

WHERE ARE THE 2007–08 FINANCIAL CRISIS PROSECUTIONS? A RESPONSE TO JUDGE RAKOFF

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On February 27, 2011, an international television audience tuned in to watch the 83rd Academy Awards.¹ Among the nominees for the less-publicized category of Best Documentary Feature was *Inside Job*, a film “about the causes and consequences of the financial crisis of 2008.”² After winning and having the Oscar handed to him, writer and producer Charles Ferguson distilled the premise of his film in one sentence: “[T]hree years after a horrific financial crisis caused by massive fraud, not a single executive has gone to jail, and that’s wrong.”³

Ferguson would not be the first to express his frustration over the lack of criminal sanction for the activities by the finance industry that led to the 2007–08 financial crisis and the meltdown of the mortgage industry. A former congressional staff member told *Rolling Stone*, in a particularly *Rolling Stone* manner, “Everything’s fucked up, and nobody goes to jail. . . . That’s your whole story right there.”⁴

Anger and frustration was not confined to Hollywood or Capitol Hill. One would not normally expect federal judges to comment on potential cases against or theoretical crimes committed by the financial services industry. This is particularly true for those judges sitting on the Southern District of New York, whose courthouse sits less than a mile from the New York Stock Exchange and frequently metes judgment on Wall Street’s

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1. *The 83rd Academy Awards, 2011*, OSCARS, <http://www.oscars.org/oscars/ceremonies/2011> (last visited Sept. 21, 2016).

2. A. O. Scott, *Who Maimed the Economy, and How*, N.Y. TIMES, Oct. 8, 2010, at C1.

3. “*Inside Job*” *Winning Best Documentary Feature*, YOUTUBE (Mar. 4, 2011), <https://www.youtube.com/watch?v=yB--kY3vsqE>.

4. Matt Taibbi, *Why Isn’t Wall Street in Jail?*, ROLLING STONE, Mar. 3, 2011, at 44.

dirty laundry. However, in a 2014 *New York Review of Books* article, Judge Jed S. Rakoff spared no ammunition in his criticism of the Justice Department's lack of high profile indictments: "[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."⁵

Undeniably, there have been financial fraud prosecutions by the federal government in the years following the collapse of the mortgage industry that led to the 2007–08 financial crisis.⁶ For example, the U.S. Attorney's Office for the Eastern District of New York unsuccessfully prosecuted two Bear Stearns hedge fund managers, Ralph Cioffi and Matthew Tannin, for their investment in mortgage-backed assets.⁷ Some have speculated that their acquittal gave pause to federal prosecutors and prevented additional mortgage fraud criminal cases.⁸ Additionally, few criminal referrals were made by regulators to the Justice Department. The Office of Thrift Supervision, Office of the Comptroller of the Currency, Federal Reserve, and Federal Deposit Insurance Corporation collectively made zero referrals in relation to the mortgage industry failure.⁹ At the height of the crisis, only 120 FBI agents were assigned to investigate mortgage fraud.¹⁰ And while banks made some mortgage fraud referrals, they were typically against "the hairdressers of the world . . . [and other] small fish."¹¹

In his article, Judge Rakoff offers three explanations for why there has yet been, and there is unlikely to be, prosecutions for mortgage fraud against financial executives in connection with the Great Recession.¹² First, he argues that the Justice Department "had other priorities" in the

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

6. Anna Stolley Persky, *Great Recession: Where's the Punishment After the Crime?*, WASH. LAWYER (May 2014), <http://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/may-2014-recession.cfm> ("Since fiscal year 2009, the Justice Department has filed nearly 16,000 financial fraud cases against more than 23,000 individuals. More than 4000 of the defendants were involved in mortgage fraud cases.")

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

8. *See id.*

9. Joshua Holland, *Hundreds of Wall Street Execs Went to Prison During the Last Fraud-Fueled Bank Crisis*, MOYERS & CO. (Sept. 17, 2013), <http://billmoyers.com/2013/09/17/hundreds-of-wall-street-exec-s-went-to-prison-during-the-last-fraud-fueled-bank-crisis>.

10. *Id.*

11. *Id.*

12. Rakoff, *supra* note 5.

decade leading to the financial crisis.¹³ His discussion of these priorities actually yields two separate factors that must be evaluated individually. He suggests that in the wake of the 9/11 attacks, the Department shifted priorities from its traditional focus on investigation and prosecution of prior committed crimes.¹⁴ Instead, the Department's focus would be counterterrorism.¹⁵ Additionally, Judge Rakoff argues that federal prosecutors tasked with bringing corporate criminal cases focused on lower-hanging fruit, such as insider trading, at the expense of the harder to investigate, harder to prove matters, like mortgage fraud.¹⁶ Second, Judge Rakoff suggests that the federal government's role in creating regulatory policies that significantly contributed to the crisis yielded a reluctance to prosecute lest the government's actions be critiqued in a court of law.¹⁷ Finally, he attacks the philosophical shift in the Department's handling of corporate crime, moving from the prosecution of individuals to reforming the behavior of corporate entities through deferred or non-prosecution agreements.¹⁸

Judge Rakoff is correct to attribute a portion of the lack of prosecutions to the Justice Department's shift in focus to counterterrorism and pursuing cases that would yield "easier" convictions. However, his suggestions that an embarrassment about the government's role in the financial crisis or a focus on corporate reform contributed to the lack of prosecutions is misplaced. This Commentary will proceed in four parts, each evaluating the merits of Judge Rakoff's identified factors contributing to the lack of executive prosecutions related to the mortgage fraud scandal.

I. JUSTICE DEPARTMENT SHIFT TO COUNTERTERRORISM

On September 11, 2001, terrorists struck the United States in an unprecedented attack. Virtually overnight, the federal government responded by shifting to an almost singular focus: counterterrorism.¹⁹ The Justice Department would be on the front lines of this transformation. Then-Attorney General John Ashcroft notes that "[o]ur immediate focus was the need to change the culture of the Department of Justice from a

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. NICHOLAS RYDER, THE FINANCIAL CRISIS AND WHITE COLLAR CRIME: THE PERFECT STORM? 89 (2014).

model prioritizing prosecution of terrorism to a model prioritizing the prevention of terrorism.”²⁰ In the immediate aftermath of the attacks, over one-third of the FBI’s special agents were assigned to counterterrorism activities.²¹ And while “this surge [in agents] was only temporary and most agents returned to their normal assignments relatively quickly,”²² the Justice Department fundamentally reorganized to focus on the terrorist threat.²³

This shift was a radical departure from the Department’s traditional function. Instead of focusing on retrospective investigation and prosecution, the Department would now concentrate on prevention of future terrorist attacks.²⁴ The change was not merely structural, but also involved a change in “approach, dedication of resources, and information sharing with law enforcement, the intelligence community, and . . . allies abroad.”²⁵ The Department’s counterterrorism funding tripled, and over 1000 FBI agents were assigned to the task.²⁶ These agents were assigned to various operational units newly created to focus on counterterrorism activities.²⁷ This massive counterterrorism apparatus turned the FBI into an agency resembling a domestic intelligence agency.²⁸

When the Department shifted its focus to counterterrorism, it was a natural consequence that other law enforcement priorities would suffer. Indeed, Ashcroft himself conceded that “[w]e cannot do everything we once did, because lives now depend on us doing a few things very well.”²⁹ In this new Justice Department, prosecutors and investigators experienced in corporate crimes were redeployed to dismantle the financial networks that terrorist networks relied upon to remain operational.³⁰ However, despite numerous warnings within both Main Justice and the Bureau about the

20. John Ashcroft, *Reflections on Events and Changes at the Department of Justice*, 32 HARV. J.L. & PUB. POL’Y 813, 817 (2009).

21. Bret E. Brooks, *Law Enforcement’s Role in U.S. Counterterrorism Strategy*, 83 POLICE J. 113, 114 (2010).

22. *Id.*

23. *See Fact Sheet: Shifting from Prosecution to Prevention, Redesigning the Justice Department to Prevent Future Acts of Terrorism*, U.S. DEP’T OF JUSTICE (May 29, 2002), <http://fas.org/irp/news/2002/05/fbireorganizationfactsheet.pdf>.

24. Ashcroft, *supra* note 20, at 817.

25. John C. Richter, *Counter-terrorism: A Federal Prosecutor’s View*, 33 OKLA. CITY U. L. REV. 297, 309 (2008).

26. Ashcroft, *supra* note 20, at 817.

27. *Id.* at 820.

28. *Id.*; David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT’L SECURITY L. & POL’Y 1, 9 (2011).

29. Ashcroft, *supra* note 20, at 818.

30. *See RYDER, supra* note 19, at 89–90; Ashcroft, *supra* note 20, at 821.

prevalence of mortgage fraud, no resources were devoted to investigate it.³¹ As former Attorney General Alberto Gonzalez noted, “I don’t think anyone can credibly argue that [mortgage fraud] is more important than the war on terror.”³²

II. PROSECUTOR AMBITION

It would be easy to attribute the lack of prosecutions to ambitious federal prosecutors eager to ride the revolving door from Wall Street regulator to “Big Law” defense counsel for Wall Street and back again. Indeed, since the Justice Department began vigorously pursuing the prosecution of financial crimes in the 1960s, white shoe firms in Washington and New York have created robust white collar defense practices and staffed them with some of the most talented former federal prosecutors they can hire.³³ As the accusation is often leveled, prosecutors do not bring cases against executives because “top prosecutors were often people who previously represented the financial institutions in question and/or were people who expected to be representing such institutions in the future.”³⁴ However, such an accusation would run afoul of the core duty an attorney owes her client, in this case the United States government.³⁵ Judge Rakoff is correct to join in resisting this temptation, noting that “most federal prosecutors, at every level, are seeking to make a name for themselves, and the best way to do that is by prosecuting some high-level person.”³⁶ And his anecdotal observation is supported by the academic literature.³⁷

31. RYDER, *supra* note 19, at 90–93.

32. *Id.* at 93.

33. Robert S. Bennett, Hilary Holt LoCicero & Brooks M. Hanner, *From Regulation to Prosecution to Cooperation: Trends in Corporate White Collar Crime Enforcement and the Evolving Role of the White Collar Criminal Defense Attorney*, 68 BUS. LAW. 411, 430 (2013).

34. Rakoff, *supra* note 5.

35. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 9 (AM. BAR ASS'N 2016) (“Such [ethical] issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules [of Professional Conduct]. These principles include the *lawyer's obligation zealously to protect and pursue a client's legitimate interests . . .*” (emphasis added)).

36. Rakoff, *supra* note 5.

37. *See, e.g.*, Edward L. Glaeser, Daniel P. Kessler & Anne Morrison Pieh, *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 288 (2000) (finding that federal prosecutors prioritize prosecuting persons who are older, more likely to be veterans, more successful in their careers, more likely to be married, and more likely to be veterans).

Instead, Judge Rakoff suggests that prosecutors responsible for financial crimes pursued easier convictions than the executives responsible for mortgage fraud.³⁸ Thus while financial fraud did not completely fall off the map, there were easier high-level targets for federal prosecutors than executives allegedly engaged in mortgage fraud. In the aftermath of the financial crisis, the easiest targets were not those who had perpetuated an alleged widespread mortgage fraud. Such prosecutions would require a time intensive investigative bottom-up effort to yield results.³⁹ Ponzi schemes like the Madoff scandal were far easier for prosecutors to prove and to explain to a jury.⁴⁰ And insider trading cases such as the Raj Rajaratnam prosecution had fairly airtight evidence that allowed for an easier conviction.⁴¹

III. FEDERAL GOVERNMENT'S REGULATORY CONTRIBUTION TO CRISIS

Judge Rakoff argues that “the government’s own involvement in the underlying circumstances that led to the financial crisis” contributed to the lack of high-level prosecutions.⁴² This explanation does not hold water for a very simple reason: the same could be said of the S&L scandal. Both the S&L and mortgage fraud scandals shared striking similarities in the manner by which their frauds were perpetuated in order to enrich executives and officers of banking institutions.

For both, the decisions of regulators allowed the frauds to persist for years. Yet the Justice Department pursued S&L executives with gusto, while the Great Recession executives have escaped criminal sanction.

38. Rakoff, *supra* note 5; cf. Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 LAW & SOC'Y REV. 291, 310–11 (1987) (finding that prosecutors use their discretion in whom to charge to avoid uncertainty, particularly in the relative success of prosecution). *But see* Glaeser, Kessler & Pieh, *supra* note 37, at 288 (interpreting data to suggest that federal prosecutors seek more difficult cases).

39. Rakoff, *supra* note 5 (“If you are a prosecutor attempting to discover the individuals responsible for an apparent financial fraud, you go about your business in much the same way you go after mobsters or drug kingpins: you start at the bottom and, over many months or years, slowly work your way up. Specifically, you start by ‘flipping’ some lower- or mid-level participant in the fraud who you can show was directly responsible for making one or more false material misrepresentations but who is willing to cooperate, and maybe even ‘wear a wire’—i.e., secretly record his colleagues—in order to reduce his sentence. With his help, and aided by the substantial prison penalties now available in white-collar cases, you go up the ladder.”).

40. *See id.*

41. *See id.*

42. *Id.*

According to Rakoff, the mortgage fraud scandal had its origins in policy decisions made by both Congress and regulatory agencies that created perverse incentives for financial institutions to profit from wholesale fraud in the home mortgage market.⁴³ In 1999, Congress passed the Gramm-Leach-Bliley Act, which repealed the long-standing prohibition on financial institutions and their executives from simultaneously engaging in investment and commercial banking.⁴⁴ And throughout the decade preceding the crisis, the Federal Reserve had “kept interest rates low, in part to encourage mortgages.”⁴⁵ The Department of Housing and Urban Development required Fannie Mae and Freddie Mac to hold a minimum of half of their mortgages for riskier, low-income borrowers.⁴⁶ And banking regulatory agencies, such as the Office of Thrift Supervision, abandoned all mortgage underwriting regulations, letting banks set their own standards for when a borrower was credit-worthy.⁴⁷

In Rakoff’s telling, all of these policy decisions created a potent cocktail that enticed banks to engage in riskier and riskier behavior to maximize short-term profits in the mortgage industry to the long-term detriment of the economy. In a climate of steady economic growth and low inflation, and with no restrictions on investment banking, banks began to see mortgages not as a bet on the creditworthiness of individual borrowers to repay over a significant period of time, but rather as an easy method to issue collateralized mortgage-backed securities.⁴⁸

With no standards for credit underwriting, mortgage brokers began to abandon all sense of due diligence.⁴⁹ For example, Countrywide Financial openly advertised their ability to approve practically anyone for a loan.⁵⁰ The result was what became known as “liar’s loans,” where incomes of borrowers would be drastically inflated, but not confirmed by the lender.⁵¹

43. *See id.*

44. Gramm-Leach-Bailey Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999). *But see* James Ledbetter, *An Inc. Interview with Bill Clinton*, INC., Sept. 2015, at 166, 170 (“Look at all the grief I got for signing the bill that ended Glass-Steagall. There’s not a single solitary example that it had anything to do with the financial crisis.”).

45. Rakoff, *supra* note 5.

46. *Id.* *But see* Paul Krugman, Opinion, *Fannie, Freddie, and You*, N.Y. TIMES, July 14, 2008, at A21 (“Fannie and Freddie had nothing to do with the explosion of high-risk lending [in the mortgage industry] In fact, Fannie and Freddie, after growing rapidly in the 1990s, largely faded from the scene during the height of the housing bubble.”).

47. Rakoff, *supra* note 5.

48. Persky, *supra* note 6.

49. *See id.*

50. *Frontline: The Untouchables*, *supra* note 7.

51. Holland, *supra* note 9.

The prevalence of these loans grew by over 500% from 2003 to 2006, and “[b]y 2006, 40 percent of all the home loans made that year and half of all the loans called ‘subprime’ were liar’s loans.”⁵² And before these loans were securitized, due diligence officers of the era reported a party atmosphere behind the rubber-stamp approval sessions of a portfolio of loans, where six-figure salaried waitresses were considered plausible.⁵³ Traditionally, mortgages served as a relatively low-risk lending mechanism for banks to profit on the interest generated over decades of repayment. However, the new goal for home mortgages was to generate up-front fees through the sale of securitized mortgages.⁵⁴ This scheme was successful, so long as you weren’t the last person to be caught holding the toxic assets. Of course, the last to be caught with the assets was the federal government.⁵⁵

Similarly, the regulatory roots of the S&L scandal lie with easy access to capital and expanding authority to invest. Savings and Loan institutions were created during the New Deal and existed to provide access to consumer home mortgages.⁵⁶ In the 1970s, rising inflation made it difficult for S&L’s to attract capital, as they were prohibited from paying more than 5.5 percent interest on new deposits.⁵⁷ As part of the deregulation trend of the 1970s and 80s, these caps on interest rates were loosened.⁵⁸ Deregulation of S&L’s was later extended beyond just interest rate caps, eventually allowing them to expand their ability to invest beyond their traditional home mortgage mission.⁵⁹ Adding fuel to the fire was a massive increase in governmental S&L depository insurance maximums from \$40,000 to \$100,000.⁶⁰ Additionally, restrictions upon the ability of individuals to control ownership shares of S&L’s were repealed.⁶¹ The result was a powder keg rife for exploitation. Individuals could now gain control of an S&L, access “unprecedented amounts of cash” by offering high

52. *Id.*

53. *Frontline: The Untouchables*, *supra* note 7.

54. See Louise Story, *Wall St. Profits Were a Mirage, But Huge Bonuses Were Real*, N.Y. TIMES, Dec. 18, 2008, at A1.

55. See The Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765.

56. KITTY CALAVITA, HENRY N. PONTELL & ROBERT TILLMAN, *BIG MONEY CRIME: FRAUD AND POLITICS IN THE SAVINGS AND LOAN CRISIS* 9 (1997).

57. *Id.* at 10.

58. *Id.* at 11–12.

59. *Id.*

60. *Id.* at 11.

61. *Id.* at 12–13.

interest rates on deposits, invest them virtually however they wished, and if the money was lost, the government would insure the deposits.⁶²

The result of this deregulation was a massive banking fraud that centered around three schemes. The simplest of these was outright theft of bank resources by their owners and executives.⁶³ Some S&L controlling parties blatantly stole money directly from the institution and stashed it for their own use.⁶⁴ More common were questionable expenses charged to the banks for items ranging from guns and ammunition, luxury household goods, electronics, event tickets, boats, lavish parties, and alcohol.⁶⁵ These activities led a California regulator to famously note that “[t]he best way to rob a bank is to own one.”⁶⁶

While “looting” was the easiest way to take advantage of the loose regulations on S&L’s, more common and most similar to the mortgage fraud scandal were so-called “hot deals.”⁶⁷ These transactions needed three players: two S&L bankers and a corrupt property appraiser.⁶⁸ An S&L would purchase a piece of property and promptly have it appraised.⁶⁹ Based on that appraisal, the S&L would then sell the property to another S&L.⁷⁰ The banks would then swap the property back and forth, and possibly to other S&L’s, all the while earning a “profit.”⁷¹ These deals were often completed the same day, with tables lined down a hallway to pass the appropriate documents from one transaction to the next.⁷² S&L bankers would make their money on “up-front points and fees but . . . never [see] the proceeds of any of the properties’ resales.”⁷³ The flaw in this scheme is fairly obvious: everyone continues to profit as the property is passed from S&L to S&L, and the last person caught “holding the bag” when the bubble bursts absorbs all the losses.⁷⁴ And with government insured deposits, the taxpayer was always the one holding the bag last.⁷⁵

62. *Id.* at 12.

63. *Id.* at 58.

64. *Id.* at 58–59.

65. *Id.* at 58–62.

66. *Id.* at 58.

67. *Id.* at 48.

68. *Id.* at 49.

69. *Id.*

70. *Id.*

71. *Id.* at 49–50.

72. *Id.* at 50.

73. *Id.* at 53.

74. *Id.* at 51.

75. *Id.*

The final key S&L scheme was hatched out of desperation to continue the good times for as long as possible: accounting tricks.⁷⁶ Toxic assets were temporarily sold to other S&L's prior to regulatory audits to improve the balance sheet.⁷⁷ Multiple books were kept.⁷⁸ Board meeting minutes were doctored.⁷⁹ However, the good times would eventually come to an end, the scandal would break, and the Justice Department would react with gusto. In the wake of the scandal, the Department mustered a bevy of resources to punish executives and other players for their financial misdeeds. A Washington-based working group was established to coordinate efforts between the Office of the Comptroller of the Currency, Main Justice, and the Treasury Department.⁸⁰ In the Dallas metro area, a hotbed of S&L fraud, two additional special task forces were established to handle local investigations.⁸¹ Hundreds of agents and dozens of attorneys yielded "more than 1100 defendants . . . in 'major' savings and loan cases[,] and 839 were convicted."⁸² The Justice Department increased spending on financial fraud enforcement by more than two and a half times.⁸³ In total, over 30,000 criminal referrals were made in relation to the S&L Scandal.⁸⁴ In Texas and California alone, two of the states hardest hit by the scandal, over 2800 individuals were referred to the Department for investigation for financial fraud.⁸⁵

The disparity in treatment between S&L executives and the leaders of the financial institutions responsible for the mortgage fraud scandal is alarming. However, what is unquestionable is that the Justice Department has pursued crimes committed by financial institution executives in pervasive, highly publicized scandals in the past, even when the government's regulatory decisions contributed to the crisis. Further, it seems implausible that a federal prosecutor would decline to bring a case against an executive because a regulatory scheme created an opening for illegal behavior.⁸⁶ While the government may have played a role in the

76. *Id.* at 65.

77. *Id.*

78. *Id.* at 66.

79. *Id.*

80. *Id.* at 131.

81. *Id.*

82. *Id.*

83. *Id.*

84. Holland, *supra* note 9.

85. CALAVITA, PONTELL & TILLMAN., *supra* note 56, at 148 tbl.6.

86. See Rakoff, *supra* note 5 ("[M]ost federal prosecutors, at every level, are seeking to make a name for themselves, and the best way to do that is by prosecuting some high-level person.").

genesis of the mortgage fraud scandal, there is no plausible reason to believe that this would have contributed to the Justice Department's lack of prosecutions.

IV. JUSTICE DEPARTMENT'S CORPORATE REFORM AGENDA

Judge Rakoff also claims that the Justice Department's shift to deferred prosecution and no prosecution agreements has led to a more lenient treatment of corporate executives.⁸⁷ Pretrial diversion is not unique to white collar crime, and had been used in prosecutions of individuals for decades prior to their use against corporations.⁸⁸ Deferred and non-prosecution agreements with corporations have their origins in the late 1990s issuance of the Holder Memorandum,⁸⁹ which for the first time made public the Department's considerations before indicting corporations.⁹⁰ The Holder Memo was followed in 2003 by the Thompson Memorandum, which slightly revised the language from the original policy.⁹¹ Most importantly, the Thompson Memorandum made mandatory the considerations the Holder Memorandum made advisory.⁹² While the Department's policies relating to the prosecution of corporate crime has been updated slightly in the last decade, it now exists largely as written by Thompson in the United States Attorneys' Manual for use by all federal prosecutors.⁹³ The policy sets as its objective "increas[ing] focus on (1) the authenticity of corporate cooperation with investigations, and (2) corporate governance and compliance programs."⁹⁴ After the successful prosecution of Arthur Andersen for its role in the Enron scandal, which brought the demise of one of the Big Five accounting firms, the Department began to

87. *Id.*

88. David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1304–06 (2013).

89. Memorandum from Eric Holder, Deputy Attorney Gen., U.S. Dep't of Justice, to All Component Heads & U.S. Attorneys (June 16, 1999), <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF>.

90. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 881 (2007).

91. See Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys (Jan. 20, 2003), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_doj_thomp.authcheckdam.pdf.

92. *United States v. Stein*, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006).

93. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.000 (2016).

94. 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).

rely more heavily on deferred prosecution and non-prosecution agreements with corporate defendants to accomplish these goals.⁹⁵

Judge Rakoff's argument that the shift to these agreements contributed to a lack of prosecutions conflates the prosecution of corporations with that of individuals.⁹⁶ While Rakoff is correct to note that "[c]ompanies do not commit crimes; only their agents do,"⁹⁷ this argument proves too little. He presents a false dichotomy;⁹⁸ there is no reason why the Justice Department could not pursue criminal prosecution of both the firm *and* the individual. It is a both/and, not either/or scenario. Nor can it be said that the Justice Department no longer values the imposition of criminal sanction on corporate crimes. Indeed, the United States Attorneys' Manual explicitly endorses individual criminal liability for corporate crimes:

Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. *Provable individual culpability should be pursued, particularly if it relates to high-level corporate officers*, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.⁹⁹

Indeed, the Department has sought the prosecution of high-profile individual defendants concurrently with deferred or non-prosecution agreements cases on numerous occasions. For example, in 2005, federal prosecutors in cooperation with the IRS brought charges against nine KPMG officials, including the former deputy chairman of the firm, for their roles in a multi-billion dollar tax fraud conspiracy.¹⁰⁰ And in 2012, charges were brought against numerous Massey Coal officials for their roles in environmental and workplace safety violations.¹⁰¹

95. Uhlmann, *supra* note 88, at 1310–11.

96. Rakoff, *supra* note 5.

97. *Id.*

98. *Id.* (“[W]hy not prosecute the agent who actually committed the crime [instead of the company]?”)

99. U.S. DEP'T OF JUSTICE, *supra* note 93, § 9-28.210 (emphasis added).

100. *KPMG to Pay \$456 Million for Criminal Violations*, INTERNAL REVENUE SERV. (Aug. 29, 2005), [https://www.irs.gov/uac/KPMG-to-Pay-\\$456-Million-for-Criminal-Violations](https://www.irs.gov/uac/KPMG-to-Pay-$456-Million-for-Criminal-Violations).

101. Uhlmann, *supra* note 88, at 1298.

Further, Judge Rakoff exaggerates the role that deferred prosecution and no prosecution agreements have played in the Justice Department's prosecution of corporate crime. In the most robust study of the Department's use of these agreements, Professor Brandon L. Garrett found specific information on only 255 agreements between 2001 and 2012, an average of slightly more than twenty per year.¹⁰² Updated data from Professor Garrett covering the years since 2012 also shows no significant increase in this rate.¹⁰³ Another way to evaluate whether individuals are benefiting due to these agreements is to evaluate the rate of individual white collar prosecution against the rate of corporate white collar prosecution. In the first nine months of fiscal year 2015, the Department brought 5173 white collar charges against individuals.¹⁰⁴ By contrast, the Department filed only 237 criminal complaints against corporations in fiscal year 2014.¹⁰⁵ While the total number of white collar prosecutions against both corporate entities and individuals has unquestionably declined in the past twenty years, the Department still prosecutes individuals for white collar crimes at a significantly more frequent rate than it charges corporations.

V. CONCLUSION

Judge Rakoff deserves commendation for his contribution to the discussion regarding the lack of high-profile prosecutions related to the 2007–08 financial crisis. It is indeed alarming that the pervasive corporate fraud that precipitated the crisis has yielded no significant individual prosecutions. However, if we are to understand why there has been such a failure within the Justice Department, it is important to identify the correct root causes. My hope is that this comment can direct further research and commentary into the questions the lack of prosecutions raises. For instance, the shift to counterterrorism by the Justice Department has arguably affected its ability to pursue its more traditional role of retrospective investigation and prosecution. Scholarship is needed to evaluate the possibility of shifting counterterrorism away from the

102. BRANDON L. GARRETT, TOO BIG TO JAIL 65 (2014). *But see* Uhlmann, *supra* note 88, at 1318 (noting that within the Criminal Division, two-thirds of matters are resolved through deferred or non-prosecution agreements).

103. *See* Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, UNIV. OF VA. SCH. OF LAW, http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp (last updated Aug. 23, 2016).

104. *Federal White Collar Crime Prosecutions at 20-Year Low*, TRAC REPORTS (July 29, 2015), <http://trac.syr.edu/tracreports/crim/398/>.

105. *Justice Department Data Reveal 29 Percent Drop in Criminal Prosecutions of Corporations*, TRAC REPORTS (Oct. 13, 2015), <http://trac.syr.edu/tracreports/crim/406/>.

Justice Department and to more appropriate agencies, such as the Department of Homeland Security. And while we know that there was a disparity in high-profile prosecutions in the S&L scandal and the mortgage fraud scandal, the reasons remain a mystery. Additionally, while the role of prosecutorial discretion and its impact on career ambitions of federal prosecutors has been studied, more questions remain open than resolved. Answering those questions could lead to more effective representation of the government by prosecutors. Finally, while deferred and non-prosecution agreements do not seem to be replacing individual prosecutions, white collar enforcement by the Justice Department has declined significantly against both corporations and individuals over the last twenty years. While some explanation may be attributed to factors identified in this comment, such as the shift to counterterrorism, a more complete account of this decline is needed.