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YOU THINK YOU'RE UPSET?

Criminologists demand that kingpins be held criminally liable for the financial mess

By Julius (Jay) Wachtel. “White-Collar Criminology and the Wall Street Occupy Movement,” Henry Pontell and William Black’s sharp-tongued missive in the current issue of *The Criminologist*, accuses the criminal justice system of an inexcusable failure to hold top financial executives accountable for the current mess:

The global meltdown of 2008 was influenced by flawed financial policies, law-breaking, greed, irresponsibility, and not an inconsiderable amount of concerted ignorance and outright stupidity...Control fraud [fraud by executives] has played an integral part...In the end control fraud will persist as long as the kleptocratic corporate culture remains entrenched...This [arresting and denigrating Wall Street protesters] stands in stark contrast to the virtual absence of indignation, moral outrage and effective law enforcement that would have stopped those whose real crimes have led many law-abiding citizens around the world into the streets.

Henry and William are in good company. Here’s what [President Obama recently had to say](#):

Too often, we’ve seen Wall Street firms violating major antifraud laws because the penalties are too weak and there’s no price for being a repeat offender. No more. I’ll be calling for legislation that makes those penalties count so that firms don’t see punishment for breaking the law as just the price of doing business.

Well, the barn door’s been open for a while. More than 1,000 savings and loan institutions collapsed during [the S & L crisis of the 1980’s and early 1990’s](#). Then the worst financial calamity since the Great Depression, it cost taxpayers a cool \$124 *billion* to resolve. Studies place much of the blame on risky investment strategies, inadequate regulation and poor oversight, factors that now seem depressingly familiar. Whether crime played a significant role is a matter of debate; the FDIC and many economists said no, while [Pontell and Black said yes](#). Regardless, [the Feds staged a massive law enforcement response](#). According to the *New York Times* 839 persons were ultimately convicted for their roles in the debacle.

Most of those brought to account were relatively low-level employees. But a few top executives also got hammered. Perhaps the best known is [Charles Keating](#). A wealthy banker and real-estate developer, Keating had five U.S. Senators in his pocket. While “The Keating Five” did their best to hold regulators at bay, their generous friend eventually earned ten years in a California prison for selling worthless bonds to ordinary folks. But [his conviction was thrown out](#) before the term was half up. [A Federal appeals court later ruled](#) there was no proof that Keating, who never had personal contact with buyers, knew that the representations made by his sales force were false.

Irate, the Feds then tried and convicted Keating for fraud and racketeering. Once again the conviction was reversed, this time because jurors had taken the state conviction into account. A civil judgment that ordered the septuagenarian to recompense the Government to the tune of \$4.3 billion was also reversed. Knowing that the Feds were determined to bring him down whatever the cost, in 1999 [Keating pled guilty to four counts of fraud](#) in exchange for time served. A parallel case against his son was also dropped. The Justice Department nonetheless declared victory. “What we get out of this is, Keating admits for the first time criminal culpability.”

It’s true, as Pontell and Black point out, that the current crisis [has spawned far fewer prosecutions](#) than the old. But the time is still young, and the FBI says that it has 3,000 investigations underway. In “[Fighting the Wall Street Mob](#)” we looked into the case of Raj Rajaratnam, a hedge fund magnate whose success was all but guaranteed by a steady flow of tips from corporate insiders. Rajaratnam, who pled guilty and got eleven years, was part of a web of collusion involving tipsters, traders, and so-called “research” firms that brought those who knew and those who wished to know together. The most recent target to come out of that case, former Goldman Sachs director [Rajat Gupta](#), is the 56th. Wall Streeter charged with insider trading in the past two years. A remarkable *fifty-one* have been convicted.

What’s really remarkable is that it happened at all. Unlike ordinary crimes, white-collar offenses typically require proof that a defendant knew or suspected that what they were doing was illegal. *Mens rea* is seldom an obstacle when going after the little fish. Corrupt mortgage brokers who flip homes using straw buyers and pocket the proceeds – a crime that was commonplace during both crises – leave such a trail of slime that once their shenanigans are discovered all they can do is plead guilty. Such cases are relatively easy to investigate (straw buyers are themselves easy to “flip”) and yield multiple defendants, promising the obsessively numbers-oriented Feds bragging rights on the cheap.

On the other hand, there's precious little to distinguish legal from illegal trading. When a friendly someone passes on a tidbit from a boardroom meeting, who's to know? Rajaratnam and his buds would still be up to their old tricks had a wily FBI agent not turned to the tool that helped neuter the mob. Thousands of hours' worth of wiretaps produced a bounty of *mens rea*, with enough crook talk to satisfy the most demanding juror.

Rajaratnam and Gupta (who is still to be tried) were fairly high up in the food chain. Still, they were more opportunists than shot-callers, and while their self-serving acts gave them an unfair advantage it didn't threaten to bring down the house. What Pontell and Black are really screaming for is the head of a Keating, someone whose skullduggery cost ordinary citizens real money.

The Feds almost got two. In 2007 several [Bear Sterns hedge funds](#) that invested in mortgage-backed securities collapsed, costing investors a tidy \$1.6 billion. In what was considered a "slam dunk" case Federal prosecutors charged managers Ralph Cioffi and Matthew Tannin with holding back news that the ship was sinking, effectively throwing their clients' life preservers overboard. As proof the Government offered e-mail exchanges between the two. One, which said "the entire subprime market is toast," was followed up days later with a cheery "we're very comfortable" note to investors. But the managers also speculated that since prices had tanked maybe it really *was* a good time to buy. "There was a reasonable doubt on every charge," a juror explained. "We just didn't feel that the case had been proven."

In January 2011 the Justice Department [announced they would not be prosecuting](#) Angelo Mozilo, former kingpin of Countrywide Financial, the mortgage lender whose spectacular belly-flop helped propel the meltdown. Like his lesser counterparts at Bear Sterns, Mozilo also penned facially incriminating e-mails. Here's how he privately described a bundle of unsecured subprime mortgages that Countrywide was offering for sale: "In all my years in the business, I have never seen a more toxic product." Yet the prospective buyers were all highly sophisticated investors, and if they thought the product viable, who's to say that it wasn't? (Mozilo did pay about \$70 million in civil penalties and restitution, chump change considering what taxpayers have shelled out.)

Well, if not Mozilo, who? In 2001 [the U.S. Senate formally referred Goldman Sachs](#), the poster child of the recession and its top cheese Lloyd Blankfein to the Justice Department for prosecution. Should that really happen – and most observers would bet heavily against it – the Government will need to prove *beyond a reasonable doubt* that Blankfein knew his firm, *which remains in business*, was a house of cards. Well, good luck with that.

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Cioffi and Tannin are the only major-firm financial denizens to be prosecuted in connection with the recent meltdown. It's for such reasons that Pontell, Black and others smell a conspiracy to let kingpins skate. But when a jury of ordinary people turns away an opportunity for revenge, we ought to pay attention. Our system requires proof that white-collar defendants have evil in their hearts. But the big boys' distance from corrupt transactions and the ambiguities and contradictions of the market can make it impossible to demonstrate their state of mind to the necessary certainty.

Of course, if we're displeased with the present way of doing things because it gives culpable one-percenters a free pass we could always change the law. Then when *we* get in trouble it's a cinch that Mozilo and Blankfein would send us their lawyers to help out.

Right?