

Too Big to Jail

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Gregg Barak's (2012) *Theft of a Nation* attempts to solve a mystery that has puzzled many observers of the financial crisis that began in 2008: Why have so few of those responsible for the fiscal crisis—executives and officers at investment banks and mortgage lenders, in particular—been charged with crimes? The explanation Barak offers centers on the existence of a "banking cartel" that consists of the major Wall Street investment banks which "along with its political allies pretty much control what does or does not constitute securities violations in the world of fraudulently based market transactions" (Barak 2012:6). This cartel is able to maintain its dominant position because of a collusive relationship with key political actors who both set the regulations and standards that govern banks' operations and who determine when and to whom criminal sanctions will be applied.

The idea that there are close ties and interests that bind Wall Street and Washington is not new, but Barak's analysis locates this connection within the broader framework of critical criminology and Marxist informed theories of "crimes of capitalist control." For Barak, the failure to hold those responsible for the crisis accountable is symptomatic of a larger contradiction in advanced capitalist societies in which the "dominant interests and behaviors of the political economy are both illegal and controlling" (2012:92). This contradiction becomes apparent when legal institutions are confronted with evidence of widespread corruption and fraud at the highest levels of the financial system and find themselves "in the contradictory position of both trying to chastise and to excuse these violations" (Barak 2012:92). For regulators and prosecutors, one way out of this contradictory position is to avoid the imposition of criminal penalties on malefactors (both individuals and organizations) and instead rely on civil sanctions as part of a conciliatory strategy that seeks to "control the damage done to the faith

of Wall Street investors in the financial system" (Barak 2012:96).

In this essay, I want to build on Barak's analysis to explore further some of the factors that lie behind the government's response to the financial crisis. My goal is not to refute his argument but to suggest an additional dimension to the factors that have shaped this response. I will suggest that in addition to overt collusion between government agencies and investment banks, the increasing predominance of financial institutions in the U.S. economy, as well as the economies of other countries, has created barriers to the application of criminal sanctions to those responsible for the financial crisis. The result has been policies that place a higher priority on the continued operation of the existing global financial system than on either the development of an alternative fiscal structure and/or the prosecution of guilty parties.

ECONOMIC DEPENDENCE AND POLITICAL RESISTANCE TO SANCTIONS

Barak's analysis draws not only on Marxist traditions in the social sciences but also on populist critiques of American society that go back to at least the early 20th century when Louis Brandeis warned of a "financial oligarchy" consisting of banks, trusts, and railroads that controlled much of the economy (Brandeis [1914] 1971). More contemporary versions of this critique can be found in the writings of journalist Matt Taibbi who has warned that "America...is fast becoming a vast ghetto in which all of us...are being bled dry by a relatively tiny oligarchy of extremely clever financial criminals and their castrato henchmen in government..." (2011:33). While there is certainly more than a kernel of truth in these populist narratives, the situation may be even more complicated

than they suggest. The contemporary financial crisis and the apparent failure of the state to aggressively punish those responsible may well reflect structural changes in the American economy.

In the last several decades, the U.S. economy has become dominated by financial industries to an unprecedented extent. As documented by Simon Johnson, by the mid-2000s, earnings in the financial industries comprised over 40% of all domestic corporate profits in the U.S, up from less than 10% in the early 1980s (Johnson 2009:49). As a result of this shift the American economy has become increasingly dependent upon the financial services industry. This dependency is most evident in certain parts of the country. New York is probably the best example. In 2011, taxes from Wall Street firms made up 14% of New York State's total tax revenues (before the financial crisis that proportion was as high as 20%). In New York City in 2010, jobs in the securities industry accounted for 23.5% of all wages paid in the private sector, despite making up only 5.3% of all private sector jobs in the city (New York State Comptroller's Office 2012). This economic reliance on the financial industry has led New York politicians to aggressively defend the industry against critics who seek tighter controls on Wall Street. In 2009, then New York governor David Paterson responded to calls in Washington to limit bonuses paid to executives at bailed-out insurance giant AIG by stating: "At the end of the day, when they shut those bonuses down, they were shutting New York State down. That's where we got our tax dollars" (Blain 2009). New York City mayor Michael Bloomberg took a more novel approach when he argued that efforts to crackdown on Wall Street abuses would inevitably hurt the working class. Referring to the taxes paid by Wall Street firms he told Congressional leaders: "That's the way we pay our cops and firefighters and teachers... If that industry is hurt, it will be people at the lower end of the economic spectrum who will really feel the pain" (Miller 2010).

These statements suggest that one source of resistance to efforts to punish those guilty of financial malfeasance are the political figures who must contend with the potential economic consequences of aggressive crackdowns on corporate crime. The need to avoid economic fallout was cited by former New York Attorney General Elliott Spitzer as a reason for the decision, in 2003, to reach a settlement with Wall Street investment banks that had violated securities laws by issuing fraudulent research reports favorable to their clients in which those firms paid monetary penalties in exchange for an agreement not to pursue them criminally. In response to criticisms of the non-prosecution agreement, Spitzer pointed to the agreement worked out with Merrill Lynch, in which the firm paid a \$100 million fine and escaped criminal charges.

What we are seeking here is to reform the system and restore integrity and driving Merrill Lynch out of business wouldn't have made sense. [If criminal charges had been brought against the firm], [t]hey would have a brokerage house that is under indictment, that if convicted criminally of the sort of behavior that I think we could have convicted them of, would go out of business. (Tillman and Indergaard 2005:250)

In other words, Spitzer acknowledged that Merrill and most of the other firms involved in the settlement were guilty of crimes, but declined to prosecute out of fear of the economic consequences of doing so.

CRIME CONTROL VS. DAMAGE CONTROL

The fact that prosecutors are often reluctant to pursue organizational defendants out of fear of the economic consequences suggests a situation in which, as Tillman and Indergaard (2005:263) have put it, America is being "held hostage" by corrupt corporations whose executives can operate with a sense of impunity knowing that they and their firms are not only too big to fail but also too big to prosecute and too big to jail. This situation also raises questions about the state's interests and goals in responding to financial crimes. In their book on the savings and loan crisis of the 1980s, Calavita, Pontell and Tillman argue that there the state's primary interest was not in crime control—the pursuit of individual criminal offenders—but rather in "damage control," stabilizing the economy.

The government's response to the savings and loan debacle can be seen, then, as an effort directed less at penalizing thrift wrongdoers for their misdeeds than at limiting damage to the industry, preventing comparable damage in other financial sectors, and containing the hemorrhage of government-insured capital. (1997:136)

There are indicators that in the current governmental response to the financial crisis there are conflicts between those officials who want to focus on crime control and those whose goals are primarily in stabilizing the economy, and that the latter are prevailing. As Barak points out (2012:99-100), early on in the crisis there were tensions between then New York Attorney General, Andrew Cuomo who pushed for more aggressive prosecution and Timothy Geithner, then head of the New York Federal Reserve Bank, who wanted to focus on calming financial markets. In public comments, Geithner, after he became Secretary of Treasury, indicated that he did not believe that criminal activities played a significant role in the financial crisis. For example, in a speech in the

spring of 2012, he responded to a question about the apparent lack of prosecutions by stating:

Most financial crises are caused by a mix of stupidity and greed and recklessness and risk-taking and hope. You can't legislate away stupidity and risk-taking and greed and recklessness. (Reuters 2012)

Geithner's views have been echoed by other high-level officials, including Attorney General Eric Holder who told an audience at Columbia University Law School that his Department of Justice had "found that much of the conduct that led to the financial crisis was unethical and irresponsible. But we also have discovered that some of this behavior – while morally reprehensible – may not necessarily have been criminal" (U.S. Dept. of Justice 2012).

CIVIL SETTLEMENTS VS. CRIMINAL SANCTIONS

Regardless of whether prosecutorial reluctance has been the result of fear of economic consequences or collusive relationships between Washington and Wall Street, the outcome has been the same: a reliance by government agencies on civil remedies rather than criminal sanctions in the response to financial malfeasance. One of the more insightful points that Barak makes in his book is that the government's response has been characterized by a "non-penal strategy" that has resulted in "conciliatory efforts by the government, namely the SEC and DOJ, to restore institutionalized business as usual..."(2012:96). The use of civil rather than criminal sanctions has allowed the government to give the appearance that something is being done about the crisis without imposing harsh penalties on those responsible.

One can see this same strategy at work in other major financial crime cases. The recent handling of money-laundering allegations against international bank HSBC provides a good example. In July, 2012 the Senate Permanent Subcommittee on Investigations released a blistering report that provided detailed evidence that HSBC had for years been laundering money for drug cartels in Mexico and Asia and had done business with Middle Eastern banks with clear links to terrorist organizations (U.S. Senate 2012). With this type of overwhelming evidence, indictments seemed imminent. Then on December 9, 2012, HSBC announced that it had reached an agreement with local, state, and federal authorities to resolve the case by paying a \$1.92 billion settlement (Silver-Greenberg 2012b). When asked why a criminal conviction against the corporation was not sought, Lanny Breuer, the former Assistant Attorney General for the Criminal Division at the Justice Department in charge of the case, told reporters: "Our goal here is not to bring HSBC down, it's not to cause a systemic effect on the

economy, it's not for people to lose thousands of jobs. The innocent people who would suffer don't deserve that" (O'Toole 2012). The decision not to seek criminal charges in the HSBC case brought quick and harsh criticism from numerous quarters, including the *New York Times*, which published an editorial, excoriating government officials who made the deal.

Federal and state authorities have chosen not to indict HSBC, the London-based bank, on charges of vast and prolonged money laundering, for fear that criminal prosecution would topple the bank and, in the process, endanger the financial system....Clearly, the government has bought into the notion that too big to fail is too big to jail. (*The New York Times* 2012)

Technically, the Justice Department did file criminal charges against the bank but allowed it to enter into a deferred prosecution agreement in which HSBC was able to, in effect, evade criminal sanctions. When a deferred prosecution agreement is entered into the government files charges but agrees not to pursue prosecution for a specified period of time if the defendant complies with an agreed-upon set of conditions. In effect, it is like a period of probation, but the defendant avoids the collateral consequences of a criminal conviction.

ECONOMIC PATRIOTISM

The HSBC scandal was one of several involving British banks that emerged in the summer of 2012. Another involved the venerable London-based bank, Standard Chartered. Here too one sees politicians rising to the defense of an institution accused of financial crimes. In August, 2012, Standard Chartered, a major international bank that in 2011 generated \$5 billion in profits, was accused by an obscure New York bank regulator, Benjamin Lawsky the head of the state's Department of Financial Services, with violating U.S. laws prohibiting financial transactions with countries like Iran and North Korea (Silver-Greenberg 2012c). Referring to Standard Chartered as a "rogue institution," the regulator sought to revoke the bank's license for moving \$250 billion through its New York branch for Iranian clients and then taking measures to disguise the transactions. To bolster its case, the regulator quoted from an email from one of the bank's executives who declared "You f---ing Americans. Who are you to tell us, the rest of the world, that we're not going to deal with Iranians" (New York State Department of Financial Services 2012:5).

The accusations, coming on the heels of revelations about criminal activity at other major British banks, provoked quick and strong reactions from English politicians. John Mann, a Labour MP, saw in the regulatory action "an increasing anti-British bias by US regulators and politicians aimed at shifting financial

markets from London to New York” (Rushe and Treanor 2012). The mayor of London, Boris Johnson, accused American regulators of “beating up on British banks” and defended the email message quoted above by stating: “I disapprove of the language, of course. But I have to say ...that there seems to be something fine and sound about the underlying sentiment” (Salmon 2012). This defensive posture is no doubt related to the prominence of banks and the financial services industry in Britain in general, and London in particular. In 2007, financial services accounted for 8.3% of the UK’s GDP and 18% of London’s GDP. In that same year, financial services companies and their employees contributed over 40% of all taxes paid in the UK (McKenzie 2009).

Despite the rhetoric, and despite the fact that the bank had been accused of a serious crime, money laundering, Standard Chartered quickly resolved the New York state issue by agreeing to pay \$340 million in return for which it was allowed to continue doing business in the state (Silver-Greenberg 2012a). But it still faced ongoing criminal investigations by federal authorities. In December, 2012 those issues were resolved when Standard Chartered entered into a deferred prosecution agreement with the Department of Justice that allowed the bank to avoid criminal prosecution by paying the government \$327 million (Silver-Greenberg 2012b). While the combined amounts paid by the bank (\$667 million) may seem like a lot, one has to question the deterrent effect of these penalties when one considers that they represented only 13% of the institution’s 2011 profits.

With these examples I want to suggest that one of the explanations for the apparent leniency shown toward institutions accused of financial crimes is the increasing dependence of the U.S. economy, and those of other countries, on the financial services industry for revenue, both private, in the form of wages, and public, in the form of taxes. This situation reflects the growing financialization of the economy, “a pattern of accumulation in which profits accrue primarily through financial channels rather than through trade and commodity production” (Krippner 2005:174). The growing dominance of the financial sector in the economy is also reflected in that sector’s influence on politics. Analyses of campaign contribution data show that “the financial sector is far and away the largest source of campaign contributions to federal candidates and parties, with insurance companies, securities and investment firms, real estate interests and commercial banks providing the bulk of that money” (Center for Responsive Politics n.d.). But the influence of the financial sector on political decision-making is often less direct than the *quid pro quo* suggested by campaign contributions operating instead through cultural channels. As Simon Johnson has put it:

Over the past decade, the attitude took hold that what was good for Wall Street was good for the country....

[the financial services industry] benefitted from the fact that Washington insiders already believed that large financial institutions and free-flowing capital were crucial to America’s position in the world. (Johnson 2009:50)

This viewpoint was evident in the response by the financial community and its political allies to efforts in Washington to tighten control over corporate conduct following the corporate scandals of the early 2000s with laws like Sarbanes-Oxley (which, among other things provided criminal penalties for CEOs who falsified their companies’ financial statements). For example, a report co-sponsored by the offices of New York City mayor Michael Bloomberg and New York senator Charles Schumer made a forceful argument that such reform measures ultimately harmed America’s global financial dominance and thus the fate of all Americans.

The 20th Century was the American century in no small part because of our economic dominance in the financial services industry, which has always been centered in New York.... All Americans have a vested interest in strengthening America’s financial services industry.... The flawed implementation of the 2002 Sarbanes-Oxley Act (SOX) ...[has] produced far heavier costs than expected ... The time has come not only to re-examine implementation of SOX, but also to undertake broader reforms, using a principles based approach to eliminate duplication and inefficiencies in our regulatory system. (City of New York 2007:ii)

These responses to allegations of financial wrongdoing represent appeals to what Clift and Wolf refer to as “economic patriotism”: “economic choices which seek to discriminate in favour of particular social groups, firms or understood by the decision-makers as insiders because of their territorial status” (2012:308). In the cases cited above, the implicit argument made by politicians is that concern over suspected instances of corporate malfeasance should be overridden by regional and national economic interests.

TOO BIG TO JAIL

In bringing attention to these issues I do not mean to diminish the significance of Barak’s argument about “non-penal strategies” resulting from collusion between Wall Street and Washington. But I do want to suggest that the pressure towards non-prosecution of financial crimes can exist even in the absence of *overt* collusion. The increasingly widespread acceptance of the “too big to jail,” or perhaps more accurately, the “too economically important to jail,” viewpoint has created a situation in which executives at financial firms can engage in illegal, but highly profitable, behavior with little fear of criminal

sanctions. Concern that this may be exactly the situation in which we find ourselves prompted a January, 2013 letter from Senators Chuck Grassley and Sherrod Brown to Attorney General Eric Holder in which they asked:

1. Has the Justice Department designated certain institutions whose failure could jeopardize the stability of the financial markets and are thus, "too big to jail"?
2. Has the Justice Department ever failed to bring a prosecution against an institution due to concern that their failure could jeopardize financial markets? (Brown and Grassley 2013)

As of this writing, the Justice Department has not responded to these questions, but they go to the heart of the issue. As Brown and Grassley (2013) observed in their letter:

Our markets will only function efficiently if participants believe that all laws will be enforced consistently, and that violators will be punished to the fullest extent of the law. There should not be one set of rules that apply to Wall Street and another set for the rest of us.

CONCLUSIONS

Those of us who do research in the area of white-collar crime frequently complain about the relatively low visibility of our work in academic and policy discussions. This situation has become all the more galling in recent years as the U.S. has been shaken by a series of corporate crime waves and a devastating financial crisis triggered, in part, by widespread white-collar criminality. Gregg Barak's *Theft of a Nation* will hopefully help to change this situation. The primary strength of Barak's work is that he places the issue of the comparative leniency shown to white-collar offenders within a larger theoretical framework that describes the relationship between law, capital, and financial crime. This framework forces us to step back and examine the broader forces that are shaping our economy and our society. In this essay I have attempted to follow Barak's lead to consider how the increasing predominance of the financial services industry in our economy has influenced our legal responses to financial crime. I would hope that others would also take a cue from Barak's analysis to think about how a changing institutional environment has facilitated white-collar crime.

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