



School of Law  
UNIVERSITY OF GEORGIA

Digital Commons @ University of Georgia  
School of Law

---

Scholarly Works

Faculty Scholarship

---

7-1-2010

## The Blameless Corporation

Larry D. Thompson

*University of Georgia School of Law, lthomps@uga.edu*



---

### Repository Citation

Larry D. Thompson, *The Blameless Corporation*, 47 Am. Crim. L. Rev. 1251 (2010),  
Available at: [https://digitalcommons.law.uga.edu/fac\\_artchop/1052](https://digitalcommons.law.uga.edu/fac_artchop/1052)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#)  
For more information, please contact [tstriepe@uga.edu](mailto:tstriepe@uga.edu).

# COMMENTS

## THE BLAMELESS CORPORATION

Larry D. Thompson\*

### INTRODUCTION\*\*

Good afternoon. Two things you might discern from that wonderful introduction are 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, the issue of corporate criminal liability. So it's really good to be able to talk to my colleagues about it. I prepared a written speech for today, but instead of delivering it, I would like to talk with you informally this afternoon.

I'd like to begin by reading the following quotation: “[W]hite-collar crime[]’ [is] one of the most serious problems confronting law enforcement authorities.” Who would you guess wrote that? Was it Ralph Nader, Barney Frank, or some other crusading politician? No, this was written by former Chief Justice Rehnquist, hardly a paragon of anti-corporatism. The quotation illustrates the problem that we have with corporate criminal liability: We have maintained for years a sense of hysteria about corporate criminal conduct and, while aggressively prosecuting corporations, have not actually mitigated the problem of white-collar crime in America. I would like to explore with you this afternoon two aspects of this mess and share some of my thoughts on possible solutions.

The first aspect is my sense that the corporate criminal process is unfair to corporations. Specifically, I question the application to corporate entities of a criminal process designed for real people. I want us to consider whether it is really possible for most corporations to submit to a jury trial. As all of you know, a corporation is a person in the eyes of the law. If you and I were under investigation and we thought that the government’s investigation were ill conceived, we could exercise our constitutional right to challenge the government and defend ourselves against any charges before a jury of our peers. I am not convinced that most large corporations enjoy this right. This is one of the issues that I want to explore with you.

---

\* The author is currently Senior Vice President of Government Affairs, General Counsel and Secretary of PepsiCo, Inc. He is responsible for PepsiCo's worldwide legal functions, as well as its government affairs organization and charitable foundation. Mr. Thompson has also served in the U.S. Department of Justice as the Deputy Attorney General of the United States. © 2010, Larry D. Thompson.

\*\* The above article is a clarification and expansion of the author's previous oral statements published in *The American Criminal Law Review* 46-4—a Symposium Issue on “Achieving the Right Balance: The Role of Corporate Criminal Law in Ensuring Corporate Compliance.”

The second aspect of this mess is a sense of futility—we have subjected corporations to an unfair criminal law enforcement regime for decades without curbing corporate malfeasance. The quotation that I read to you came from *Braswell v. United States*, which is a 1988 case, so the current sense of urgency is one that we've had for a long time, and yet we still have scandals. We had major scandals in 2001 and 2002, and we again experienced the same sort of scandals, if not worse, in 2008. And I think that a lot of people are again concerned about what we can do to address criminal activity in the corporate context.

### I. PROSECUTING A CORPORATION

As we all know, it is unusual for a major corporation to submit itself to a criminal trial. Such a trial is simply too risky. One of the reasons it's risky is the strict liability that the company has for the actions of its employees. If one of the corporation's employees or agents has done something wrong, and the jury instruction applies the doctrine of *respondeat superior*, the corporation will lose the case, no matter how brilliant its evidence at trial. Today, we are almost to the point where a responsible corporation cannot really go to trial under that doctrine. I know that some very interesting proposals suggest eliminating the *respondeat superior* doctrine and, if you'll pardon the pun, I think that train left the station with the *New York Central and Hudson River Railroad* case in 1909. Long ago, our country adopted this doctrine of *respondeat superior*, and I doubt that it will change meaningfully in this day and age. And so I want to talk about at least some suggestions to address the unfairness that has arisen under this doctrine. A good example of this unfairness is the First Circuit's *Bank of New England* decision in 1987, which held that a corporation can be criminally responsible for the cumulative knowledge of a bunch of different agents, under a collective knowledge theory. When you explain to lay people that the corporation can be held responsible for the acts of rogue employees, even if their behavior contravened corporate policies, most people just don't understand. They see it as unfair. And they are right, so we need to address this.

In 1992, I wrote an essay for the Washington Legal Foundation, tackling this issue of unfairness. It dealt with the principles that should guide federal prosecution. When I worked as a corporate defense lawyer, I faced a number of prosecutors who were well meaning and ethical, and really wanted to be fair to the corporation. And the United States Attorneys' Manual encouraged prosecutors, in appropriate cases, to consider non-criminal alternatives to prosecution for many reasons. Yet I found the system to be routinely unfair to corporate defendants. In addressing this problem, my essay suggested that if a corporation has an effective compliance program, if it investigates instances of wrongdoing, if it reports known violations of the law, and if it cooperates with the government during the course of an investigation, there really is no substantial federal interest in prosecuting that corporation—especially when there are innocent employees, innocent sharehold-

ers, and innocent communities involved.

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 President's Corporate Fraud Task Force to address the corporate scandals of 2001 and 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 review events from 1992 to 2009 concerning corporate criminal liability, you will see that nothing has really changed, and I think that perhaps things have actually gotten worse.

## II. INTRODUCING EVIDENCE OF CORPORATE COMPLIANCE PROGRAMS AT TRIAL

Now that we've discussed the problem, let's talk about possible solutions. People still write articles about this issue. Recently, the Washington Legal Foundation published a particularly interesting one by Steven Kowal, entitled "Vicarious Corporate Liability: Judges Should Credit Diligent Compliance When Evaluating Criminal Intent." The article strongly advocated for courts to allow the consideration of evidence of a corporation's compliance program as a mitigating factor when assessing corporate criminal liability. It's an interesting and possibly promising proposal, but the corporation would still have to go to trial. And, even with a favorable jury instruction, a criminal trial remains an incredibly risky process for a corporation.

We should keep in mind that the collateral consequences of a corporation's conviction are enormous: suspension, debarment, and loss of permits. Even a company like PepsiCo, which really is not a government contractor, would experience enormous collateral difficulties if it were ever convicted of a crime, because it has numerous government permits, licenses, etc. So, it's still not very realistic to think that a corporation would ever subject itself to a jury trial, if it has the choice.

But if a corporation does go to trial and can receive such a jury instruction about its corporate compliance program, the playing field becomes a bit more level. The instruction gives the corporation's defense lawyers an argument and blunts the strict liability effects of *respondeat superior*.

I should add a footnote here from my personal experience as a defense lawyer. I tried a case in Winston-Salem in 1988, representing a corporation that was charged with a crime. We had no alternative but to go to trial, and this corporation, if it pled guilty, would have lost vital business licenses. But we were able to get this type of jury instruction on corporate compliance, and I think that it helped us obtain a verdict of not guilty. Jury instructions can help, but I don't think they're the full 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 idea

that has been rolling around in my mind as a former trial lawyer and someone who deals with this now as the chief lawyer for a public company: After the corporation performs the internal investigation and unsuccessfully attempts all of the creative and good measures it can to obtain a declination or a deferred prosecution agreement from the prosecutor, perhaps it should be able to avail itself of an affirmative defense. The reason I want to raise this idea is that if there is another way that a corporate target can challenge the government, I think it may have a moderating influence on a prosecutor who is stupid, malevolent, or a cowboy or cowgirl who just wants to try a case and does not want to be reasonable.

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 there is public authority—12.1, 12.2, and 12.3. This new affirmative defense would be 12.4—compliance program. The compliance program defense would have two aspects. First, the corporation would, of course, put the government on notice that it plans to assert this defense at trial and file a pretrial notice to that effect.

Now, here is the second and most critical thing that we ought to think about: The court then would be required to rule on the affirmative defense pretrial. If the corporation does indeed have a bona fide compliance program, it could possibly get a Rule 29 judgment of acquittal without submitting itself to a jury trial. The innocence of the corporation could be established as a matter of law before the trial. Of course, this proposal lacks a lot of details that would have to be worked out—this has occurred with other affirmative defenses. For example, courts have used the insanity defense to toss out indictments, pursuant to a Rule 29 judgment as a matter of law. And, although entrapment is not an affirmative defense, judges in some cases have not ruled on this issue pretrial and have instead allowed it to go to the jury. In those cases, the circuit courts have said that this is error and that entrapment is something that the judge should have ruled on as a matter of law.

The salient features of the compliance program affirmative defense could come from standards already in use. For example, the Federal Sentencing Guidelines are very, very clear and detailed about what constitutes an effective compliance program, so their description would be a terrific starting point for determining the innocence of the corporation as a matter of law. 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.

I think this proposal is consistent with the entire notion of corporate criminal liability. Even under the *New York Central* standard, the question is whether the employee was acting within the scope of his duties. I think a very principled argument can be made that the rogue employee, who circumvents effective internal controls and defies the mandates of a fully implemented compliance program, 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 saying to yourself at this point, "Look, Mr. Thompson, we're in 2009; we have evidence of all kinds of irregularities in financial institutions; Senator Leahy actually said in an 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 of my 1992 article; that is, if you really want to deter white-collar crime, the best weapon is an effective compliance program. The ineffectiveness of the current corporate criminal law regime is, after all, the second aspect of this mess, which I described earlier. And corporate criminal liability should incentivize corporations to establish effective compliance programs. Indeed, they may be the only weapons that work. I had to deal with this reality as a high-ranking government official in the Department of Justice. We do not have enough FBI agents or SEC examiners to monitor all of the instances of corporate wrongdoing that may be out there, so we must incent corporations to control and monitor their employees themselves through effective compliance programs.

In addition to reducing white-collar crime, this proposal, I think, would further level the playing field between the government and its corporate target. This leveling is necessary, because, quite frankly, the current playing field is unfairly tilted in favor of the government. What a corporation currently must rely on, even if it has smart, creative, competent defense counsel, is the goodwill of a single Assistant United States Attorney. And if the corporation draws a malevolent prosecutor, an inexperienced prosecutor, or a prosecutor who simply doesn't give a damn, it is in a terrible situation, and that is unfortunate because every corporation does have innocent employees, innocent shareholders, and, of course, innocent communities affected by its business.

I should note, however, that I have no illusions as to how difficult change in this arena will be. In fact, just three months ago, the Second Circuit in its *Ionia Management* decision rejected the argument that prosecutors should have to show the absence of an effective compliance program to convict a corporation. When I wrote the 1992 article and gave a couple of speeches about it, I said perhaps it's time to consider a corporation blameless. And, boy, did I receive a universally negative reaction from students. They just couldn't imagine a corporation not being held responsible for the wrongdoing of its employees. But when you really think about it, if a corporation investigates itself, reports known violations, and cooperates with the government, there really is no substantial federal interest in seeing that corporation prosecuted. Again, in light of the innocent employees, innocent shareholders, and innocent communities, perhaps it is time for us to consider the blameless corporation, because a corporation under that set of circumstances is, in my judgment, in effect blameless.

