Letting ‘Wall Street’ Walk

Legal double standards are the norm in the U.S. – no jail for law-flouting Wall Street bankers but mass incarceration for average citizens, especially minorities, who get caught up in the prison-industrial-complex, as Michael Brenner describes.

By Michael Brenner

Illicit financial behavior has been decriminalized in the United States – for all practical purposes. Despite the revelations of massive misconduct by banks and other financial services businesses, criminal investigations are rare, indictments exceptional and guilty judgments extraordinary.

Most potentially culpable actions are overlooked by authorities, slighted, reduced from criminal to civil status when pursued, individuals evade penalties much less punishment, and the appeals courts take extreme liberties in exonerating culprits when and if the odd conviction reaches them.

The last mentioned are establishing new frontiers in the formulation of ingeniously sophistic arguments to justify letting financial malefactors off the hook. As some wit suggests, all 32 or so judicial inventions should be assembled in a legal code called the Goldman Variations.

Our elected officials, our regulators, our politicos and the media have come to accept this as the natural order of things. Business Sections of newspapers, like The New York Times, read like the gazette for the world of organized crime in its heyday when the five Mafia families were on top of their game. (substitute Goldman Sachs, Chase Morgan, Bank of America, CITI, Wells Fargo). As for the Wall Street Journal and the legion of business magazines, they blend features of VARIETY and Osservatore Romano.

The reasons for this phenomenon are multiple: the rule of money in our politics; the neutering of regulatory bodies by the appointment of business friendly officers in symbiotic relationships with former or prospective employers; a wider culture in which the cult of wealth pervades all; and the timidity of a political class that defers to the power centers who enjoy rank, status and respect.

Obama’s appointment of Mary Jo White, from the white gloves law firm Debevoise & Plimpton which specialized in advising and representing Wall Street during the financial crisis (where she was head of litigation), to head the Security Exchange Commission is roughly analogous to appointing Dominick “Quiet Dom” Cirillo, consigliore of the Vito Genovese Mafia family, to run the FBI’s
Organized Crime Task Force in Manhattan.

In White’s case, her earlier experience as United States Attorney for the Southern District of New York (the financial district) made her an exceptionally valuable acquisition when she switched sides in 2003 – 2013. Her record at the SEC since 2013 confirms her adherence to the Holder philosophy of leniency toward financial misdeeds – and confirms where her loyalties lie.

Appointments to senior positions dealing with financial matters have been primarily “parachutists.” Several of them are more egregious than the White case. So too was former Attorney-General Eric Holder. Within days of leaving the Justice Department, he was back at his former corporate law firm – albeit as a “counselor” for the one-year stipulated transition period.

During his years in private practice, Holder represented the Swiss private bank UBS. Because of this, he recused himself from participating in the Department of Justice investigation of UBS’s abetting of tax evasion by U.S. account-holders.

Such is the privileged status of our largest financial institutions that the Obama administration has amended, de facto, the Constitution to accommodate their claim to being above the law. Former Attorney General Holder is the author of the doctrine that posits the principle of “too-big-to-prosecute.”

**Fearing Economic Damage**

Holder’s publicly stated view is that he, the Justice Department and the Executive Branch generally have a right to exempt financial institutions from criminal prosecution when they believe that doing so would cause “unacceptable” damage to the national economy. It first took shape during Bill Clinton’s administration.

Holder presented the full-blown doctrine in a startling confession during testimony before the Senate Judiciary Committee on March 5, 2011. “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 you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy,” Holder said, according to The Hill newspaper.

Holder’s comments didn’t come as a total surprise. His underlings had already made similar confessions to The New York Times the previous year, after they declined to prosecute HSBC for flagrant, years-long violations of money-laundering laws, out of fear that doing so would hurt the global economy.
Lanny Breuer, formerly in charge of doling out the Justice Department’s wrist slaps to banks, told *Frontline* as much in the documentary “The Untouchables” which aired in January 2011.

Of course, President Obama and Attorney-General Holder had taken oaths to uphold the laws of the land. That pledge does not allow them personal discretion as to whom it applies. Yet, they have acted as if the Justice Department and the Executive Branch generally have a right to exempt financial institutions from criminal prosecution when they believe that doing so would cause “unacceptable” damage to the national economy.

Let us be clear; Holder is not referring to the interpretation and application of any legal standard. He is referring to a purely subjective standard that has nothing to do with the law. In a similar vein, it is reported that the Obama administration has instructed the Department of Justice and the FBI to make mortgage fraud its lowest priority and, indeed, to dismiss hundreds of cases without any investigation whatsoever. (Report of the Inspector General, Department of Justice March 11, 2014).

The administration also improperly has diverted funds appropriated for this specific purpose to other areas. This arbitrary exclusion from investigation of the largest category of financial crime has been made in the face of a well-publicized and solemn undertaking by both President Obama and Attorney General Holder to take bold and expeditious action in this area.

“Equal protection of the laws” is a principle enshrined in the Constitution. There is no allowance for the President or the Attorney General, who serves at the President’s pleasure, to establish special classes of persons who are exempt from the laws’ stipulations – either to make them immune or to deny them due process. Yet, that is what they explicitly have done.

In a commencement address at NYU in 2014, Holder stated bluntly: “Responsibility remains so diffuse, and top executives so insulated, that any misconduct could again be considered more a symptom of the institution’s culture than a result of the willful actions of any single individual.”

The Holder-Obama doctrine concentrates heavily on the disruptive effects on the nation’s (and the world’s) financial system were any of the too-big-to-fail banks brought low by a combination of criminal convictions and financial penalties that were greater than the profits made from systematically skirting the law – as currently done.

**Addressing the Problem**

That is a highly debatable proposition on purely technical grounds. Whatever the
appraisal one makes, there are two straightforward solutions to the problem as stated.

First, one should break them up so that were they to “fail,” the systemic consequences would be manageable. Second, risk is increased rather than lowered by following a legal *cum* political strategy that has the effect of encouraging the managers of mega-financial institutions to play fast-and-loose in their financial maneuverings.

To return to the analogy of the five Mafia families, a law enforcement strategy that favored civil action over criminal prosecution, that entailed fines rather than prison time, and that kept those fines at a level where they could be calculated as a cost of doing a very lucrative business would result in a flourishing of criminal organizations – at great cost to society.

Moreover, were there a practice of Mafia bosses and police commissioners/district attorneys parachuting from one sphere to another, the collateral damage inflicted on all law enforcement would be enormous.

The Holder claim for corporate immunity is unsustainable by any reasonable legal standard and reading of the Constitution. Such reasonableness, though, no longer prevails. Witness the widespread passive acceptance of this novel revolutionary doctrine when it was pronounced – and its only slight rhetorical qualification since.

The radical idea that nominally criminal acts should be understood contextually and that judgment as well as punishment should be administered accordingly opens up a wide of questions about the conduct of our judicial system.

There is no reason why it could not be applied generally to the entire range of criminal conduct and proceedings. Following the Holder-Obama logic, this should be done at every stage of jurisprudence: indictment, trial, judgment and punishment. A recent case in New York City illustrates what the implications might be.

In that instance, a woman was arrested at Kennedy airport for possession of 500 grams of cocaine. She was detained, indicted and convicted of a felony. All that followed the well-trod legal path. It was the sentencing that broke the mold.

Judge Frederick Block placed the woman on probation rather than throwing her into the slammer. His main argument, developed in a closely reasoned 46-page opinion, concentrated on the “collateral consequences” of her conviction. Those consequences were deemed adequate punishment to meet the requirements of the law, society and the felon’s long-term integration into the community. The
addition of prison time would have made the punishment disproportionate to the crime. It would have exceeded – not fit – the crime.

What the judge pointed out is that so many legal disabilities attach to anyone convicted of a felony as to deny the person a reasonable chance of pursuing a normal life upon release. Those disabilities include disqualification for all kinds of access to government assistance programs which cover education, housing and employment. The net result would be a high likelihood of recidivism. From society’s perspective, that translates into a higher likelihood of costs associated with welfare, medical care, and possible re-institutionalization. In addition, there are the tangible and intangible costs for possible maintenance of any children she might bear.

The woman in question lives with her mother in New Haven where she was enrolled in college and was working part time as a nail technician. For her, the collateral consequences could be expected to be particularly high. The underlying logic, though, applies generally.

Setting Examples

What about the “systemic consequences?” Isn’t punishment for the commission of a crime supposed to act on a deterrent for others? Yes – in principle. That consideration, however, did not figure in the Holder-Obama doctrine as applied to financial misdeeds whose perpetrators are in a more visible position to set an example.

Indeed, one could argue that the sense of entitlement and expectation of having a right to act with impunity free of worry about accountability is far more pronounced among Wall Street executives than it is among inner city poor. Thereby, the positive value of criminal conviction followed by individual punishment would be commensurately greater in terms of a benefit to society.

The case cited above involves a felonious criminal act whose commission was proven in a court of law. American prisons, today, confine hundreds of thousands whose crimes are of a lesser order. Indeed, a significant percentage may not have committed any crime at all but rather are victims of police campaigns to cleanse the streets of those who allegedly have committed relatively minor misdemeanors.

Draconian enforcement of “zero tolerance” philosophies has led to widespread abuse of the police power in cities like New York. The absurd “three strikes and you’re out” strategy initiated in California and promoted nationwide by President Bill Clinton, has had even more dire results in spiking the incarceration rates, for longer terms – jailing mainly marijuana and other drug
users who are a threat only to themselves rather than to society.

Much has been made of the dogmatic claim that a crackdown on misbehavior is the reason for the drastic drop in urban violent crime. This is an urban legend. In New York City, former Mayor Rudi Giuliani and his Police Commissioner Bill Bratton, have been lionized for this supposed achievement. Yet, the story is pure fiction.

The unprecedented sharp decline occurred under David Dinkins, his black predecessor who was widely criticized for being “soft on crime” and stinting in his support for the police. The truth is that violent crime was closely correlated with the crack epidemic and its recession – reinforced by other trends that registered nationwide.

For these categories of criminals and alleged criminals whose misdeeds fall in the category of misdemeanors, Judge Block’s concept of “collateral consequences” is even more compelling. The concept, in fact, should be broadened to pertain to arrest and prosecution as well as sentencing. The consequences to be taken into account properly should aggregate their weight for both the individual and society. Then, there are the intangible costs of mass criminalization and imprisonment.

Unsettling Markets

Yet, while rulings like Judge Block’s may be rare regarding “street crimes,” they have become routine regarding Wall Street crimes, which are not prosecuted in the name of the Holder doctrine concerned about the unsettling effects on investor confidence and markets from casting a dark cloud over “Wall Street.”

Again, this is dubious on technical grounds; and the logical responses obvious. Let us shift ground and think of the unsettling effects produced by legally stigmatizing a considerable slice of inner-city populations. Disruption of families, instilling widespread feelings of persecution, aggravation of relations with the police, more estranged race relations, etc. It may be difficult to place numbers on these costs, but the negative consequences for society are great.

The full extent of the decade-long police “zero tolerance” campaign, and its demoralizing impact on largely minority neighborhoods, is one of the great unreported stories of our times. Corruption was its hallmark: in its misleading justifications, in its methods that systematized entrapment and fabrication of charges (Examples: creating a public nuisance by drinking a beer from a can on the steps of your house; impeding pedestrian movement by stopping to chat while walking your dog at midnight; loitering in the hallway of your own apartment
building).

Other elements of the corruption included its degeneration into a crass quota system, its abuse of the criminal justice system that jailed hundreds of thousands of innocents who couldn’t meet bail or hire a lawyer, forcing them to admit to misdemeanors that leave a permanent stain on their records in order to be released, and its exploitation by cynical politicians.

The one first-hand account that tells the tale is Matt Taibbi’s deeply disturbing *DIVIDE* (Spiegel & Grau 2014). It deals with New York City, but the same phenomenon is visible across urban America.

Collateral consequences can be a valuable concept – one that has multiple meanings. But it should be applied where it serves justice not iniquity.

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