

A Theory of “Too Big To Jail”

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A Theory of ‘Too Big To Jail’*

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Abstract

Motivated by some recent examples, this paper employs a model of public law enforcement to explain why it may not be in society’s interest to send criminals to prison. We establish two main findings. First, independent of the lawbreaker’s societal position, imprisonment is suboptimal when the harm from the illegal activity is sufficiently small. Second, for a given level of harm, imprisonment is suboptimal when the lawbreaker is sufficiently important. This latter result thus provides a rationale for why some parties are taken to be ‘too big to jail’.

Keywords: *Class Justice, Nonmonetary Sanctions, Optimal Law Enforcement, Too Big To Jail.*

JEL Classification: *D63, K42.*

“*All animals are equal, but some animals are more equal than others.*”
(George Orwell, Animal Farm)

1 Introduction

Over two thousand years ago, the Greek philosopher Aristotle formulated one of the most elementary principles of justice: *equals should be treated equally, and unequals unequally, in proportion to relevant similarities and differences.*¹ Several recent legal cases suggest one such relevant difference for lawbreakers; their societal position. In particular, someone who committed a crime may avoid prison time if (s)he is sufficiently important. More popularly phrased, a party can be ‘too big to jail’.

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¹This free, modern translation of the original maxim as formulated in *Nicomachean Ethics* can be found in, *e.g.*, Zajac (1996, p.105).

Perhaps the best-known example of “bigness” enabling a defendant to evade a prison term is his wealth. Consider, for instance, the case of Robert H. Richards IV, a rich heir to the duPont family fortune earned in the chemical industry.² In 2009, Richards pled guilty to raping his three-year-old daughter. Initially, he was indicted on two counts of second-degree rape and free on a \$60,000 secured bail while awaiting trial. In June 2008, however, he received a plea offer reducing the original indictment to one count of fourth-degree rape. In the end, judge Jan Jurden sentenced him to jail for eight years. Yet, this entire term was suspended for probation. Jurden followed the reasoning of the defense lawyers that this one-percenter would “not fare well” in prison. Rather than going behind bars, Richards was ordered to pay \$4,395 to the Delaware Violent Crimes Compensation Board and to participate in a sex offender treatment program.

Both the amount of bail paid as well as the high-quality, high-priced legal defense team, tellingly illustrate how money can keep someone out of prison.³ A defendant’s wealth is not the only relevant dimension of importance, however. Importance may also be reflected by the (potential) impact one can have on others. This is the perspective taken in this note, which has the purpose of providing an alternative rationale for the “too big to jail” phenomenon.

Toward that end, we develop and analyze a general model of public law enforcement in which offenders face an expected prison term. An illegal activity is assumed to cause direct and indirect harm. The direct harm encompasses the damage incurred by victims. The indirect harm is conditional on the sanction being imposed and incurred by third parties that are in some way dependent on the wrongdoer. The importance of the lawbreaker is reflected by the level of these externalities. In particular, the bigger the crook, the higher the cost of a prison sentence to parties not directly involved in the illegal act.

We show the existence of a critical level of importance above which it is in society’s interest not to impose jail time. Specifically, sentencing a prison term is suboptimal in two situations. First, independent of the lawbreaker’s societal position, imprisonment is not beneficial when the harm from the illegal activity is sufficiently small. Second, for a given level of harm, imprisonment is not beneficial when the lawbreaker is sufficiently important. In case of the latter, the advantageous effects of the sanction are outweighed by the costs to third parties. The presence of these externalities thus provides an explanation for why some parties are taken to be ‘too big to jail’.

The remainder of this note is organized as follows. The next section presents some illustrative examples. Section 3 introduces the model. The analysis of this model as well as our findings are in Section 4. Section 5 concludes.

2 Illustrative Narrative

Before formally analyzing the ‘too big to jail’ phenomenon, let us first present two illustrative examples. The first is a story about a successful figure in the financial sector, whereas the second is about a leading company in the pharmaceutical industry. In both cases, the lawbreakers received a relatively light sentence since levying an ‘appropriate sanction’ would have disproportionately harmed third parties not directly involved in the illegal act.

²See Wise (2015) as well as the reference therein. This book also contains many other telling examples.

³The critical role played by the high-quality defense lawyers in this case is emphasized by, *e.g.*, Çam (2019).

2.1 Fat Cats

The first example is about a guy named Martin Joel Erzinger. In 2010, he was working as a hedge fund manager for some super-rich clients at Morgan Stanley Smith Barney (now Morgan Stanley Wealth Management) and responsible for over \$1 billion in assets.⁴ In July of that same year, not far from the Colorado ski resort Vail, Erzinger ran over a cyclist with his brand new black Mercedes sedan. The victim hit the pavement so hard that he had “spinal cord injuries, bleeding from his brain and damage to his knee and scapula”. Erzinger also hit the road, but only in the sense of fleeing the scene. In fact, he drove another ten miles before stopping at a Pizza Hut around the town of Avon. There, he called the Mercedes auto assistance service to ask for a tow truck and report the damage. Not long thereafter, Erzinger got arrested.

This would have been a typical hit-and-run story, were it not for the surprising legal aftermath. Causing a hit-and-run accident as well as fleeing from such a scene are both felonies in the state of Colorado. In light of this, the District Attorney, Mark Hurlbert, was remarkably lenient for Erzinger arguing that “felony convictions have some pretty serious job implications for someone in Mr. Erzinger’s profession”. The District Attorney furthermore feared that charging felonies with jail time would damage the interests of Erzinger’s wealthy clients. In the end, he was not put in jail and charged with a misdemeanor only.

As already mentioned in the introduction, it is not uncommon for an affluent person to buy himself out of prison. What this example shows, however, is that there is more to it than just being a ‘fat cat’. Erzinger avoided imprisonment for an important part because a prison term would have created severe external costs. His clients would pay too high of a price, that is. The presence of these potential externalities therefore functioned *de facto* as an insurance and formed an effective shield against felony charges with jail time. This protection mechanism may not only be available to key figures, but also to dominant firms as the next example illustrates.

2.2 Big Pharma

The second story is about the pharmaceutical giant Pfizer. Around the turn of the millennium, Pfizer launched a new drug, *Bextra*, which was promoted as a post-surgery painkiller. The U.S. Food and Drug Administration (FDA) had approved this medicine only for the treatment of arthritis and menstrual cramps, however. *Bextra* was considered particularly unsafe for those facing a severe risk of heart attack and heart failure. Yet, this did not prevent Pfizer from marketing this medicine “off-label” as a means to alleviate pain after surgery. It took years before *Bextra* was finally taken off the shelves. By that time, this drug, together with three other medicines, had earned Pfizer roughly \$17 billion in sales revenue over the period 2001-2008.⁵ Moreover, more than half of its profits had come from such unapproved off-label prescriptions.⁶

Part of the sanction for a major health scandal such as this one is that the company gets excluded from federally funded health care programs like Medicare and Medicaid, meaning that these programs no longer cover any of Pfizer’s products. Indeed, the federal prosecutor, Mike

⁴This example closely follows the detailed descriptions provided by Greenwald (2012) and Wise (2015).

⁵See Evans (2009) and Zborowsky (2012). The other three drugs were an antipsychotic *Geodon*, an antibiotic *Zyvox*, and an anti-epileptica *Lyrical*.

⁶See Griffin and Segal (2010).

Loucks, was very explicit about it: “If we prosecute Pfizer, they get excluded”.⁷ But Pfizer did not get excluded. The reason given was that imposing this sanction would more than likely force it out of business with massive costs as a result. Shareholders would suffer, employees would lose their jobs, and, perhaps most importantly, the supply of other Pfizer products might be disrupted or stop altogether. As stated by Lewis Morris of the Department of Health and Human Services: “We have to ask whether by excluding the company [from Medicare and Medicaid], are we harming our patients?”⁸ Finally, exclusion may imply fewer innovations in the longer run, which harms society at large. In the end, it was Pfizer’s subsidiary Pharmacia & Upjohn Co. Inc., a shell company that never sold a single drug, which pleaded guilty and got excluded. Pfizer itself received a fine of approximately 2.3 billion U.S. dollars for the off-label promotion of Bextra (and the three other drugs) and kept on doing business with federal health programs.⁹

Just like in the case of Martin Erzinger, a justifiable nonmonetary sanction was substituted with a monetary sanction. And the reason is similar. In both cases, imposing the nonmonetary penalty would have created substantial costs for third parties not directly involved in the criminal activity. Society would simply harm itself too much if it would abide by its own legal standards. With this in mind, we now turn to a formal analysis to explain why society may well have been right in these and similar types of cases.

3 Model

We now introduce a model of public law enforcement in the spirit of Polinsky and Shavell (1984, 2000, 2007) with the purpose of providing a rationale for the ‘too big to jail’ phenomenon. Consider a society comprising many individuals, each of whom decides whether to commit an illegal activity.¹⁰ If an individual commits the act, then he obtains a gain $g \in [0, \bar{g}]$, where $\bar{g} > 0$ is the maximum gain from violating the law. The activity is assumed to cause *direct* harm to the victim(s) denoted by $h < \bar{g}$. In case a sanction is imposed, it may additionally cause *indirect* harm to third parties not directly involved in the act. We capture this effect with the importance measure $i \in [0, \bar{i}]$, where $\bar{i} > 0$. More specifically, and as will become clear in the ensuing analysis, the more important the individual, the larger the indirect damage of imposing a jail sentence. The composition of society is then described by a density function $\omega(g, i)$ on $[0, \bar{g}] \times [0, \bar{i}]$ with positive mass everywhere.¹¹ Let the corresponding cumulative distribution function be given by $\Omega(g, i)$. The enforcement authority observes the importance level as well as the distribution, but does not know an individual’s gain.

A person who commits the act is caught with probability $p > 0$ and, in case of conviction, can be sent to jail. Let the length of the prison sentence (or, more generally, the magnitude of the nonmonetary sanction) be given by $s \in [0, \bar{s}]$, where $\bar{s} > 0$ is the maximum jail sentence.

⁷See Gutierrez (2010).

⁸See Griffin and Segal (2010).

⁹To be clear, Pfizer’s Bextra is not an exceptional case. Other leading pharmaceutical companies have also been convicted for off-label marketing fraud. See Evans (2009) and Almashat, Preston, Waterman and Wolfe (2010).

¹⁰Even though our focus is on individuals and imprisonment, the model is more broadly applicable. In particular, it also applies to firms receiving nonmonetary sanctions.

¹¹Block and Lind (1975) take an alternative “representative agent” approach and examine the deterrent effect of imprisonment. Among other things, they establish a negative relationship between the individual’s wealth and the incentive to commit a crime.

Imprisonment creates three types of costs. First, there is a disutility for the individual going to jail, which we describe with the function $d : s \mapsto \mathbb{R}_+$. Second, there are costs associated with operating a prison, which we capture with the function $c : s \mapsto \mathbb{R}_+$. Both d and c are continuously increasing functions with $d(0) = 0$ and $c(0) = 0$. We refer to d and c together as the *direct costs of imprisonment*. Third and lastly, there may be *indirect costs of imprisonment* for parties that are not directly involved in the act or the enforcement thereof. We assume these externalities are given by $i \cdot e(s)$, where $e : s \mapsto \mathbb{R}_+$ is a continuously increasing function and $e(0) = 0$. Hence, for some given prison sentence, more important offenders create more indirect harm. Moreover, such externalities are absent for individuals who are effectively unimportant ($i = 0$).

For any particular level of importance, a person commits the activity when his gain outweighs his expected costs, $g > pd(s)$, and does not commit the activity otherwise, $g \leq pd(s)$. Non-deterred individuals create a net value of $g - h$, which can be positive or negative. In case they get caught, there are additional costs of imposing the nonmonetary sanction given by $c(s) + d(s) + i \cdot e(s)$. Summing over all levels of importance, societal welfare W can then be described as follows:

$$W(s) = \int_0^{\bar{i}} \int_{pd(s)}^{\bar{g}} (g - h - p(c(s) + d(s) + i \cdot e(s))) \omega(g, i) dg di.$$

For each importance level i , the objective of the enforcement authority is to select the nonmonetary sanction s for which welfare is maximal.

4 Analysis and Findings

Consider the group of individuals of importance i . To determine the optimal sanction for this type, the authority's objective is to pick s to maximize:

$$W(s) = \int_{pd(s)}^{\bar{g}} (g - h - p(c(s) + d(s) + i \cdot e(s))) \cdot \omega(g, i) dg.$$

It is common in the literature on public law enforcement to take a differential approach to address such a problem. In the above general framework, this is non-trivial, however. To see this, suppose for the moment that all functions are twice differentiable.

Using the fact that $g = pd(s)$ for the marginal individuals, the first-order condition is:

$$\frac{dW(s)}{ds} = (h + p(c(s) + i \cdot e(s))) \cdot \left(\frac{d\Omega(pd(s))}{ds} \right) - p \int_{pd(s)}^{\bar{g}} (c'(s) + d'(s) + i \cdot e'(s)) \cdot \omega(g, i) dg = 0.$$

The first part captures the (expected) marginal benefit from increasing the sanction. A slightly longer jail sentence saves the harm (h) and expected societal costs ($p(c(s) + i \cdot e(s))$) of the marginally deterred individuals $\left(\frac{d\Omega(pd(s))}{ds} \right)$. The second part is the (expected) marginal cost of increasing the sanction. The undeterred individuals experience more disutility ($d'(s)$), the cost of imprisonment increase ($c'(s)$), and third parties that are affected suffer more in case of conviction ($i \cdot e'(s)$).

Note that a necessary condition for ‘no jail time’ to be an optimum is that the first derivative at $s = 0$ is (weakly) negative:

$$\frac{dW(0)}{ds} = (h) \cdot \left(\frac{d\Omega(0)}{ds} \right) - p \int_0^{\bar{g}} (c'(0) + d'(0) + i \cdot e'(0)) \cdot \omega(g, i) dg \leq 0,$$

which requires a sufficiently small harm h since $\frac{d\Omega(0)}{ds}$, $d'(0)$, $c'(0)$ and $e'(0)$ are all strictly positive. This, however, is generally not sufficient. Indeed, note that the second derivative is given by:

$$\begin{aligned} \frac{d^2W(s)}{ds^2} &= -p \int_{pd(s)}^{\bar{g}} (c''(s) + d''(s) + i \cdot e''(s)) \cdot \omega(g, i) dg + p(2i \cdot e'(s) + d'(s) + 2c'(s)) \cdot \left(\frac{d\Omega(pd(s))}{ds} \right) \\ &\quad + (h + p(i \cdot e(s) + c(s))) \cdot \left(\frac{d^2\Omega(pd(s))}{ds^2} \right). \end{aligned}$$

This condition effectively consists of three parts, only the second of which is of unambiguous sign (namely positive). The first and third part can be negative or positive depending on the specific functional form of the direct costs of imprisonment as well as the distribution. Taken together, it is then quite possible that W has a minimum and that the solution is interior or at the upper bound \bar{s} , *i.e.*, the optimal sentence may be maximal.¹²

Of course, one could proceed with such a differential approach and impose additional structure on the model to ensure that W reaches its maximum at $s = 0$. Yet, as the preceding analysis indicates, this requires additional assumptions on the functional forms that are not necessarily natural or easy to interpret. In the following, we therefore take a different, and in many ways simpler, approach. Specifically, we derive a condition under which ‘no jail time’ ($s = 0$) is preferred to an alternative case in which a generic sanction $s > 0$ is imposed. To that end, and for some given level of importance i , let

$$W^s = \int_{pd(s)}^{\bar{g}} (g - h - p(c(s) + d(s) + i \cdot e(s))) \cdot \omega(g, i) dg,$$

and

$$W^n = \int_0^{\bar{g}} (g - h) \cdot \omega(g, i) dg,$$

be societal welfare with a sanction ($s > 0$) and without a sanction ($s = 0$), respectively. The next result establishes a condition under which it is optimal not to sanction.

Theorem 1 *Fix $s > 0$. For a given level of importance i , societal welfare without a sanction (W^n) is higher than societal welfare with a sanction (W^s) when:*

$$i > i^* \equiv \left(\frac{1}{p \cdot e(s)} \right) \cdot \left(\frac{\int_0^{pd(s)} (h - g) \cdot \omega(g, i) dg}{\int_{pd(s)}^{\bar{g}} \omega(g, i) dg} - p \cdot (d(s) + c(s)) \right).$$

¹²This analysis complements Kaplow (1990) who argues that the optimal nonmonetary sanction generally need not be interior.

Proof. Social welfare without a sanction (W^n) is higher than social welfare with a sanction (W^s) when:

$$\begin{aligned}
\int_0^{\bar{g}} (g - h) \omega(g, i) dg &> \int_{pd(s)}^{\bar{g}} (g - h - p(c(s) + d(s) + i \cdot e(s))) \cdot \omega(g, i) dg \\
&\Leftrightarrow \int_0^{pd(s)} (g - h) \omega(g, i) dg + \int_{pd(s)}^{\bar{g}} (g - h) \omega(g, i) dg > \\
&\int_{pd(s)}^{\bar{g}} (g - h) \omega(g, i) dg - p \int_{pd(s)}^{\bar{g}} (c(s) + d(s) + i \cdot e(s)) \omega(g, i) dg \\
&\Leftrightarrow \int_0^{pd(s)} (g - h) \omega(g, i) dg > -p \int_{pd(s)}^{\bar{g}} (c(s) + d(s) + i \cdot e(s)) \omega(g, i) dg.
\end{aligned}$$

Rearranging gives:

$$i > \frac{-\int_0^{pd(s)} (g - h) \cdot \omega(g, i) dg - p \int_{pd(s)}^{\bar{g}} (d(s) + c(s)) \cdot \omega(g, i) dg}{p \cdot e(s) \cdot \int_{pd(s)}^{\bar{g}} \omega(g, i) dg},$$

which, for any given $s > 0$, is equivalent to

$$i > \left(\frac{1}{p \cdot e(s)} \right) \cdot \left(\frac{\int_0^{pd(s)} (h - g) \cdot \omega(g, i) dg}{\int_{pd(s)}^{\bar{g}} \omega(g, i) dg} - p \cdot (d(s) + c(s)) \right).$$

■

This result reveals there is a critical level of importance above which it is optimal not to levy a sanction. This threshold i^* basically consists of two parts. The first part is the reciprocal of the expected externalities resulting from imposing a nonmonetary penalty. All else equal, the greater these externalities, the higher the costs of enforcement and, therefore, the larger the range of importance levels for which not sanctioning is optimal. The second part subtracts the expected direct costs of enforcement from a fraction of deterred over undeterred individuals. It therefore captures the effectiveness of sanctioning. For instance, the threshold is *ceteris paribus* decreasing in the number of undeterred individuals and the expected costs of enforcement. Naturally, the more effective a sanction, the more likely it is beneficial to actually impose one.¹³

The next example illustrates the above finding.

Example 2 Suppose that individuals are uniformly distributed over $[0, \bar{g}] \times [0, \bar{i}]$ and assume $\bar{g} = \bar{s} = \bar{i} = 1$. Suppose further that $p = s = \frac{1}{2}$ and that $h = \frac{3}{4}$. Finally, let $c(s) = e(s) = s = \frac{1}{2}$ and $d(s) = 3s = 1\frac{1}{2}$. This gives $i^* = \frac{1}{2}$. Hence, imposing the nonmonetary sanction $s = \frac{1}{2}$ is beneficial when $i \in [0, \frac{1}{2})$ and not beneficial for those individuals for whom $i \in (\frac{1}{2}, 1]$.

¹³Note that the effect of the probability of being caught p is ambiguous. On the one hand, an increase in p increases deterrence, which makes imposing a sanction more beneficial. On the other hand, it makes it more likely that the sanction will indeed be imposed, which raises costs.

Clearly, whether or not the condition $i > i^*$ holds will depend on the underlying modelling assumptions and is ultimately an empirical question. That said, however, there are two general conclusions that can be drawn from Theorem 1. Firstly, notice that i^* is negative when the direct harm h is sufficiently small. In such cases, ‘no prison time’ is preferred, independent of the level of importance. In fact, there are two forces that make not sanctioning superior when the direct harm is small enough. On the one hand, there are the undeterred individuals (the ones with a relatively high gain) who commit the act either way. For this group, imposing a sanction is clearly inferior since it only creates additional (expected) costs due to enforcement. On the other hand, there are the deterred individuals (the ones with a relatively low gain). Any benefit for society should come from this group. However, when the direct harm is small, the gain from deterrence is limited. Indeed, in the extreme ($h \rightarrow 0$), enforcement is exclusively costly.¹⁴

Secondly, not sanctioning is also optimal when there is substantial harm, but the individual involved is sufficiently important. To see this, suppose there is no indirect harm ($i = 0$) and a sufficiently large direct harm so that it is beneficial to levy a sanction ($i^* > 0$). A rise in importance now has the following two effects. First, prosecuting the undeterred becomes increasingly more expensive through a rise in $i \cdot e(s)$. This makes not sanctioning *ceteris paribus* more beneficial. Second, switching to no sanction simultaneously has a negative effect in that previously deterred individuals now find it attractive to commit the act. If the indirect harm is large enough, however, this adverse effect is outweighed by the positive effect of saving on enforcement costs.

The following two corollaries summarize the preceding discussion and provide sufficient conditions.¹⁵

Corollary 3 *If $h \rightarrow 0$, then it is optimal not to impose a sanction ($s = 0$), independent of an individual’s importance.*

Corollary 4 *Fix $h > 0$. If $\bar{i} \rightarrow \infty$, then it is optimal not to impose a sanction ($s = 0$) for all individuals for whom $i \in (i^*, \infty)$.*

Corollary 3 shows that not sanctioning is optimal when the gains from deterrence are small. Given that the harm resulting from the act is limited, this seems non-controversial. Arguably, the same cannot be said for the ‘too big to jail’ statement in Corollary 4. This finding shows that society may be better off by letting someone walk free when (s)he is sufficiently important, even when the harm caused by the illegal activity is substantial. Since putting an important person behind bars can have a severe negative impact on outsiders and therefore on society as a whole, the overall welfare effect of a jail sentence may well be negative.

¹⁴To be clear, the welfare effect of deterrence need not be negative. If it is positive, then imposing no sanction may still be optimal when enforcement is sufficiently costly.

¹⁵These conditions are sufficient rather than necessary in the sense that h may be far above 0 and i can be relatively low.

5 Concluding Remarks

In the aftermath of the worldwide financial crisis of 2007-2008, analysts and reporters frequently qualified banks and other financial institutions as being ‘too big to fail’. This phrase is used to characterize companies that play a pivotal role in the economy so that their collapse would result in substantial losses for society as a whole. Consequently, when a key market player is in trouble, the government has a strong incentive to come to the rescue by intervening (*e.g.*, through a bailout). The less-known term ‘too big to jail’ in some sense mirrors this in that important parties are not (appropriately) punished rather than saved.¹⁶

In this note, we have presented a theory of this ‘too big to jail’ phenomenon. Within the context of a general public law enforcement model, we have shown there is a critical level of importance above which it is in society’s interest not to impose a nonmonetary sanction. Specifically, it is preferred not to put someone behind bars when: (1) the damage from the illegal act is sufficiently small, or (2) for some given level of damage, the individual is sufficiently important. What drives the latter is that the degree of importance is reflected by the level of externalities. The more important the individual, the higher the external costs of a prison term to third parties not directly involved in the illegal act.

The finding that it can be in the public interest to forgo nonmonetary penalties for important parties is arguably problematic and closely resembles the problem of class justice. In both cases, it will prove difficult if not impossible to keep society’s leading figures within the boundaries of the law. Or, as the British philosopher Francis Bacon is claimed to have once stated: “*The laws are like cobwebs; the small flies are caught but the great break through*”.¹⁷ As this note has argued, however, it may well be sensible to have laws like cobwebs as long as the great are great enough.

¹⁶It is worth noting that large banks have also been “too big to jail”, see Packin (2014) and Markham (2018).

¹⁷See, for example, Westen (1969) and Richards (1973).

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