
2016

Book Note: Too Big To Jail: How Prosecutors Compromise With Corporations, by Brandon L. Garrett

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Citation Information

Pearlston, Maya. "Book Note: Too Big To Jail: How Prosecutors Compromise With Corporations, by Brandon L. Garrett." *Osgoode Hall Law Journal* 53.3 (2016) : 1130-1132.

DOI: <https://doi.org/10.60082/2817-5069.3058>

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol53/iss3/22>

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Abstract

OVER THE PAST DECADE, the criminal justice system has been confronted with a staggering increase in prosecutions of corporations. In *Too Big to Jail: How Prosecutors Compromise with Corporations*,¹ Brandon L. Garrett explores the “hidden world” of corporate prosecutions² and looks at what happens when a major company is prosecuted in the United States. Using compiled data of corporate settlement agreements and convictions from the past decade, the author reveals that prosecutors fail to effectively punish corporate crimes. Garrett draws upon his research to bring the necessary attention to corporate crime and to reflect on whether enough is being done to properly hold corporations accountable for their misconduct. In chapter one, Garrett sets the tone for the disheartening notion that large organizations are “too big to jail” and details the many challenges faced by federal prosecutors, analogizing a corporate prosecution to the Biblical battle between David and Goliath. The author examines the more lenient approaches used by federal prosecutors, noting a decline in convictions of companies accompanied by an expansion in the use of deferred prosecution and non-prosecution agreements, which are settlement agreements that focus on improving and restructuring the corporation.

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Book Note

***Too Big To Jail: How Prosecutors
Compromise With Corporations*, by
Brandon L. Garrett**

MAYA PEARLSTON

OVER THE PAST DECADE, the criminal justice system has been confronted with a staggering increase in prosecutions of corporations. In *Too Big to Jail: How Prosecutors Compromise with Corporations*,¹ Brandon L. Garrett explores the “hidden world” of corporate prosecutions² and looks at what happens when a major company is prosecuted in the United States. Using compiled data of corporate settlement agreements and convictions from the past decade, the author reveals that prosecutors fail to effectively punish corporate crimes. Garrett draws upon his research to bring the necessary attention to corporate crime and to reflect on whether enough is being done to properly hold corporations accountable for their misconduct.

In chapter one, Garrett sets the tone for the disheartening notion that large organizations are “too big to jail” and details the many challenges faced by federal prosecutors, analogizing a corporate prosecution to the Biblical battle between David and Goliath. The author examines the more lenient approaches used by federal prosecutors, noting a decline in convictions of companies accompanied by an expansion in the use of deferred prosecution and non-prosecution agreements, which are settlement agreements that focus on improving and restructuring the corporation.

1. (Cambridge, Harvard University Press, 2014) 365 pages.

2. *Ibid* at 18.

In chapters two and three, Garrett describes the shift in corporate prosecutions from corporate conviction to corporate rehabilitation. Chapter two details the collapse of the accounting firm Arthur Andersen in the Enron scandal following its criminal conviction in 2002, and the author asserts that this case changed the way in which federal prosecutors approached corporate prosecutions. Chapter three explores the emergence of the use of deferred prosecution and non-prosecution agreements in corporate criminal cases.

Chapter four illustrates the difficulties in individual prosecutions, making particular reference to the use of the “ostrich defense,”³ and provides empirical data to bring evidence to this effect. For instance, in cases involving deferred prosecution or non-prosecution agreements, only 35 per cent were accompanied by prosecutions of corporate officers and employees.⁴ Using the example of the BP Texas City refinery explosion, chapter five addresses the meaningful role that victims can play in corporate prosecutions. Garrett notes the rising amounts of restitution paid by convicted organizations,⁵ lauding such payments as an important way in which companies can be held accountable.

In chapter six, Garrett criticizes judges and prosecutors for their leniency in sentencing corporations and argues that convictions are inadequate if they are not accompanied by appropriate punishment. Chapter seven discusses the role of independent corporate monitors in ensuring compliance and overseeing structural reform. Garrett highlights the need for more prosecutorial appointments of corporate monitors⁶ and greater judicial involvement in supervising the compliance process. In chapter eight, the author briefly delves into a discussion of the constitutional rights afforded to corporations and how these rights may affect criminal prosecutions.

Chapter nine shifts the discussion from domestic prosecutions to foreign prosecutions, which represent 13 per cent of the corporate prosecutions that comprise the author’s compiled data.⁷ There has been a sizeable increase in prosecutions of foreign companies, and Garrett reveals that corporate fines against foreign firms are much larger compared to those against domestic firms.

3. The “ostrich defense” may be used by corporate executives who claim ignorance of criminal activities of lower level employees.

4. Garrett, *supra* note 1 at 83.

5. *Ibid* at 125-27.

6. The author observes that only 25 per cent of deferred prosecution and non-prosecution agreements required a monitor to provide independent supervision of compliance. See Garrett, *ibid* at 174-75.

7. *Ibid* at 219. The majority of the foreign corporations were convicted of the following crimes: antitrust, ocean pollution, and *Foreign Corrupt Practices Act of 1977* violations (*ibid*).

In focusing on the relative success of foreign corporate prosecutions, Garrett hopes that US prosecutors can learn from approaches used in the foreign context for domestic prosecutions.

In chapter ten, Garrett offers his concluding thoughts on the current system for prosecuting corporations, exploring three matters: “too big to jail” concerns with corporate prosecutions, evaluations of corporate prosecutions, and various concrete reforms (touched on in previous chapters of the book) that could make for more effective corporate prosecutions.

Garrett’s detailed and comprehensive examination of corporate criminal prosecutions paints a grim but realistic picture of corporate crimes—the complexities inherent in prosecuting large companies mean that corporations are often not held accountable for their crimes. *Too Big to Jail* stands as an important contribution to existing information on corporate prosecutions, revealing the inadequacies of current approaches used by federal prosecutors and addressing new ways in which to effect meaningful criminal punishment of corporations.