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ARTICLES

THE BLAMELESS CORPORATION

Larry Thompson*

On April 21, 2009, the Georgetown University Law Center hosted a Symposium on "Achieving the Right Balance: The Role of Corporate Criminal Law in Ensuring Corporate Compliance."¹ The following are transcribed remarks excerpted from the daylong event.

INTRODUCTION

Good afternoon. One thing you can discern from Cheryl's wonderful introduction is that I'm old and I've been around a long time. I really have been around a long time and have experienced, as a defense lawyer and as a prosecutor, this issue of corporate criminal liability, and I've been thinking about it for a long time and it's really good to be able to talk to my colleagues about this. I had a script, not a script but a prepared talk that I was going to give, and I gave it to the Editor of the law review, I just kind of want to talk informally this afternoon with you.

If you look at my essay that I wrote in 1992 you'll see a quote and it's the following: "White collar crime is the most serious and all pervasive crime problem in America today." So, you might think, if you don't look at it, who wrote that? Was it Ralph Nader, was it Barney Frank, or some other member of Congress? No, this was written by the former Chief Justice Rehnquist. The quote illustrates the problem that we have with corporate criminal liability. There has always been a sense of hysteria, a sense of urgency, associated with corporate criminal law. The whole state of what you might call corporate criminal law, I think, is in a mess and there are two aspects of the mess I would like to discuss both of them with you this afternoon.

The first aspect is this abiding sense of unfairness as it relates to the corporate criminal process. What I mean by that is, is it really possible for a corporation to submit itself to a jury trial? As all of you know, a corporation is a person under the eyes of the law. If you and I were under investigation and we thought that the

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1. The Symposium Webcast is available at <http://141.161.127.22:80/qtmedia/ACLR%20Corporate%20Criminality%204:21:09.mov>

government had gotten it wrong and the government's investigation was ill-conceived, then we have a constitutional right to challenge the government, have a jury of our peers, and take the government to trial. This is one of the real conundrums and I want to talk about that this afternoon. There is another sense in which the state of corporate law is a mess and, that is, there is a sense of futility. I read you that quote and that came from the case *United States v. Brazwell*, I believe it's a 1980 case, but we have this sense of futility that we've had for a long time, but we're still having scandals. We had a scandal in 2002 now we've had sort of scandals, if not worse, in 2008 and I think a lot of people are saying what can we do about corporate wrongdoing in the corporate context.

So, let me talk about those issues, but before I do, I look around the room and I see so many friends and colleagues and some people in academia, Ellen Podgor who is a former professor at Georgia State University and I've lectured at her classes. Sara Beale, who is a professor at Duke Law School, and Sara and I graduated from law school together at the University of Michigan. And Cheryl mentioned I spent a wonderful semester as a visiting professor at the University of Georgia Law School and it was just a wonderful time before I joined PepsiCo, this was between government and PepsiCo. Now, I know there are frustrations in any profession, but one of the things that happens or one of the things I think about when I have my own particular frustration, is what one of my University of Georgia Law School colleagues told me when I was a visiting professor. He said being a law professor is like finding the loophole in life. So sometimes I search for that loophole Sara and Ellen.

I. PROSECUTING A CORPORATION

Whether or not a corporation can ever submit itself to a trial, as we all know, is very very risky. One of the reasons it's risky is that you have strict liability. If one of your employees or agents has done something wrong under the *respondeat superior* doctrine and you get that jury instruction, no matter how brilliant your evidence at trial is going to be, and you get that *respondeat superior* jury instruction, you are going to lose the case. It's almost to the point that you cannot really go to trial under that doctrine. I know that there are some very interesting proposals to eliminate the *respondeat superior* doctrine and, if you'll pardon the pun, I think that train has left the station under the *New York Central Railroad* case in 1909. Long ago the state of law was defined in our country and I don't think it's going to be changed meaningfully in this day and age, and so I want to talk about at least some suggestions with respect to that. It's also a sense of unfairness that under some theories of liability you can be held responsible not even if one agent did something but a whole bunch of different agents under this collective knowledge theory in the *Bank of New England* case. When you deal with lay people there is a sense of just unreality when you tell someone that the corporation can be held responsible by the acts of a rogue employee, even if it's

contrary to corporate policies, people just don't understand that. And so that's a sense of unfairness and we need to address that.

In 1992, in trying to address this issue of unfairness, I wrote an essay for the Washington Legal Foundation and it dealt with the concept of the principles of federal prosecution. When I would have cases, there were a number of prosecutors who were well meaning and ethical and really wanted to try to understand the issue associated with corporate criminal liability, and if you directed the prosecutors to the principles of federal prosecution there it became clear the United States Attorneys Manual encouraged prosecutors, in appropriate cases, to consider non-criminal alternatives to prosecution for lots of reasons. The thesis of my essay was that if a corporation has set up an effective compliance program, if a corporation investigates instances of wrongdoing, if a corporation reports known violations of law, and if a corporation cooperates with the government during the course of an investigation, is there really a substantial federal interest in prosecuting that corporation especially when there are innocent employees, there are innocent shareholders and innocent communities involved. That was the thrust of what I was trying to do.

Of course, as a reward for my efforts I later became Deputy Attorney General of the United States, and had the honor of chairing the Corporate Fraud Task Force, the president's Corporate Fraud Task Force after the corporate scandals of 2002. I've seen this issue of corporate criminal liability as a defense lawyer, as a prosecutor, and now in-house as a general counsel of a large public company. If you go from 1992 to today 2009, really nothing has changed with respect to the issues of corporate criminal liability, and I think they've actually perhaps gotten worse.

II. INTRODUCING EVIDENCE OF CORPORATE COMPLIANCE PROGRAMS AT TRIAL

So, let's talk about what perhaps we can consider. People are still writing articles about this issue. There is a really interesting article that was published by the Washington Legal Foundation by Steven Kowal entitled: "Vicarious Liability: Judges Should Credit Diligent Compliance When Evaluating Criminal Intent." The article strongly advocated the introduction of evidence during the course of a trial on corporate compliance programs and advocated that the court allow this kind of evidence into play. It's an interesting proposal and it's promising but I have a small concern or maybe not a small but a significant concern about the proposal because quite frankly you still have to go to trial. Even in the context of getting a favorable jury instruction, you still have to go to trial and I'm sure all of you in this room understand that that is still a risky process and you advise your clients that there is no guarantee that your side is going to prevail.

The other dimension of the conundrum of corporate criminal liability, which is the collateral consequences if you are convicted, is enormous. Suspension and debarment, loss of permits, even a company like PepsiCo, that really is not a

government contractor, would have enormous consequences to it if it was ever convicted of a crime because we have permits, all kinds of government permits, licenses, etc. So, it's not very realistic with respect to thinking about corporate criminal liability of a corporation subjecting itself to a jury trial.

I'll just add a footnote though from my experience as a defense lawyer. If you do go to trial, and you do have a jury instruction about corporate compliance programs, it does serve somewhat to level the playing field. It does give you an argument, it does blunt the strict liability effects of *respondeat superior*. Ellen and Sara, I remember a case that Wade Smith and I tried in Winston-Salem in 1988 and we were representing a corporation that was charged with a crime. We had no alternative but to go trial there and this corporation, if it had pled guilty, it would have lost all kinds of licenses but we were able to get the jury instruction on corporate compliance and I think that jury instruction was very important, we were able to get a not guilty verdict. So, jury instructions can help, but I don't think that's the answer.

III. A NEW AFFIRMATIVE DEFENSE RULE 12.4 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

I'm a little reluctant to offer this proposal in the midst of academics and people who have spent a lot more time thinking about this than I have but this is the thing that has been rolling around in my mind as a former trial lawyer and someone who has to deal with this now as the chief lawyer for a public company. That is, perhaps, when you really get down to it, and you have an investigation and you can't do all the creative and good things to get a declination from the prosecutor to have the prosecutor do a deferred prosecution agreement, and you have to think about challenging the government, perhaps, we ought to think about an affirmative defense. The reason I want to put that out there is that if there is another way a corporate target can challenge the government, I think that serves to have a moderating influence on a prosecutor who is either stupid, who is malevolent or who is cowboy or cowgirl who just wants to try a case and not be reasonable.

So, let's talk about the affirmative defense. We have three of them in the Federal Rules of Criminal Procedure. There is an alibi, there is insanity, and public authority, 12.1, 12.2, 12.3 so this would be 12.4 compliance policies. There would be two aspects of this defense. Of course, the corporation would have to put the government on notice that this is the defense that it is going to assert at trial and would have to, in pretrial, file a notice to the government that they are going to assert the corporate compliance defense. Now, here is the second and I think the critical thing we ought to think about, and that is the court then would be required to rule on the affirmative defense pretrial. If the compliance program indeed is a bona fide compliance program, there is the possibility that the corporation could get a Rule 29 judgment of acquittal and you don't have to go to trial and you don't have to submit yourself to a jury trial. The innocence of the corporation would be

established as a matter of law. Now, there have to be a lot of little things worked out but, for example, on the defense of insanity there are cases that toss out indictments on the basis of insanity pursuant to a Rule 29 judgment as a matter of law. If you look at the issue of entrapment, although it's not an affirmative defense, there are some cases where a judge has not ruled on entrapment pretrial and has let the issue of entrapment go to the jury. The circuit courts have said that's error and that is something that should not have gone to the jury and that is something that the judge should have ruled on as a matter of law.

The salient features of this affirmative defense would be, for example, the Federal Sentencing Guidelines are very, very clear and detailed about what constitutes an effective compliance program so this would be a terrific starting point for as a matter of law determining what the innocence of the corporation. Now, of course, if the compliance program is honored, more in the breach than in its administration, if it's simply a paper program then this affirmative defense would not be available. But, I think this is consistent with the notion of corporate criminal liability. Even under the *New York Central* standard, it's whether the employee was acting within the scope of his duties and now there have been all kinds of cases that have really narrowed that, but if you have an effective compliance program and you have a rogue employee, I think a very principled argument could be made that the employee is not acting within the scope of his or her employment.

IV. WHY A NEW APPROACH TO CORPORATE CRIMINAL LIABILITY MAKES SENSE

Now, you might be asking yourself at this point look Mr. Thompson we're in 2009, we have evidence of all kinds of irregularities in financial institutions, you have Senator Leahy actually saying in open hearing that he wants to see people go to jail as a result of what has happened, why would anyone want to agree to this kind of proposal. Why would anyone want to do this? I think the answer to that gets back to the premise in my 1992 article and, that is, that if you really want to have a deterrence of corporate criminal liability, the best weapon against corporate misconduct is establishing an effective compliance program. That is absolutely the best weapon. We need to incentivize corporations to establish effective compliance programs and I had to deal with this as a high ranking government official in the Department of Justice, you have to face this reality. We do not have enough FBI agents, we do not have enough SEC examiners to monitor all the instances of corporate wrongdoing that may be out there, so you need to be able to incent corporations to have an effective compliance program and this is a very powerful incentive. This provision I think is one further step in leveling the playing field between a corporate target of a government investigation and the government. Because, quite frankly, the way the game is played today, the playing field is unfairly tilted in favor of the government. What you are relying on, even if you have smart creative competent defense counsel, you basically are relying on the

good faith and the goodwill of a single assistant United States Attorney. That is all you are relying on. And if you have a malevolent prosecutor, if you have a prosecutor who is not experienced, or if you have a prosecutor who simply doesn't give a damn you are in a terrible situation and that is unfortunate because the corporation does have innocent people. The corporation does have innocent shareholders and of course innocent communities. When I wrote the article in 1992 and I did a couple speeches about it and I said perhaps we should consider this a blameless corporation, perhaps it's time to consider a corporation blameless. And boy I got a universal negative reaction from students. They just couldn't imagine a corporation not being held responsible for wrongdoing by its employees. But when you think about it, when you really think about it, when a corporation investigates itself, reports known violations, cooperates with the government, then under the principles of federal prosecution, and this is a defined term, there is really no substantial federal interest in seeing that corporation prosecuted. Again, in the light of innocent employees, innocent shareholders and innocent communities, there is no substantial federal interest and perhaps it is time for us to consider the blameless corporation because a corporation under those set of circumstances is in my judgment in effect blameless.