

## Review Essay

*Capital Offenses: Business Crime and Punishment in America's Corporate Age.* By *Samuel W. Buell*. New York: W. W. Norton, 2016. xx + 296 pp. Notes, index. Cloth, \$27.95. ISBN: 978-0-393-24783-1.

*The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives.* By *Jesse Eisinger*. New York: Simon & Schuster, 2017. xxi + 377 pp. Notes, index. Cloth, \$28.00; e-book, \$14.99. ISBN: cloth, 978-1-5011-2136-4; e-book, 978-1-5011-2138-8.

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We live in an age of extraordinary corporate power and frequent corporate scandals: malfeasance at American defense contractors, savings and loans, and health-care companies in the 1980s and 1990s; grossly manipulated financial statements at major companies in the 1990s and early 2000s; blatant schemes of tax evasion in the same decades, conjured up by leading law and accounting firms; major safety lapses at Toyota, General Motors, and British Petroleum; rampant bribery of foreign officials by Siemens; and widespread deceptions/manipulations associated with the securitized mortgage markets, emissions standards by automakers such as Volkswagen, the setting of interbank interest rates, and the creation of unauthorized accounts at Wells Fargo.

These episodes are sure to attract extensive analysis by historians in the decades to come. But given the strong disciplinary preference to gain some temporal distance before wading into research topics, the initial engagement with such recent events tends to come from journalists and social scientists. In a pair of trade books well worth the attention of business historians, investigative reporter Jesse Eisinger and Duke law professor Samuel Buell take up one key dimension of this profusion of corporate wrongdoing: the disinclination of American prosecutors to respond to such episodes through criminal trials, especially during the last decade.

The highly readable narratives constructed by Eisinger and Buell demonstrate considerable historical sensibility. Each book heeds evolving political, institutional, economic, and cultural contexts; each rests on significant historical research in public court documents and news

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coverage about especially prominent allegations of corporate crime. Eisinger also draws on hundreds of interviews with prosecutors, defense attorneys, and business executives. Neither provides the extensive citation that historians tend to prefer.

Both authors take heed of the reality that in the United States prosecution of business executives for actions taken in the course of their managerial duties faces difficult hurdles. The issues at hand tend to be enormously complex, taxing the comprehension of prosecutors, much less juries. The world of modern banking involves byzantine financial instruments such as collateralized debt obligations and credit default swaps. Automobile manufacturing and deep-sea oil drilling involve scores of processes and integration of physical engineering with cutting-edge computer systems. This complexity creates challenges for prosecutors who try to construct clear causal stories about the chain of events that produced deceptive marketing of financial products, dangerous ignition switches, duplicitous emissions systems, or calamitous blowouts on offshore oil rigs. In addition, the tasks of gathering evidence about behavior within corporations can be daunting. The sheer volume of relevant communications and paperwork can bury prosecutors, even as no written documentation may exist for crucial conversations. Further muddying prosecutorial waters, decision making tends to be diffused within large firms, which complicates the pinpointing of individual responsibility for specific policies and actions.

For Eisinger, however, the great challenges that confront criminal cases against business executives do not fully explain the paucity of prosecutions in the wake of recent episodes of business misconduct. As Eisinger's title intimates, his account emphasizes unfortunate choices and missed opportunities, which facilitated a culture of timidity and even fear among Department of Justice (DOJ) prosecutors. Early chapters stress the capacity of the best prosecutors to build strong cases against corporate malefactors, such as those brought against Enron executives Jeffrey Skilling and Kenneth Lay in the wake of that company's bankruptcy, or the associated case brought against the Arthur Andersen accounting firm for obstruction of justice (chiefly by destroying documents relevant to the Enron case).

As with legal takedowns of mob kingpins, Eisinger argues, sufficiently resourced, experienced, and committed prosecutorial teams can bring top-level executives who have broken the criminal law to justice. These prosecutors patiently build factual cases against midlevel managers most directly implicated by readily available evidence. They then exert consistent pressure against those underlings, trading plea deals for testimony against higher-ups. Relying on practical skills honed in previous cases, they also demonstrate savvy trial management, focusing

indictments on the most supportable charges and streamlining the presentation of cases before juries. Eisinger stresses the many positive impacts of the resulting public trials, which educate the public about corporate transgressions, compel judges to clarify legal ambiguities, make other executives think twice before engaging in illegal conduct, and buttress popular confidence in the legitimacy of economic institutions.

During the last fifteen years, Eisinger shows, many hard-charging prosecutors stayed out of the “chickenshit club,” defined in 1997 by then U.S. attorney James Comey as those of his peers who would never bring a case if there were any possibility of acquittal. Hailing mostly from working-class or lower-middle-class backgrounds, federal lawyers such as Paul Pelletier, Justin Weddle, and Jim Kidney worked for years to develop fraud cases against corporate behemoths such as American Insurance Group, PNC Bank, the accounting firm KPMG, and Goldman Sachs.

Their efforts, however, ran into a legal and political backlash set off by the prosecution of Arthur Andersen as a result of its connection with malfeasance at Enron, which accelerated the collapse of the accounting firm. In a series of subsequent appellate cases, including appeals of the Enron and Arthur Andersen convictions, judges clipped the wings of prosecutors, widening the contexts in which they had to demonstrate criminal intent in order to sustain felony charges and reaffirming the right of corporations to pay for the defense attorneys who represented their managers. Spooked by the dissolution of Arthur Andersen and confronting heat from members of Congress, as well as top officials at the Federal Reserve and other financial regulatory agencies, high-ranking DOJ officials in first the Bush and then the Obama administrations pulled in the prosecutorial reins.

Coming from prominent law firms with corporate clients, key DOJ appointees in the Washington, D.C., headquarters—such as Paul McNulty and Lanny Breuer—increasingly pressed the offices of U.S. attorneys not to bring high-profile cases against major business enterprises to trial. Instead, they preferred civil settlements and deferred prosecution agreements (DPAs), in which corporations often admitted no wrongdoing, but paid large fines and committed to implement changes in their business practices. In many instances, DPAs resulted from extensive internal investigations by corporations of their own activities, rather than from evidence gathering by prosecutors. For Eisinger, this shift represented a regrettable choice, not an inevitable concession to political and economic realities that were only sharpened by the global financial crisis of 2008.

In *Capital Offenses*, Buell offers a quite different perspective on these developments. As a former federal prosecutor who took on important roles in the multiyear investigation of Boston mobster Whitey

Bulger and the Enron cases, Buell has a deep appreciation for the logistical dilemmas explored by Eisinger. But the Duke law professor views the problems posed by alleged corporate criminality as more rooted in legal architecture and economic structure. This mindset guides the organization of Buell's argument.

Whereas Eisinger proceeds in a largely chronological consideration of key cases and emphasizes prosecutorial personalities and tactical assessments, Buell begins with a historical consideration of business crime and especially fraud as Anglo-American legal concepts. These opening chapters note how difficult it can be to clearly define prohibited business activities, how susceptible the business criminal code is to the discovery of loopholes, and how much prosecutorial evaluations of alleged criminal actions within corporations inevitably depend on careful readings of context. He then considers the institutional structures that constrain and enable prosecutors, defense attorneys, and the judiciary, in turn. Ranging across dozens of alleged business crimes since the 1990s, these chapters teem with keen insights about the evolution of investigative practices and professionalism within the DOJ, the gravitation of prosecutors toward insider-trading cases, the creation of intelligence networks among defense lawyers, and the shifting standards that guide judicial sentencing in business cases.

For Buell, the perplexities posed by business crime have two main sources. The first is the basic Anglo-American commitment to the rule of law, which emphasizes the importance of demonstrating criminal intent in felony prosecutions. The second is the extent to which American public policy and social norms have sought to empower the modern corporation and reward hard-charging innovation, so as to facilitate technological progress and economic growth. With so much legal, policy, and cultural scaffolding to support risk taking and profit seeking through the mechanism of the business corporation, Buell tends to see judges as often rightly looking askance at prosecutors who proceed with questionable cases against business enterprises or their managers.

Buell, moreover, is far less sanguine about the benefits of corporate prosecutions, whether involving DPAs or full-blown trials. He worries that even successful criminal cases against major businesses can deflect public attention from more important policy debates. If corporations have become too big to jail, he wonders, perhaps the most pressing objectives to redress the "corporate responsibility deficit" should be to cut them down to size and construct more effective regulatory constraints on their behavior—goals that he recognizes are highly unlikely in the short term, given the present shape of national politics.

These two fine books each represent superb first cuts at a key theme in recent American business history. As historians of business, policy,

and law dig into the problem of late twentieth- and early twenty-first-century corporate criminality, the two volumes will provide crucial (and contrasting) interpretive touchstones, whether for case studies of specific instances of alleged malfeasance or for broader syntheses of institutional responses and policy reforms. They also suggest some crucial research questions, including the degree to which mechanisms of capture account for decision making within the DOJ, the impact of DPAs on corporate behavior, and the influence that prosecutions (and nonprosecutions) of major corporations have had on public opinion.

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