuer recently stated:

But we don't let these institutions go. We've brought civil cases. We've brought regulatory cases. And the entire approach here is to have a multi-pronged, comprehensive

assessment of what the law covers. There are also statutes, such as RICO, that incorporate an array of different state crimes.

Podger, *supra* note 199, at 531. A shortage of criminal laws is almost surely not the problem.

201. This can take the hard form of positive retributivism advocated by Michael Moore, see MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 153 (1997) (“[W]e ought to punish offenders because and only because they deserve to be punished.”), or the weaker form of negative retributivism described by John Mackie, see John L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 4 (1982) (“Within what can broadly be called a retributive theory of punishment, we should distinguish negative retributivism, the principle that one who is not guilty must not be punished, from positive retributivism, the principle that one who is guilty ought to be punished.”). There are few, if any, who advocate punishment for natural persons for purely instrumental reasons without reference to desert. Of course, for things other than natural persons, desert may be less necessary to invoke punishment. See Gilchrist, *supra* note 19, at 27–31.

202. Sometimes criminal indictment is like “us[ing] a sledgehammer to crack a nut.” Breuer, *supra* note 107.

approach to what gave rise to the financial crisis.²⁰³

Where the criminal law fails to address a problem, something else must be done. The current problem, seen clearly in the HSBC case, is that what is done in place of criminal prosecutions is insufficient, resulting in inadequate general deterrence and an expressive cost. The bank is not prosecuted, because prosecuting a large, systemically important financial institution for widespread, serious criminal conduct poses too much risk to the viability of the bank and thus to innocent interests. The bankers are not prosecuted, either because no one is guilty of a willful crime or because the cases are too difficult to build. Either way, recent history demonstrates the impracticality of prosecuting large banks and those who work for large banks, even, or perhaps especially, when the criminal conduct is serious. Given the costs of systemically not prosecuting, and the potential harms of prosecuting, it is time to look beyond the criminal law to govern and punish banks and bankers.

IV. LOOKING BEYOND THE CRIMINAL LAW

The deterrence and expressive problems with the status quo demand a solution, and the best solutions involve looking beyond the criminal law.²⁰⁴ Specifically, individual bankers engaged in wrongdoing could be penalized through existing regulations. This Part briefly reviews some of these regulations and describes how they might ameliorate the expressive and deterrence costs that arise when banks and bankers are not criminally prosecuted.

Civil regulation avoids some of the challenges inherent in white-collar criminal prosecutions due to less demanding evidentiary requirements. Banking is a highly regulated profession, and the penalties available against bankers whose recklessness has resulted in significant criminal conduct are

203. Frontline Transcript, *supra* note 108.

204. The rationale for not criminally prosecuting bank employees who appear to have committed criminal offenses is the lack of evidence and/or the difficulty of building a successful case. Prosecutors should not bring cases where they believe they lack sufficient evidence to convince a jury of proof beyond a reasonable doubt. Where there is sufficient evidence, however, criminal prosecutions may be appropriate, and nothing in this section is meant to suggest otherwise.

quite severe. Strong, regulatory actions against the individuals responsible—even if only through recklessness—for the criminal conduct would reduce or eliminate the impression that banks and bankers are above the law. That regulators are not using these tools—even as the criminal law has proven ineffective against large banks and bankers—is problematic and demands further inquiry, and perhaps oversight, of the regulators.

Individual bankers involved in criminal wrongdoing can be subject to cease-and-desist orders.²⁰⁵ Cease-and-desist orders were issued against HSBC in the years preceding its settlement with DOJ. The orders, however, were not very effective. The failure of regulators to remedy the problem says a lot about the inefficacy of the OCC as an AML regulator. As a recent senate report on HSBC's AML problems and OCC's failures concludes:

[T]he current OCC examination system has tolerated severe AML deficiencies for years and given banks great leeway to address targeted AML problems without ensuring the effectiveness of their AML program as a whole. As a result, the current OCC examination process has allowed AML issues to accumulate into a massive problem before an OCC enforcement action is taken.²⁰⁶

Indeed, the Report notes that between 2005 and 2010,

205. 12 U.S.C. § 1818(b)(1) provides in part:

If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or other request by the depository institution or institution-affiliated party, or any written agreement entered into with the agency, the appropriate Federal banking agency for the depository institution may issue and serve upon the depository institution or such party a notice of charges in respect thereof.

206. HSBC AML Senate Report, *supra* note 43, at 282.

when the criminal conduct was ongoing, OCC examined HSBC more than forty times, and the examiners identified more than eighty problems and recommended two cease-and-desist orders.²⁰⁷ Nevertheless, OCC supervisors took “no formal or informal enforcement action during nearly that entire period, allowing the bank’s AML problems to fester.”²⁰⁸

OCC’s failure to regulate HSBC does not necessarily mean OCC is not capable of competently bringing enforcement actions against individual bankers.²⁰⁹ Regulating a large bank is difficult for the same reasons that prosecuting a large bank is difficult: remedies matched to the scale of wrongdoing, or remedies sufficient to adequately deter, may jeopardize the viability of the institution and thus generate the harm to innocent parties discussed above.²¹⁰ These concerns do not apply to regulatory enforcement against individual bank employees.

Bank employees are subject to the same regulations as banks. Any federal banking agency may issue cease-and-desist orders not only to banks, but also to any “institution-affiliated party,”²¹¹ a term that includes officers, directors and employees of the bank.²¹² To prevail, the agency need only demonstrate

207. *Id.*

208. *Id.*

209. It does, however, suggest that OCC’s performance has been poor. If, as this Article suggests, we are to look to regulators to better govern banks and bankers, it will be necessary to scrutinize those agencies to make sure they are up to the task in terms of resources, personnel, and incentives.

210. *See supra* Part III.A.1.

211. *See* 12 U.S.C. § 1818(c) (2013).

212. *See* 12 U.S.C. § 1813(u)(1) (2013). Notably, it also includes:

any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in—

(A) any violation of any law or regulation;

(B) any breach of fiduciary duty; or

(C) any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution.

See 12 U.S.C. § 1813(u)(4). Accordingly, should cease-and-desist proceedings against individual employees reveal that outside counsel or accountants were advising on HSBC’s AML programs (as is almost surely the case), there is a basis to bring cease-and-desist proceedings even against those outside parties if the FDIC can prove their participation was reckless. The scope of this rule is troubling as it creates a risk of chilling advocacy. For example, HSBC was likely represented in most, if not all, of the OCC inquiries. Putting aside the fact that the OCC appears to have flirted with recklessness, the danger of ex post accusations of recklessness against attorneys is that the ex ante role of an

that the party has engaged in “an unsafe or unsound practice” or violated any “law, rule, or regulation, or any condition imposed in writing by a Federal banking agency.”²¹³ And it need not satisfy proof beyond a reasonable doubt.

The cease-and-desist authority would allow a federal banking agency to seek restitution or reimbursement from officers, directors, and employees on a showing of unjust enrichment or a “violation or practice [that] involved a reckless disregard for the law.”²¹⁴ So the difficulties and challenges of prosecuting individuals catalogued in the preceding section are mitigated in *two* ways: first, the standard of proof is no longer beyond a reasonable doubt; second, the requisite mens rea, rather than the demanding standards of knowledge and purpose, is mere recklessness. This rule opens the door to seeking clawbacks from individual bank employees on whose watch widespread criminality occurred.²¹⁵ The prospect of losing income and bonuses from the period during which crimes within the bank continued—if made real through enforcement—would provide a powerful incentive to provide oversight, maintain compliance and terminate potentially criminal practices. This practice alone would go a long way toward fixing the deterrence problem of limited criminal consequences for large banks. Moreover, while the legal system still would be guilty of treating people differently depending on their affiliation with large institutions (e.g., Mr. Goodgame receives six years in prison while bankers lose their incomes), the imposition of serious financial penalties on the bankers who allowed the misconduct to occur, at least would mitigate

attorney in adversarial proceedings with a regulator like the OCC is to *advocate*. It is difficult to imagine how an attorney could properly advocate on behalf of her client in an adversarial proceeding against a regulator if, by doing so, she exposes herself to a charge of recklessness should she prevail. Indeed, in any case where the attorney-advocate prevailed with the regulator (which is, of course, her job), and the AML programs were later deemed to be inadequate, the attorney would have exposure for her prior advocacy. Such a mechanism would effectively render attorneys de facto regulators—responsible for correctly assessing the adequacy of the programs they were retained to defend.

213. See 12 U.S.C. § 1818(b)(1).

214. See 12 U.S.C. § 1818(b)(6)(A).

215. See Miriam A. Cherry & Jarrod Wong, *Clawbacks: Prospective Contract Measures in an Era of Excessive Executive Compensation and Ponzi Schemes*, 94 MINN. L. REV. 368, 412 (2009) (defining a clawback as “as a right to, or action for, the restitution of unfair enrichment that is otherwise justified or permitted under prevailing applicable law”).

the discrepancy.

Federal banking agencies have other powerful tools against the individual employees who caused HSBC's criminal conduct: suspension, removal, and prohibition. Where the agency determines that the violation involves either personal dishonesty or the "willful or continuing disregard by such party for the safety or soundness"²¹⁶ of the bank, the agency may suspend or prohibit the party from participating in the conduct of affairs of *any* federally-insured institution.²¹⁷ The suspension or prohibition remains in effect until modified.²¹⁸ This rule represents the power to effectively ban, from the entire industry for life, those employees whose violations involve personal dishonesty or a willful or continuing disregard for bank safety. To date, federal banking agencies have brought no such actions against current or former HSBC employees. The absence of such actions is difficult to understand because the burden of proof and the mens rea are lower for regulatory actions. This is especially true considering that the DPA Statement of Facts describes conduct by high-level bank employees that would appear to satisfy a recklessness standard.²¹⁹ As with clawbacks, industry suspensions and bans for individual bank employees would have salutary deterrent and expressive effects.

These regulatory actions could represent achievable and meaningful punishment. Of course, punishment poses its own problems. Professor Miriam Baer argues that public actors too often favor punishment, and she suggests that creative, ex ante regulatory action may be preferable in the long run.²²⁰ Notably, Baer distinguishes punishment from regulation "not by reference to the penalty (imprisonment or fines) or the type of law (criminal or civil) but rather by reference to the motivations and goals that fuel government action."²²¹ Where a government entity "seeks to deliver just deserts and communicate moral condemnation . . . it acts as a punisher."²²² The ex post regulatory actions urged in this Article would, by

216. See 12 U.S.C. § 1818(e)(1)(C).

217. See 12 U.S.C. § 1818(e)(3).

218. See 12 U.S.C. § 1818(e)(3)(B).

219. See *supra* text accompanying notes 47–55 and 71–74.

220. See Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 579 (2012).

221. *Id.* at 580.

222. *Id.*

Professor Baer's standard, be punishment. Nonetheless, regulators ought to use these tools to deliver just deserts and to communicate moral condemnation. They should do so because the absence of criminal action has left deterrence and expressive deficits.²²³

Professor Baer presents a compelling argument that we too often resort to punishment in the corporate context at the expense of more creative (and potentially more efficacious) forms of corporate governance.²²⁴ Baer's conclusion is predicated on a number of drawbacks associated with punishment: merely symbolic enforcement with weak results; over deterrence; pretext for other, less commendable social goals; and institutional competence.²²⁵ In the case of banks, however, these potential drawbacks are either not present or limited. The proposed enforcement actions are not puffery, they are strong: salary clawbacks and industry bans represent significant penalties for the real people who suffer them. Over deterrence might represent a concern were regulators to become too aggressive at some point in the future, but that is hardly a pressing issue at this juncture. The purpose of the punishment is not pretextual: it is to deter and to blame. Professor Baer is surely right to note that where regulators become punishers, it alters the dynamic between the regulator and the regulated in a way that can undermine other, more cooperative regulatory efforts. However, in the present environment, the bank regulators appear to be too cooperative, too lenient. There is a need for punishment, and regulators can and ought to impose it under existing laws.

The existing regulations are extraordinarily powerful, and as such, they pose their own risks. These regulations are appealing because they do not face the same hurdles as white-collar criminal prosecutions, and this fact is double-edged. "Because administrative penalties are 'civil' in nature, they escape the wide range of constitutional provisions protecting the rights of criminal defendants."²²⁶ This lack of procedural protections from unwarranted punishment creates the risk of abuse and could undermine the perceived legitimacy of the

223. See *supra* Part II.

224. See Baer, *supra* note 220, at 637.

225. See *id.*

226. Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 908 (2012).

punishment.²²⁷ These risks are real, and should regulators begin using these regulations more aggressively, it would be worth considering whether additional procedural protections ought to be imposed. Right now, however, the problem is otherwise: there are serious crimes that are not being punished, notwithstanding the fact that regulators have the tools to do so.

That no regulatory actions have been taken against bankers suggests a problem with the regulators. Of course, it is not news that the OCC has been an ineffective regulator of HSBC. The Senate Report on the United States' vulnerability to money laundering details at length the repeated failures of the OCC to correct known problems at HSBC over a period of years.²²⁸ OCC, and other federal bank regulators, presently have the tools to remedy the problem that banks are too big to prosecute. They can go after the people who allowed the crimes to occur. They can go after money, jobs, and even careers where the criminal conduct is serious enough. That they never do is a problem that merits the attention of the public, the media, and the politicians, all of whose current attentions are on the prosecutors.

CONCLUSION

People are upset by the lack of real criminal action in the wake of such serious and widespread criminal conduct. There are good explanations for the limited use of criminal prosecutions against banks and bankers, but regardless of how good those explanations are, the status quo of limited enforcement and penalties generates problems of deterrence and expression. Something more ought to be done, and current

227. See *id.* (procedural protections at criminal law "provide legitimacy to the process of retribution").

228. See HSBC AML Senate Report, *supra* note 43, at 283–335. The Report states in part:

[D]uring the five-year period from 2005 to 2010, OCC AML examiners conducted nearly four dozen AML examinations, identified at least 83 AML Matters Requiring Attention, and recommended two cease and desist orders to strengthen HBUS' AML program. Despite the many AML problems identified by its examiners, OCC supervisors took no formal or informal enforcement action during nearly that entire period, allowing the bank's AML problems to fester.

Id. at 283.

regulations may provide the answer.

If we are serious about deterring crimes like those that happened at HSBC, it is not necessary to put a major financial institution out of business or even to put anyone in prison. Instead, make it known that senior bank executives will be held personally and financially accountable for the criminal conduct that occurs because of their recklessness. Compliance will be enhanced. If the government is serious about bank crime—and if it is serious about not sending messages that the rich and powerful are immune from prosecution where the disenfranchised are targeted—it should use the regulatory tools that are available. These regulations provide for severe penalties—including clawbacks and prohibition from the industry—that will deter and will send a clear message. And these penalties can be imposed for mere recklessness proven by a preponderance of the evidence. There have been many calls for the prosecutors to get tough. The truth is, it may be better for the regulators to do so.