

WHY IT IS GETTING HARDER TO PROSECUTE EXECUTIVES FOR CORPORATE MISCONDUCT

Peter J. Henning*†

INTRODUCTION.....	503
I. IT ONLY LOOKS LIKE FRAUD	510
II. EVEN IF YOU PROVE A CRIME, THERE MAY NOT BE MUCH PUNISHMENT.....	517
CONCLUSION.....	521

INTRODUCTION

The Department of Justice has made it a priority in corporate criminal investigations to require that companies single out those within the organization responsible for any wrongdoing. In a memorandum issued in September 2015, former Deputy Attorney General, Sally Q. Yates, drew a line in the sand for determining whether a corporation would receive credit for cooperating in an investigation: “In order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct.”¹ Ms. Yates defended the policy more recently by asserting that, “[o]ur goal is not to collect corporate heads.”² But that has to be the hope. Otherwise, society will view the Department’s focus on individual liability as just a publicity stunt that fails to police organizations for the harms they cause.³

* Professor of Law, Wayne State University Law School. The author may be contacted at peter.henning@wayne.edu.

† My thanks to Will Ortman for his many helpful comments on a draft, and to Jennifer Taub and the Vermont Law Review editors for their hard work on the Symposium and this essay.

1. Memorandum from Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, to the Assistant Attorney Gen., Antitrust Div., the Assistant Attorney Gen., Civil Div., the Assistant Attorney Gen., Criminal Div., the Assistant Attorney Gen., Env’t & Nat. Res. Div., the Assistant Attorney Gen., Nat’l Sec. Div., the Assistant Attorney Gen., Tax Div., the Dir., Fed. Bureau of Investigation, the Dir., Exec. Office for U.S. Trs., all U.S. Attorneys (Sept. 9, 2015), <https://www.justice.gov/dag/file/769036/download>.

2. Sally Q. Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, Remarks at the New York City Bar Association White Collar Crime Conference (May 10, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association> [hereinafter Yates Address].

3. See Joseph W. Yockey, *Beyond Yates: From Engagement to Accountability in Corporate Crime*, 12 N.Y.U. J.L. & BUS. 409, 410 (2016) (“Its guidelines amount to political talking points that are unlikely to produce meaningful change.”); Elizabeth E. Joh & Thomas W. Joo, *The Corporation as Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 VA. L. REV. 51, 52 (2015)

Former Attorney General Eric Holder and other federal officials have long touted how strongly the government cracked down on corporate misconduct in response to political pressure to act caused by the financial crisis.⁴ They extracted settlements from Bank of America for \$16.65 billion,⁵ Citigroup for \$7 billion,⁶ and JPMorgan for \$13 billion,⁷ related to the packaging and sale of residential mortgage-backed securities during the run-up to the financial crisis in 2008. Prosecutors obtained guilty pleas from the foreign subsidiaries of Rabobank and Royal Bank of Scotland for their role in manipulating the London Interbank Offered Rate, or Libor.⁸ BNP Paribas pleaded guilty and paid \$8.9 billion for violations of economic sanctions laws prohibiting transactions on behalf of companies in Sudan, Iran, and Cuba.⁹ Perhaps this was done to help overcome Holder's response at a Senate hearing in 2013 that some banks had become "so large that it does become difficult for us to prosecute them when we are hit with

("This tough talk about individual corporate agents is probably at least in part a short-term political move."); Chris Modlish, Note, *The Yates Memo: DOJ Public Relations Move or Meaningful Reform That Will End Impunity for Corporate Criminals?*, B.C. L. REV., (forthcoming) ("Although the Yates Memo's six prosecutorial guidelines are a step in the right direction, many commentators have pointed out that they are simply a restatement of the DOJ's already longstanding policy of targeting individuals. Indeed, some have even gone so far as to state that the new rules are merely symbolic public messaging.") (footnote omitted).

4. See Court E. Golumbic & Albert D. Lichy, *The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1315 (2014) ("The financial crisis of 2008 wreaked havoc on Main Street and Wall Street and was followed by a deep global economic downturn. In the aftermath of the crisis, the Justice Department came under increasing political pressure to take tougher measures against financial institutions deemed responsible for triggering the collapse.") (footnote omitted).

5. Press Release, U.S. Dep't of Justice, Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), <https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>.

6. Press Release, U.S. Dep't of Justice, Justice Department, Federal and State Partners Secure Record \$7 Billion Global Settlement with Citigroup for Misleading Investors about Securities Containing Toxic Mortgages (July 14, 2014), <https://www.justice.gov/usao-edny/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement>.

7. Press Release, U.S. Dep't of Justice, Justice Department, Federal and State Partners Secure Record \$13 Billion Global Settlement with JPMorgan for Misleading Investors about Securities Containing Toxic Mortgages (Nov. 19, 2013), <https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement>.

8. 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, 2013), <https://www.justice.gov/opa/pr/rbs-securities-japan-limited-agrees-plead-guilty-connection-long-running-manipulation-libor>.

9. Press Release, U.S. Dep't of Justice, BNP Paribas Agrees to Plead Guilty and to Pay \$8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (June 30, 2014), <https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial>.

indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy.”¹⁰

Holder tried to take back that ill-phrased statement, claiming weeks later that he had been “misconstrued” and that “[b]anks are not too big to jail.”¹¹ A few months after that, in announcing the settlement with Bank of America, Associate Attorney General Tony West said, “[b]y filing this lawsuit today, we reaffirm an important principle — that everyone must play by the same set of rules, and no institution is too big or too powerful to escape appropriate enforcement.”¹² But no amount of jawboning could change the public perception that “too big to jail” had taken hold of federal prosecutors.¹³ As Professor Brandon Garrett pointed out, “[t]hese billions of dollars in fines imposed in recent years are not all that they appear. The staggering fines . . . are dominated by a handful of blockbuster cases, and should not suggest that federal prosecutors have necessarily become more aggressive across the board.”¹⁴

Even as the drumbeat of large settlements marched on, the ground shifted to a new critique of the Department of Justice’s response to the financial crisis. Corporate fines and disgorgement, along with purported relief to distressed borrowers, was no longer good enough. As Federal District Judge Jed S. Rakoff pointed out, “[I]f . . . the Great Recession was in material part the product of intentional fraud, the failure to prosecute those responsible must be judged one of the more egregious failures of the criminal justice system in many years.”¹⁵ The corporate punishments were akin to paying a parking ticket—albeit a sizeable one—with no one inside the company held accountable for wrongdoing perpetrated through the organization. There were crimes, so the Department led us to believe, but

10. Jonathan Well, *There Is Still Such a Thing as ‘Too Big to Jail’*, BLOOMBERG (May 6, 2014), <https://www.bloomberg.com/view/articles/2014-05-06/there-is-still-such-a-thing-as-too-big-to-jail>.

11. *Oversight of the U.S. Dep’t of Justice: Hearing Before the Comm. on the Judiciary, U.S. H. of Reps.*, 113th Cong. 15 (2013) (statement of Eric H. Holder, Jr., Attorney Gen., U.S. Dep’t of Justice), <https://judiciary.house.gov/wp-content/uploads/2016/02/113-43-80973-1.pdf> [hereinafter *House Judiciary Committee Hearing*].

12. Press Release, U.S. Dep’t of Justice, Department of Justice Sues Bank of America for Defrauding Investors in Connection with Sale of Over \$850 Million of Residential Mortgage-Backed Securities (Aug. 6, 2013), <https://www.justice.gov/opa/pr/departments-justice-sues-bank-america-defrauding-investors-connection-sale-over-850-million>.

13. See BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 83–84 (2014) (discussing that often the corporations, not individuals, were held liable).

14. Brandon L. Garrett, *The Rise of Bank Prosecutions*, 126 YALE L.J.F. 33, 39 (2016).

15. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, THE N.Y. REVIEW OF BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/>.

apparently no one to point the finger at except the corporate logo.¹⁶ Whether there was in fact widespread criminality is an open question, but when it comes to public opinion about responsibility for the financial crisis, facts do not often seem to matter.¹⁷

Does the shift to emphasizing individual culpability mean there will be an upsurge of prosecutions of corporate executives who oversee companies that engage in misconduct? The short answer is no. One reason is that the new—or perhaps renewed—emphasis on pursuing individuals is not a real change in the Department of Justice’s policy.¹⁸ Prosecuting individuals has always been a priority, from the insider trading prosecutions in the 1980s of Ivan Boesky and Michael Milken,¹⁹ to the Savings and Loan Crisis in the early 1990s,²⁰ to the accounting scandals that brought down companies like Enron and WorldCom in the early 2000s.²¹ The companies were far less important than going after individuals, especially since the leader’s misconduct is what wiped out the enterprise.

Why the need for the Deputy Attorney General to defend the policy by proclaiming that federal prosecutors are not looking for “corporate heads,” when that appears to be its express purpose? Perhaps this is a means to set the groundwork for a handy excuse: to explain why companies might continue to receive the typical deferred (or non-prosecution) agreements to settle cases even though there are few individual prosecutions, and none involving senior executives. The oft-repeated insistence that pursuing cases against individuals is difficult because of the heightened intent

16. See Yockey, *supra* note 3, at 411 (“When a frustrated and financially hard-hit public sees a dearth of individual prosecutions following bank collapses and widespread evidence of predatory lending, it is only natural for questions to arise about the efficacy of federal enforcement.”).

17. See Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL’Y REV. 265, 268 (2014) (“Once we put bad analogies aside and squarely try to figure out whether widespread criminal misconduct drove—or was even associated with—the financial crisis, we face one of the classic accountability problems in federal criminal law: since a financial collapse is not itself evidence of criminal conduct, and white-collar criminal activity is rarely revealed with any clarity except by those responsible for prosecuting crimes, how does one assess the adequacy of those prosecutorial efforts?”) (footnote omitted).

18. See Yockey, *supra* note 3, at 413 (“Overall, though, the memo represents little more than a written restatement of how the game has always been played. DOJ officials spanning both the Bush and Obama administrations stressed and continue to stress the importance of aggressively pursuing individuals in cases of corporate crime.”).

19. Kurt Eichenwald, *Milken Set to Pay a \$600 Million Fine in Wall St. Fraud*, N.Y. TIMES (Apr. 21, 1990), <http://www.nytimes.com/1990/04/21/business/milken-set-to-pay-a-600-million-fine-in-wall-st-fraud.html?pagewanted=all>.

20. Franklin E. Zimring & Gordon Hawkins, *Crime, Justice, and the Savings and Loan Crisis*, 18 CRIME & JUST. 247, 247 (1993).

21. Suzanne Barlyn, *U.S. Judge Closes SEC’s Case Against Ex-Enron Chief Skilling*, REUTERS (Dec. 8, 2015, 4:04 PM), <http://www.reuters.com/article/us-sec-enron-skilling-idUSKBN0TR2OP20151208>.

requirements in many white-collar offenses reinforces this explanation. This heightened intent helps to forestall criticism of the absence of prosecutions of high-level corporate officials. Yates noted in her recent speech: “Blurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme.”²² In other words, do not blame us, it is the fault of these complex organizations.

So despite the hope of generating more individual prosecutions, the Department of Justice seems to be hedging its bets at the outset—and for good reason. What is becoming increasingly apparent is that prosecuting cases against corporate employees and executives, which has never been easy, is getting harder. Nor is the Justice Department’s recent track record for pursuing individuals for corporate wrongdoing a harbinger of great success.

The Gulf of Mexico oil spill in 2010 led Attorney General Holder to proclaim that, “we must also ensure that anyone found responsible for this spill is held accountable. That means enforcing the appropriate civil — and if warranted, criminal — authorities to the full extent of the law.”²³ Four years later, the tally from the prosecutions of five BP Inc. employees—none a senior executive—was 23 counts withdrawn before trial, 23 more counts dismissed by judges, three guilty pleas to misdemeanors, and two acquittals.²⁴ This track record does not inspire much confidence that prosecutors will be any more successful in pursuing individuals when there is serious corporate misconduct.²⁵

Companies have adopted increasingly extensive compliance programs in response to pressure from the government to show their adherence to the law and willingness to prevent violations. Those efforts can also give management a basis to claim that they were unaware of any wrongdoing, or at least sought outside guidance before embarking on a course of conduct—evidence that can help establish their good faith. The Fraud Section in the

22. Yates Address, *supra* note 2.

23. Eric Holder, Attorney Gen., U.S. Dept. of Justice, Address in New Orleans on the Gulf Oil Spill (June 1, 2010), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-gulf-oil-spill>.

24. See Aruna Viswanatha, *U.S. Bid to Prosecute BP Staff in Gulf Oil Spill Falls Flat*, WALL ST. JOURNAL, <http://www.wsj.com/articles/u-s-bid-to-prosecute-bp-staff-in-gulf-oil-spill-falls-flat-1456532116> (last updated Feb. 27, 2016) (discussing the results of the government’s prosecution of BP staff involved in the Gulf oil spill).

25. See Yockey, *supra* note 3, at 415 (“Federal prosecutors understand that managers often play pivotal roles in creating the conditions that can lead to corporate malfeasance, and they know that the surest way to improve their professional prospects is to convict managers who are caught committing criminal wrongs. They just have a hard time making much headway given the cards they have been dealt.”).

Department of Justice's Criminal Division, which is responsible for a number of corporate prosecutions, even hired a compliance "guru" to advise the Department on how well a company is working to prevent and detect violations.²⁶ For cases under the Foreign Corrupt Practices Act, there is a one-year pilot program to offer an extra benefit to companies that self-report and fully cooperate, including a 50% discount on any recommended fine—almost like a "Black Friday" or "Cyber Monday" sale.²⁷ So pursuing cases against individuals, especially executives, will not be any easier as corporations become savvier at playing the cooperation game.

As companies get larger, there is a shrinking chance someone from the C-suite will have had any actual involvement in day-to-day decisions that provide the fodder for an individual prosecution. It appears that mid-level managers will have to bear the brunt of the focus on individual liability for corporate misconduct.²⁸ For example, the investigation of Volkswagen for installing a "defeat device" in a number of its diesel vehicles to pass strict environmental tests was clearly the work of numerous individuals inside the company.²⁹ Yet, to date, only one engineer has pleaded guilty, and he was well down the ladder from the senior levels of company management.³⁰ The company pleaded guilty in January and agreed to pay \$4.3 billion to settle criminal and civil charges, and six mid-level executives were charged with

26. According to a press release issued in November 2015, the hiring of Hui Chen as an adviser to the head of the Fraud Section heralded a new approach to evaluating corporate compliance: Chen will provide expert guidance to Fraud Section prosecutors as they consider the enumerated factors in the United States Attorneys' Manual concerning the prosecution of business entities, including the existence and effectiveness of any compliance program that a company had in place at the time of the conduct giving rise to the prospect of criminal charges, and whether the corporation has taken meaningful remedial action, such as the implementation of new compliance measures to detect and prevent future wrongdoing. Press Release, U.S. Dep't of Justice, New Compliance Counsel Expert Retained by the DOJ Fraud Section (Nov. 2, 2015), <https://www.justice.gov/criminal-fraud/file/790236/download>.

27. Memorandum from Andrew Weissmann, Chief, Fraud Section, Criminal Div., U.S. Dep't of Justice, to Fraud Section, Criminal Div., U.S. Dep't of Justice (Apr. 5, 2016), <https://www.justice.gov/opa/file/838386/download>. Like any program that seeks cooperation, prosecutors are unlikely to announce that it was a failure. So we should expect the one-year program to become a permanent feature of FCPA cases.

28. See Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1791 (2015) ("Most prosecuted individuals were not high-up officers of the companies, but rather middle managers of one kind or another."); Yockey, *supra* note 3, at 416 ("At the threshold, with high-level managers likely to remain insulated from indictment-inducing activities, lower-level employees must now be favorites to emerge as the most frequent targets under the Yates protocol.")

29. Press Release, U.S. Dep't of Justice, Volkswagen Engineer Pleads Guilty for His Role in Conspiracy to Cheat U.S. Emissions Tests (Sept. 9, 2016), <https://www.justice.gov/opa/pr/volkswagen-engineer-pleads-guilty-his-role-conspiracy-cheat-us-emissions-tests>.

30. *Id.*

helping to cover up the environmental violations.³¹ But only one of those executives is in federal custody after being arrested in Miami, while the others are safely out of reach in Germany, which does not extradite its citizens.³² Although Volkswagen's former chief executive, Martin Winterkorn, has been identified as a suspect by German prosecutors, whether charges against senior management will ever be brought—especially in the United States—remains an open question.³³

Nor is it just a matter of how difficult it can be to prove an executive committed a crime. The courts are attuned in this context, unlike more mundane prosecutions that involve obvious misconduct, to arguments that statutes are being applied too aggressively by prosecutors trying to make ordinary actions into something criminal—a claim that few drug dealers or gang members could ever advance with a straight face.

I offer below some thoughts about why it is becoming more difficult to pursue charges against individuals involved in corporate misconduct, especially those in the executive suite. I make no claim to any unified theory about the future of white-collar prosecutions, nor do I propose any solutions, if there are any to be had. Instead, these are developments to watch that may help explain why prosecutions of senior managers are becoming a relic.

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

32. See Peter J. Henning, *U.S. Crackdown on Corporate Wrongdoers May Be Undone by National Borders*, N.Y. TIMES: DEALBOOK (Jan. 16, 2017), https://www.nytimes.com/2017/01/16/business/dealbook/us-crackdown-on-corporate-wrongdoers-may-be-undone-by-national-borders.html?_r=0 (“The arrest of Mr. Schmidt highlights the problem the Justice Department faces in pursuing charges against the other five defendants. All are believed to be in Germany, and as long as they stay there they can avoid the fate of their co-worker.”).

33. See Jack Ewing, *Offices of Volkswagen and Audi Chiefs Searched in Raid, Warrant Says*, N.Y. TIMES (Mar. 19, 2017), <https://www.nytimes.com/2017/03/19/business/volkswagen-chief-executive-emissions-warrant.html> (discussing a German search warrant and subsequent raid of Volkswagen executive offices in Germany). “[T]he warrant, signed by a judge in Munich, allowed investigators to seize documents and other items such as appointment calendars, copies of emails, mobile phones and electronic passwords from Mr. Müller [current chief executive of Volkswagen] and Mr. Stadler [head of the Audi division], and numerous other current or past Volkswagen and Audi employees.” *Id.* The German warrant further stated that, “investigators are still trying to determine who ‘took initiative for this development, which levels of company hierarchy were informed, and what level made the decision to mass produce the defeat device.’” *Id.*

I. IT ONLY LOOKS LIKE FRAUD

Early in the movie *The Blues Brothers*, Elwood Blues (Dan Aykroyd) tells his brother Jake (John Belushi), recently released from prison, that it will not be easy to put their eponymous band back together because its members have gone in different directions. Jake berates his brother for not telling the truth about the status of the band while he was behind bars:

Jake: You were outside, I was inside, you were s'posed to keep in touch with the band. I kept asking you if we were gonna play again.

Elwood: Well, what was I gonna do? Take away you're [sic] only hope? Take away the very thing that kept you going in there? I took the liberty of bull[*****] you, okay?

Jake: You lied to me.

Elwood: It wasn't lies, it was just bull[*****].³⁴

It seems that some federal appeals courts have taken to heart Elwood's explanation of his dissembling to limit the scope of fraud laws.

In *United States v. Weimert*,³⁵ the Seventh Circuit overturned the conviction of a former bank officer who led the sale of its interest in a property development in Texas shortly after the financial crisis when it was desperate to raise capital.³⁶ David Weimert obtained two offers for the property, both of which exceeded the bank's target price.³⁷ It turns out that he told the winning bidders that his employer, AnchorBank, required that he participate in negotiations as one of the investors to approve the deal.³⁸ In turn, he told the bank that the buyers insisted that he be a minority partner in the transaction.³⁹ The \$7.8 million sale helped the bank meet certain capital requirements from its bailout during the financial crisis.⁴⁰ Everyone should have been happy—except that a subsequent SEC investigation of the transaction resulted in Weimert spilling the beans about

34. THE BLUES BROTHERS (Universal Pictures 1980), <http://www.sellingyourscreenplay.com/wp-content/uploads/screenplay/scripts/The-Blues-Brothers.pdf>.

35. *United States v. Weimert*, 819 F.3d 351 (7th Cir. 2016).

36. *Id.* at 353–54.

37. *Id.*

38. *Id.* at 361.

39. *Id.*

40. *Id.* at 363.

his misstatements to the two sides in the deal.⁴¹ Subsequently indicted, a jury convicted Weimert of five counts of wire fraud, and sentenced him to 18 months in prison, well below the recommended sentencing range of 87 to 108 months.⁴²

The Seventh Circuit reversed the conviction, finding that any misstatement to the buyer “would not have been material because it was deception of the opposing party in a transaction about the negotiating positions of third parties.”⁴³ When two sides are trying to reach an agreement, “Congress could not have meant to criminalize deceptive misstatements or omissions about a buyer’s or seller’s negotiating positions.”⁴⁴ Does that mean it is permissible to lie? Not about everything, since factual representations could be the basis for a fraud prosecution. But Weimert’s lies were just about a condition for reaching a deal, and so “negotiating parties, and certainly the sophisticated businessmen in this case, do not expect complete candor about negotiating positions, as distinct from facts and promises of future behavior.”⁴⁵ Thus, “[d]eception about negotiating positions—about reserve prices and other terms and their relative importance—should not be considered material for purposes of mail and wire fraud statutes.”⁴⁶ The Seventh Circuit refused to find any fraud based on the fiduciary duty Weimert owed to AnchorBank as an employee and officer. The court pointed out that the Supreme Court in *Skilling v. United States* confined the honest services theory of fraud to bribes and kickbacks.⁴⁷

How appropriate that the appeals court sits in Chicago, the site of much of *The Blues Brothers*, because apparently, in negotiations, a party is free to take Elwood’s view of lying in its dealings with the other party. The Seventh Circuit described the case as an “unusual, and seemingly unprecedented, prosecution” because “[t]he final contract terms were in plain view and were in fact discussed and negotiated by the interested

41. *Id.* (“In April 2012, Weimert gave testimony before the SEC regarding the deal. He testified that the Burkes had not *insisted* on his involvement, but that instead he had told the Burkes he would ‘like to be part of the transaction.’ Weimert said he had felt he ‘was the broker in the transaction and deserved a piece of the transaction.’ Weimert further testified that he was ‘an earmark to the deal,’ a description he claims he used to alert the IDI board that he ‘wanted to make sure that they understood that I wasn’t absolutely necessary for this deal.’ All IDI directors testified at Weimert’s trial, though, that Weimert had not described his role as an ‘earmark’ but had told them instead that his participation was required by the Burkes.”).

42. *Id.* at 364.

43. *Id.* at 365, 370.

44. *Id.* at 357 (citations omitted).

45. *Id.* at 358.

46. *Id.*

47. *Id.* at 354 (citing *Skilling v. United States*, 561 U.S. 358 (2010)).

parties. We leave the civil law issues and remedies for civil cases.”⁴⁸ The terms were there, and AnchorBank got a better deal than it might have otherwise, so perhaps the circuit court was taking a “no harm, no foul” approach. But, mail and wire fraud are not dependent on the victims actually losing money, so long as there is a fraudulent scheme designed to deprive that person of something of value.⁴⁹ It is unclear how much of a stretch it was to prosecute a corporate official for lying to both sides in a deal so that he could cut himself in on a part of it. Yet, after the Supreme Court’s narrow reading of the honest services provision in *Skilling*, it turns out that mere conflicts of interest are not subject to prosecution, even if designed to enrich the person who was dishonest.

The Second Circuit has also found that lies in the context of business relationships may not be enough to support a fraud charge. In *United States v. Litvak*,⁵⁰ the circuit court overturned the securities fraud conviction of a former bond salesman at Jefferies & Co., Jesse Litvak, who misled purchasers about the cost at which his firm acquired the securities it sold to them.⁵¹ These were residential mortgage-backed securities sold to sophisticated investors, and a spreadsheet containing the actual prices was accidentally sent to a buyer.⁵² “Those he dealt with were unaware that he was taking a larger cut on behalf of Jefferies than he had represented to them. Without knowledge of Litvak’s actions, the financial consequences of negotiations colored by false representations were virtually undiscoverable in the opaque RMBS market.”⁵³

Unable to deny that Litvak lied to his clients, the defense sought to introduce expert testimony that buyers conducted their own analysis of the value of the bonds, which made the defendant’s misstatements about their cost immaterial.⁵⁴ The trial court excluded it, but the Second Circuit agreed the evidence should have been admitted, finding that

a jury could reasonably have found that misrepresentations by a dealer as to the price paid for certain RMBS would be immaterial to a counterparty that relies not on a “market” price or the price at

48. *Id.* at 370.

49. *See* *United States v. Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016) (“For § 1343 forbids only schemes to *defraud*, not schemes to do other wicked things, *e.g.*, schemes to lie, trick, or otherwise deceive. The difference, of course, is that deceiving does not always involve harming another person; defrauding does.”).

50. *United States v. Litvak*, 808 F.3d 160 (2d Cir. 2015).

51. *Id.* at 177.

52. *Id.* at 177, 190.

53. *Id.* at 177.

54. *Id.* at 180.

which prior trades took place, but instead on its own sophisticated valuation methods and computer model. The full context and circumstances in which RMBS are traded were undoubtedly relevant to the jury's determination of materiality.⁵⁵

In other words, Litvak may have lied, but the clients did not really care about what his firm paid so there was no fraud. Rather than dismiss the charges, the Second Circuit remanded the case for retrial so that the government could get another shot at a conviction.⁵⁶

In another decision reading the scope of the law of fraud narrowly, the Second Circuit in *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*⁵⁷ incorporated the common law doctrine that breach of a contractual promise was insufficient to prove fraudulent intent under the mail and wire fraud statutes.⁵⁸ The Department of Justice filed a civil lawsuit against Countrywide Home Loans, at one time the nation's largest mortgage lender that Bank of America acquired when the housing market started to collapse in 2008.⁵⁹ The Department pursued the case under a provision of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). This provision allows the government to seek penalties for conduct that violates the fraud statutes so long as it affects "a federally insured financial institution."⁶⁰ Congress passed FIRREA during the Savings and Loan Crisis, and the government largely overlooked the law until around 2012 when the Department of Justice saw it as a means to go after banks for their role in issuing (and securitizing) questionable subprime mortgages.

The complaint alleged that Countrywide agreed to sell mortgages to Fannie Mae and Freddie Mac where borrowers met certain financial criteria, but actually sold mortgages that fell well short of the requirements—resulting in substantial losses when the housing market collapsed in 2008.⁶¹ The lie was in creating a program to speed up the mortgage approval process that resulted in pawning off mortgages that Countrywide knew fell short of the lending standards it agreed to abide by. Judge Rakoff, who presided over the trial, said that the program "was from start to finish the vehicle for a brazen fraud by the defendants, driven by a

55. *Id.* at 183.

56. *Id.* at 190.

57. *U.S. ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650 (2d Cir. 2016).

58. *Id.* at 653.

59. *Id.* at 652.

60. *Id.* at 653 (quoting the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. §§ 1833a(a), (c)(2) (2012)).

61. *Id.* at 654.

hunger for profits and oblivious to the harms thereby visited, not just on the immediate victims but also on the financial system as a whole.”⁶²

The Second Circuit overturned the verdict, relying on the doctrine that “the common law requires proof—other than the fact of breach—that, at the time a contractual promise was made, the promisor had no intent ever to perform the obligation.”⁶³ So while Countrywide knew it was selling loans that it should not have made under the program, it did not lie at the time it entered the contracts with Fannie and Freddie because there was no evidence to show its intent. In other words, there was no affirmative misstatement when it sold the mortgages to Fannie Mae and Freddie Mac, even though the mortgage company took advantage of a lack of vigilance on the part of its counterparty. That did not constitute fraud because it “requires proof of deception, which is absent from ordinary breach of contract.”⁶⁴ The circuit court concluded, therefore, that

[t]he Government did not prove—in fact, did not attempt to prove—that at the time the contracts were executed Countrywide never intended to perform its promise of investment quality. Nor did it prove that Countrywide made any later misrepresentations—*i.e.*, ones not contained in the contracts—as to which fraudulent intent could be found.⁶⁵

Did the Second Circuit fall for a nice trick by Countrywide’s lawyers—confused by the oft-referenced contractual doctrine of an “efficient breach,” turning it into a defense to a fraud charge? Professor Garrett said that “[i]f so, the Second Circuit swallowed it hook, line, and sinker.”⁶⁶

Countrywide’s case was hardly an ordinary efficient breach, in that Countrywide did not redirect resources to a higher good. Instead, it took advantage of its own prior statement that it would adhere to specified standards for approving borrowers, and then sold defective products to

62. U.S. ex rel. O’Donnell v. Countrywide Home Loans, Inc., 33 F. Supp. 3d 494, 503 (S.D.N.Y. 2014), *rev’d*, 822 F.3d 650 (2d Cir. 2016).

63. *O’Donnell*, 822 F.3d at 660.

64. *Id.*

65. *Id.* at 663.

66. Brandon L. Garrett, *Bad Hustle*, COLUMBIA LAW SCH.: THE CLS BLUE SKY BLOG (June 13, 2016), <http://clsbluesky.law.columbia.edu/2016/06/13/bad-hustle/>. It is interesting to consider whether Bank of America would have quickly settled a threatened criminal case charging violations of the mail and wire fraud statutes rather than a civil case, much as it did with regard to other conduct during the years before the financial crisis. Why did the Department of Justice use FIRREA rather than the underlying criminal statutes? Was it perhaps out of fear that the conduct was unethical, but perhaps not sufficiently criminal?

Fannie Mae and Freddie Mac. Countrywide displayed mendacious conduct—far worse than the actions of a party simply making an economic decision that will not cause significant harm that it can rectify by paying the appropriate damages. Professor Garrett asked, “[W]ho would want to sign a ‘master’ contract that might later expose a person to outright deceit?”⁶⁷ In light of *Weimert*, a party may want to be especially careful about negotiating that contract, too.

The courts have thrown obstacles in the way of pursuing fraud cases, and then there is the question of whether a jury will convict corporate executives for business practices that tread close to the line, but may not clearly cross over it. A jury in Boston acquitted the former chief executive and the vice president of sales for a medical device company on conspiracy and wire fraud charges related to promotion of a product for an unapproved use.⁶⁸ The government’s fraud theory was that they tried to increase sales through off-label marketing of a device to deliver steroid medications to sinuses to make the company a more attractive takeover candidate, but the jury rejected those counts.⁶⁹ The jury convicted two defendants of ten misdemeanor counts of violating the Food, Drug, & Cosmetic Act, but those charges did not require proof of any intent to violate the law, permitting a conviction based on strict liability.⁷⁰

Fraud cases are not the only place where the courts take a narrow—one might even say crabbed—view of what constitutes a crime. In *McDonnell v. United States*,⁷¹ the corruption prosecution of the former governor of Virginia, the Supreme Court read the “official act” element of the bribery offense so that “[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit” within that requirement.⁷² Chief Justice Roberts’s opinion for a unanimous Court asserted that, “[t]here is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government’s boundless interpretation of the federal bribery statute.”⁷³

67. *Id.*

68. Brendan Pierson, *J&J Unit’s Former Execs Convicted of Unapproved Marketing*, REUTERS (July 20, 2016, 6:48 PM) <http://www.reuters.com/article/usa-acclarent-fraud-idUSL1N1A61UH>.

69. *See id.* (discussing the acquittal of two former Acclarent Inc. executives for fraudulent promotion of a medical device).

70. *Id.*

71. *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

72. *Id.* at 2372.

73. *Id.* at 2375.

But *McDonnell* was much more than a “tawdry tale” as it involved a panoply of gifts showered on the governor and his family to buy access and favor from him—all of which he happily accepted while helping champion the products of his benefactor.⁷⁴ The opinion seems to ignore the fact that much of what elected officials do involves meetings, talking with constituents and government employees, and attending events. Yet, that alone is no longer enough to prove corruption because there must be “something more” that relates to an actual exercise of authority.⁷⁵

In *McDonnell*, the Court showed its willingness to curtail the use of an obstruction of justice statute to keep prosecutors from moving too aggressively to pursue cases that it believed were beyond what Congress must have meant in enacting the law. Congress enacted 18 U.S.C. § 1519 as part of the Sarbanes-Oxley Act to permit prosecutors to pursue obstruction charges when material was destroyed before the government started its investigation. The law provided for up to 20 years in prison for anyone who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter”⁷⁶

In *Yates v. United States*,⁷⁷ the Court overturned the conviction of a defendant who destroyed undersized red groupers, discovered on his fishing boat, which the government ordered him to preserve until the boat returned to port.⁷⁸ The government argued that “tangible object” covered the groupers, which clearly fall within the dictionary definition of that term.⁷⁹ A plurality opinion by Justice Ginsberg, however, rejected such an “unrestrained reading,” finding that the term “is better read to cover only objects one can use to record or preserve information, not all objects in the physical world.”⁸⁰ Justice Alito, in a concurring opinion, also found the statute’s terminology and title indicated that it was limited to just recordkeeping, pointing out, “How does one make a false entry in a fish?”⁸¹ The majority got the result it wanted, drawing fire from Justice Kagan in a

74. *Id.*

75. *Id.* at 2370.

76. Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy, 18 U.S.C. § 1519 (2012).

77. *Yates v. United States*, 135 S. Ct. 1074 (2015).

78. *Id.* at 1078, 1088–89.

79. *Id.* at 1081.

80. *Id.*

81. *Id.* at 1090 (Alito, J., concurring).

dissenting opinion that points to an obvious flaw in the narrow reading of § 1519: “A ‘tangible object’ is an object that’s tangible.”⁸²

It is difficult to assail the approach of prosecutors in *Yates*, who adopted a plausible, common sense reading of the statutory term in a case in which the defendant destroyed evidence of wrongdoing. If that is too aggressive, then perhaps the fault lies with Congress, not the prosecutors. Justice Kagan pointed out “that § 1519 is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion.”⁸³ Going a step further, she noted the statute was “unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.”⁸⁴ The overcriminalization critique is a worthy one, but is not a valid reason to effectively rewrite a statute under the guise of discerning what Congress really meant to prohibit. The effect is to give defendants a basis to challenge other statutes. Defendants can now point to the purported pernicious effect of prosecutorial aggressiveness as a basis to cut back on how courts apply these laws to white-collar crimes—at a time when these statutes are already frequently assailed for their use of broad terms.

There is now plenty of room for crafty, well-advised executives to push hard for profits and the personal gain that comes from corporate success, while crafting a plausible argument that they may have come close—but never actually crossed—the line into fraud or corruption. The courts of late have effectively diminished the possibility of proving a violation by an individual within an organization. Courts have done so by allowing at least a measure of lies, “tawdry tales,” and complaints about broadly worded statutes to take conduct outside criminal prohibitions. So perhaps Elwood Blues was right, that it is all right just to take the liberty of . . . well, you know.⁸⁵

II. EVEN IF YOU PROVE A CRIME, THERE MAY NOT BE MUCH PUNISHMENT

In the current environment, it is difficult to show that the relatively few prosecutions of corporate executives have much of a deterrent effect.⁸⁶

82. *Id.* at 1091 (Kagan, J., dissenting).

83. *Id.* at 1101.

84. *Id.* at 1101.

85. THE BLUES BROTHERS, *supra* note 34.

86. See Richman, *supra* note 17, at 276 (“Unless we are careful—or are ready for a more sustained commitment of resources—the message of a relative handful of prosecutions will be ‘a few heads will roll when the market takes a deep dive and the public seeks retribution.’ And the target deterrence audience will weigh the slim chance that lightning will strike them against the enormous financial gains from continued play.”). The most effective deterrent to criminal conduct is the certainty

Even proving a violation by a corporate executive will be difficult, as the Department of Justice readily concedes. One way to diminish the problem of establishing a defendant's intent is to lower the threshold for proving that element of the offense. That approach has been controversial, too, and there is a push in Congress to raise the intent level for offenses rather than making it easier to prove a crime.

The food and drug safety laws, along with some environmental statutes, allow for prosecution of officials under the "responsible corporate officer" doctrine.⁸⁷ This doctrine makes an individual's supervisory authority and the consequent failure to prevent a violation sufficient to support a criminal conviction.⁸⁸ In *United States v. Park*, the Supreme Court upheld the conviction of the president of a supermarket chain for unsanitary conditions that violated the Food, Drug, and Cosmetic Act. The Court held that the statute "imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will [ensure] that violations will not occur."⁸⁹

In *United States v. DeCoster*,⁹⁰ the Eighth Circuit in a 2-1 decision upheld the convictions and sentences of a father and son who were executives in a family-owned chicken farming business for violations of the same law at issue in *Park*.⁹¹ They were convicted as the responsible corporate officers for a number of food safety violations that helped trigger a massive salmonella outbreak in 2010.⁹² The district judge sentenced them

of detection and punishment, while the actual term of imprisonment is much less relevant. But, if there is little risk of punishment, then it is unlikely that there will be any real deterrence of white-collar crimes with the Yates Memo. See Peter J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, 61 WAYNE L. REV. 27, 41 (2015) ("Studies have shown that certainty of punishment is the principle factor in assessing the success of a deterrent, so that increased spending on detection will have more of an appreciable impact on the crime rate than increasing the level of punishment imposed on those convicted of a violation.").

87. Randy J. Sutton, "Responsible Corporate Officer" Doctrine or "Responsible Relationship" of Corporate Officer to Corporate Violation of Law, 119 A.L.R. 5th 205 § 2 (2004).

88. *Id.*

89. *United States v. Park*, 421 U.S. 658, 672 (1975).

90. *United States v. DeCoster*, 828 F.3d 626 (8th Cir. 2016).

91. *Id.* at 636.

92. The circuit court summarized the information generated in the criminal investigation after the salmonella outbreak:

The investigation revealed that Quality Egg previously had falsified records about food safety measures and had lied to auditors for several years about pest control measures and sanitation practices. Although its food safety plan stated that Quality Egg performed flock testing to identify and control salmonella, no flock testing was ever done. Quality Egg employees had also bribed a USDA inspector in 2010 to release eggs for sale which had been retained or "red tagged" for failing to meet minimum quality grade standards. Quality Egg also misled state regulators and retail customers by changing the packing dates of its eggs and

to three months each in prison, but on appeal, they argued that the punishment was a violation of due process and the Eighth Amendment because the government did not have to prove any mens rea for a conviction.⁹³ The Eighth Circuit rejected those arguments, holding that, “[t]he elimination of a mens rea requirement does not violate the Due Process Clause for a public welfare offense where the penalty is ‘relatively small,’ the conviction does not gravely damage the defendant’s reputation, and congressional intent supports the imposition of the penalty.”⁹⁴ Rejecting the Eighth Amendment argument, the circuit court found that the sentences were “not grossly disproportionate to the gravity of their misdemeanor offenses,” pointing out that the salmonella outbreak traceable to their business may have affected upwards of 56,000 victims, some of whom were hospitalized or suffered long-term injuries.⁹⁵

The dissenting opinion by Circuit Judge Beam argued for proof of negligence as the prerequisite for imposing a jail sentence for a violation. Judge Beam argued, “[T]here is no precedent that supports imprisonment without establishing some measure of a guilty mind on the part of these two individuals, and none is established in this case.”⁹⁶ He was not alone in assailing the sentences imposed on corporate executives under the “responsible corporate officer” doctrine. The Washington Legal Foundation, the U.S. Chamber of Commerce, and the National Association of Manufacturers (“NAM”) all argued that a conviction and prison sentence for a strict liability offense based on the person’s status within an organization violates due process.⁹⁷ NAM’s brief, which the libertarian Cato Institute joined, put it succinctly: “The notion that any executive can be sent to prison because a subordinate committed a criminal a regulatory

selling the misbranded eggs into interstate commerce. The parties additionally stipulated that one Quality Egg employee was prepared to testify at trial that Jack DeCoster had once reprimanded him because he had not moved a pallet of eggs in time to avoid inspection by the USDA. The investigation also revealed that in 2008 Peter DeCoster had made inaccurate statements to Walmart about Quality Egg’s food safety and sanitation practices.

Id. at 631.

93. *Id.*

94. *Id.* at 633.

95. *Id.* at 635.

96. *Id.* at 642 (Beam, J., dissenting).

97. Br. for Amici Curiae, The National Association of Manufacturers and the CATO Institute Supporting Appellants and Reversal at 1, *United States v. Decoster*, 828 F.3d 626 (8th Cir. 2016) (Nos. 15-1890, 15-1891); Br. of Washington Legal Foundation as Amicus Curiae in Supp. of Defs.-Appellants, Urging Reversal at 1–2, *United States v. Decoster*, 828 F.3d 626 (8th Cir. 2016) (Nos. 15-1890, 15-1891); Br. for Amici Curiae Pharmaceutical Research and Manufacturers of America and Chamber of Commerce of the United States of America in Supp. of Appellants and Urging Reversal at 3, *United States v. Decoster*, 828 F.3d 626 (8th Cir. 2016) (Nos. 15-1890, 15-1891).

[sic] offense without his or her knowledge is incompatible with our established principles of fairness and justice.”⁹⁸ So the idea of expanding the accountability of corporate officers through strict liability offenses appears to be anathema to corporate America—and its lobbyists, no doubt.

Legislation on criminal justice reform in Congress includes a bill that would adopt a “[d]efault state of mind” requiring proof of knowledge for any criminal prosecution under a statute for which “no state of mind is required” by the text of the provision.⁹⁹ In addition, the bill would require that, “if the offense consists of conduct that a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, was unlawful, the Government must prove that the defendant knew, or had reason to believe, the conduct was unlawful.”¹⁰⁰ This sounds like the kindergarten excuse that “everybody else was doing it” when a child is caught breaking the rules. As long as it looked like the conduct fell within some reasonable business norm, then the person could not be convicted unless it was shown that they knew their actions violated the law, but went ahead otherwise. This would be even better than a good faith defense because the burden would be on the prosecution to prove the most onerous subjective state of mind in the law—that one is consciously violating a known legal duty—that is normally reserved for crimes involving complex legal requirements, like tax evasion. Executives will have a field day claiming that they did not understand the law or never really wanted to violate it.

The proffered reason why this type of law is necessary is to keep innocent people from being swept up in a regulatory crackdown for actions that they were unaware violated the law. For example, Senator Orrin Hatch told the Senate, “Without adequate mens rea protections—that is, without the requirement that a person know his conduct was wrong, or unlawful—everyday citizens can be held criminally liable for conduct that no reasonable person would know was wrong. This is not only unfair; it is immoral.”¹⁰¹ So pity the poor corporate executive who believed he or she was not doing anything wrong, only wanting to help the company, but now faces charges.

98. Br. for Amici Curiae the National Association of Manufacturers and the CATO Institute Supporting Appellants and Reversal at 12, *United States v. DeCoster*, 828 F.3d 626 (8th Cir. 2016) (Nos. 15-1890, 15-1891).

99. Criminal Code Improvement Act of 2015, H.R. 4002, 114th Cong. § 11 (2d Sess. 2015).

100. *Id.*

101. Senator Orrin Hatch, Speech on Senate Floor (Sept. 21, 2015), <http://www.hatch.senate.gov/public/index.cfm/2015/9/hatch-it-s-time-for-criminal-justice-mens-rea-reform> (emphasis omitted).

Criminal prosecutions of corporate officers have not happened in the last few years anyway, and it is getting harder to pursue those cases. Add in a defense that rewards going along with the crowd while maintaining at least plausible ignorance of exactly what the law requires, and there will be no criminal consequences for individuals for their role in corporate misconduct.

CONCLUSION

The Justice Department often finds itself in a “damned if you do, damned if you don’t” position. Any prosecution that results in a “not guilty” verdict is a damaging loss, while failing to pursue cases that have a low chance of success means that prosecutors have not been aggressive enough. That job is not getting any easier, because the chances of pursuing cases against individuals inside large corporate organizations appear to be even harder to achieve. The problem may be more attributable to overpromising on the pursuit of individuals. This is likely to result in underdelivering by bringing few successful cases, not that there is some devious plan to give executives a pass. The net result will be the same, as few individual prosecutions are likely to occur. Having made the prosecution of those inside the corporation a particular focus of its investigations, the Justice Department may have doomed itself to failure because it cannot reasonably hope to live up to the expectations it created.

Whether bringing fewer cases against individuals involved in corporate misconduct is a good or bad thing is a very different question. It may well be that decisions like *Weimert*, *Litvak*, and *O’Donnell v. Countrywide* reflect the trend to limit the use of criminal laws as tools to deter violations by corporations. Business organizations are subject to a number of regulatory requirements. It is arguable that policing their conduct can be done better, or at least more expeditiously, through the administrative process and in civil enforcement actions than in a criminal prosecution. Holding individuals in an organization accountable when there are potentially numerous actors who had a hand in the misconduct reeks of identifying a scapegoat. Whether or not criminal prosecution is the better way to pursue wrongdoing, prosecuting individuals is unlikely to result from the announced change in how a corporation can cooperate with the Department of Justice.

