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BREAKING BAD? TOO-BIG-TO-FAIL BANKS NOT GUILTY AS NOT CHARGED

NIZAN GESLEVICH PACKIN[*]

Since the 2008 financial crisis, rating agencies,[1] regulators,[2] global organizations,[3] and academics[4] have argued that large banks receive significant competitive advantages because the market still perceives them as likely to be saved in a future financial crisis.[5] Therefore, not only do the largest banks enjoy the economic safety benefits of being large and diversified, but they also receive implicit as well as explicit and direct government subsidies.[6] The most significant subsidy, an implicit one,

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1. *See, e.g.*, STANDARD & POOR'S, BANKS: RATING METHODOLOGY AND ASSUMPTIONS 11 (2011), *available at* http://www.standardandpoors.com/spf/upload/Ratings_EMEA/2011-11-09_CBEvent_CriteriaFIBankRatingMethodologyAndAssumptions.pdf (predicting government assistance to banks becoming a permanent factor in forming banks' credit, "regardless of governments' recent and emerging policy response.").

2. Former Federal Reserve Chairman Ben Bernanke believes that taxpayer-funded bank subsidies should end. *See* Christopher Ryan, *Elizabeth Warren: Too-Big-To-Fail Banks Get $83bn/Year Subsidy. Why?*, AM. BLOG (Feb. 28, 2013, 12:41 PM), http://americablog.com/2013/02/elizabeth-warren-83bn-bank-subsidy.html.

3. *See* Kenichi Ueda & Beatrice Weder di Mauro, *Quantifying Structural Subsidy Values for Systemically Important Financial Institutions* (Int'l Monetary Fund, Working Paper No. WP/12/128, 2012), *available at* http://www.imf.org/external/pubs/ft/wp/2012/wp12128.pdf (arguing that large banks receive substantial rewards because the bigger they are, the more disastrous their failure would be, and estimating the subsidy to the ten biggest banks at $83 billion annually).

4. *See, e.g.*, *Who is Too Big to Fail: Does Title II of the Dodd-Frank Act Enshrine Taxpayer-Funded Bailouts?: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Svcs.*, 113th Cong. 69 (2013) (written testimony of David A. Skeel, Jr., Professor of Corporate Law at the Univ. of Pa. Law Sch.), *available at* http://financialservices.house.gov/ uploadedfiles/hhrg-113-ba09-wstate-dskeel-20130515.pdf (large banks, "[a]mong other benefits . . . borrow money much more cheaply than other financial institutions, because their cost of credit is artificially reduced by the Too Big to Fail subsidy.").

5. *See, e.g.*, Viral V. Acharya, et al., *The End of Market Discipline? Investor Expectations of Implicit State Guarantees* 3, 13 (Working Paper, Dec. 2013), *available at* http://ssrn.com/abstract=1961656 (arguing that "[t]he implicit subsidy provided large financial institutions [an annual] funding cost," and that the "passage of Dodd-Frank did not eliminate expectations of future government support"); Anat R. Admati et al., *Fallacies, Irrelevant Facts, and Myths in the Discussion of Capital Regulation: Why Bank Equity Is Not Expensive* 1–7 (Max Planck Inst. for Research on Collective Goods, Working Paper 2013/23, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2349739.

6. Put simply, subsidies are a method of financial support given to those in need without any pay-back obligation on the receiving end. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1174 (10th ed. 1996). Subsidies can take various forms and can be granted using different types of policies, which include direct transfers of funds and support or indirect assistance. Doug Koplow, *Case Studies of Subsidy Reform and Sustainable Development: Energy*, *in* ORG. FOR ECON. CO-OPERATION & DEV.,

stems from market perception that the government will not allow the largest banks to fail—*i.e.*, that they are "too-big-to-fail" ("TBTF")[7]—enabling them to borrow at lower interest rates.[8] Focusing on these subsidies, recent media reports sent shockwaves across financial markets by estimating the value of the financial advantages for the six largest U.S. banks since the start of 2009 at $102 billion.[9] On November 14, 2013, the Government Accounting Office ("GAO") issued the first of two reports on the benefits large banks receive because of their size.[10] A less obvious yet highly-related issue is large banks' exemptions from criminal statutes. This issue was not mentioned in the 2013 report, but should be included in the 2014 report that will examine the economic advantages the largest banks receive because of implied government support. Specifically, in this Commentary, I argue that this exemption contributes to the subsidies' economic value while also creating incentives for unethical and even criminal activity.

Before analyzing the elements of such exemptions, it is critical to first understand large banks' subsidies framework in which such a benefit exists. The 2013 report was the result of a highly controversial debate on

SUBSIDY REFORM AND SUSTAINABLE DEVELOPMENT: POLITICAL ECONOMY ASPECTS 93 (2007), *available at* http://www.cbd.int/doc/case-studies/inc/cs-inc-oecd-SubsidyReform-PoliticalEconomy-en.pdf. Justice Brennan explained the distinction between direct subsidies and tax exemption as follows:

> A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes.

Walz v. Tax Comm'n of New York, 397 U.S. 664, 690 (1970) (footnote omitted). He explained that direct subsidies involve government "forcibly" diverting the income of taxpayers to the recipient, whereas exemption involves government "merely refrain[ing] from diverting to its own uses income independently generated . . . through voluntary contributions." *Id.* at 691 (citing from Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development–Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 553 (1968)).

7. *See* Robert Johnson, *Introduction* to ROOSEVELT INST., MAKE MARKETS BE MARKETS 9 (Robert Johnson & Erica Payne eds.) (2010), *available at* http://www.makemarketsbemarkets.org/report/MakeMarketsBeMarkets.pdf ("The structure of our current financial markets . . . has not been subject to the most important principle of all—the opportunity for market participants to fail.").

8. *See, e.g.*, John C. Coffee, Jr., *Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 COLUM. L. REV. 795, 800–01 (2011); Stefan Jacewitz & Jonathan Pogach, *Deposit Rate Advantages at the Largest Banks* 4 (Working Paper, Feb. 21, 2014), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018474.

9. Bob Ivry, *No Lehman Moments as Biggest Banks Deemed Too Big to Fail*, BLOOMBERG (May 9, 2013, 11:00 PM), *available at* http://www.bloomberg.com/news/2013-05-10/no-lehman-moments-as-biggest-banks-deemed-too-big-to-fail.html.

10. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-18, GOVERNMENT SUPPORT FOR BANK HOLDING COMPANIES: STATUTORY CHANGES TO LIMIT FUTURE SUPPORT ARE NOT YET FULLY IMPLEMENTED (2013), *available at* http://www.gao.gov/assets/660/659004.pdf.

the existence and nature of such subsidies, especially following the enactment of the Dodd-Frank Act,[11] but there is still disagreement as to whether large banks actually receive any subsidies.[12] Certain commentators argue that large banks deserve different treatment because they create benefits for businesses that would not be available elsewhere;[13] the banking field facilitates substantial scale economies,[14] which make

11. Despite the big banks' attempts to prove that the Dodd-Frank Act would render their advantages insignificant, they have only been able to point to one independent academic research team that has found that the megabanks' market advantages diminished because of the Dodd-Frank rules (concluding that the Act "has been effective in reducing" the subsidy). Bhanu Balasubramnian & Ken B. Cyree, *Has Market Discipline on Banks Improved After the Dodd-Frank Act?* 2 (Working Paper, Nov. 2, 2013), *available at* http://ssrn.com/abstract=2349042.

12. The voices arguing against the existence of the subsidy appear to come exclusively from the financial services industry, and, therefore, should (i) be sorted out from objective research undertaken by more neutral experts, and (ii) not be viewed equally. *See, e.g.*, *Examining the GAO Study on Government Support for Bank Holding Companies: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 113th Cong. (2014) (written testimony of Simon Johnson), *available at* http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=982071a1-e2fd-4d02-bacc-962d4683affb ("Perhaps most worryingly for the validity of future analysis, the GAO seems to weight all "expert" opinion equally, irrespective of whether the work in question was undertaken by people who work for big banks . . . If the GAO cannot sort out sensible analysis from sophisticated lobbying, then its important follow-up report on the current value of implicit subsidies to large banks is unlikely to have much value."). Such financial services industry members' reports include various reasonings as to why no subsidy exists. *See, e.g.*, Press Release, Fin. Servs. Forum, et al., Fin. Indus. Addresses Alleged Large Bank Subsidy (Mar. 11, 2013), *available at* http://images.politico.com/global /2013/03/10/financial_industry_addresses_alleged_large_bank_subsidy_11_march_13.html; STEVE STRONGIN ET AL., GOLDMAN SACHS, GLOBAL MARKETS INST., MEASURING THE TBTF EFFECT ON BOND PRICING (2013), *available at* http://www.goldmansachs.com/our-thinking/public-policy/ regulatory-reform/measuring-tbtf-doc.pdf (arguing that the six biggest U.S. banks enjoyed a funding advantage, which reversed to a disadvantage after the financial crisis); Michel Araten, *Credit Ratings as Indicators of Implicit Government Support for Global Systemically Important Banks* 1 (Working Paper, May 31, 2013), *available at* http://ssrn.com/abstract=2272800 (arguing that "market data discounts the notion of government support" for big banks); Bert Ely, *Revisiting an Old Debate: Do Banks Receive a Federal Safety Net Subsidy?*, 18 NO. 21 BANKING POL'Y REP. 1, 1 (1999) (arguing that "banks pay all costs of banking's federal safety net"); Mark Whitehouse, *Too-Big-to-Fail Myths, Goldman Sachs Edition*, BLOOMBERG (May 28, 2013, 1:25 PM), *available at* http://www.bloomberg.com/news/2013-05-28/too-big-to-fail-myths-goldman-sachs-edition.html.

13. Charles W. Calomiris, *Debate: Should Big Banks Be Broken Up?: The Opposition's Opening Statements*, ECONOMIST (May 14, 2013), *available at* http://www.economist.com/debate/days/view/977 (arguing that the largest banks' product diversity, large scale, and global reach create unique advantages for their customers).

14. *See, e.g.*, *Non Interest Expense as Percent of Assets, FY2012, All Banks Reported to FDIC, 12/31/2012*, OPTIRATE, *available at* http://bankblog.optirate.com/wp-content/uploads/2013/06/NonIntExpToAssets2012.jpg (showing significant economies of scale with the largest Banks); David C. Wheelock & Paul W. Wilson, *Do Large Banks Have Lower Costs? New Estimates of Returns to Scale for U.S. Banks*, 44 J. MONEY, CREDIT, & BANKING 171 (2012); Joseph P. Hughes et al., *Are Scale Economies in Banking Elusive or Illusive? Evidence Obtained by Incorporating Capital Structure and Risk-Taking into Models of Bank Production*, 25 J. BANKING & FIN. 2169 (2001) (finding that bank holding companies of all sizes were operating with significant returns to scale and that increased risk-taking is associated with smaller-scale economies); Allen N. Berger & Loretta J. Mester, *Inside the Black Box: What Explains Differences in the Efficiencies of Financial Institutions?*, 21 J. BANKING &

large banks a source of gains for society[15] that justify Congress's support. Therefore, they essentially argued that the largest banks are unique and worth protecting because they leverage revenue and cost synergies through economies of scale, and as a result create benefits, that pass on to their customers and investors and lower the costs of finance for the entire society.[16]

One of the benefits large banks receive is a non-monetary semi-exemption from criminal statutes that contributes to their subsidies value. Indeed, the Department of Justice ("DOJ") allows for "deferred prosecution" and advances settlements instead of criminal charges for large financial institutions when they violate criminal laws such as money laundering and drug trafficking.[17] This semi-immunity policy, nicknamed "too-big-to-jail,"[18] also translates into an additional economic advantage that only the largest banks enjoy.[19]

TOO-BIG-TO-JAIL

In the years following the financial crisis, the media reported on large-scaled scandals in which the biggest banks were illegally involved. Nevertheless, even after it had learned about these scandals, the U.S. government only fined rather than prosecuted the relevant banks. This approach, which was nicknamed too-big-to-jail, caused a great deal of

FIN. 895, 928 (1997) ("Serious estimates of scale economies for U.S. banks over $25 billion will likely have to wait for the consolidation of the industry to create enough of these large banks to yield reasonable estimates."). Generally, "economies of scope" refers to the lowering average cost for a firm in producing two or more products. John C. Panzar & Robert D. Willig, *Economies of Scope*, 71 AM. ECON. REV. 268, 268 (1981).

15. JAN SCHILDBACH, DEUTSCHE BANK: DB RESEARCH, UNIVERSAL BANKS: OPTIMAL FOR CLIENTS AND FINANCIAL STABILITY (2012), http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD 0000000000296976.pdf.

16. *Id.*

17. Jessica Silver-Greenberg, *HSBC to Pay Record Fine to Settle Money-Laundering Charges*, N.Y. TIMES, Dec. 12, 2012, at B3, *available at* http://dealbook.nytimes.com/2012/12/11/hsbc-to-pay-record-fine-to-settle-money-laundering-charges/?_r=0 ("Federal and state authorities secured a record $1.92 billion payment from HSBC . . . to settle charges that the banking giant transferred billions of dollars for nations under United States sanctions, enabled Mexican drug cartels to launder tainted money through the American financial system, and worked closely with Saudi Arabian banks linked to terrorist organizations.").

18. Arthur E. Wilmarth Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1428 (2013).

19. *See* Cornelius Hurley, *GAO Must Ensure Accurate Accounting in TBTF Study*, AM. BANKER (Sept. 24, 2013, 3:00 PM), http://www.americanbanker.com/bankthink/gao-must-ensure-accurate-accounting-in-tbtf-study-1062337-1.html?ET=americanbanker:e17059:761074a:&st=email&utm_source =editorial&utm_medium=email&utm_campaign=AB_Intraday_092513 (detailing the harm to taxpayers resulting from both bank bailouts and large bank exemptions from criminal statutes).

anger and frustration.[20] Trying to justify this policy, Attorney General Holder explained that the DOJ cannot indict big financial institutions because doing so might harm the economy. Holder, testifying before the Senate Judiciary Committee, said that he is "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."[21] Some have argued that this declaration is unsurprising given that in 1999, as Deputy Attorney General, Holder instructed prosecutors to consider "collateral consequences" when determining whether or not to prosecute corporations.[22]

This statement also makes sense given the current reality, in which the U.S. government preferred, instead of prosecution,[23] a $13 billion settlement in November 2013 with JPMorgan for its role in creating the 2008 crisis.[24] One of the reasons for doing so is that whatever acts JPMorgan had allegedly done were of such magnitude that prosecution through the judicial system would have prolonged the proceedings not just over years, but possibly over generations. Thus, prosecuting JPMorgan appears to have been unrealistic and out of the question. JPMorgan was allowed to become too-big-to-jail, and now it is out of the reach of any

20. Press Release, Or. Sen. Jeff Merkley, Merkley Blasts "Too Big to Jail" Policy for Lawbreaking Banks (Dec. 13, 2012) [hereinafter *Merkley*], *available at* http://www.merkley.senate .gov/newsroom/press/release?id=42a606e4-7c45-42ed-8348-c77c508f9281 (reprinting Oregon Senator Jeff Merkley's open letter to Eric Holder criticizing the U.S. Department of Justice for its no-prosecution policy and demanding explanations). One month after Senator Merkley's letter, twenty-four members of Congress echoed his admonitions in a separate letter to Attorney General Holder. Letter from George Miller, et al., Members of Cong., to Eric Holder, U.S. Att'y Gen. (Jan. 14, 2013), *available at* http://georgemiller.house.gov/sites/georgemiller.house.gov/files/HSBC%20Letter.pdf.

21. *Transcript: Attorney General Eric Holder on 'Too Big to Jail'*, AM. BANKER (Mar. 6, 2013, 3:15 PM), http://www.americanbanker.com/issues/178_45/transcript-attorney-general-eric-holder-on-too-big-to-jail-1057295-1.html; *see also* Peter Schroeder, *Holder: Big Banks' Size Complicates Prosecution Efforts*, THE HILL (Mar. 6, 2013, 7:00 PM), http://thehill.com/blogs/on-the-money/banking-financial-institutions/286583-holder-big-banks-size-complicates-prosecution-efforts#ixzz2fx mQO2Uk.

22. *See* Memorandum from the Deputy Att'y Gen. on Bringing Criminal Charges Against Corps. to All Component Heads and U.S. Attorneys (June 16, 1999), *available at* http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF; *see also* Jillian Berman, *Eric Holder's 1999 Memo Helped Set The Stage For 'Too Big To Jail'*, HUFFINGTON POST. (June 4, 2013, 5:01 PM), http://www.huffingtonpost.com/2013/06/04/eric-holder-1999-memo_n_ 3384980.html.

23. Danielle Kurtzleben, *Potential Criminal Charges Loom, but JPMorgan May Remain Too Big to Jail*, US NEWS (Nov. 19, 2013), http://www.usnews.com/news/articles/2013/11/19/potential-criminal-charges-loom-but-jpmorgan-may-remain-too-big-to-jail.

24. *See* Peter Eavis & Ben Protess, *Considering the Fairness of JPMorgan's Deal*, N.Y. TIMES, Oct. 22, 2013, at B1, *available at* http://dealbook.nytimes.com/2013/10/21/considering-the-fairness-of-jpmorgans-deal/?_r=0.

government, even if such benefits offend the public's sense of justice. And while the DOJ declared that it "does not release individuals from civil charges, nor does it release JPMorgan or any individuals from potential criminal prosecution,"[25] this statement does not mean much. According to certain studies, major banks normally do not get prosecuted, and banks that do typically receive deferred or non-prosecution agreements, which are settlements that avoid indictment or convictions.[26] Similarly, individuals are also rarely prosecuted, and that helps the firm avoid criminal convictions as well.[27] They believe that this is the result of the government not wanting the major banks to lose their banking licenses, or to hurt their reputation and consequently innocent shareholders.[28]

IF YOU BUILD IT, THEY WILL COME

Letting JPMorgan and other large banks dodge criminal liability has several negative effects. First, it "effectively vitiates the law as written by Congress,"[29] as Congress had no intentions to declare that violations of money laundering, terrorist financing, or fraud would *only* constitute civil violations.

Second, giving the large banks *de facto* special treatment conflicts with the basic constitutional provision of equality under the law,[30] as it essentially requires applying the law in such a way that discriminates in favor of the largest banks. Thus, it contradicts one of the most fundamental American legal principles,[31] reinforced by the Supreme

25. Kurtzleben, *supra* note 23.

26. *Id.*

27. Michael Rothfeld, *Firms Get Penalized, but Many Workers Don't*, WALL ST. J. (Jan 16, 2014, 7:42 PM), http://online.wsj.com/news/articles/SB10001424052702304419104579324962459771186 (this information is based on an analysis of data done by University of Virginia professor of law Brandon Garrett, in his forthcoming book TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS).

28. Kurtzleben, *supra* note 23.

29. *Merkley*, *supra* note 20.

30. Cass R Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 74 SOC. RES. 1, 11 (2007) (arguing that "[c]onstitutional provisions usually protect such rights as . . . equality under the law").

31. This principle is founded on the (i) Equal Protection Clause; (ii) Due Process Clause (containing an equal protection component comparable to the Equal Protection Clause in the Fourteenth Amendment); and (iii) Substantive Due Process doctrine. *See* U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V; Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 841–43 (2003). These clauses and doctrines allow challenges of discrimination resulting from government actions and laws.

Court's equal protection jurisprudence.[32] Accordingly, reflecting upon this practice, a federal judge in New York noted that for judges who take an oath to apply the law equally, the 'too-big-to-jail' excuse is troubling, and disregards the principle of equality under the law.[33]

Third, while the troubling too-big-to-jail policy refers to the prosecution of financial institutions, rather than their senior executives, it appears that the DOJ is also uninterested in prosecuting the individuals who worked at those banks and led their negative behavior.[34] In fact, the DOJ has not pursued any of the large banks' executives that were personally involved in the scandals that took place in the last few years despite the fact that several government agencies clearly stated in reports that in their opinion, fraud and unethical behavior both caused and exacerbated the financial crisis. For example, the Financial Crisis Inquiry Commission, in its final report, "uses variants of the word 'fraud' no fewer than 157 times in describing what led to the crisis, concluding that there was a 'systemic breakdown,' not just in accountability, but also in ethical behavior. . . . [T]he crisis was in material respects the product of intentional fraud."[35]

Finally, making TBTF banks pay large fines in lieu of being prosecuted for their illegal actions is also problematic because it creates negative incentives for large banks in the contexts of (i) desired ethical standards

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32. Although many have assumed, including the Supreme Court in historic cases such as Palmer v. Thompson, 403 U.S. 217, 224–25 (1971) (motive irrelevant where swimming pool closings affect races equally) and Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218 (1964) (shutting down all public schools in wake of desegregation order without intent evaluation), that action that carries the effect of discrimination violates principles of equality, the Court later narrowed the Constitution's guarantee of equality under the law, ruling that intent was the standard. *See* Brando Simeo Starkey, *A Failure of the Fourth Amendment & Equal Protection's Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies*, 18 MICH. J. RACE & L. 131 (2012). The intent doctrine took full shape in Washington v. Davis, 426 U.S. 229 (1976) and Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977). Accordingly, courts examine purposefulness and intent to discriminate rather than merely disproportionate impact upon a certain group. And intent is most easily proven where discrimination takes the form of a classification on the face of a statute or rule. However, the intent doctrine may not apply here, nor should it narrow equal protection principles, because Attorney General Holder's comments make clear that the government's failure to prosecute the biggest banks is intentional, purposeful, and applicable only to a subset of financial institutions.

33. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), *available at* http://www.nybooks.com/articles/ archives/2014/jan/09/ financial-crisis-why-no-executive-prosecutions/?pagination=false. Judge Rakoff is a United States District Judge for the Southern District of New York.

34. "[N]ot a single high-level executive has been successfully prosecuted in connection with the recent financial crisis, and given the fact that most of the relevant criminal provisions are governed by a five-year statute of limitations, it appears likely that none will be." *Id.*

35. *Id.*

and business-doing norms in the financial markets; (ii) encouraging criminal behavior by guaranteeing a "carrot"—it is worth the banks' while to engage in criminal behavior because even if a fine is higher than the criminally-obtained profit, which is usually not the case, the fine can be paid for from the fruits of additional crimes committed in the future;[36] and (iii) encouraging criminal behavior by eliminating any potential "stick"—ensuring large banks that the only thing they have to lose is money.[37]

WHAT'S NEXT?

Concerned with this too-big-to-jail policy, legislatures have recently attempted to introduce bills that would bolster U.S. anti-money laundering laws, close loopholes, support the flow of information, and if nothing else, give financial regulators greater civil powers to hold senior executives at large banks accountable for misconduct happening on their watch.[38]

In addition, as suggested by a U.S. district judge, the government can and should criminally charge executives in TBTF banks because, despite Attorney General Holder's concern about the economic reverberations of prosecuting TBTF banks, those banks would not collapse if one or more of their high level executives were prosecuted, as opposed to the institutions themselves.[39] For example, concerns were raised in the U.S. over whether criminally prosecuting HSBC, the London-based bank that was involved in money laundering, would lead to its collapse and damage the financial system. Independently of how the government treats HSBC as an institution, it can and should charge its senior executives that made culpable decisions regarding the money laundering.[40] Moreover, liability should stand on the well-established "willful blindness" or "conscious

36. John Titus, *How Obama Surrendered Sovereignty to The Criminal Banking Cartel*, DAILY BAIL (Apr. 24, 2013, 5:33 PM), http://dailybail.com/home/how-obama-surrendered-sovereignty-to-the-criminal-banking-ca.html ("[Deferred prosecution] looks very much like a green light for big banks to commit crimes with wild abandon while pretending that fines levied in lieu of prosecution (a) are something other than a small tax paid by the banks doing business as criminal enterprises, (b) cannot simply be paid for from the fruit of additional crimes in the future, and thus (c) do not guarantee more crime.").

37. "When prosecutors choose not to prosecute to the full extent of the law in a case as egregious as this, the law itself is diminished. The deterrence that comes from the threat of criminal prosecution is weakened, if not lost." Editorial, *Too Big to Indict*, Dec. 12, 2012, N.Y. TIMES, at A38, *available at* http://www.nytimes.com/2012/12/12/opinion/hsbc-too-big-to-indict.html?_r=2&ee.

38. *See, e.g.*, Press Release, Comm. on Fin. Svcs.—Democrats, *Leading House Democrats Introduce Bills to Deter Money Laundering And Hold Executives Responsible* (Oct. 24, 2013), *available at* http://democrats.financialservices.house.gov/press/PRArticle.aspx?NewsID=1597.

39. Rakoff, *supra* note 33.

40. Titus, *supra* note 36.

disregard" doctrine, which has been used to infer that top executives had knowledge of the dubious nature of the activities that their institutions were involved in.[41] The Supreme Court has weighed in on this idea, and has recently concluded that

> [t]he doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances.[42]

If the DOJ refuses to prosecute large financial institutions, it can still prosecute their executives, and must if the federal government is serious about preventing another financial crisis. The ambiguous threat of economic harm resulting from prosecution is not applicable to prosecuting individuals, and the prospect of protracted litigation is no justification for failure to protect consumers from shouldering the banking industry's criminal activity.

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41. *Id.*
42. *See* Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2068–69 (2011).