

**TOO BIG TO PROSECUTE:
COLLATERAL CONSEQUENCES,
SYSTEMIC INSTITUTIONS
AND THE RULE OF LAW**

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Introduction

“Necessity is the plea for every infringement of human freedom.”¹
—William Pitt

The failure to prosecute systemic institutions² by the Department of Justice (“DOJ”) after the financial crisis of 2008 has been explained as a policy of necessity for fear of the “collateral consequence” of economic harm.³ This policy, in turn, has been criticized as undermining the rule of law.⁴ However, both the popular press and academic press have failed to explain how the policy of collateral consequences undermines the rule of law. This Article is intended to fill that gap.

The perception that something was awry with the legal system came to light after the financial crisis of 2008. Although the DOJ had, as of 2013, filed nearly 10,000 financial fraud cases in a three year period,⁵ no systemic institution or senior executive from a systemic institution has been criminally prosecuted as a result of criminal activity stemming from the financial crisis of 2008.⁶ This failure to

¹ BARLETT’S FAMILIAR QUOTATIONS 381 (John Bartlett & Justin Kaplan eds., 17th ed. 2002) (quoting William Pitt, Speech in the House of Commons (Nov. 18, 1793)) (opposing the introduction of a regulating bill presented as necessary to save another systemic institution—the British East India Company).

² For purposes of this article, systemic institutions are large, complex institutions whose size contributes to the probability that there will be deemed substantial consequences to innocent third parties if a prosecutor decides to prosecute. See 12 C.F.R. pt. 1310 app. A § II (2014). For a more detailed description of the characteristics of systemic financial institutions, see *infra* note 42.

³ See, e.g., DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.1000.B (2008), available at <http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>, archived at <http://perma.cc/4G9B-RDUW>; *Who Is Too Big to Fail: Are Large Financial Institutions Immune From Federal Prosecution?: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 113th Cong. 6 (2013) [hereinafter *Who Is Too Big to Fail*] (statement of Mythili Raman, Acting Assistant Att’y Gen., Criminal Division, Department of Justice).

⁴ See *infra* note 15-16 and accompanying text.

⁵ *Who Is Too Big to Fail*, *supra* note 3, at 5 (statement of Mythili Raman, Acting Assistant Att’y Gen., Criminal Division, U.S. Department of Justice).

⁶ *Id.* at 6; Letter from Peter J. Kadzik, Principal Deputy Assistant Att’y Gen., Dep’t of Justice, to Patrick McHenry, Chairman, Subcomm. on Oversight & Investigation of the House Comm. on Fin. Servs. (May 16, 2013), *reprinted in*

prosecute has continued post-financial crisis, including for criminal activity such as money laundering for the benefit of drug cartels and terrorist organizations.⁷ While systemic institutions have paid significant fines for criminal activity through a settlement process known as Deferred Prosecution Agreements (“DPA”) with no admission of guilt,⁸ non-systemic institutions and their senior executives seem to be treated differently. For example, while G&A Check Cashing, a non-systemic check cashing company, was charged with criminal penalties, including jail time for top executives, on money laundering charges, the DOJ brought no criminal action against HSBC, a systemic institution, when it was involved in a much larger and more egregious money-laundering scheme.⁹ Instead, the DOJ entered into a DPA with HSBC with no admission of guilt.¹⁰ Various explanations for this failure to prosecute systemic institutions have been given, such as that systemic institutions can out-attorney the U.S. attorneys,¹¹ that the criminal activity

Who Is Too Big to Fail, *supra* note 3, at 81. *See also Who Is Too Big to Fail*, *supra* note 3, at 4, 10-11, 17, 81-83 (listing the individuals and institutions that have been criminally prosecuted by the DOJ). In the chart provided in *Who Is Too Big to Fail*, *supra* note 3, at 83, there are no systemic institutions listed. The senior executives listed were not from systemic institutions. *Id.* Further, the systemic banks listed where non-senior executives were prosecuted are disproportionately foreign rather than domestic entities. *See id.* With respect to the post-crisis LIBOR scandal, criminal charges to date are against individuals and Japanese subsidiaries of UBS and the Royal Bank of Scotland (“RBS”). *Id.* at 6.

⁷ Press release, Dep’t. of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement, (Dec. 11, 2012), <http://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations>, *archived at* <http://perma.cc/R2VH-W5YR>.

⁸ *See, e.g.*, MATT TAIBBI, THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP 323 (2014). DPAs allow the DOJ to subsequently prosecute if conditions specified in the agreement have not been met. *See, e.g.* Cindy A. Schipani, *The Future of the Attorney-Client Privilege in Corporate Criminal Investigations*, 34 DEL. J. CORP. L. 921, 925 (2009). The DOJ may also enter into a Non-Prosecution Agreement (“NPA”) where the option to bring prosecution later is not included. *See, e.g., id.*

⁹ Victoria Finkle, *Are Some Banks ‘Too Big to Jail’?*, AM. BANKER (Jan. 22, 2013, 12:48 PM), http://www.americanbanker.com/issues/178_15/are-some-banks-too-big-to-jail-1056033-1.html?zkPrintable=1&nopagination=1.

¹⁰ *Id.*

¹¹ *See* Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE

involving systemic institutions is overly complex,¹² and that what these systemic institutions did was, perhaps, unethical, but not illegal.¹³ However, it became clear in 2012 that the primary reason for the DOJ's failure to prosecute systemic institutions was due to the fear that the collateral consequences would harm the economy.¹⁴

A critical problem with this collateral consequences policy is that it has created a public perception that the legal system is unfair, with real and perceived prosecutorial preferences for corporations with many employees and shareholders and great economic impact. In essence, while the economically weak get prosecuted, the economically powerful do not.¹⁵ It is this public perception that is at the heart of the rule of law issue—a lack of trust in the system due to policies like collateral consequences.¹⁶

L.J. 823, 878-79 (2014).

¹² See Finkle, *supra* note 9.

¹³ See Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, THE NEW YORK REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/>, archived at <http://perma.cc/3B7W-TDFG>; Marty Robins, *Why Have Top Executives Escaped Prosecution?*, THE NEW YORK REV. BOOKS (Apr. 3, 2014), <http://www.nybooks.com/articles/archives/2014/apr/03/why-have-top-executives-escaped-prosecution/>, archived at <http://perma.cc/9WLA-4ZKN>; Preet Bharara, U.S. Att'y, Remarks at SIFMA's Compliance and Legal Society Annual Seminar (Mar. 31, 2014), available at <http://www.justice.gov/usao/nys/pressspeeches/2014/SIFMARemarks2014.php>; archived at <http://perma.cc/6MCX-T322>.

¹⁴ See *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Eric. H. Holder, Jr., Att'y Gen., Department of Justice), available at http://www.americanbanker.com/issues/178_45/transcript-attorney-general-eric-holder-on-too-big-to-jail-1057295-1.html; Lanny A. Breuer, Assistant Att'y Gen., Dep't of Justice, Remarks at the New York City Bar Association (Sept. 13, 2012), available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html>, archived at <http://perma.cc/5KBG-DEH9>.

¹⁵ See *supra* notes 6-10 and accompanying text.

¹⁶ See *Wall Street Fraud and Fiduciary Duties: Can Jail Time Serve as an Adequate Deterrent for Willful Violations?: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 127-29 (2010) (statement of James K. Galbraith, Lloyd M. Bentsen, Jr. Chair in Government/Business Relations, Lyndon B. Johnson School of Public Affairs, University of Texas at Austin); 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, 1322 (2014); see also Letter

Section II of this Article provides some historical context for the term “collateral consequences” and its policies. As explained in detail below, the term collateral consequences has been used to describe the consequences individuals and corporations face if charged with and/or found guilty of a crime. Most people think of criminal consequences in terms of incarceration and/or fines, but the consequences are much more extensive. There are statutory consequences, such as loss of voting privileges, and de facto consequences, such as reputational and emotional harm.¹⁷ The policy of collateral consequences, as implemented by the DOJ, takes such statutory and non-statutory consequences into consideration when exercising prosecutorial discretion to determine whether to prosecute systemic institutions or pursue an alternative course of action such as DPAs. But collateral consequences are not taken into consideration for individuals or non-systemic institutions.¹⁸

Section III examines and defines the rule of law. While many commentators have argued that the DOJ policy of collateral consequences undermines the rule of law, none have explained how this policy undermines the rule of law. Indeed, many academics disagree about the meaning of the rule of law. To overcome some of these definitional disputes, the rule of law is defined here by including the three most commonly accepted principles: (1) no disparate treatment that favors the government and others in positions of power;¹⁹ (2) no

from Senator Jeffrey A. Merkley to Eric Holder, Att’y Gen., Dep’t of Justice (Dec. 13, 2012), *available at* <http://www.merkley.senate.gov/newsroom/press/release/?id=42a606e4-7c45-42ed-8348-c77c508f9281>; *archived at* <http://perma.cc/L6GF-E37B>.

¹⁷ See *infra* text accompanying notes 36-40.

¹⁸ *Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal Prosecution?: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 113th Cong. 33 (2013) (statement of Mythili Raman, Acting Assistant Att’y Gen., Criminal Division, Department of Justice).

¹⁹ See SHAWNA WILSON, FED. JUDICIAL CTR., U.S. RULE OF LAW ASSISTANCE: A GUIDE FOR JUDGES 1 (2011), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/RulLaw11.pdf/\\$file/RulLaw11.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/RulLaw11.pdf/$file/RulLaw11.pdf), *archived at* <http://perma.cc/78HC-A46U>; Jerry Brito, “Agency Threats” and the Rule of Law: An Offer You Can’t Refuse, 37 HARV. J.L. & PUB. POL’Y 553, 567-68 (2014) (quoting FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72-73 (1944) [hereinafter THE ROAD TO SERFDOM]); Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 8 (1997); Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J.

politicization of the law, meaning that the law is “not subject to political bargaining or to the calculus of social interests”;²⁰ and (3) legal certainty so people will know how to conduct their affairs.²¹ As discussed below, the first principle, no disparate treatment, is the primary problem contributing to the lack of trust in political, legal, and financial institutions because of the public perception that the policy of collateral consequences is unfair.²²

Additionally, Section III examines the rule of law through an international perspective. Many systemic institutions have been the beneficiaries of the policy of collateral consequences.²³ However, it has not escaped notice that United States authorities seem to be more focused on foreign systemic institutions regarding investigation and enforcement.²⁴ To the extent foreign systemic institutions are treated differently, this may violate the rule of law and other international norms, such as the principle of national treatment.²⁵ There is an international rule of law that resembles the Anglo-American rule of law tradition; however, some nations apply a rule through law policy.²⁶ This is a goal-oriented, ends-justify-the-means approach, and some commentators claim that this rule through law approach is becoming more prevalent in the United States through policies like collateral consequences.²⁷

In Section IV, the three commonly accepted principles of the rule of law are applied to the policy of collateral consequences. This section discusses the reality and public perception of disparate treatment, politicization, and lack of certainty created by this policy.

INT'L L. & POL. 43, 50-51 (2010); *see also* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 177-78 (10th ed., MacMillan and Co. Ltd., 1965) (1885); F.A. HAYEK, *Lecture IV: The Decline of the Rule of Law*, in THE MARKETS AND OTHER ORDERS 178, 178 (Bruce Caldwell ed. 2014) [hereinafter *Lecture IV*]; JOHN RAWLS, A THEORY OF JUSTICE 208-09 (rev. ed. 1999).

²⁰ RAWLS, *supra* note 19, at 25; *see also* Brito, *supra* note 19, at 567 (2014) (quoting HAYEK, THE ROAD TO SERFDOM, *supra* note 19, at 73); Fallon, *supra* note 19, at 24-25.

²¹ *See* Brito, *supra* note 19, at 567 (2014) (quoting HAYEK, THE ROAD TO SERFDOM, *supra* note 19, at 73); Fallon, *supra* note 19, at 8.

²² *See infra* Part III.A.

²³ *See, e.g., supra* note 6, text accompanying notes 9-10.

²⁴ *See supra* note 6.

²⁵ *See infra* notes 134-41 and accompanying text.

²⁶ *See infra* Section III.E.

²⁷ *See infra* notes 144-49 and accompanying text.

Unfortunately, there is a wealth of evidence indicating a reality as well as public perception that the policy of collateral consequences undermines each of the three commonly accepted rule of law principles. Additionally, this section applies international principles of the rule of law to the policy of collateral consequences and concludes that there is a similar undermining of the rule of law.

The consequences of collateral consequences are examined in Section V. While Section IV comes to the conclusion that the DOJ policy of collateral consequences undermines the rule of law, what does this mean in terms of societal harm, if any? If we accept the DOJ's statement that the collateral consequences of prosecuting systemic institutions could result in harm to the economy, what social harm have we wrought on society by undermining the rule of law? The answer is a lack of trust in political, legal, and financial systems, which, ironically, harms the economy as well.²⁸ We have evidence of these harms, but only the unsubstantiated speculation that the policy of collateral consequences results in less harm.

Finally, Section VI proposes some solutions. We could do nothing and hope that the DOJ's policy is temporary and working. This solution is not practical as we have too much to lose and not enough time to invoke such trust. We could eliminate systemic institutions so the policy of collateral consequences becomes unnecessary. While this has the benefit of secondary gains, such as reinforcement of the free market system, it is unlikely to happen due to political impediments. We could eliminate the collateral consequences policy. This has the benefit of upholding the rule of law as disparate treatment, politicization, and uncertainty are greatly mitigated, but at the expense of properly applied prosecutorial discretion. Finally, we could adopt a universal collateral consequence policy applicable to large and small institutions as well as individuals. This option makes the most sense in terms of prosecutorial discretion and social harms reflected in collateral consequences to individuals as well as small and systemic corporations. It also has the benefit of addressing the United States' embarrassingly high prison population. However, while a policy of universal application of collateral consequences has the potential of reinforcing the rule of law in terms of disparate treatment and politicization, it adds to the problem of uncertainty.

²⁸ See *infra* notes 210-12 and accompanying text.

I. *The Policy of Collateral Consequences*

The concept of collateral consequences has been around for years.²⁹ Generally, it has been understood in terms of repercussions to individuals from a criminal conviction.³⁰ In the individual context, prosecutors, in determining whether to bring criminal charges, do not consider collateral consequences.³¹ However, collateral consequences have recently gained public attention due to the DOJ's policy to consider collateral consequences in exercising its prosecutorial discretion to not prosecute systemic institutions.³² This policy has evolved over the years from a policy where collateral consequences were not considered to a policy that considers collateral consequences in the aftermath of the Enron scandal in 2001 with the prosecution and, subsequent closure of the accounting firm Arthur Andersen in 2002.³³ The job losses from the closure of Arthur Andersen and other economic impact factors created some concern and facilitated the changed policy at the DOJ to consider collateral consequences, but only for systemically important institutions.³⁴

²⁹ See, e.g., Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1320 (2013) (“The [Supreme Court decision acknowledging collateral consequences] was a tremendous triumph for poor criminal defendants, but it was not an innovation; the defense community had been developing the doctrine of collateral consequences and articulating its importance for years.”) (citation omitted).

³⁰ See generally Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002); see also Drinan, *supra* note 29, at 1320.

³¹ See, e.g., *Who Is Too Big to Fail: Are Large Financial Institutions Immune From Federal Prosecution?: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 113th Cong. 7 (2013) (statement of Mythili Raman, Acting Assistant Att’y Gen., Criminal Division, Department of Justice) (explaining that “collateral consequences never enter into the equation” in the prosecution of individuals).

³² See *id.* at 6.

³³ See Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 14-15 (2006).

³⁴ See *id.* (“The indictment had devastating consequences for the firm. With the criminal indictment, Anderson could no longer audit public companies. Twenty-eight thousand people lost their jobs and Arthur Andersen became a shell of its former self. As a result, the Thompson Memo [on consideration of collateral consequences] was (and is) widely seen as changing the DOJ’s

Collateral consequences are the de jure or de facto accompanying repercussion of law enforcement action.³⁵ Until recently, the most common use of the term “collateral consequences” related to de jure accompanying repercussions from a criminal conviction of an individual.³⁶ The de jure consequences may include “loss or restriction of a professional license, ineligibility for public housing and public benefits including welfare benefits and student loans, loss of voting rights, ineligibility for jury duty, ineligibility for federal jobs, and deportation for immigrants, including those who, while not U.S. citizens, hold permanent resident status.”³⁷ The de facto collateral consequences of a decision to prosecute business entities or individuals could include: significant costs; loss of reputation; difficulties in obtaining employment upon release; family problems, including hardship for children of the convicted person; homelessness;³⁸ social

landscape for prosecuting entities. Following Thompson, the use of pre-trial agreements exploded.”) (citations omitted).

³⁵ See James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 390-91 (2006).

³⁶ See *supra* text accompanying note 30.

³⁷ CATHERINE HANSENS ET AL., A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING THE CRIMINALIZATION OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV 57 (2014), available at https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf, archived at <http://perma.cc/WR4K-KVRS>; see also 20 U.S.C. § 1091(r) (2012) (suspending students convicted of the possession or sale of a controlled substance from federal student aid); 42 U.S.C. § 1973gg-6(a)(3)(B), (g) (2012) (allowing for the removal of the right to vote “by reason of criminal conviction”); 7 C.F.R. § 7.19 (2015); 12 C.F.R. § 1209.101 (2015); UNIV. OF MD. SCH. OF LAW, REENTRY OF EX-OFFENDERS CLINIC, A REPORT ON THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN MARYLAND 14-16 (2007), available at http://www.sentencingproject.org/doc/publications/cc_report2007.pdf, archived at <http://perma.cc/56VV-9V3K>. See generally Chin, *supra* note 30.

³⁸ See NAT’L RES. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 260-80 (Jeremy Travis et al. eds., 2014); UNIV. OF MD. SCH. OF LAW, *supra* note 37, at 16-21; Chin, *supra* note 30, at 253-54; Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1671 (2003); Barbara Mulé & Michael Yavinsky, *Saving One’s Home: Collateral Consequences For Innocent Family Members*, 30 N.Y.U. REV. L. & SOC. CHANGE 689, 689 (2006).

stigma; and emotional consequences for individuals.³⁹ The direct consequences would include possible incarceration, fines, and/or probation.⁴⁰ Federal prosecutors do not take collateral consequences into consideration in deciding whether to prosecute individuals.⁴¹ However, following the savings and loan crisis of the 1980's and the Enron scandal in 2001, the DOJ adopted a written policy of taking collateral consequences into consideration in deciding whether to bring criminal charges against systemic institutions.⁴²

³⁹ These are also known as “social consequences.” See, e.g., Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 624 n.1 (2006).

⁴⁰ See, e.g., Chin, *supra* note 30, at 253, 262.

⁴¹ See *supra* note 31 and accompanying text. Although the DOJ claims it does not take collateral consequences into consideration regarding criminal activity by individuals, the Securities and Exchange Commission (“SEC”) apparently has taken the collateral consequences of political fall-out into consideration in a decision not to investigate and, if proper, prosecute an individual who, allegedly, engaged in insider trading. The individual was John Mack who, apparently, obtained insider information about the GE/Heller merger prior to the merger and public disclosure about the merger. Roddy Boyd, *Letter Details Pequot Probes*, N.Y. POST, June 25, 2006, at 31. An attorney at the SEC, Gary J. Aguirre, wanted to investigate but was told not to due to Mr. Mack’s “powerful political connections.” TAIBBI, *supra* note 8, at 327. When Mr. Aguirre protested, he was fired. Fulcrum Inquiry, *SEC Investigators are Themselves Investigated by Whistleblower*, HGEXPERTS.COM, <http://www.hgexperts.com/article.asp?id=5234> (last visited Apr. 16, 2015), archived at <http://perma.cc/2CXN-UBZU>. After the incident became public, the SEC did proceed with the investigation, but by this time the statute of limitations on civil and criminal charges had expired. *Id.* Mr. Aguirre sued the SEC under whistleblowing statutes and settled with the agency. See *id.* The SEC did obtain a settlement with Pequot Capital Management, the party that allegedly obtained the insider information from Mr. Mack. Press Release, Sec & Exch. Comm’n, SEC Charges Pequot Capital Management and CEO Arthur Samberg with Insider Trading (May 27, 2010), available at <https://www.sec.gov/news/press/2010/2010-88.htm>, archived at <http://perma.cc/7YG2-HCWX>. See generally Aguirre v. SEC, 551 F. Supp. 2d 33 (D.D.C. 2008); MINORITY STAFF OF S. COMM. ON FIN., 110TH CONG., THE FIRING OF AN SEC ATTORNEY AND THE INVESTIGATION OF PEQUOT CAPITAL MANAGEMENT (Comm. Print 2007). DPAs originated in the state criminal justice systems for minor charges where prosecution did not make sense. See, e.g., Golumbica & Lichy, *supra* note 16, at 1301.

⁴² See Paul A. Ferillo, *Collateral Consequences of the UBS and RBS LIBOR Settlements*, HARVARD L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar.

The savings and loan crisis was caused by many factors, including economic factors, deregulation, and criminal activity.⁴³ This

12, 2013), <http://corpgov.law.harvard.edu/2013/03/12/collateral-consequences-of-the-ubs-and-rbs-libor-settlements/>, archived at <http://perma.cc/SH9Z-NGJ7>; *supra* note 33 and accompanying text; see also *Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal Prosecution?: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 113th Cong. 48-49 (2013) (statement of Mythili Raman, Acting Assistant Att’y Gen., Criminal Division, Department of Justice); DEP’T OF JUSTICE, *supra* note 3, § 9-28.1000; Editorial, *Too Big to Indict*, N.Y. TIMES, Dec. 12, 2012, at A38; Bharara, *supra* note 13; James M. Cole, Deputy Att’y Gen., Dep’t of Justice, Remarks at the Government Enforcement Institute at the University of Texas School of Law (May 21, 2014), available at <http://www.justice.gov/iso/opa/dag/speeches/2014/dag-speech-140521.html>, archived at <http://perma.cc/E5D9-BKLL>; Lawrence S. Goldman, *Credit Suisse Conviction Does Not Demonstrate Substantial Change in Department of Justice Enforcement*, WHITE COLLAR CRIME PROF BLOG (May 29, 2014), http://lawprofessors.typepad.com/whitecollarcrime_blog/2014/05/credit-suisse-conviction-does-not-demonstrate-substantial-change-in-department-of-justice-enforcement.html, archived at <http://perma.cc/NXN7-MG7Y>; Ted Kaufman, *Why DOJ Deemed Bank Execs Too Big To Jail*, FORBES (July 29, 2013, 9:30 AM), <http://www.forbes.com/sites/tedkaufman/2013/07/29/why-doj-deemed-bank-execs-too-big-to-jail/>.

For purposes of this article, systemic financial service institutions in the United States are defined as those being required to submit to an annual “stress test” conducted by the Federal Reserve (bank holding companies with total consolidated assets equal to or greater than \$50,000,000,000) in accordance with sections 165(a)(1) and (i) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, as they pose a significant risk to the United States financial stability if they fail. 12 U.S.C. § 5365(a)(1), (i) (2012). The systemic financial service institutions subject to this requirement in 2013 were: Ally Financial Inc., American Express Company, Bank of America Corporation, The Bank of New York Mellon Corporation, BB&T Corporation, Capital One Financial Corporation, Citigroup Inc., Fifth Third Bancorp, The Goldman Sachs Group, Inc., JPMorgan Chase & Co., KeyCorp, Morgan Stanley, The PNC Financial Services Group, Inc., Regions Financial Corporation, State Street Corporation, SunTrust Banks, Inc., U.S. Bancorp, and Wells Fargo & Company. *Dodd-Frank Act Stress Test 2013: Supervisory Stress Test Methodology and Results*, <http://www.federalreserve.gov/bankinforeg/stress-tests/appendix-c.htm>, archived at <http://perma.cc/6KUR-3X8W>.

⁴³ See generally Henry N. Pontell & Kitty Calavita, *The Savings and Loan Industry*, 18 CRIME & JUST. 203 (1993); Jan S. Blaising, *Are the Accountants*

resulted in an increase in “white collar” prosecutions as well as new legislation to assist prosecutorial actions.⁴⁴ However, some perceived a focus on criminal conduct of corporations as prosecutorial abuse and harmful to the economy.⁴⁵ The DOJ responded to this criticism in 1999 by issuing a memorandum by then Deputy Attorney General Eric Holder articulating a prosecutorial discretion policy that considered collateral consequences for systemic institutions.⁴⁶ In 2008, the collateral consequences part of the Holder memorandum became a part of the United States Attorneys’ Manual section titled “Principles of Federal Prosecution of Business Organizations.”⁴⁷ The section dealing with collateral consequences states:

9-28.1000 Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases.

Accountable? Auditor Liability in the Savings and Loan Crisis, 25 IND. L. REV. 475 (1991).

⁴⁴ See Harris Weinstein, *Attorney Liability in the Savings and Loan Crisis*, 1993 U. ILL. L. REV. 53, 53 (1993) (stating that in the four years prior to the article there were “over 1000 criminal cases and nearly 2000 civil cases arising from the savings and loan crisis,” which “include[d] more than ninety civil cases brought against lawyers”); see also Mark Rosencrantz, *You Wanna Do What? Attorneys Organizing as Limited Liability Partnerships and Companies: An Economic Analysis*, 19 SEATTLE U. L. REV. 349, 367 n.143 (1996) (quoting Weinstein, *supra*, at 53).

⁴⁵ Cf. Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 805-06 (2013) (discussing this view on the increased prosecution of corporations in the context of Enron and Arthur Andersen).

⁴⁶ Memorandum from Eric H. Holder, Deputy Att’y Gen., Dep’t of Justice, to All Component Heads and U.S. Att’ys (June 16, 1999) [hereinafter Holder Memorandum], available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF>, archived at <http://perma.cc/CK23-E6PX>.

⁴⁷ DEP’T OF JUSTICE, *supra* note 3, § 9-28.1000; see also *Who Is Too Big to Fail*, *supra* note 3, at 6 (“The consideration of collateral consequences on innocent third parties . . . has been required by the U.S. Attorneys’ Manual since 2008. But the basic principles underlying that policy have a much longer history at the [DOJ]. The first Department-wide guidance on this subject was issued in 1999 . . .”).

B. Comment: . . . In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federally funded programs such as health care programs. . . .

. . . [I]n evaluating the relevance of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity.⁴⁸

The Principles of Federal Prosecution of Business Organizations also take into consideration the importance of respect for the law⁴⁹ and public confidence in the system.⁵⁰

But the Holder memorandum in and of itself was not the only cause for the collateral consequences policy and resulting increase in DPAs for systemic institutions. Not long after the Holder memorandum became a part of the federal prosecutors' handbook on considerations

⁴⁸ DEP'T OF JUSTICE, *supra* note 3, § 9-28.1000.

⁴⁹ *Id.*

⁵⁰ *Id.* at § 9-28-100.

for bringing an indictment, the Enron scandal occurred.⁵¹ Enron's well-publicized collapse had its own collateral consequence; the indictment of Enron's accountants, the accounting firm of Arthur Andersen.⁵² Andersen was indicted for obstruction of justice for allegedly shredding documents that may have established that Andersen assisted Enron in fraudulently covering-up its true, shaky, financial position.⁵³ At trial in the United States district court, Andersen lost.⁵⁴ Although it won on appeal to the United States Supreme Court⁵⁵ due to faulty jury instructions, the damage had been done to Andersen's reputation. Andersen closed its doors in 2002 and 28,000 employees in the United States, 88,000 worldwide, lost their jobs.⁵⁶ The DOJ decided not to retry Andersen and, in response to the negative backlash from the Andersen case,⁵⁷ updated the Principles of Federal Prosecution of Business Organizations in a January 20, 2003 memorandum from Deputy Attorney General Larry D. Thompson.⁵⁸ The section on collateral consequences was substantially the same except this memoran-

⁵¹ Richard A. Oppel Jr. & Andrew Ross Sorkin, *Enron Collapses as Suitor Cancels Plans for Merger: Bankruptcy Is Expected*, N.Y. TIMES, Nov. 29, 2001, at A1.

⁵² Golumbica & Lichy, *supra* note 16, at 1306-07; Ferillo, *supra* note 42.

⁵³ Golumbica & Lichy, *supra* note 16, at 1306-07; Ferillo, *supra* note 42.

⁵⁴ *United States v. Arthur Andersen, LLP*, 374 F.3d 281, 281 (5th Cir. 2004) *rev'd*, 544 U.S. 696 (2005); Golumbica & Lichy, *supra* note 16, at 1307.

⁵⁵ *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 708 (2005) (holding that due to flawed jury instruction the conviction could not be upheld); Golumbica & Lichy, *supra* note 16, at 1308.

⁵⁶ Golumbica & Lichy, *supra* note 16, at 1307; Ellis W. Martin, *Deferred Prosecution Agreements: "Too Big to Jail" and the Potential of Judicial Oversight Combined With Congressional Legislation*, 18 N.C. BANKING INST. 457, 463 (2014); Ferillo, *supra* note 42.

⁵⁷ Golumbica & Lichy, *supra* note 16, at 1308; Ferillo, *supra* note 42. *But see* Markoff, *supra* note 45, at 797-98 (asserting that study of large, publicly traded corporations convicted of crime from 2001 to 2010 showed that none went out of business due to the alleged "Andersen effect"). Interestingly, no banks or financial service sector institutions are in the list of those convicted. *Id.* at 819.

⁵⁸ Golumbica & Lichy, *supra* note 16, at 1308; Martin, *supra* note 56, at 465; Memorandum from Larry D. Thompson, Deputy Att'y Gen., Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys (Jan. 20, 2003) [hereinafter Thompson Memorandum], available at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojt_homp.authcheckdam.pdf, archived at <http://perma.cc/JT6E-NJH6>.

dum expressly recognized DPAs as an option for cooperation,⁵⁹ but did not address the importance of public confidence in the system.⁶⁰

Subsequent to the Andersen case, the DOJ changed tactics, concentrating on other options, such as DPAs, rather than insisting on a guilty plea or trial.⁶¹ This approach continued through the 2008 financial crisis due, in part, to the DOJ's concerns about the economic collateral consequences if a systemic bank was criminally prosecuted.⁶² The Principles of Federal Prosecution of Business Organizations were further updated in 2006 (Deputy Attorney General Paul McNulty issued a memorandum in December 2006⁶³) to address an issue raised by a court regarding unconstitutional waivers of attorney-client privileges.⁶⁴ While the section relating to collateral consequences remained substantially the same, the importance of public confidence in the system returned in this memorandum.⁶⁵

The current United States Attorneys' Manual includes the Holder, Thomas, and McNulty memoranda sections on collateral consequences:

9-28.100 Duties of Federal Prosecutors and
Duties of Corporate Leaders

. . . .

. . . Thus, the manner in which we do our job as prosecutors . . . affects public perception of our mission. Federal prosecutors recognize that they must maintain public confidence in the way in which they exercise their charging discretion. . . .

⁵⁹ Thompson Memorandum, *supra* note 58; *see also* Golumbica & Lichy, *supra* note 16, at 1309.

⁶⁰ *See* Thompson Memorandum, *supra* note 58.

⁶¹ Ferillo, *supra* note 42.

⁶² *See* Ferillo, *supra* note 42; Cole, *supra* note 42.

⁶³ Memorandum from Paul J. McNulty, Deputy Att'y Gen., Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys (December 2006) [hereinafter McNulty Memorandum], *available at* http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf, *archived at* <http://perma.cc/MUR2-WH22>.

⁶⁴ *See* United States v. Stein, 435 F.Supp.2d 330, 364 (S.D.N.Y. 2009); Alan I. Raylesberg, *DOJ Revises Guidelines to Limit Demands that Corporations Waive Attorney-Client Privilege or Not Advance Employees' Legal Fees as a Condition of 'Cooperating' with a Government Investigation*, CHADBOURNE & PARKE LLP (Sept. 8, 2008), <http://www.chadbourne.com/clientalerts/2008/dojrevises/>, *archived at* <http://perma.cc/ULB6-DER3>.

⁶⁵ McNulty Memorandum, *supra* note 63.

....

9-28.300 Factors to Be Considered

A. General Principle: . . . In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

....

. . . 7. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution . . .

....

9-28.1000 Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases.

B. Comment: . . . In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federally funded programs such as health care programs. Determining whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, and is a decision that will be made based on the applicable statutes, regulations, and policies.

. . . [I]n evaluating the relevance of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs,

should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity.⁶⁶

Prior to the Holder memorandum, during the time period of 1992 to 1999, there were only twelve prosecutorial DPA type agreements relating to corporate crime.⁶⁷ After the Holder memorandum, between 2000 and 2012, there were 245.⁶⁸

While none of the above mentioned memoranda nor the United States Attorneys' Manual specifically mention economic impact factors as a collateral consequence, the language, including: "disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution"⁶⁹ is sufficiently broad to include such economic impact factors.

There is no dispute that the DOJ has considered potential economic impact factors as a collateral consequence in its determination of whether to prosecute systemic institutions after the financial crisis of 2008.⁷⁰ Further, when considering collateral consequences, and specifically economic impact, the DOJ consults with domestic and foreign regulators and "hears from the companies that are the subjects of the Department's investigations and their counsel regarding potential collateral consequences."⁷¹ Indeed, attorneys for corporations facing

⁶⁶ DEP'T OF JUSTICE, *supra* note 3, § 9-28.000.

⁶⁷ Martin, *supra* note 56, at 461.

⁶⁸ *Id.*

⁶⁹ DEP'T OF JUSTICE, *supra* note 3, § 9-28.300.

⁷⁰ *Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal Prosecution?: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 113th Cong. 3, 6, 33 (2013); Breuer, *supra* note 14; Cole, *supra* note 42; Ferillo, *supra* note 42.

⁷¹ *Who Is Too Big to Fail*, *supra* note 3, at 49; *see also* Bharara, *supra* note 13.

possible criminal charges are very pointed in using collateral consequences and exploiting the fear that ensued post Andersen and the financial crisis in arguing that their corporation may fail and, like Arthur Andersen, take the economy with it.⁷² For example, in a September 2012 speech given by former Assistant Attorney General Lanny Breuer at a New York Bar Association meeting, he stated:

We are frequently on the receiving end of presentations from defense counsel, CEOs, and economists who argue that the collateral consequences of an indictment would be devastating for their client. In my conference room, over the years, I have heard sober predictions that a company or bank might fail if we indict, that innocent employees could lose their jobs, that entire industries may be affected, and even that global markets will feel the effects. Sometimes—though, let me stress, not always—these presentations are compelling. In reaching every charging decision, we must take into account the effect of an indictment on innocent employees and shareholders, just as we must take into account the nature of the crimes committed and the pervasiveness of the misconduct. I personally feel that it's my duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if we indict the corporation. In large multi-national companies, the jobs of tens of thousands of employees can be at stake. And, in some cases, the health of an industry or the markets are a real factor. Those are the kinds of considerations in white collar crime cases that literally keep me up at night, and which must play a role in responsible enforcement.⁷³

At the time of this speech, Mr. Breuer was the Assistant Attorney General who headed the Criminal Division of the DOJ,⁷⁴ which is the

⁷² See Ferillo, *supra* note 42; Breuer, *supra* note 14.

⁷³ Breuer, *supra* note 14.

⁷⁴ See Press Release, Dep't of Justice, Assistant Attorney General Lanny A. Breuer Announces Departure from Department of Justice (Jan. 30, 2013), available at <http://www.justice.gov/opa/pr/assistant-attorney-general-lanny->

division in charge of deciding whether to bring criminal charges against financial institutions relating to, among other things, the financial crisis.⁷⁵ Further, Mr. Breuer's boss at the time, Attorney General Eric Holder, subsequently confirmed Mr. Breuer's sentiments in a statement before the Senate Judiciary Committee:

I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if we do prosecute—if we do bring a criminal charge—it will have a negative impact on the national economy, perhaps even the world economy. I think that is a function of the fact that some of these institutions have become too large.⁷⁶

Mr. Holder later backtracked on this statement in testimony before the House Judiciary Committee, stating, “There is no bank, there is no institution, there is no individual that cannot be prosecuted by the U.S. Department of Justice.”⁷⁷ Despite this “clarification,” the Attorney General's initial statement as well as Assistant Attorney General Breuer's statement indicates that collateral consequences, particularly fear of harm to the economy, has played a role in the decision to not prosecute systemic institutions. Further, the significant increase in DPAs since the policy of collateral consequences was implemented has enhanced a perception that collateral consequences are a significant factor.⁷⁸ As mentioned above, the prosecution of systemic institutions post the 2008 financial crisis has been negligible.⁷⁹

breuer-announces-departure-department-justice, *archived at* <https://perma.cc/5B97-JRJM>.

⁷⁵ *About the Division*, DEP'T OF JUSTICE, <http://www.justice.gov/criminal/about/> (last visited Mar. 12, 2015), *archived at* <http://perma.cc/X54Y-4TK2>.

⁷⁶ *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Eric. H. Holder, Jr., Att'y Gen., Department of Justice), *available at* http://www.americanbanker.com/issues/178_45/transcript-attorney-general-eric-holder-on-too-big-to-jail-1057295-1.html; *see also Who Is Too Big to Fail*, *supra* note 3, at 2.

⁷⁷ *Who Is Too Big to Fail*, *supra* note 3, at 3.

⁷⁸ *See supra* text accompanying notes 67-68.

⁷⁹ *See supra* notes 6-10 and accompanying text; *see also* Ferillo, *supra* note 42 (“The December 2012 settlement with British bank HSBC provided a particularly vivid example of the DOJ's approach. In its settlement papers, HSBC admitted that it had served as a conduit for illegal money laundering

II. *The Rule Of Law*

There are many different definitions for the term “rule of law.”⁸⁰ However, despite this difficulty in attempting to define the term, the plethora of definitions have certain commonly accepted principles.⁸¹ These commonly accepted principles include: (1) no disparate treatment that favors the government and others in positions of power;⁸² (2) no politicization of the law, meaning that the law is “not subject to political bargaining or to the calculus of social interests”;⁸³ and (3) legal certainty so people will know how to conduct their affairs.⁸⁴ All three of these principles are “second order principles” in that they have to do with the implementation of the “first order principles” of law.⁸⁵ For example, a law against fraud is a first order principle of law.⁸⁶ The second order principles, or “rule of law principles,”⁸⁷ would require that the law against fraud be applied equally, in a non-political fashion, and that the people understand the fraud law so they can act accordingly.⁸⁸ Therefore, the rule of law has significant relevance to decisions of whether or not to prosecute,⁸⁹

transactions with foreign drug cartels and sanctioned countries, including Iran. Nonetheless, the DOJ accepted a deferred prosecution without a guilty plea. In press coverage of the HSBC settlement, the U.S. Treasury Department acknowledged that the DOJ had recently asked about the consequences on the broader economy of prosecuting ‘a large financial institution.’ The press speculated that potential collateral consequences had significantly influenced the DOJ’s decision not to charge HSBC.”)

⁸⁰ See, e.g., DICEY, *supra* note 19, at 188-196 (discussing the English rule of law tradition as embodying three conceptions: (1) that no one can be punished except for the “distinct breach of law”; (2) that all are equal under the law; and (3) that the law reigns supreme over arbitrary power); Enrique R. Carrasco, *Autocratic Transitions to Liberalism: A Comparison of Chilean and Russian Structural Adjustment*, 5 *TRANSNAT’L L. & CONTEMP. PROBS.* 99, 114 n.81 (1995).

⁸¹ See Carrasco, *supra* note 80, at 114 n.81.

⁸² See *supra* note 19 and accompanying text.

⁸³ See *supra* note 20 and accompanying text.

⁸⁴ See *supra* note 21 and accompanying text.

⁸⁵ Robert S. Summers, *The Principles of the Rule of Law*, 74 *NOTRE DAME L. REV.* 1691, 1691-93 (1999).

⁸⁶ See *id.*

⁸⁷ *Id.* at 1708-09.

⁸⁸ See *id.* at 1691-93.

⁸⁹ While there are some constitutional limits to such discretion, such as a prohibition on selections on who to prosecute based upon “an unjustifiable

constitutional law, such as equal protection⁹⁰ and due process;⁹¹ procedural rules;⁹² and rules of evidence.⁹³ This section examines the

standard such as race, religion, or other arbitrary classification,” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)), and other equal protection standards, such as a prohibition on vindictive prosecutions, *id.* at 361-62, a finding of such abuse of discretion is rare. *See United States v. Johnson*, 577 F.2d 1304, 1307 (5th Cir. 1978); *Prosecutorial Discretion*, 42 GEO. L.J. ANN. REV. CRIM. PROC. 239, 243 (2013).

⁹⁰ U.S. CONST. amends. V, XIV. The Fifth Amendment (applicable to the Federal government) does not contain an equal protection clause like the Fourteenth Amendment (directed to the states), but it has been held to contain an equal protection component, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and the Court’s analysis is the same under the Fifth Amendment and the Fourteenth Amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

⁹¹ The key to understanding procedural due process and its relationship to the rule of law is to understand the purpose of the phrase “reasonably designed to ascertain the truth.” RAWLS, *supra* note 19, at 210. There is a spectrum from “pure procedural justice” to “imperfect procedural justice” within which reasonable procedural justice will fall. *Id.* at 73-76. And the measure by which we determine if our legal system meets reasonable procedural justice is public perception. Dmitry Bam, *Understanding Caperton: Judicial Disqualification Under the Due Process Clause*, 42 MCGEORGE L. REV. 65, 80 (2010) (quoting *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting)); Paul M. Seby, *Adarand Constructors, Inc. v. Peña: Restoring the Fabric of Equal Protection*, 15 ST. LOUIS U. PUB. L. REV. 51, 72 n.159 (1995). Claims of attainment of pure procedural justice are fatuous but, theoretically, it would be marked by the lack of the endless variety of circumstances and the changing relative positions. RAWLS, *supra* note 19, at 76. At the other end of the spectrum, imperfect procedural justice would take into account a myriad of personal circumstances and information in applying procedural justice resulting in increased opportunities for bias and value opinionated judgments thus undermining certainty and, hence, the rule of law. *Id.* at 74-75.

⁹² The Due Process Clause of the United States Constitution is an example of a second order principle, enforcing the rule of law through procedural safeguards. U.S. CONST., amends. V, XIV. Additional procedural safeguards are found in the United States Constitution Amendment IV (rule against illegal search and seizure) and Amendment VI (relating specifically to criminal prosecutions). U.S. CONST., amends. IV, VI. Finally, rules of evidence may also serve as second order (rule of law) principles. *See Mark A. Drumbl, Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda’s Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 634 (1998) (“[E]xtremely flexible rules of evidence . . . have a tendency to promote

three commonly accepted principles of the rule of law articulated above including disparate treatment, politicization, and certainty.⁹⁴

A. Disparate Treatment

The most consistent principle under the rule of law is that of no disparate treatment; that there should be equal treatment under the law.⁹⁵ Accordingly, second order principles should ensure that first order principles of law are equally and fairly applied.⁹⁶ Certainly, gross violations of the rule of law due to corruption, such as bribery, would be an example of disparate treatment undermining the rule of law.⁹⁷ Favoritism due to political power and wealth are also examples,⁹⁸ as is “discriminat[ion] against certain groups.”⁹⁹ However, often disparate treatment is rationalized in an attempt to justify the conduct such as the

uncertainty”); Philip Selznick, *American Society and the Rule of Law*, 33 SYRACUSE J. INT’L. L. & COM. 29, 31-32 (2005) (relating the effects of rules of evidence on disparate treatment or politicization in terms of abuse of power).

⁹³ See DICEY, *supra* note 19, at 16; Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1023-24 (2014); Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review*, 58 ADMIN. L. REV. 499, 546 (2006); Cassandra Burke Robertson, *Due Process in the American Identity*, 64 ALA. L. REV. 255, 260 (2012).

⁹⁴ See *supra* text accompanying notes 19-21, 82-84.

⁹⁵ The equal protection clause in the United States Constitution reflects this principle as follows: “The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923) (quoting *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352 (1918)).

⁹⁶ See RAWLS, *supra* note 19, at 3-15; Summers, *supra* note 85, at 1691-93.

⁹⁷ See RAWLS, *supra* note 19, at 206-08; Melissa S. Hung, Comment, *Obstacles to Self-Actualization in Chinese Legal Practice*, 48 Santa Clara L. Rev. 213, 238 (2008).

⁹⁸ See RAWLS, *supra* note 19, at 206-08; Nadia E. Nedzel, *The Rule of Law: Its History and Meaning in Common Law, Civil Law, and Latin American Judicial Systems*, 10 RICH. J. GLOBAL L. & BUS. 57, 62 (2010); Office of the Press Sec’y, *The President’s 2001 International Trade Agenda*, WHITE HOUSE (May 10, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/05/20010511.html>, archived at <http://perma.cc/BT4B-UXAN>.

⁹⁹ RAWLS, *supra* note 19, at 206-07.

economic necessity justification for the collateral consequences policy.¹⁰⁰

One could take a Kantian, categorical imperative, approach to this rule of law principle holding an absolute position against disparate treatment.¹⁰¹ In this sense, the rule of law reflects elements of Kant's categorical imperative,¹⁰² for purposes of this Article, defined as follows: "I ought never to act except in such a way that I could also will that my maxim should become a universal law."¹⁰³ This maxim, stated simply, requires one to consider what the world would be like if everyone acted the same way.¹⁰⁴ For example:

[A] person in financial distress considers whether he should borrow money without repaying it. His maxim would be to engage in the pretence of promising while secretly intending not to repay the loan. Kant argues that this maxim would not lend itself to universalization, because if everyone engaged in fraudulent promising, their inconsistent behavior would destroy the institution of promising. Therefore, absent a consistent universalization of his maxim, there would be no way for the actor to take the (non-existent) law-like nature of his maxim as the determining ground of his action.¹⁰⁵

Accordingly, while certain conduct may result in greater benefits to a few, such conduct would be just only if those who are not so fortunate still experience an improvement to their situation.¹⁰⁶

This universal approach eliminates disparate treatment, but needs to be applied in the context of desirable social goals. This does not imply that the ends justify the means, which does not require a

¹⁰⁰ See *supra* text accompanying note 1.

¹⁰¹ See *infra* note 103 and accompanying text.

¹⁰² RAWLS, *supra* note 19, at 206-07, 222-23.

¹⁰³ IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 15 (Mary Gregor ed. & trans., Cambridge Univ. Press 1997) (1785); see also George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 537, 540 (1987).

¹⁰⁴ See Fletcher, *supra* note 103, at 546-47.

¹⁰⁵ Fletcher, *supra* note 103, at 546 (footnotes omitted); see also L. Scott Smith, *Truth and Justice on the Scaffold: A Critique of "Hired Gun" Advocacy*, 62 TEX. B.J. 1096, 100 (1999).

¹⁰⁶ RAWLS, *supra* note 19, at 13.

universal approach. Rather, it requires establishing desirable conduct (first order principles of law) and then enforcing individual responsibility for that conduct (second order principles of law) in a manner creating universal advantages.

While the universal approach to the rule of law reflects a Kantian categorical imperative with respect to first order principles of law, such a proposition if taken to its logical extreme would impose a rather rigid legal system. As a practical matter, such an absolutist position is not possible given the frailties of human nature.¹⁰⁷ Thus, the main goal should be that the legal system is not viewed by people as arbitrary and capricious.¹⁰⁸

Disparate treatment due to wealth is viewed as arbitrary and capricious and is of particular concern today with respect to the shrinking middle class¹⁰⁹ as well as the failure to prosecute systemic institutions.¹¹⁰ Wealth is not a categorical imperative in terms of equal wealth for all, but the manner in which one acquires or maintains wealth may infringe upon elements of the rule of law demanding equality. Thus, obtaining or maintaining wealth due to disparate treatment of first order principles of law would violate the rule of law.¹¹¹

Disparate wealth seems, to some degree, inevitable¹¹² particularly in a free market economy where innovation and productivity is promoted by economic incentives. Some may be more motivated than others by such incentives. What is important for rule of law purposes is that first order principles of law are applied fairly and equally by the second order rule of law principles so as to ensure equal wealth opportunity to the greatest extent possible.¹¹³ Accordingly, it is critical that the economic incentives are free from artificially created preferences and barriers.¹¹⁴ In this regard, the rule of law and free market principles are in accord. However, where there is a decline of the rule of law there is a negative impact on the free market system and equal economic opportunity as economic activity is directed in a discrimina-

¹⁰⁷ See G.W.F. HEGEL, PHILOSOPHY OF RIGHT 173-74 (S.W. Dyde trans., 2001); Anthony Paul Farley, *The Dream of Interpretation*, 57 U. MIAMI L. REV. 685, 703 (2003).

¹⁰⁸ See DICEY, *supra* note 19, at 175-76.

¹⁰⁹ TAIBBI, *supra* note 8, at 322.

¹¹⁰ See *infra* Part IV.A.

¹¹¹ See RAWLS, *supra* note 19, at 53-54.

¹¹² See *id.*

¹¹³ *Id.*

¹¹⁴ See *id.* at 55.

tory fashion justified on the grounds of necessity.¹¹⁵ But the short-term advantages of expediency often come at the high price of long-term harm to the rule of law, which includes long-term economic harm.¹¹⁶

B. Politicization

The rule of law may not be politicized.¹¹⁷ By that I mean first order principles of law “are not subject to political bargaining or to the calculus of social interests.”¹¹⁸ To some extent, this aspect of the rule of law overlaps disparate treatment where first order principles of law are applied to some classes, but not others.¹¹⁹ The main distinction here is that the disparate treatment in the politicized context is motivated by political objectives such as quid pro quo or harm to some for an alleged greater good.

To ensure the rule of law is not politicized, the legal system must be governed by first order principles of law, not power brokers. To achieve this independence of the political process and other extraneous pressures, integral parts of the legal system, such as the police, prosecutors, and the judiciary, must be independent from the political process.¹²⁰

C. Legal Certainty

Many commentators on the rule of law have opined that a critical rule of law factor is that people should know and understand the laws.¹²¹ This is important with regard to fostering the human dignity of autonomy to plan for one’s future and guiding conduct in accordance

¹¹⁵ HAYEK, *Lecture IV*, *supra* note 19, at 180.

¹¹⁶ *Id.*

¹¹⁷ RAWLS, *supra* note 19, at 3-4.

¹¹⁸ *Id.* at 25.

¹¹⁹ *See supra* text accompanying notes 98-99.

¹²⁰ JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 217-18 (1979); *see also* *THE FEDERALIST NOS. 78-79* (Alexander Hamilton).

¹²¹ *See* HEGEL, *supra* note 107, at 174; RAWLS, *supra* note 19, at 48-49, 208-09, 211; RAZ, *supra* note 120, at 213-29; *THE FEDERALIST NO. 80* (Alexander Hamilton); Jeffrey L. Fisher, *The Exxon Valdez Case and Regularizing Punishment*, 26 *ALASKA L. REV.* 1, 19 (2009); Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damage Awards*, 2012 *BYU L. REV.* 1, 4, 24, 30 (2012).

with societal expectations.¹²² Optimal legal certainty requires that laws be promulgated in such a fashion as to provide people access to them and that the laws are clear so people can understand what is expected of them.¹²³ Uncertainty in the law creates a chaotic, unstable environment, as people do not know what is expected of them and further undermines the rule of law because uncertainty promotes arbitrary power, abuse of discretion, and disparate treatment.¹²⁴

Absolute legal certainty is neither obtainable nor desirable.¹²⁵ It is not obtainable because even if the laws are accessible, people may choose not to take the time to familiarize themselves with the law.¹²⁶ Additionally, people may be unable or incapable of comprehending even clearly promulgated laws or be frustrated by externalities.¹²⁷ Even if these natural or socially created impediments were not much of a factor to the general understanding of the law, because language has inherent ambiguities, some vagueness is inevitable.¹²⁸ Absolute legal certainty is not desirable because there may be certain, limited situations where the exercise of controlled discretion is desirable to achieve important goals.¹²⁹ Accordingly, legal certainty is a matter of degree, with greater certainty desirable to promote the rule of law.¹³⁰

¹²² RAWLS, *supra* note 19, at 48-49, 207-08; RAZ, *supra* note 120, at 221; Fisher, *supra* note 121, at 19; Lens, *supra* note 121, at 4, 24, 30.

¹²³ HEGEL, *supra* note 107, at 174; RAWLS, *supra* note 19, at 209; RAZ, *supra* note 120, at 213-14.

¹²⁴ RAZ, *supra* note 120, at 212-24.

¹²⁵ RAZ, *supra* note 120, at 221-28.

¹²⁶ JEROME FRANK, LAW AND THE MODERN MIND 35 (1930) (“[U]ncertainty is much overrated, since most men act without regard to the legal consequences of their conduct . . .”).

¹²⁷ RAZ, *supra* note 120, at 221. One commentator, Jerome Frank, has further ridiculed the myth that laws can be entirely predictable (the concept of absolute legal certainty) as “the childish desire to have a fixed father-controlled universe, free of chance and error due to human fallibility.” FRANK, *supra* note 126, at 34. His view is, in part, based upon the externality of judges who, in the process of deciding a case, may create law or alter rules in an unexpected manner. *Id.* at 34-35.

¹²⁸ RAZ, *supra* note 120, at 222.

¹²⁹ *See id.* at 222, 228.

¹³⁰ *Id.* at 222.

D. International

As this Article addresses the rule of law issue with regard to collateral consequences being considered for systemic institutions, it is important to address the rule of law in the international context as these systemic institutions have a global presence. The rule of law in the international context has been addressed by the United Nations and is defined as follows:

[The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹³¹

Additionally, the United States Department of State and the U.S. Agency for International Development jointly developed a similar definition for their justice-sector foreign assistance programs:

“Rule of law” is a principle under which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated, and consistent with international human rights principles.¹³²

Both of these definitions of the rule of law in the international context include elements addressing disparate treatment (“equally enforced”), politicization (“all persons, institutions and entities, public

¹³¹ U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Rep. of the Secretary-General*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

¹³² WILSON, *supra* note 19, at 1 (citation omitted).

and private, including the State itself, are accountable to laws,” and “equally enforced”), and certainty (“publicly promulgated”).¹³³ While the politicization and certainty issues may be generally treated in a similar fashion as domestic situations, the main principle to avoid disparate treatment in the international business context is achieved by “national treatment.”¹³⁴

National treatment requires the application of *lex loci protectionis* (the law of the place of protection);¹³⁵ the policy that “a foreign firm that conducts business in a local market should receive national treatment, that is, the foreign firm should be treated no less favorably than a domestic firm operating in like circumstances.”¹³⁶ For example, in the United States, national treatment has been applied to the financial services sector through the International Banking Act of 1978:

Except as otherwise specifically provided in this chapter or in rules, regulations, or orders adopted by the Comptroller under this section, operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location¹³⁷

While national treatment seems to be a rule of law norm in the international context,¹³⁸ including the financial services sector,¹³⁹ and

¹³³ See *supra* text accompanying notes 131-132.

¹³⁴ See Lucy McKinstry, Note, *Regulating a Global Market: The Extraterritorial Challenge of Dodd-Frank's Margin Requirements for Uncleared OTC Derivatives & a Mutual Recognition Solution*, 51 COLUM. J. TRANSNAT'L L. 776, 819 & n.218 (2013) (citation omitted).

¹³⁵ Sharon E. Foster, *Does the First Amendment Restrict Recognition and Enforcement of Foreign Copyright Judgments and Arbitration Awards?*, 10 PACE INT'L L. REV. 361, 396-97 (1998).

¹³⁶ McKinstry, *supra* note 134, at 819 n.218 (citation omitted).

¹³⁷ 12 U.S.C. § 3102(b) (2012).

¹³⁸ McKinstry, *supra* note 134, at 819 n.218 (citation omitted).

¹³⁹ David Zaring, *The President and International Financial Regulation*, 45 CASE W. RES. J. INT'L L. 361, 364 (2012) (“A national treatment paradigm, for example, animates much of the work done in financial regulation. National

has been adopted in United States financial services laws,¹⁴⁰ the European Union has adopted a “comparable treatment” approach for financial service institutions:

Under the comparable treatment requirement, a [foreign] country whose banks participate in the European Union’s banking market must provide European Union banks with “effective market access comparable to that granted by the [Union]” If it appeared to the Commission that a [foreign] country was not giving European Union banks comparable treatment, the Commission could submit proposals to the European Union Council for authority to negotiate with [the foreign] country. Thus, if European Union banks were not allowed in a foreign country to do everything they were allowed to do in the European Union, punitive action was possible.¹⁴¹

Comparable treatment specifically calls for disparate treatment in violation of the rule of law by allowing for punitive action against foreign banks to which domestic banks would not be subject.

E. Rule Through Law

The rule of law tradition articulated above does not have universal acceptance internationally in that some states have a very different rule through law tradition. The Anglo-American rule of law tradition puts the law above government.¹⁴² However, the Continental tradition is the rule through law where the law is an instrument through which the government accomplishes certain goals.¹⁴³

treatment provides that regulators will not treat their own banks, insurance companies, or broker deal[er]s better or differently than the way they treat foreign banks, insurance companies, or broker deal[er]s.”).

¹⁴⁰ See *supra* note 137 and accompanying text.

¹⁴¹ Sharon E. Foster, *Too Big to Fail—Too Small to Compete: Systemic Risk Should Be Addressed Through Antitrust Law but Such a Solution Will Only Work If It Is Applied on an International Basis*, 22 FLA. J. INT’L L. 31, 44 (2010) (citations omitted).

¹⁴² See, e.g., Nedzel, *supra* note 98, at 62.

¹⁴³ *Id.* at 62-63.

The rule through law approach more closely resembles situational ethics than the Kantian categorical imperative as the ends justify the means. In general:

Situational ethics allows for the contingent nature of human relationships, infinite possibilities, “the dynamic nature of interacting events, and the evolving contextual circumstances.” . . .

A situational ethicist is also aware of community standards as reflected in the laws, but may be “willing to compromise those standards if doing so would seem to better serve a greater good or purpose.” . . . It is the “contextual appropriateness” of the act, not whether the act is good or evil, which is the focus for a situational ethicist. Rules are not ignored; however, circumstances allow deviation, provided the greater good is served. Of course, the down side to open-ended situational ethics is ad hoc judgment, a lack of categorical rules which provide certainty, and a sense of a lack of fairness in the legal system.¹⁴⁴

This goal driven, utilitarian approach of the rule through law may have certain efficiencies but it also has the potential to promote certain individuals or groups over others in times of crisis as well as in corrupt systems.¹⁴⁵ Further, it is inconsistent with the international rule of law as articulated by the United Nations as well as the Anglo-American tradition in that it may allow for disparate treatment, politicization, and lack of certainty by being goal driven.¹⁴⁶ Increased discretion, or ad hoc judgments, increases the probability of disparate treatment, politicization, and uncertainty in the legal system.¹⁴⁷

While this may appear to be in contradiction to the international and Anglo-American rule of law system, some have argued that the rule of law has eroded or completely disappeared from Anglo-American jurisprudence.¹⁴⁸ This has resulted in more of a rule through

¹⁴⁴ Sharon E. Foster, *Fire Sale: The Situational Ethics of Antitrust Law in an Economic Crisis*, 78 MISS. L.J. 777, 779-80 (2009) (citations omitted).

¹⁴⁵ See Nedzel, *supra* note 98, at 62-63.

¹⁴⁶ See *id.* at 62-64, 83-84.

¹⁴⁷ See *id.* at 83-84.

¹⁴⁸ *Id.* at 63-64; see also HAYEK, *Lecture IV*, *supra* note 19, at 185-86; Donald L. Beschle, *Kant's Categorical Imperative: An Unspoken Factor in Constitu-*

law system, thus eliminating some of the second order principles of law conflicts between the systems, but at the expense of the rule of law principles.¹⁴⁹

III. The Conflict Between Collateral Consequences and the Rule of Law

The DOJ policy of collateral consequences is a rule through law approach and has resulted in a very public backlash.¹⁵⁰ It has been perceived to be a policy of disparate treatment, politicization of the law, and one that creates uncertainty in the legal system.¹⁵¹ We see evidence of this perception in the media, Congressional actions, academic discourse, and polls.¹⁵² Additionally, in the international context there is a perception of disparate treatment, politicization of the law, and uncertainty with the use of DPAs with guilty pleas for foreign systemic institutions, but not with regard to domestic systemic institutions.¹⁵³

A. Disparate Treatment

The policy of collateral consequences, as articulated by the DOJ, does provide for disparate treatment in that it allows prosecutorial discretion to treat systemic institutions differently from non-systemic institutions and individuals.¹⁵⁴ So the problem of disparate treatment is

tional Rights Balancing, 31 PEPP. L. REV. 949, 963 (2004) (arguing that United States Constitutional law analysis employs a great deal of utilitarianism particularly in its balancing test).

¹⁴⁹ See HAYEK, *Lecture IV*, *supra* note 19, at 185-88.

¹⁵⁰ See *infra* text accompanying notes 166-180.

¹⁵¹ See *infra* Part IV.A-C.

¹⁵² See *infra* text accompanying notes 169-180.

¹⁵³ See *infra* Part IV.D.

¹⁵⁴ See DEP'T OF JUSTICE, *supra* note 3, § 9-28.1000. Similarly, regulators who have the power to revoke a systemic institutions charter are reluctant to do so for similar fears of collateral consequences. Bharara, *supra* note 13 ("That being said, both the [DOJ's] internal guidelines and the responsible exercise of prosecutorial discretion generally require prosecutors to carefully consider the potential collateral consequences of our actions. It may be that a financial institution is blameworthy but its conduct was not so severe and pervasive that it should receive the corporate death penalty. But often the greatest existential threat to the company comes not from the prosecutor who has the power to file an indictment, but from the regulator who has the power to revoke a charter. In this context, it has been my experience that banking regulators with whom the

real in the sense that there is a policy that allows it. The DOJ has not provided specific instances where collateral consequences were dispositive in a decision not to prosecute nor where they were considered; although it has been stated that they were used in rare circumstances indicating that collateral consequences have been an influence.¹⁵⁵ But equally, if not more, important is the public perception of disparate treatment.¹⁵⁶

To be clear, I am discussing here public perceptions, not whether criminal prosecutions were or are viable under the law. Perceptions are important for confidence in and legitimacy of the legal system.¹⁵⁷ Further, given the fact that a great deal of evidence of this criminal activity is not available for public view, the public is left to perceive issues of fairness.¹⁵⁸ Even the non-collateral consequence reasons given for this failure to prosecute have a negative public perception and rule of law ramifications. For example, the statement, “do not prosecute systemic institutions because they can out-attorney the U.S. attorneys,”¹⁵⁹ creates a system where the motivation to settle lies with the U.S. attorneys for fear that they will lose cases brought against systemic institutions. When it comes to people with little or no

revocation decision ultimately rests are often loathe to commit to a decision before or even at the same time as the prosecutor—even when all the relevant facts are known. This uncertainty created by the unwillingness or inability to provide assurances (even when the actual likelihood of revocation is extremely remote) can skew the decision-making process, can effectively tie a prosecutor’s hands, and can potentially let a bad company off the hook.”)

¹⁵⁵ See, e.g., *Who Is Too Big to Fail: Are Large Financial Institutions Immune From Federal Prosecution?: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 113th Cong. 7 (2013) (statement of Mythili Raman, Acting Assistant Att’y Gen., Criminal Division, Department of Justice).

¹⁵⁶ See DEP’T OF JUSTICE, *supra* note 3, § 9-28.100.

¹⁵⁷ See *id.*; TAIBBI, *supra* note 8, at 399; Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, 85 U. COLO. L. REV. 1, 18 (2014); Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 914 (2013) (“Perception of fairness in the law is critical to compliance with the law.”).

¹⁵⁸ Ramirez, *supra* note 157, at 922 (discussing how when prosecutors decide not to prosecute, the public does not have access to all the information that led to that decision, and thus the public is left to perceive whether they believe the decision is fair).

¹⁵⁹ See generally Buell, *supra* note 11 (arguing in favor of DPA’s because of the difficulty of prosecuting systemic institutions).

means to defend their case, the motivation to settle, indeed on not so generous terms, shifts to the defendant.¹⁶⁰ This disparate treatment creates an unfair system based on wealth rather than justice.¹⁶¹ Regarding the “it’s so complex” argument,¹⁶² this not only creates disparate treatment based upon size and complexity, but it also undermines the rule of law since it reduces legal certainty for the victims of the alleged fraud.¹⁶³ Finally, the “what they did was unethical, but not illegal” argument is highly debatable,¹⁶⁴ and has only added to the distrust of the legal system due to the lack of credulity.¹⁶⁵ However, this Article is focused on public perceptions and the effect on the rule of law, not whether there was any criminal conduct.

Certainly, the DOJ recognizes the importance of public perception¹⁶⁶ and the current problem of the public perception of disparate treatment.¹⁶⁷ It would be difficult to miss the strong public perception that systemic institutions and their upper management are immune from prosecution due to disparate treatment. The media, Congressional actions, academic discourse, and polls evidence this perception.¹⁶⁸ It is not so much the fact that some people are discussing this topic; it is the sheer volume and diversity of sources that causes concern.

For example, a Google search of media sources indicates 2,520,000 hits when the search term “‘wall street’ prosecutions” is

¹⁶⁰ See generally Note, *Settling for Less: Applying Law and Economic to Poor People*, 107 HARV. L. REV. 442 (1993).

¹⁶¹ See generally *id.* But see Bharara, *supra* note 13.

¹⁶² See *supra* note 12 and accompanying text.

¹⁶³ See Bharara, *supra* note 13.

¹⁶⁴ See *supra* note 13 and accompanying text.

¹⁶⁵ On the relationship between the rule of law and trust, see *infra* Part V.A.

¹⁶⁶ See McNulty Memorandum, *supra* note 63.

¹⁶⁷ See Preet Bharara, U.S. Att’y, Remarks at ACAMS AML Risk Management Conference (Jan. 27, 2014), available at <http://www.justice.gov/usao/nys/pressspeeches/2014/ACAMSRiskManagementConference2014.php>, archived at <http://perma.cc/5JQA-TLJV> (“[M]any people have asked: whether certain institutions have become simply too big to prosecute, or ‘too big to jail.’”); Bharara, *supra* note 13 (“The public has questioned whether excessive concern over the collateral consequences of taking criminal action—particularly against financial institutions—has led to a conclusion that some institutions are simply too big to prosecute, that some companies are just ‘too big to jail.’”).

¹⁶⁸ See *infra* notes 170-80 and accompanying text.

used.¹⁶⁹ For “too big to jail” there are 263,000 hits.¹⁷⁰ An example of media content regarding this issue includes the following from a *Washington Post* blog post:

So, yeah. Zero Wall Street CEOs are in jail. But we did promise you a list:

1. No one.
2. LOL.
3. Wall Street’s lawyers are amazing.
4. Etc. Etc.

It’s not that federal government tried to prosecute a bunch of them but lost the cases. There were no serious efforts at criminal prosecutions at all.¹⁷¹

Congressional actions include hearings specifically addressing the too-big-to-jail issue.¹⁷² Additionally, some members of Congress

¹⁶⁹ Search done February 5, 2014.

¹⁷⁰ Search done February 5, 2014.

¹⁷¹ Neil Irwin, *This Is a Complete List of Wall Street CEOs Prosecuted For Their Role in the Financial Crisis*, WASH. POST WONKBLOG (Sept. 12, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/12/this-is-a-complete-list-of-wall-street-ceos-prosecuted-for-their-role-in-the-financial-crisis/>, archived at <http://perma.cc/9WQZ-HTL4>; see also Finkle, *supra* note 9 (discussing failure to prosecute systemic banks in money laundering cases).

¹⁷² See, e.g., *Who Is Too Big to Fail: Are Large Financial Institutions Immune From Federal Prosecution?: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 113th Cong. (2013); *Wall Street Reform: Oversight of Financial Stability and Consumer and Investor Protections: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 113th Cong. 29-30 (2013); *Examining Lending Discrimination Practices and Foreclosure Abuses: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 25-27 (2012) (statement of William K. Black, Associate Professor of Economics and Law, University of Missouri-Kansas City School of Law); Letter from Leslie R. Caldwell, Nominee for Assistant Att’y Gen. of the Criminal Div., Dep’t of Justice, to Patrick Leahy, Chairman, Senate Comm. on the Judiciary, and Charles Grassley, Ranking Member, Senate Comm. on the Judiciary (Feb. 24, 2014), available at <http://www.judiciary.senate.gov/imo/media/doc/021114QFRs-Caldwell.pdf>, archived at <http://perma.cc/S3RG-HUQL> (“I am concerned that the Department is avoiding prosecuting institutions or executives at financial institutions for fear that the company is ‘too big to jail.’ I certainly recognize that settlements and non-prosecution agreements have a place in the prosecutor’s playbook. But I find it disturbing how often they are relied on. In my view, this rewards and perpetuates criminal

have expressed concern about the reality of disparate treatment. For example:

We are supposed to be a country of laws. The laws should apply to Wall Street as well as everybody else. So I was stunned when our country's top law enforcement official recently suggested it might be difficult to prosecute financial institutions that commit crimes because it may destabilize the financial system of our country and the world.¹⁷³

As for academic discourse, some argue that there has been disparate treatment for systemic institutions, but that this is starting to change.¹⁷⁴ Others argue that there is no evidence in procedural or substantive law that disparate treatment exists.¹⁷⁵ Some seem to acknowledge disparate treatment, but argue that it is justified by proper consideration of externalities, like economic impact, and that the non-prosecution of bankers from systemic institutions is often explained by lack of evidence or the difficulty of white-collar prosecutions generally.¹⁷⁶ Finally, some argue that systemic institutions are provided with an implied immunity from prosecution.¹⁷⁷ While there are a wide

misconduct, and increases the risk that future criminal behavior will adversely affect financial markets and our fragile economy.”)

¹⁷³ Sen. Bernie Sanders, *Too Big to Jail?*, HUFFINGTON POST, (Mar 28, 2013, 3:17 PM), http://www.huffingtonpost.com/rep-bernie-sanders/too-big-to-jail_b_2973641.html, archived at <http://perma.cc/2F6S-6XK6>.

¹⁷⁴ Golombica & Lichy, *supra* note 16, at 1321-22, 1337 (discussing the negative perception of disparate treatment but also claiming that the Credit Suisse case represents “[t]he [b]eginning of the [e]nd of [m]odern DPAs”).

¹⁷⁵ See generally Buell, *supra* note 11. The Buell article fails to consider collateral consequences. It does discuss “Claims of Failure to Prosecute,” but dismisses such claims by arguing that these bank fraud cases are difficult to prosecute and that there is no evidence of fraud, specifically an “intent to deceive.” *Id.* at 846-54. I disagree with this observation as the LIBOR DPAs as well as the Financial Crisis Inquiry Report do point to such evidence. See *infra* notes 269-71. However, whether this evidence is enough to convict I could not say.

¹⁷⁶ See Gilchrist, *supra* note 157, at 17-18.

¹⁷⁷ See, e.g., Nizan Geslevich Packin, *Breaking Bad? Too-Big-To-Fail Banks Not Guilty as Not Charged*, 91 WASH. U. L. REV. 1089, 1092 (2014); Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving In to Wall Street*, 81 U. CIN. L. REV. 1283, 1429-30 (2013).

variety of opinions about the reality of disparate treatment, all of the academic discussion, either expressly or implicitly, acknowledges the public perception that there is disparate treatment in favor of systemic institutions.

As for polls, there are none as of the date of this Article that directly ask the public if it perceives systemic institutions or their executives as “too big to jail.” However, a 2013 Reuters/Ipsos poll indicates that 53% do not believe Wall Street bankers have been sufficiently prosecuted for their role in the financial crisis.¹⁷⁸ A 2013 Pew Research poll indicates that the public views the government’s economic policies as largely benefitting “large banks and financial institutions (69%), large corporations (67%), and wealthy people (59%).”¹⁷⁹ Additionally, recent polls indicate declining trust and confidence in the legal system.¹⁸⁰ While a more specific polling question would be beneficial, the public perception evidenced by the media, Congressional action, and academic discourse, together with the information provided by the polls, indicate that the collateral consequences policy is not well perceived.

B. Politicization

As defined above, politicization of the law examines if first order principles of law are “subject to political bargaining or to the

¹⁷⁸ Michael Erman, *Five Years after Lehman, Americans Still Angry at Wall Street: Reuters/Ipsos Poll*, REUTERS, (Sept. 15, 2013, 7:05 AM), <http://www.reuters.com/article/2013/09/15/us-wallstreet-crisis-idUSBRE98E06Q20130915>, archived at <http://perma.cc/YG3B-N8X3>.

¹⁷⁹ *Five Years after Market Crash, U.S. Economy Seen as ‘No More Secure’*, PEW RES. CENTER (Sept. 12, 2013), <http://www.people-press.org/2013/09/12/five-years-after-market-crash-u-s-economy-seen-as-no-more-secure/>, archived at <http://perma.cc/7LPK-7TNE>.

¹⁸⁰ *Confidence in Congress and Supreme Court Drops to Lowest Level in Many Years*, HARRIS INTERACTIVE (May 18, 2011), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/780/Default.aspx>, archived at <http://perma.cc/44JF-6BLC> (reporting that 19% of respondents had a great deal of confidence in the courts and the justice system, 54% had only some confidence, 23% had hardly any confidence, and 3% declined to answer); Justin McCarthy, *Americans Losing Confidence in All Branches of U.S. Gov’t*, GALLUP (June 30, 2014), <http://www.gallup.com/poll/171992/americans-losing-confidence-branches-gov.aspx>.

calculus of social interests.”¹⁸¹ In the case of collateral consequences, the stated policy makes clear that first order principles of law are subject to the calculus of social interests. Specifically, the United States Attorneys’ Manual states that prosecutors should consider such social interests as “disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public.”¹⁸² Further, prosecutors are instructed to consider “non-penal sanctions” other government agencies may invoke, such as “potential suspension or debarment from eligibility for government contracts or federally funded programs such as health care programs.”¹⁸³ As for political bargaining, there is no known direct evidence relating to the DOJ, but there is a strong public perception of politicization. Again, when looking at the media, Congressional actions, academic discourse, and polls, we see evidence of this public perception.¹⁸⁴

In the media, as noted above, a Google search of media sources indicates 2,520,000 hits when the search term “‘wall street’ prosecutions” is used and 263,000 for “too big to jail.”¹⁸⁵ Many of these hits include perceptions of politicization of the system. For example, that the government has an incentive to look the other way when it comes to bank fraud due to the revolving door;¹⁸⁶ that some settlements between the DOJ and systemic institutions are the results of “back-door agreements between the Obama administration and Wall Street’s top banks”;¹⁸⁷ that political contributions contribute to the lack of prosecutions;¹⁸⁸ and that the result of the failure to prosecute

¹⁸¹ See *supra* notes 20, 83, 118 and accompanying text.

¹⁸² See *supra* note 66 and accompanying text.

¹⁸³ See *supra* note 66 and accompanying text.

¹⁸⁴ See *infra* notes 185-96 and accompanying text.

¹⁸⁵ See *supra* notes 169-70 and accompanying text.

¹⁸⁶ See David Cay Johnston, *Too Big to Jail*, NEWSWEEK (Apr. 16, 2014, 12:54 PM), <http://www.newsweek.com/2014/04/25/too-big-jail-248153.html>, archived at <http://perma.cc/K4YF-CUEP>.

¹⁸⁷ Gabriel Black, *Mortgage Fraud: Too Big to Jail—Bank of America’s Sweetheart Settlement with US Department of Justice*, GLOBAL RESEARCH (Aug. 22, 2014), <http://www.globalresearch.ca/mortgage-fraud-too-big-to-jail-bank-of-americas-sweetheart-settlement-with-us-department-of-justice/5396982>, archived at <http://perma.cc/D4VQ-4HJW>.

¹⁸⁸ David Sirota, *Big Connection Between Campaign Contributions and Lack of SEC Prosecutions: Study*, INT’L BUS. TIMES (Aug. 11, 2014, 12:55 PM), <http://www.ibtimes.com/big-connection-between-campaign-contributions-lack-sec-prosecutions-study-1654062>, archived at <http://perma.cc/AW4S->

is a public perception that the big banks and their leaders will never have to answer fully for the crisis. The shameless pursuit of Wall Street campaign donations by both political parties strengthens this perception, and further undermines confidence in the rule of law.¹⁸⁹

With regard to Congressional actions, it is understandably difficult to find evidence of Congress' perception that first order principles of law are subject to political bargaining as this would require an acknowledgement of potential legal and ethical violations. Still, some in Congress have acknowledged that the public's perception is that Wall Street has too much influence over Congress.¹⁹⁰ As for first order principles of law being subject to the calculus of social interests, there are numerous instances where Congress and specific members of Congress have expressed concern that the lack of prosecutions of systemic institutions and high ranking executives of systemic

3HD3 (“[F]irms that increased their PAC contributions by \$1 million over five years ended up halving their probability of being prosecuted.”)

¹⁸⁹ Editorial, *No Crime, No Punishment*, N.Y. TIMES, Aug. 26, 2012, at SR10.

¹⁹⁰ See 160 Cong. Rec. S3825 (daily ed. June 19, 2014); 159 Cong. Rec. S5661 (daily ed. July 11, 2013); Press Release, Congressman Peter DeFazio, House Passes DeFazio Amendment to Rein In Wall Street Influence on Financial Regulation (July 22, 2011), available at <http://defazio.house.gov/media-center/press-releases/house-passes-defazio-amendment-to-rein-in-wall-street-influence-on>, archived at <http://perma.cc/8Y6S-79BA> (“The revolving door between Washington and Wall Street has been described by the Washington Post as ‘spinning at a dizzying pace’ It is no surprise that the New York Times dubbed Goldman Sachs ‘Government Sachs’ for all of the employees who bounce back and forth between the Capitol and its Manhattan office tower. [This] amendment simply eliminates potential conflict of interest for voting members of the Financial Stability Oversight Council (FSOC) who have spun through that revolving door.”); Press Release, Senator Jeff Merkley, Merkley Blasts “Too Big to Jail” Policy for Lawbreaking Banks (Dec. 13, 2012), available at <http://www.merkley.senate.gov/news/press-releases/merkley-blasts-too-big-to-jail-policy-for-lawbreaking-banks>, archived at <http://perma.cc/9RHL-M8UL>; Mark Gongloff, *Elizabeth Warren: Banks Get Wrist Slaps While Drug Dealers Get Jail*, HUFFINGTON POST, (Mar. 7, 2013, 5:19 PM), http://www.huffingtonpost.com/2013/03/07/elizabeth-warren-hsbc-money-laundering_n_2830166.html, archived at <http://perma.cc/2RMY-CQQF>.

institutions are due to the social interest of avoiding negative impacts on the economy.¹⁹¹

Academic discourse relating to the politicization issue is not so prolific. Most seems to focus on issues such as the pros and cons of DPAs, including disparate treatment concerns.¹⁹² Those that address politicization issues focus more on the social interests aspect, rather than the political bargaining issue.¹⁹³ However, some commentators suggest political bargaining as a reason for the failure to prosecute by pointing out circumstantial evidence, such as the adoption of DPAs as the preferred method of dealing with criminal violations by systemic institutions at the height of the financial crisis in the summer of 2008 when systemic institutions feared for their survival,¹⁹⁴ and deliberate avoidance of criminal prosecutions by the DOJ.¹⁹⁵

¹⁹¹ *Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal Prosecution?: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 113th Cong. 6 (2013); Letter from Leslie R. Caldwell, *supra* note 172; Sanders, *supra* note 173.

¹⁹² See, e.g., Golombica & Lichy, *supra* note 16, at 1312-15.

¹⁹³ See *id.*; Don Mayer et al., *Crime and Punishment (or the Lack Thereof) for Financial Fraud in the Subprime Mortgage Meltdown: Reasons and Remedies For Legal and Ethical Lapses*, 51 AM. BUS. L.J. 515, 572 (2014) (fearing that prosecuting systemic financial service institutions would harm already fragile economy); Packin, *supra* note 177, at 1092-94; David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1324-25 (2013) (arguing that prosecutors' preference for DPAs is simply the result of cost-benefit analysis). *But see* Gilchrist, *supra* note 157, at 21-38 (arguing that DPA's are justified, in part, due to social consequences and the unique position of banks in the economy).

¹⁹⁴ See Wilmarth, Jr., *supra* note 177, at 1375-79, 1429.

¹⁹⁵ Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics*, 127 Harv. L. Rev. 1991, 2026-29 (2014) (book review). In discussing Jeff Connaughton's book, *The Payoff: Why Wall Street Always Wins*, Levitin draws readers' attention to Connaughton's statements regarding how the Fraud Enforcement and Recovery Act of 2009 was a failure due to the Senate Appropriations Committee failure to fund enforcement programs; how the DOJ handed off financial fraud to the SEC, which seemed more interested in assessing fines than prosecuting crimes; how senior executives of systemic financial service institutions and the institutions were not prosecuted; and how there has not been a satisfactory explanation for this failure to prosecute. *Id.* This leads Connaughton to conclude that there was no desire to prosecute due to Wall Street influence, which caused political failure. *Id.*

There are no polls directly on point regarding collateral consequences politicizing prosecutions. However, recent polls do indicate that a large majority of the public believes systemic institutions have too much influence over the political system.¹⁹⁶ Considering all of the various sources and the plethora of materials, it is difficult to deny that there is a public perception that the collateral consequences policy has politicized the legal system.

C. Certainty

Laws relating to systemic institutions and, in particular the financial services sector, as well as the structure of systemic institutions, have been described as complex, contributing to the difficulty in prosecuting systemic institutions.¹⁹⁷ For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act is indicative of the uncertainty problem, consisting of over eight hundred pages of unintelligible language, which did little more than require regulatory agencies to promulgate more regulation.¹⁹⁸ While people have access to Dodd-Frank,¹⁹⁹ it was also promulgated in such a fashion that most people would not care to access it given its over eight hundred pages, nor understand it if one was ambitious enough to attempt to read it. This is the buried in transparency problem; make the laws voluminous, complex, and costly to administer to ensure the laws will not be

¹⁹⁶ See, e.g., KARLYN BOWMAN & ANDREW RUGG, AM. ENTER. INST., FIVE YEARS AFTER THE CRASH: WHAT AMERICANS THINK ABOUT WALL STREET, BANKS, BUSINESS, AND FREE ENTERPRISE 9 (2013) (“In a Harris poll from April 2012, 86 percent said that ‘big companies’ had too much power and influence in Washington. [81] percent said that was true of banks, 88 percent of political action committees, and 85 percent of political lobbyists. But only 4 percent gave that response about small businesses. The attitudes about the power and influence of big institutions like corporations and banks were deeply ingrained before the financial crisis, and responses did not change very much after the crash.”).

¹⁹⁷ See Tudor Jones, Comment, *The Fallout of Too Big For Trial: Advocating Control Person Liability*, 44 GOLDEN GATE U. L. REV. 365, 368-69 (2014) (examining rule of law in general and how the difficulty in proving fraud due to complexity of financial products and corporate structure excuse undermines legal certainty).

¹⁹⁸ See generally Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2012) (codified in scattered sections of the U.S.C.).

¹⁹⁹ See *supra* note 123 and accompanying text.

understood and to discourage the public from legal relief in the courts.²⁰⁰ The buried in transparency problem is particularly applicable to laws relating to systemic institutions, and the uncertainty problem is further exacerbated by the policy of collateral consequences by increasing prosecutorial discretion.

Prosecutorial discretion, the decision of who to charge and the scope of the criminal charges, has been given broad deference by the United States Supreme Court.²⁰¹ This is partly due to separation of power concerns between the executive and judicial branches,²⁰² as well as the concern that the judiciary is ill-equipped to second-guess prosecutorial decisions.²⁰³ There are some constitutional limits to such discretion under the Equal Protection clause of the United States Constitution, but the courts will apply the rational basis test²⁰⁴ and prosecutorial discretion is presumed to have a rational basis due to the Court's concern that subjecting prosecutors to such oversight may "chill law enforcement" and "undermine prosecutorial effective-

²⁰⁰ See ELIZABETH WARREN, *A FIGHTING CHANCE* 59-60, 80 (2014) (reporting examples of the problem in bankruptcy laws). Another example is the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2012) (codified in scattered sections of the U.S.C.), which is 906 pages long.

²⁰¹ *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Heckler v. Chancy*, 470 U.S. 821, 832 (1985); *Wayte v. United States*, 470 U.S. 598, 607-08 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

²⁰² *Armstrong*, 517 U.S. at 464; *Heckler*, 470 U.S. at 832; *Bordenkircher*, 434 U.S. at 364.

²⁰³ *Wayte*, 470 U.S. at 607-08 ("This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.")

²⁰⁴ *Heller v. Doe*, 509 U.S. 312, 319-320 (1993) (holding that while prosecutorial discretion may result in disparate treatment, there would be no Equal Protection violation under the rational basis test if there is found to be "a rational relationship between the disparity of treatment and some legitimate governmental purpose.").

ness.”²⁰⁵ Additionally, wide latitude is generally allowed under the Equal Protection Clause for economic policy,²⁰⁶ which one could call the policy of collateral consequences based upon the fear of economic harm. Theoretically, a decision on who to prosecute based upon “an unjustifiable standard such as race, religion, or other arbitrary classification”²⁰⁷ and vindictive prosecutions,²⁰⁸ would be an abuse of discretion and violate the Constitution. Realistically, a finding of such abuse of discretion is rare.²⁰⁹

Given the limited review of prosecutorial discretion, the policy of collateral consequences as applied to systemic institutions is highly questionable as it has increased prosecutorial discretion, decreased legal certainty and, hence, undermined the rule of law. This policy has contributed to the lack of certainty and trust in the political, legal, and financial systems, because there is little certainty that the laws will be enforced.²¹⁰ This lack of trust, real or perceived, is critical as recognized by the DOJ itself in its United States Attorneys’ Manual at section 9-28.100²¹¹ and recent court decisions suggesting some oversight of DPAs may be warranted.²¹²

²⁰⁵ *Wayte*, 470 U.S. at 607

²⁰⁶ *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993).

²⁰⁷ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985); *Bordenkircher*, 434 U.S. at 364 (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

²⁰⁸ *Prosecutorial Discretion*, 42 GEO. L.J. ANN. REV. CRIM. PROC. 239, 243 (2013).

²⁰⁹ See *United States v. Johnson*, 577 F.2d 1304, 1307 (5th Cir. 1978) (“[I]n the rare situation in which the decision to prosecute is so abusive as to encroach on constitutionally protected rights, the judiciary must protection against unconstitutional deprivations.”).

²¹⁰ See *Lack of Trust—Caused by Institutional Corruption—Is Killing the Economy*, WASHINGTON’S BLOG (May 4, 2012), <http://www.washingtonsblog.com/2012/05/trust.html>, archived at <http://perma.cc/RM2Y-SM36>; *supra* note 124 and accompanying text.

²¹¹ DEP’T OF JUSTICE, *supra* note 3, § 9-28.100.

²¹² In *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at *6-7 (E.D.N.Y. July 1, 2013), Judge Gleeson suggested some review may be warranted:

Nevertheless, it is easy to imagine circumstances in which a deferred prosecution agreement, or the implementation of such an agreement, so transgresses the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court. For example, the DPA, like all such agreements, requires HSBC to “continue to cooperate fully

D. International Context

Evidently sensitive to the accusations of failure to prosecute systemic institutions, the DOJ has recently announced several DPAs where there were guilty pleas.²¹³ However, only foreign banks, primarily their subsidiaries, have been sacrificed and only after steps were taken to mitigate any regulatory collateral consequences. On December 19, 2012, the Japanese subsidiary of UBS, a Swiss systemic financial service institution, pled guilty to wire fraud in relation to the LIBOR interest rate fixing scandal.²¹⁴ On February 6, 2013, the Japanese subsidiary of the Royal Bank of Scotland, a British systemic financial

with the [government] in any and all investigations.” . . . Recent history is replete with instances where the requirements of such cooperation have been alleged and/or held to violate a company’s attorney-client privilege and work product protections or its employees’ Fifth or Sixth Amendment rights. The DPA also contemplates, in the event of a breach by HSBC, an explanation and remedial action, which the government will consider in determining whether to prosecute the pending charges and/or bring new ones. . . . What if, for example, the “remediation” is an offer to fund an endowed chair at the United States Attorney’s alma mater? Or consider a situation where the current monitor needs to be replaced. . . . What if the replacement’s only qualification for the position is that he or she is an intimate acquaintance of the prosecutor proposing the appointment? . . . I do not intend to catalog all of the possible situations that might implicate the Court’s supervisory power in this case. I couldn’t even if I wanted to; the exercise would amount to looking through a glass, darkly, at five years of potential future developments in the case. What I can say with certainty is that by placing the DPA on the Court’s radar screen in the form of a pending criminal matter, the parties have submitted to far more judicial authority than they claim exists.

²¹³ See *infra* text accompanying notes 214-218.

²¹⁴ Ferillo, *supra* note 42. Prosecution of a subsidiary rather than the parent corporation due to collateral consequences considerations is not limited to systemic financial service corporations. For example, the DOJ accepted a guilty plea from a subsidiary of the pharmaceutical company GlaxoSmithKline “for, among other things, unlawful promotion of prescription drugs for off-label uses” to protect the parent “from possible debarment from Medicare and other government programs.” *Id.*

service institution, pled guilty to wire fraud in relation to the LIBOR interest rate fixing scandal.²¹⁵ On May 19, 2014, the DOJ obtained a settlement with a guilty plea involving Credit Suisse, a Swiss systemic financial service institution accused of criminally violating U.S. tax laws.²¹⁶ The settlement with Credit Suisse included regulatory waivers of collateral consequences so Credit Suisse would be able to continue to do business in the United States.²¹⁷ On June 27, 2014, the DOJ and BNP Paribas S.A., a French systemic financial service institution, entered into a plea agreement where BNP Paribas pled guilty to criminal charges in violation of U.S. sanctions laws, including transactions totaling at least \$4.3 billion that benefitted Sudan, Iran, and Cuba.²¹⁸ Sentencing negotiations were conducted with various state and federal regulators to mitigate the collateral consequence of revoking its license to do business in the United States.²¹⁹ As of the date of this Article,

²¹⁵ *Id.*

²¹⁶ Press Release, Dep't of Justice, Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns (May 19, 2014), available at <http://www.justice.gov/opa/pr/credit-suisse-pleads-guilty-conspiracy-aid-and-assist-us-taxpayers-filing-false-returns>, archived at <http://perma.cc/7S3T-6WXV>.

²¹⁷ See *id.*; Peter Eavis, *In Credit Suisse Settlement, a Question of Justice*, N.Y. TIMES DEALBOOK (May 21, 2014, 2:13 PM), <http://dealbook.nytimes.com/2014/05/21/in-credit-suisse-settlement-a-question-of-justice/>, archived at <http://perma.cc/8QWC-HRKN>; Goldman, *supra* note 42; Jessica Silver-Greenberg & Ben Protess, *In Tax Case, Credit Suisse Is Denied Milder Penalty*, N.Y. TIMES DEALBOOK (May 19, 2014, 8:59 PM), http://dealbook.nytimes.com/2014/05/19/feeling-the-force-of-the-law/?_r=0, archived at <http://perma.cc/WJ8T-DZCB>.

²¹⁸ Press Release, 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), available at <http://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial>, archived at <http://perma.cc/QQU8-A5ZT>.

²¹⁹ See Dep't of Justice, Plea Agreement Re: United States v. BNP Paribas S.A. (June 27, 2014), available at <http://www.justice.gov/opa/bnp-paribas.html>, archived at <http://perma.cc/9L2G-V9A2>; Press Release, N.Y. Dep't of Fin. Servs., Cuomo Administration Announces BNP Paribas to Pay \$8.9 Billion, Including \$2.24 Billion to NYDFS, Terminate Senior Executives, Restrict U.S. Dollar Clearing Operations for Violations of Law (June 30, 2014), available at <http://www.dfs.ny.gov/about/press2014/pr1406301.htm>, archived at <http://perma.cc/ZK3K-4SC9>. On May 1, 2015 BNP Paribas received its sentencing. Press Release, Dep't of Justice, BNP Paribas Sentenced for Conspiring to Violate the International Emergency Economic

there have been no DPAs with guilty pleas by United States systemic institutions.²²⁰ Although this is disparate treatment in theory, the reality of this tactic is to obtain the same effect as DNPs with no guilty plea—the avoidance of collateral consequences by back room agreements with regulatory agencies.²²¹

Powers Act and the Trading with the Enemy Act (May 1, 2015), *available at* <http://www.justice.gov/opa/pr/bnp-paribas-sentenced-conspiring-violate-international-emergency-economic-powers-act-and>, *archived at* <http://perma.cc/H2NH-HQY2>. Regulatory punishment was limited to suspension of its U.S. dollar clearing operations through its New York branch and other affiliates for one year for business lines on which the misconduct centered. *Id.*

²²⁰ See *Federal Organizational Prosecution Agreements*, UNIVERSITY OF VA. SCH. OF LAW, http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.su.php (last updated Apr. 21, 2015), *archived at* <http://perma.cc/3XKV-MP4K> (listing all federal prosecution agreements).

²²¹ For example, Charles Keating was the chairman of American Continental Corporation, which purchased Lincoln Savings & Loan and subsequently, infamously failed during the savings and loan debacle in the 1980's. *Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1113 (9th Cir. 1999). Keating was convicted at trial on charges, which included federal charges of racketeering and bank fraud. *Id.* The federal conviction was overturned on appeal because the jury had improperly learned about a prior state court conviction (which was also overturned). *Id.* Keating did ultimately plead guilty to wire fraud and concealment of assets, but was sentenced to time served, and there was no fine. Press Release, Dep't of Justice, Charles Keating Pleads Guilty to Federal Fraud Charges, Four Criminal Convictions Resolve 10-Year-Old Case (Apr. 6, 1999), *available at* <http://web.archive.org/web/19990921172635/>; <http://www.usdoj.gov/usao/cac/pr/072.htm>, *archived at* <http://perma.cc/XC9G-3HCQ>. See also Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 412 n.268 (2003).

In a case involving fraud to cover up a \$600 million loss, executives from AIG were tried but sentencing leniency and bail ultimately resulted in no time served together with a reversal on appeal due to prejudice. *United States v. Ferguson*, 676 F.3d 260 (2d Cir., 2011). The appellate judge ruled there was prejudice regarding the jury being told of acts in such a manner to possibly blame the 2008 financial crisis on the defendants, but the jury decision happened six months before the financial crisis. *Id.* at 275-77. See also *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 708 (2005) (holding that due to flawed jury instruction the conviction could not be upheld); *United States v. Cioffi*, 668 F.Supp.2d 385, 399 (E.D.N.Y. 2009) (granting motion to suppress evidence in Bear Stearns hedge fund case); TAIBBI, *supra* note 8, at 136-39; Zachery Kouwe & Dan Slater, *2 Bear Stearns Fund Leaders Are Acquitted*, N.Y. TIMES, Nov. 11, 2009, at A1. This lack of success in prosecuting large

While foreign systemic financial service institutions have received the benefit of the collateral consequences policy,²²² which would be in accord with the principles of national treatment, it appears as though there is disparate treatment in requiring these foreign systemic institutions, or at least their subsidiaries, to plead guilty while not requiring the same of domestic systemic institutions.²²³ It is, perhaps, too early to draw conclusions and, indeed, there is a dearth of materials on this subject at this point in time. However, if the pattern persists, concerns about disparate treatment, politicization, certainty and, hence, the rule of law will be implicated.

IV. *The Consequences of Collateral Consequences*

This is the Court of Chancery; which has its decaying houses and its blighted lands in every shire; which has its worn-out lunatic in every madhouse, and its dead in every churchyard; which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to monied might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give—who does not often give—the warning, “Suffer

financial institutions also occurred after the Great Depression when the government attempted to prosecute some large banks believed to have contributed to the economic crisis of 1929. *See generally* *United States v. Morgan*, 118 F.Supp. 621 (S.D.N.Y. 1953) (dismissing antitrust action for lack of evidence of a conspiracy or combination).

²²² The DPA for HSBC, a British systemic financial institution, is an example of this. *See* Press release, Dep't. of Justice, *supra* note 7; Ferillo, *supra* note 42 (“The December 2012 settlement with British bank HSBC provided a particularly vivid example of the DOJ's approach. In its settlement papers, HSBC admitted that it had served as a conduit for illegal money laundering transactions with foreign drug cartels and sanctioned countries, including Iran. Nonetheless, the DOJ accepted a deferred prosecution without a guilty plea.”).

²²³ Sheelah Kolhatkar, *U.S. Finally Ready to Charge Banks for Crimes—As Long as They're Non-U.S. Banks*, BLOOMBERG BUS. (Apr. 30, 2014), <http://www.businessweek.com/articles/2014-04-30/u-dot-s-dot-finally-ready-to-charge-banks-for-crimes-as-long-as-theyre-foreign-banks>, archived at <http://perma.cc/9PCA-KF3M>.

any wrong that can be done you rather than come here!”²²⁴

The above quotation from Charles Dickens’ *Bleak House* vividly describes the collateral consequences of undermining the rule of law: a lack of trust in the legal system. In this short quotation we see elements of disparate treatment, politicization, and lack of certainty as discussed in Part III above.²²⁵ This is the consequence of a policy of collateral consequences; by undermining the rule of law, it undermines trust and legitimacy in political, legal, and financial institutions and harms the economy as discussed below.

A. Lack of Trust in the System

The failure to prosecute systemic institutions due to fear of collateral consequences to the economy has created a public perception of unfairness and a lack of trust in the political, legal, and financial systems.²²⁶ This lack of trust undermines the efficacy of the legal system²²⁷ and confidence in the government.²²⁸ This, in turn, is critical to both political and economic stability.²²⁹

The lack of trust in the United States political and financial system is well documented in several polls. In 2011, an NBC/Wall Street Journal poll indicated that 76% of Americans believed that

²²⁴ CHARLES DICKENS, *BLEAK HOUSE* 2 (Doubleday & Co., Inc. 1953) (1853).

²²⁵ See *supra* Part III.

²²⁶ See *Lack of Trust—Caused by Institutional Corruption—Is Killing the Economy*, *supra* note 210.

²²⁷ Gilchrist, *supra* note 157, at 17-18; Press Release, Senator Sherrod Brown, Sens. Brown, Grassley Press Justice Department On “Too Big To Jail” (Jan. 29, 2013), available at <http://www.brown.senate.gov/newsroom/press/release/sens-brown-grassley-press-justice-department-on-too-big-to-jail>, archived at <http://perma.cc/DL5C-UBPZ> (“The nature of these settlements has fostered concerns that ‘too big to fail’ Wall Street banks enjoy a favored status, in statute and in enforcement policy. This perception undermines the public’s confidence in our institutions and in the principal that the law is applied equally in all cases.”)

²²⁸ Ramirez, *supra* note 157, at 871-72 (arguing that the failure to prosecute elites “diminish[es] confidence in government”); Press Release, Senator Sherrod Brown, *supra* note 227.

²²⁹ Regarding political stability see RAWLS, *supra* note 19, at 6 (“Distrust and resentment corrode the ties of civility, and suspicion and hostility tempt men to act in ways they would otherwise avoid.”); Gilchrist, *supra* note 157, at 17-18.

financial and political institutions favored the wealthy.²³⁰ Similarly, there is a decline of public confidence in the judicial system²³¹ as well as the legislative and executive branches of government.²³² This lack of trust has economic repercussions and has been attributed by some as the cause for the slow recovery and continued fragility of the economy.²³³

B. Economic Impact

A critical problem with the policy of collateral consequences is that the lack of trust in political, legal, and financial systems generates harm to the economy.²³⁴ This is ironic as the stated justification for not prosecuting systemic institutions was a concern that the collateral consequence of such prosecutions would be significant economic

²³⁰ Jonathan Weisman, *WSJ/NBC Poll: Most Americans Say U.S. Economy Favors 'Small Portion of the Rich'*, Wall St. J. Washington Wire (Nov. 7, 2011, 5:41 PM), <http://blogs.wsj.com/washwire/2011/11/07/wsjnbc-poll-most-americans-say-u-s-economy-favors-small-portion-of-the-rich/>.

²³¹ Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 451-52 (2014) (“The Harris Poll, which has measured confidence in the judiciary since 2003, shows a decline in the number of people who have a ‘great deal of confidence’ in the courts and the justice system, from 22% in 2005, to 19% in 2011. An ABA report issued in 1997 concluded that the ‘perceived decline of public confidence in federal and state courts is supported by persuasive evidence.’ Law professors and other commentators share the opinion that ‘[p]ublic confidence in the court system has greatly diminished and continues to wane,’ and that ‘[d]iminished public confidence in the judiciary has become one of the most important issues facing American courts.’”).

²³² McCarthy, *supra* note 180.

²³³ See *infra* Part V.B.

²³⁴ *Wall Street Fraud and Fiduciary Duties: Can Jail Time Serve as an Adequate Deterrent for Willful Violations?: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 127-29 (2010) (statement of James K. Galbraith, Lloyd M. Bentsen, Jr. Chair in Government/Business Relations, Lyndon B. Johnson School of Public Affairs, University of Texas at Austin); Ramirez, *supra* note 157, at 872, 910; *Lack of Trust—Caused by Institutional Corruption—Is Killing the Economy*, *supra* note 210; Shahien Nasiripour, *Financial Reform Destined To Fail, Top Federal Reserve Official Says*, HUFFINGTON POST (June 28, 2011, 10:29 AM), http://www.huffingtonpost.com/2011/06/28/dodd-frank-fail-hoenig_n_885900.html, archived at <http://perma.cc/MCT9-7SCF>.

harm.²³⁵ But, as systemic institutions have not been prosecuted, the concern that to do so would cause economic harm is pure speculation,²³⁶ while the concern that the failure to prosecute has caused economic harm does have evidence to support it.

Trust is critical for efficiently expanding commerce, which is necessary for a vibrant economy.²³⁷ Trust reduces transaction costs and high trust societies exhibit better performance and more successful

²³⁵ See *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Eric. H. Holder, Jr., Att’y Gen., Department of Justice), available at http://www.americanbanker.com/issues/178_45/transcript-attorney-general-eric-holder-on-too-big-to-jail-1057295-1.html; Breuer, *supra* note 14.

²³⁶ Some attribute the failure of Lehman Brothers in September 2008 as the cause of the financial crisis or at least a major contributing factor. See, e.g., Rolf H. Weber et al., *Addressing Systemic Risk: Financial Regulatory Design*, 49 TEX. INT’L L.J. 149, 160 (2014); Steven McNamara, *Financial Markets Uncertainty and the Rawlsian Argument for Central Counterparty Clearing of OTC Derivatives*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y, 209, 230 (2014). However, the collapse of Lehman Brothers was merely a result of the financial crisis that started with the collapse of the housing bubble in 2007. See FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT 213-30 (2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>, archived at <http://perma.cc/UCD9-LQP6>. No doubt, there were collateral consequences from the collapse of Lehman Brothers. See *id.* at 339-40. But to attribute the financial crisis to the collapse of Lehman Brothers is not supported by the evidence.

²³⁷ See Christine Lagarde, Managing Dir. Int’l Monetary Fund, *Economic Inclusion and Financial Integrity—an Address to the Conference on Inclusive Capital* (May 27, 2014), available at <http://www.imf.org/external/np/speeches/2014/052714.htm>, archived at <http://perma.cc/QB55-DKZ4> (“One of the main casualties has been trust—in leaders, in institutions, in the free-market system itself. The most recent poll conducted by the Edelman Trust Barometer, for example, showed that less than a fifth of those surveyed believed that governments or business leaders would tell the truth on an important issue. This is a wakeup call. Trust is the lifeblood of the modern business economy. Yet, in a world that is more networked than ever, trust is harder to earn and easier to lose. Or as the Belgians say, ‘la confiance part à cheval et revient à pied’ (‘confidence leaves on a horse and comes back on foot’)); Daniel Hamermesh, *The Economic Benefits of Trust*, FREAKONOMICS (May 9, 2011, 3:03 PM), <http://freakonomics.com/2011/05/09/the-economic-benefits-of-trust/>, archived at <http://perma.cc/6E3R-MUFY>; Gilles Saint-Paul et al., *How to Rebuild Trust*, VOX (Mar. 21, 2010), <http://www.voxeu.org/article/why-financial-regulation-must-also-rebuild-trust>, archived at <http://perma.cc/5H6F-523J>.

development.²³⁸ In societies where institutions are not punished for cheating, low trust and increased poverty are more likely.²³⁹ Trust is also important for financial markets²⁴⁰ and necessary for economic recovery.²⁴¹ For example, Iceland took a different approach to the financial crisis that decimated its economy: it prosecuted those responsible for financial crimes, which increased trust and economic growth.²⁴²

The notion that trust is critical to a vibrant economy is a well-known principle in a free market system, which requires access to

²³⁸ Stephen Knack & Paul J. Zak, *Building Trust: Public Policy, Interpersonal Trust and Economic Development*, 10 SUPREME CT. ECON. REV. 91, 92 (2003); Paul J. Zak & Stephan Knack, *Trust and Growth*, 111 ECON. J. 295, 296-297, 317 (2001); James S. Henry & Laurence J. Kotlikoff, *Restoring Trust in Our Economy*, FORBES (July 21, 2010, 6:00 PM), <http://www.forbes.com/2010/07/18/economy-trust-health-care-opinions-columnists-james-henry-laurence-kotlikoff.html>.

²³⁹ Zak & Knack, *supra* note 238, at 296.

²⁴⁰ See Paola Sapienza & Luigi Zingales, *Anti-Trust America: A Trust Deficit Is Driving Our Economy Down*, CITY JOURNAL (Feb. 27, 2009), <http://www.city-journal.org/2009/eon0227pslz.html>, archived at <http://perma.cc/4JR7-LZJ7>.

²⁴¹ *Wall Street Fraud and Fiduciary Duties: Can Jail Time Serve as an Adequate Deterrent for Willful Violations?: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 129 (2010) (statement of James K. Galbraith, Lloyd M. Bentsen, Jr. Chair in Government/Business Relations, Lyndon B. Johnson School of Public Affairs, University of Texas at Austin) (“Either the legal system must do its work. Or the market system cannot be restored. There must be a thorough, transparent, effective, radical cleaning of the financial sector and also of those public officials who failed the public trust. The financiers must be made to feel, in their bones, the power of the law. And the public, which lives by the law, must see very clearly and unambiguously that this is the case.”); *Hope, Greed and Fear: The Psychology Behind the Financial Crisis*, U. PA. WHARTON SCH. BUS. (Apr. 15, 2009), <http://knowledge.wharton.upenn.edu/article/hope-greed-and-fear-the-psychology-behind-the-financial-crisis/>, archived at <http://perma.cc/A5RB-DYVW>.

²⁴² Alex, *More Icelandic Bankers Arrested*, ICE NEWS (Jan. 20, 2011, 12:33 PM), <http://www.icenews.is/2011/01/20/more-icelandic-bankers-arrested/>, archived at <http://perma.cc/G388-C9NK>; Julia Werdigier, *Iceland Indicts Ex-Executives of Failed Bank*, N.Y. TIMES DEALBOOK (Feb. 23, 2012, 7:16 PM), <http://query.nytimes.com/gst/fullpage.html?res=9C04E3D6103EF930A15751C0A9649D8B63&ref=iceland>.

reliable information.²⁴³ A lack of or misleading information will distort the market and undermine the free market system.²⁴⁴ Indeed, Thomas Hoenig, director of the Federal Deposit Insurance Corporation and former president and chief executive of the Tenth District Federal Reserve Bank in Kansas City, Missouri stated:

I suggest that the problem with SIFIs [systemically important financial institutions] is they are fundamentally inconsistent with capitalism They are inherently destabilizing to global markets and detrimental to world growth. So long as the concept of a SIFI exists, and there are institutions so powerful and considered so important that they require special support and different rules, the future of capitalism is at risk and our market economy is in peril.²⁴⁵

Hoenig's statement reflects the economic reality that systemic institutions require market intervention by the government to exist, thus undermining capitalism and free market principles.²⁴⁶ As with disparate treatment discussed above,²⁴⁷ it is not possible to apply a categorical imperative of absolutely no government intervention in the market, nor is such a state of affairs necessarily desirable. However, some markets are more free than others and the public perception is that we got the balance between no intervention and too much intervention wrong, in favor of too much intervention for systemic institutions.²⁴⁸ We have socialized the markets, at least with regard to systemically important

²⁴³ See, e.g., Hayne E. Leland & David H. Pyle, *Informational Asymmetries, Financial Structure, and Financial Intermediation*, 32 J. FIN. 371, 371 (1977).

²⁴⁴ See *id.*

²⁴⁵ Nasiripour, *supra* note 234. SIFIs have been defined by the Financial Stability Oversight Council as banks with assets over \$50 billion. Dodd-Frank Wall Street Reform and Consumer Protection Act § 115, 12 U.S.C. § 5325 (2012).

²⁴⁶ See David Shay Corbett II, *Free Markets and Government Regulation: The Competing Views of Thomas Woods and George Cooper*, 14 N.C. BANKING INST. 547, 549 (2010) (book review) (defining free markets).

²⁴⁷ See *supra* Part IV.A.

²⁴⁸ See, e.g., *Too Much Government Meddling?* WORLD FIN. (Sept. 5, 2012), <http://www.worldfinance.com/home/special-reports-home/to-intervene-or-not-to-intervene>, archived at <http://perma.cc/58ML-DH4C>.

institutions, while claiming to maintain a free market system.²⁴⁹ We have implemented disparate treatment to prop-up institutions that the free market would have eliminated.²⁵⁰ Not only has the government intervened by bailouts and ongoing surreptitious subsidies for systemic institutions,²⁵¹ but the application of collateral consequences as a policy for systemic institutions is market intervention to the extent it encourages criminal conduct, such as fraud, that affects the quality of information disseminated to the markets.²⁵² This creates informational asymmetries, which harms the markets.²⁵³ But, more importantly, these policies have harmed trust in our political, legal, and financial systems by undermining the rule of law.

V. *Solutions*

There are at least four possible solutions: (1) do nothing; (2) eliminate systemic institutions; (3) eliminate the policy of collateral consequences; or (4) apply a universal collateral consequences policy.

To do nothing requires either an acceptance of the premise that the DOJ is correct in its application of collateral consequences to save the economy or apathy. Assuming the former, one would have to believe that the information the DOJ has received from systemic institutions and their economists is valid and that such failure to prosecute will vanish when the economy is healthy. Public perception does not support the assumption that the information the DOJ has received from systemic institutions and their economists is valid. Indeed, the reality of the situation is that there are too many conflicts of interest to

²⁴⁹ See Niall Ferguson, *There's No Such Thing as Too Big to Fail in a Free Market*, TELEGRAPH (Oct. 5, 2009, 8:23 PM), <http://www.telegraph.co.uk/finance/financialcrisis/6263315/Theres-no-such-thing-as-too-big-to-fail-in-a-free-market.html>.

²⁵⁰ See Corbett II, *supra* note 246, at 552.

²⁵¹ INDEP. COMMUNITY BANKERS OF AM., END TOO-BIG-TO-FAIL 3, 10-11 (2013) (“Because these firms are too big to fail, they court risks that no smaller firm would tolerate and act with impunity. The markets offer them credit at rates that do not reflect their true risk—rates that are subsidized by an implicit taxpayer guarantee. This too-big-to-fail subsidy, valued at \$83 billion annually by two economists with the International Monetary Fund (IMF) and Bloomberg View, creates a competitive imbalance.”).

²⁵² For the assertion that the policy of collateral consequences does encourage criminal conduct, see Ramirez, *supra* note 157, at 872, 921-28.

²⁵³ See Leland & Pyle, *supra* note 243, at 371.

reasonably expect the public to accept such a premise.²⁵⁴ The revolving door between systemic institutions and their regulators is well documented.²⁵⁵ The political contributions flowing from Wall Street to the legislative and executive branches of government is also well documented.²⁵⁶ The information provided to the DOJ in making its decision whether to prosecute or not due to collateral consequences comes, in part, from the systemic institutions under investigation.²⁵⁷ I doubt they would agree that indictment was a good idea. Finally, there is the conflict of interest problem in the economics profession.²⁵⁸ Evidently, this profession does not have ethical rules regarding conflicts of interest, leaving economists free to sell their analysis to the highest bidder.²⁵⁹

Second, we can eliminate systemic institutions, alleviating the concerns that prompted the policy of collateral consequences. This solution also has economic benefits, such as providing a more efficient, free market economy²⁶⁰ and, potentially, restoring trust in some of our political institutions by reducing the flow of cash from Wall Street to Washington D.C. If systemic institutions did not exist, there would be no need to provide subsidies to prop them up and recycle the subsidies in the form of political contributions.²⁶¹ This would enhance free markets and promote competition on a level playing field. Additionally, smaller institutions would be more manageable, thus eliminating the excuse given by senior management that they did not know what was going on regarding criminal activity²⁶² and, possibly reduce such

²⁵⁴ See Levitin, *supra* note 195, at 2023-29.

²⁵⁵ *Id.*; Wilmarth, Jr., *supra* note 177, at 1407-17.

²⁵⁶ Levitin, *supra* note 195, at 2023-29; Wilmarth, Jr., *supra* note 177, at 1363-69.

²⁵⁷ See *Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal Prosecution?: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 113th Cong. 49 (2013); Bharara, *supra* note 13.

²⁵⁸ Lawrence G. Baxter, "Capture" in *Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL'Y 175, 183 (2011).

²⁵⁹ RICHARD A. POSNER, A FAILURE OF CAPITALISM 258-59 (2009); Baxter, *supra* note 258, at 183.

²⁶⁰ See *supra* text accompanying notes 243-253.

²⁶¹ See *supra* notes 250, 256 and accompanying text.

²⁶² See, for example, TREASURY COMMITTEE, FIXING LIBOR: SOME PRELIMINARY FINDINGS, 2012-13, H.C. 481-II, at 9 (U.K.), available at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmtreasy/481/481ii.pdf>,

criminal activity. Fewer DPA agreements coupled with management knowing what is going on would certainly go a long way in deterring criminal activity.²⁶³ While I support this solution as economically efficient and in line with the rule of law, I fear this will not be accomplished until we go through another financial crisis, which, with the current system, is inevitable. Too much has been done to maintain the status quo.²⁶⁴

Of course, some have argued that maintaining the status quo, including systemic institutions, is necessary for international competition as other states still have such institutions,²⁶⁵ which are economically efficient due to economies of scale.²⁶⁶ Unlike the *contra* argument, these assertions are not supported by evidence.²⁶⁷ Some may

archived at <http://perma.cc/448X-TZTT>, in which Robert Diamond, CEO of Barclays from 2010 to 2012, prior to which he was CEO of Barclays Capital, testified that he did not learn about the manipulation of LIBOR rates until July 2012. The LIBOR manipulation had been going on since at least 2005. *Id.* at 3; see also Sharon E. Foster, *LIBOR Manipulation and Antitrust Allegations*, 11 DEPAUL BUS. & COM. L.J. 291, 299 (2013).

²⁶³ See *supra* note 252.

²⁶⁴ See Jeremy C. Kress, *Credit Default Swaps, Clearinghouses, and Systemic Risk: Why Centralized Counterparties Must Have Access to Central Bank Liquidity*, 48 HARV. J. ON LEGIS. 49, 51, 84 (2011); Wilmarth, Jr., *supra* note 177, at 1426.

²⁶⁵ See MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP 34-36 (2007), available at www.nyc.gov/html/om/pdf/ny_report_final.pdf, archived at <http://perma.cc/NYQ6-HVPP>.

²⁶⁶ See Joseph P. Hughes & Loretta J. Mester, *Who Said Large Banks Don't Experience Scale Economies? Evidence from a Risk-Return-Driven Cost Function*, 22 J. FIN. INTERMEDIATION 559, 578-80 (2013) (finding scale economies due to technology as well as too-big-to-fail subsidies); Mark J. Roe, *Structural Corporate Degradation Due to Too-Big-To-Fail Finance*, 162 U. PA. L. REV. 1419, 1436-37 (2014) ("It is possible that the big banks have efficiencies from scale economies and also benefit from substantial too-big-to-fail distortions.").

²⁶⁷ See generally Richard Davies & Belinda Tracey, *Too Big to Be Efficient? The Impact of Implicit Subsidies on Estimates of Scale Economies for Banks*, 46 J. MONEY, CREDIT & BANKING 219 (2014) (arguing that scale economies are affected by too-big-to-fail subsidy, which, if eliminated, results in no scale efficiencies for large banks); John H. Boyd & Amanda Heitz, *The Social Costs and Benefits of Too-Big-to-Fail-Banks: A "Bounding" Exercise* (Feb. 8, 2012) (unpublished manuscript), available at http://casee.asu.edu/upload/tbtf_aer_final_new_title.pdf, archived at <http://perma.cc/B6QC-P8BG> (arguing that

argue that it would be against free market principles to have the government intervene to break-up systemic institutions. Perhaps, but this could be accomplished by free market principles; simply eliminate the subsidies and prosecute the criminals and see what the invisible hand of the market will do.²⁶⁸

Third, we could eliminate the collateral consequences policy. This universal approach has the benefit of eliminating, to the degree possible, disparate treatment and politicization while enhancing certainty, thus enforcing the rule of law. It also has the benefit of enhanced deterrence, which seems to be necessary given the continued egregious conduct by systemic institutions.²⁶⁹ If prosecuting a systemic institution results in its failure, so be it. The market, rather than biased interests, would have spoken. As for the fear of economic free fall, the Iceland experience cited above draws such an outcome into question.²⁷⁰ Additionally, the failure of Lehman Brothers example, cited by suppor-

economies of scale are difficult to estimate in the banking sector but concluding that the social costs of subsidizing large banks outweigh any economies of scale); Robert DeYoung & Chao Jiang, *Economies of Scale and the Economic Role of Banks* (May 2013) (unpublished manuscript), available at http://www.vgsf.ac.at/fileadmin/user_upload/P/DeYoung_and_Jiang_May_22_2013.pdf, archived at <http://perma.cc/94KJ-GZ73> (arguing that economies of scale studies are inconclusive but data appears to indicate some economies of scale for certain products and diseconomies for other products); Hulusi Inanoglu et al., *Analyzing Bank Efficiency: Are “Too-Big-to-Fail” Banks Efficient?* (March 8, 2013) (unpublished manuscript), available at <http://rsickles.blogs.rice.edu/files/2014/03/Inanoglu-et-al.-banking-paper-2013.pdf>, archived at <http://perma.cc/WS8A-3PVG> (arguing that there are no scale efficiencies for large banks and in fact negative scale efficiencies).

²⁶⁸ See *supra* text accompanying note 250.

²⁶⁹ See, e.g., Ferillo, *supra* note 42 (discussing HSBC’s money-laundering for drug cartels and terrorists); Patricia Hurtado, *The London Whale*, BLOOMBERG (Apr. 23, 2015, 12:09 PM), <http://www.bloombergvew.com/quicktake/the-london-whale> JP Morgan and the London Whale, archived at <http://perma.cc/T2J7-AFUN> (discussing JP Morgan’s overvaluing of its portfolio to hide losses); *The Libor Scandal: The Rotten Heart of Finance*, ECONOMIST, July 7, 2012, at 25 (discussing the rigging of LIBOR involving several systemic banks); Kaja Whitehouse, *JPMorgan Forks Over \$50M in ‘Robo-Signing’ Pact with DOJ*, USA TODAY (Mar. 4, 2015 2:01 PM EST), <http://www.usatoday.com/story/money/2015/03/03/jpmorgan-robo-signing-department-justice/24332863/>, archived at <http://perma.cc/GXX4-6Z34> (discussing the practice of robo-signing, which involves a fraudulent signature relating to mortgage foreclosures involving several systemic banks).

²⁷⁰ See *supra* note 242 and accompanying text.

ters of the economic doom theory, is more correlative than causative as the economy was already in crisis mode at the time Lehman Brothers failed.²⁷¹ True, the failure of Lehman Brothers caused some panic and a drop in the stock market, but we will never know if this would have been short term or if it truly caused the crisis to get worse because the government intervened.²⁷² So much for faith in self-correcting markets.

The problem with this universal approach is that it does take away a potentially legitimate prosecutorial option. Additionally, as a practical matter, even without a written collateral consequences policy, it is probable that prosecutors consider collateral consequences, consciously and subconsciously in making their prosecutorial decisions.²⁷³

Recognizing that it is probable that collateral consequences will somehow come into the decision making process, the fourth suggested solution is for a universal collateral consequence policy applicable to large and small institutions as well as individuals. While this may increase abuse of prosecutorial discretion, thus harming deterrence, it does have the benefit of being a supportive policy for the rule of law in that it reduces disparate treatment and politicization. It could, however, reduce certainty in that one is still uncertain how to act depending upon the discretion of the prosecutor.

That said, a universal collateral consequences policy has the benefit of potentially reducing our prison population, especially relating to non-violent crimes.²⁷⁴ Currently, the United States has the largest prison population in the world.²⁷⁵ Is this a prudent, efficient, and desirable state of affairs? Not only does incarceration reduce productivity, but the collateral consequences of incarceration, including unemploy-

²⁷¹ See *supra* note 236.

²⁷² See *supra* note 236.

²⁷³ Note, though, that most studies and scholarship address this unwritten prosecutorial discretion factor in terms of overreaching bias, particularly regarding racial bias against certain racial groups. See generally, e.g., Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512 (2007). The implication of a bias against certain groups is that there is a bias in favor of not prosecuting certain groups. See generally *id.*

²⁷⁴ A significant portion of the United States prison population is incarcerated for non-violent crimes. NAT'L RES. COUNCIL, *supra* note 38, at 38-39, 48-49.

²⁷⁵ *Id.* at 2, 33; *Highest to Lowest—Prison Population Total*, INTERNATIONAL CENTRE FOR PRISON STUDIES http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All, archived at <http://perma.cc/YTA8-W33E> (last visited March 23, 2015) (reporting United States prison population of 2,217,000).

ment, are not productive.²⁷⁶ Families are broken up, lives are ruined, recidivism is rampant,²⁷⁷ and societal costs are exorbitant.²⁷⁸ By applying collateral consequences considerations to small businesses and individuals, many of these social costs and the embarrassingly high prison population may be resolved in support of, rather than at the expense of, the rule of law.

VI. Conclusion

The DOJ's policy of collateral consequences undermines the rule of law. It creates disparate treatment, it politicizes the law, and it creates uncertainty. Indeed, the policy of collateral consequences is a rule through law approach as it utilizes the law for specific goals, in this case allegedly to avoid economic harm.²⁷⁹ But the rule of law cannot be applied like a categorical imperative.²⁸⁰ It is neither possible, nor desirable. Sometimes prosecutorial discretion should be applied in deciding whether the social costs of prosecuting are outweighed by the social costs of collateral consequences in an attempt to aim for the least injustice.²⁸¹ However, collateral consequences should be applied universally, to individuals, small corporations, and systemic institutions as a universal approach is more in accord with the rule of law.

As with many situations in the law, this is a balancing act: if there is a perception that the rule of law is excessively applied so as to ignore collateral consequences and critical social needs, the law

²⁷⁶ See *supra* text accompanying notes 36-40.

²⁷⁷ MATTEW R. DUROSE ET AL., DEP'T OF JUSTICE RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 1 (2014), available at <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>, archived at <http://perma.cc/2A9C-DYVW> ("About two-thirds (67.8%) of released prisoners were arrested for a new crime within 3 years, and three-quarters (76.6%) were arrested within 5 years.").

²⁷⁸ One study estimates that incarceration costs taxpayers \$63.4 billion per year. *The Cost of a Nation of Incarceration*, CBS News (Apr. 23, 2012, 5:15 PM), <http://www.cbsnews.com/news/the-cost-of-a-nation-of-incarceration/>, archived at <http://perma.cc/EBU8-2E98>. This does not include indirect social/economic costs due to collateral consequences for incarcerated individuals, such as unemployment. See NAT'L RES. COUNCIL, *supra* note 38, at 6, 7, 233-39. State budgetary spending from the general fund for corrections is ranked third, behind Medicaid and education. *Id.* at 314.

²⁷⁹ See *supra* Part III.E.

²⁸⁰ See *supra* text accompanying notes 101-108.

²⁸¹ See RAWLS, *supra* note 19, at 213.

becomes barren; if collateral consequences are considered in a disparate fashion so as to create a perception of injustice, the rule of law becomes barren.²⁸² We have experienced both ends of this spectrum with the Arthur Andersen experience creating the first perception²⁸³ and the DOJ policy of collateral consequences creating the second perception.²⁸⁴ It is critical that we get this balance right to restore trust in our political, legal, and financial systems or these institutions will become, if they have not already, Dickens' Court of Chancery.²⁸⁵

²⁸² *See id.* at 96; RAZ, *supra* note 120, at 229.

²⁸³ *See supra* text accompanying notes 52-57, 72-73.

²⁸⁴ *See supra* Part V.

²⁸⁵ *See supra* note 224 and accompanying text.