How Should Prosecutors Punish Corporate Criminals?

By RICHARD H. MCADAMS

Review of TOO BIG TO JAIL: How Prosecutors Compromise with Corporations, by Brandon L. Garrett

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Brandon Garrett is a law professor and leading expert on the subject of wrongful conviction, best known for closely examining 250 cases of people exonerated by DNA evidence. Now he has released a book on corporate crime. The title, "Too Big to Jail," might suggest that his topic is only financial crimes, especially those related to the 2008 crisis, but the book addresses all sorts of corporate crimes: fraud, antitrust, bribery, import/export restrictions, evasion of environmental and pharmaceutical regulations, etc. As with his study of exonerations, Garrett offers a pioneering empirical investigation of corporate prosecutions. Knowledge in this area was so lacking that we did not know basic facts like the number of federal prosecutions of corporations, the average fine, or the number of deferred prosecution agreements (explained shortly). There is, in other words, "no official national corporate offender registry," so Garrett created one, assembling an archive of more than 2,000 federal corporate convictions, mostly guilty pleas, and more than 300 federal deferred prosecution and non-prosecution agreements. To illuminate the "hidden world of corporate prosecutions," he put this data on-line for public use, a commendable contribution to public discourse.

Deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) are a relatively new development by which federal prosecutors agree not to indict a corporation in exchange for concessions such as an admission of wrongdoing, a fine and/or other payments (forfeitures, restitution to victims, civil penalties to regulators, etc.), and – more interestingly – structural reforms to the firm, *e.g.*, the creation of a corporate officer or department in charge of ensuring legal compliance. Sometimes the concession involves the temporary appointment of an outside, independent monitor who will audit the firm periodically to ensure that the promised structural changes occur. All of which makes DPAs and NPAs somewhat similar to plea-bargaining, but the bargaining here occurs in the absence of a guilty plea or even indictment. NPAs do not involve the judge; DPAs are filed with the court and, if the prosecutor agrees that the conditions are fulfilled, dismissed upon expiration, after an average of two years and three months (p.75). As of the book's publication, no judge had rejected a DPA (p.60), though it has happened one at least one occasion since.

Thus, the prosecutor gets some of the same remedies or punishments that a conviction would produce, while the corporation gets to avoid the risks of a formal criminal charge. Garrett recounts the improbable origin of DPAs – a Brooklyn plan in the 1930s for first-time juvenile offenders. Given the shared idea in structural reform and rehabilitation, the comparison seems apt, though it raises the puzzle of why, in an era of mass incarceration, federal prosecutors seem to put more stock in the rehabilitation of organizational offenders than of the human kind.

Besides collecting this data and reviewing the DPAs and NPAs, Garrett describes many recent corporate prosecutions. Among them is the famous trial of the accounting firm Arthur Anderson for obstruction of justice, based on the claim that it destroyed documents related to its infamous client, the Enron Corporation. Anderson's conviction forced it into bankruptcy, though a remnant of the company eventually won a hollow reversal in the Supreme Court. A different multinational accounting firm, KPMG, entered into what Garrett terms as "one of the most intrusive" (p.60) DPAs: to avoid prosecution for creating fraudulent tax shelters, KPMG agreed to fines, disgorgement, and restitution of $456 million, the hiring of an independent monitor, and the permanent closing of its entire private tax practice. The German firm Siemens pled guilty to a long-running scheme of international bribery and paid $450 million in fines to the DOJ, $350 million to the SEC, $800 million to the Munich Public Prosecutor's Office, in addition to $500 million the firm spent investigating its violations once the threat of federal prosecution arose and $800 million in attorneys fees.

The story of BP stands out. In an expressively discordant result, BP pled guilty to *Clean Air Act* violations after the 2005 Texas City refinery explosion that killed 15 workers and injured hundreds. BP agreed to a $50 million fine, among other substantial payments. As everyone knows, a few years later, BP's Deep Horizon oil platform explosion killed 11 workers and produced a massive oil spill in the Gulf of Mexico. For that, BP pled guilty to 11 counts of negligent manslaughter and various other crimes, the punishment for which included a $1.256 billion fine, the largest in history, and various other substantial payments.

What does Garrett discover from this extensive and intensive review of data? More than I can summarize, but among the findings: criminal fines are rising; most of the rise is from a few blockbuster cases; guilty pleas are far more common than DPAs and NPAs, but the latter procedure is growing more common; most DPAs and NPAs are used for crimes committed by public corporations and for the crimes of fraud and foreign bribery; criminal fines are frequently exceeded by the sum of various civil payments. The rise in prosecution agreements is most striking. He only found 14 DPAs and NPAs before 2001 (the first in 1992) and hundreds since. From the updates on the website, for example, it appears there were 24 in 2014.

Beyond these insights, Garrett offers various prescriptions and policy recommendations. Most persuasively, he calls for greater transparency and regularity in the highly discretionary prosecutorial process, which he says "largely remains a black box." It is difficult to tell why prosecutors decide to use DPAs and NPAs in some cases but not others, how much mitigating weight they give to self-reporting and cooperation (outside of antitrust cases, which have a clear policy), or aggravating weight to recidivism. Garrett says we don't do enough monitoring of compliance with structural reforms and we don't routinely make public the monitoring we do, so it is difficult to say what benefits different reforms have. He is right to worry about the possible cronyism in the frequent appointment of former prosecutors to lucrative monitoring jobs (he recounts the example of Chris Christie appointing his former boss John Ashcroft to a position worth tens of millions of dollars). Garrett doesn't put it this way, but if we compared federal prosecutors to federal agency regulators, we would see that administrative law demands of the latter much of the transparency and regularity he advocates for the former.

Two other normative themes stand out. One is an epistemic complaint: that the public and policymakers do not know enough about corporate crime and punishment to formulate good policy. As stated, we don't know much about how prosecutors exercise discretion; we also don't know the corporate crime rate or how corporations respond to various sanctions. As a result, "there are fundamental questions that cannot be answered."

The second theme is a law-and-order complaint: that prosecutors are too lenient, employing "too much carrot and too little stick," and "fail[ing] to effectively punish the most serious corporate crimes." "One wonders why so little is typically done to deter or correct" egregious corporate misbehavior. Garrett says that debarment should be used more frequently; that monitoring should be more common and the monitor should report to the judge, who should have more power to supervise prosecutorial agreements; that fines in various cases should have been higher. He is particularly critical of DPAs and NPAs, which he thinks should be used less frequently in favor of guilty pleas or trials. Indeed, these procedures are the "compromise" in the book's subtitle, "How Prosecutors *Compromise* with Corporations," which winds up connoting: how prosecutors *capitulate to* corporations.

What puzzles me about the book and limits what is otherwise a success is that, at bottom, the two complaints are at war with one another. If we know so little about corporate crime and prosecutors, and the results of different interventions, how can we know that prosecutors are not doing enough or not doing the right thing? Indeed, given that there are costs as well as benefits to all law enforcement, how do we know that prosecutors are not doing too much? One could just point to the existence of serious corporate crime as proof of prosecutorial inadequacy, but we ordinarily don't blame prosecutors for the very existence of crime. I raise these questions as one who shares some intuitions with Garrett; I particularly worry about the private career interests of federal prosecutors. But if our aim is deterrence and, as Garrett claims, we do not know corporate crime rates (outside of some speculative estimates of a few crimes), then we also do not know the probability of detecting a corporate crime, the certainty of punishment. Without knowing that, it seems impossible to identify the appropriate level of punitive severity. As a parallel, those who call for an end to mass incarceration point to the fact that violent crime rates have fallen for decades. If we cannot rule out the fact that the corporate crime rates have also fallen (again, my speculation is to the contrary, but it is only speculation), then it is difficult to say that the current sanctions being imposed are not sufficiently severe.

The problem is more difficult that it first appears because Garrett's claim is focused on the "American exceptionalism" (p.223) of criminal liability for corporate *organizations*. Most nations get by (or used to get by before being influenced by American law) without convicting corporations or partnerships, relying only on the liability of the natural persons, those within the firm who either carry out an illegal act or aid and abet others carrying it out. Unlike the firm, these individuals can be imprisoned, which is a significant deterrent. In addition, around the world, the organization itself is subject to various forms of civil liability for wrongdoing. In the United States, such liability includes tort damages, civil penalties assessed by regulatory agencies, and forfeitures. The greatest civil threat is often disbarment from government contracts or license revocation. To sanction a pharmaceutical firm, the government could declare that Medicaid and Medicare would no longer reimburse purchases of its drugs. Any bank convicted of money laundering would lose its charter and be driven from the industry. (It works this way for individuals, as well: by disbarring any firm that employs an individual, the government can drive the individual from his or her career.) Thus, the government can often threaten to the existence of a corporation without using criminal law.

Thus, *organizational criminal liability*, the focus of this book, is arguably a redundant and dispensable weapon in the government's arsenal. This liability has always been controversial because the corporation can be liable when any corporate employee – high or low – "commits a crime so long as the employee was acting within the scope of employment and for the corporation's benefit" (p.36). Thus, it is usually not necessary for liability that a high managerial agent was aware of the criminal activity, much less carried it out. Garrett recounts some standard academic arguments against organizational liability for crime, but comes down in favor. I believe the issue is a close one. Organizational liability has the salutary potential to divide the organization's owners from the employees who carried out the crime, making it easier to "flip" one side into cooperating with the prosecution against the other. But, on the other hand, organizational liability could be undermining deterrence if the option causes prosecutors to go too easy on corporate officers and employees, who are the only ones who can actually be jailed (because we cannot imprison the corporation). Garrett describes the difficulties of convicting individuals for corporate crimes and notes how rarely that happens. If imprisoning individuals is a better deterrent than fining organizations, then it might be that the prospect of more easily achieved organizational liability lures prosecutors (and the public) away from what matters most.

Whatever the answer, this broader context makes the epistemic problem more difficult. To know whether we are doing *the wrong thing* to deter corporate crimes, we need to know whether prosecutors would jail more or fewer individuals in the absence of organizational liability. To know that we are *not doing enough* to deter corporate crimes, we would need to consider the entire panoply of sanctions to that behavior, individual and organizational, civil and criminal. Garrett says that current fines are inadequate, but what we need to know is whether the total payments, including but not limited to fines, are inadequate. The book offers no overall assessment of these matters and no framework for deciding how much is enough. Garrett has collected data on the overall payments corporations have paid out for their offenses, and non-fine payments make frequent appearances throughout the book, but he generally ignores their relevance when making the crucial claim that criminal fines are too low.

Garrett may seem to answer this objection when he notes that criminal fines are sometimes below those suggested by the U.S. sentencing guidelines. Does the prosecutor's agreement to such fines (in DPAs, NPAs, or plea agreements) prove that prosecutors are doing too little? No, and not just because the organizational sentencing guidelines are not well connected to deterrence. Several times, Garrett complains that *judges* are sometimes too lenient in assessing fines. But the prosecutors can't expect the corporation to agree to fines larger than what the judge would give after conviction. Indeed, if prosecutors were becoming more aggressive, they would be willing to bring cases they were less certain to win at trial; in such weaker cases, they would have to settle for lower fines to induce the corporation to forego trial. In any event, fines overall are rising. Starting with the mid-1990s, cumulative fines were at or below $1 billion every year but one before 2006; since 2006, they have not fallen below $1.8 billion (p.5). Average fines have risen in a similar manner (p.292). In the 12-year period 2001-2012 on which Garrett reports, all of the ten largest fines were assessed in the last six years. Unsurprisingly, the BP fine, from 2013, was higher than all of them.

Garrett also argues that prosecutors give too little weight to recidivism and, for this point, the BP case is an extremely compelling anecdote. But the anecdote would have been even more compelling if he had estimated the amount of money BP saved by avoiding compliance with various regulations and compared those savings to the total payments – criminal fines and civil liabilities – they will pay as a result of their infractions. To achieve deterrence, we need the latter number to be larger by some amount than the former. Very possibly, it was. I still find BP's recidivism alarming, but one also wonders about how much we should generalize from BP's repeated disasters as opposed to generalizing from other examples Garrett describes, such as Siemens, where one round of civil and criminal liability, and structural reform, seems to have created a corporate compliance "role model" (p.194).

Finally, Garrett objects to the rising use of DPAs and NPAs, not just on the grounds that they are insufficiently transparent (which seems true enough, though not distinctive from most of what prosecutors do), but also because they are too lenient. Yet prosecutors might be giving up indictment and guilty pleas in exchange for greater fines or other concessions (greater cooperation in investigating individual offenders, more explicit admissions of liability binding in civil or regulatory lawsuits, etc.). What we really need to know is what the government would have gotten in these cases had it not offered an agreement, and that is not evident. Even if the government received the exact same concessions, it might do so faster and with less effort through a DPA or NPA. That might free up resources for aggressive prosecution of innovative and tricky cases, such as the prosecutions of foreign companies that, Garrett tells us, account for 13% of the corporate plea agreements in his data (p.219). In his chapter on prosecuting foreign corporations, he notes that, there too, fines are increasing.

DPAs and NPAs avoid the oversight of a judge. Garrett argues that is a defect and it might be. But it also seems from the book that some of the DPAs and NPAs involve more intrusive and innovative structural reform and monitoring than the conditions of probation that judges impose after conviction. If one's concern is the prevention of future corporate offenses, we need more evidence to reject the trade-offs in these prosecutorial bargains. Like other parts of criminal law, almost no cases go to trial. Unless we have evidence that prosecutors aren't really trying, it isn't reasonable to expect them to give up nothing and deliver more of every aspect of the bargain: a guilty plea, higher fine, more structural reform, more monitoring, *and* more judicial involvement. Prosecutors get concessions only by making concessions, just like corporations. An equally apt subtitle for the book would be "how prosecutors *bargain with* corporations." We can't say one side to a bargain did badly unless we know that the other side was willing to give up even more. Or, in this case, that the trial, discounted by its costs and risks, was better than the bargain. And, of course, that is all beyond what Garrett can show.

Garrett's call for transparency is important and persuasive, as is his concern that the American public should take notice of and energetically inquire into whether our prosecutors are doing the right things and enough things to combat corporate crime. But the best position on what transparency would end up revealing is, I think, agnosticism. We need more evidence to measure the effectiveness of federal prosecutors, and the regulatory system in general, in preventing corporate crime. None of which casts any doubt on how essential and well-timed this book is for initiating the necessary scholarly and public conversation.

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