

KEYNOTE SPEECH:
THE REALITY OF OVERCRIMINALIZATION

*Larry D. Thompson**

Good morning. Thank you very much, Norman that was a very kind introduction. I look around the room, one of the things I think we all need to do because we are a community with a common interest, a community of lawyers and scholars, is stay together. I look at Professor Ellen Podgor, and when I was in Atlanta trying cases, getting beat up, I could always call on Ellen for some point that I wanted to make in a brief, or some point I wanted to make in summation or opening statement. Because I had some clients who could pay, I attempted to pay her and she would never accept anything. So, congratulations on your honor Ellen, it is much deserved.

Well, you would think from that introduction that I have had trouble holding a job. I have been around a long time. I've been a prosecutor, a defense attorney, special counsel, a deputy attorney general, and a general counsel of a large company. But I do think that the variety of jobs I've had over the years gives me a perspective on overcriminalization, and this is the issue we are here this morning to address. I have some prepared remarks and I will present them, and I will try to answer your questions.

I. THE THOMPSON POLICY MEMO

Norman, I should probably try to ignore this, but you opened the door, so I'm going to go there and talk about the famous, or infamous, memorandum that I authored. I am sometimes, to my dismay, perhaps most known for that memorandum—infamous in some criminal defense circles—for the 2003 policy memo I authored as Deputy Attorney General.¹

The memo set forth my view that “[c]orporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment.”² I also noted that “[i]ndicting corporations for wrongdoing enables the government to address, and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.”³ In outlining the factors prosecutors should

* Senior Vice President of Government Affairs, General Counsel and Secretary, PepsiCo, Inc., and former U.S. Deputy Attorney General.

¹ See Memorandum from Larry D. Thompson, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components & U.S. Att’ys (Jan. 20, 2003).

² *Id.* at 1.

³ *Id.*

consider when deciding whether or not to charge a corporation, I included not just the traditional factors like the seriousness of the offense, the pervasiveness of the wrongdoing in the organization, and the corporation's cooperation and remedial efforts.⁴ I also asked prosecutors to consider collateral consequences—like disproportionate harm to innocent shareholders—the adequacy of prosecuting individuals, and the appropriateness of alternative civil or regulatory remedies.⁵

Now, when I reissued and revised an earlier version of that memorandum, I actually thought that I was trying to be a force for good public policy and bring some much-needed certainty to the area of corporate criminal liability, and take authority away from the whims of a single prosecutor. I have been told that a Westlaw search with “Thompson Memo” or “the Thompson Memorandum” in the law journals database produces over 700 results. And reading those comments sometimes reaffirms for me the old adage that no good deed goes unpunished. My sons tell me, “Get a life, Dad. This is going to be in your obituary so forget about it.”

Today, I think that corporations and corporate officers charged with legal non-compliance have come to feel a bit like the person that really can never accomplish a single good deed. No matter how gold-plated your corporate compliance efforts, no matter how upstanding your workforce, no matter how hard one tries, large corporations today are walking targets for criminal liability. There really is little certainty in the world of corporate criminal liability.

So this morning, I want to discuss how we got here and how, perhaps, we need to readjust prosecutorial and regulatory attitudes. I should warn everyone that I do see some value, and sometimes great value, in consistent and appropriate enforcement. The mere threat of enforcement does deter misconduct. That is a much more efficient way to ensure adherence to the law than a plethora of regulatory compliance measures that burden the innocent and culpable alike. But effective and efficient enforcement requires, as Norman said, an exercise of discretion that I fear may be lacking.

II. OVERCRIMINALIZATION TODAY

Now, let's take sort of a thumbnail sketch of the background of corporate criminal liability. As we all know—and let me remind you—corporations can be charged with crimes based on the acts of their authorized agents when acting on behalf of the company. The Supreme Court accepted this proposition just over 100 years ago in *New York Central and Hudson River Railroad v. United States*, based on agency principles bor-

⁴ *Id.* at 3.

⁵ *Id.*

rowed from tort law.⁶ While recognizing that “there are some crimes, which in their nature cannot be committed by corporations,” the Court stated that it need “go only a step farther” than the tort-law principle of respondeat superior to impose liability in the criminal context.⁷ Without corporate criminal liability, the Court asserted over 100 years ago, “many offenses might go unpunished.”⁸

So corporate criminal liability has thus emerged as a logical counterpart to respondeat superior liability in the civil context. The principle that corporations are liable for the torts of their employees is certainly a familiar one, and it seems, goes unquestioned by most lawyers today. But let’s think about it. Perhaps that doctrine is not as inevitable as it may seem, or even as appropriate as it may seem. In recent years, in a number of contexts, courts have challenged the basic assumptions underlying respondeat superior. These developments hold valuable lessons, I believe, for criminal responsibility as well. Let’s look at a few of these.

In *Burlington Industries, Inc. v. Ellerth*, for example, the Supreme Court addressed whether, under Title VII, an employer could be held liable for harassment by its supervisors.⁹ The Court held that absent a tangible employment action, the employer may defend on the ground that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” by a supervisor, and that the “plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities.”¹⁰ The Court thus preserved vicarious liability as a general matter, but created sort of an affirmative defense based on the reasonableness of both the employer’s and the victim’s conduct.¹¹

In *Kolstad v. American Dental Association*, the Supreme Court considered when an employer could be held vicariously liable for punitive damages for the discriminatory acts of its employees.¹² The Court prohibited such liability where the employee’s acts were “contrary to the employer’s ‘good-faith efforts to comply with Title VII.’”¹³

In a recent case, *Correctional Services Corp.*, the Supreme Court addressed whether a federal prisoner could sue a corporation that operated the private prison where he was incarcerated, for Constitutional violations by the private employer’s employees.¹⁴ The Court held that he could not, rea-

⁶ *New York Cent. & Hudson River R.R.*, 212 U.S. 481, 494 (1909).

⁷ *Id.*

⁸ *Id.* at 495.

⁹ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

¹⁰ *Id.* at 765.

¹¹ *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998).

¹² *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999).

¹³ *Id.* at 545.

¹⁴ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

soning that “[t]he purpose of *Bivens* is to deter the officer,” and that the availability of relief against the individual was sufficient.¹⁵

And finally, just a month ago the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.* rejected the theory that a private corporation could be held liable under the Alien Tort Claims statute for violations of international law.¹⁶ The Court held that “offenses against the law of nations for violations of human rights can be charged against States and against individual men and women, but not against juridical persons such as corporations.”¹⁷ While the employees, managers, officers, and directors of a corporation could be held liable, the corporation itself could not under this case.¹⁸

So, you can see that in a variety of contexts, courts have reexamined the underlying wisdom of automatically attributing the wrongs of corporate agents to the corporation itself. I would suggest this morning that it is high time we asked those same sorts of questions in the criminal context too. We have to take a step back and ask what purpose corporate criminal liability serves. Does it add to deterrence? Does it punish the culpable or the innocent? Is it necessary in view of other remedies? In other words, let’s take a look at, and revisit, some of the underlying premises of the so-called and infamous Thompson Memorandum.

III. THE PURPOSES OF CORPORATE CRIMINAL LIABILITY

So let’s consider these things. First, what purpose is served by attaching criminal liability to corporations based on vicarious liability? If we go back far enough in history, ladies and gentlemen, the law saw *no* purpose. “A corporation,” Blackstone stated, “cannot commit treason, or felony, or other crime.”¹⁹ That was true, even though Blackstone approved of respondeat superior in the tort context.²⁰

I think Blackstone, many years ago, was onto something here. He recognized that there are fundamental differences between corporations and humans. First, and most obviously, a corporation cannot act except through natural persons; natural people can act without the benefit of a corporation. Second, a corporation cannot be incarcerated. It can be fined, but it cannot be physically placed in jail. Given that, there is a bit of an ill fit, it seems, in applying criminal law indiscriminately to corporations.

But maybe, we ask ourselves about the contemporary purposes of criminal law—deterrence and retribution—which can only be served by

¹⁵ *Id.* at 74.

¹⁶ *See* *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

¹⁷ *Id.* at 120.

¹⁸ *Id.* at 122.

¹⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 464 (1765).

²⁰ *Id.* at 417-19.

corporate criminal sanctions. I did talk about that in my memo. Let's start with deterrence. On the one hand, the threat of incarceration might deter corporate employees from committing a crime, but it does nothing to deter the corporation directly. On the other hand, corporations can be fined, but fines can be imposed civilly rather than criminally, so the need for deterrence through monetary penalties certainly can be served without resorting to criminal sanctions.

I think, when you look at our experiences, especially in recent times, there is a real risk of over-deterrence when corporations are convicted of crimes. A criminal conviction often results in the death of a corporation. We know this from recent examples in the Arthur Andersen indictment and the Drexel Burnham plea deal.

As these examples suggest, conviction typically sounds the death knell for a corporation. Indeed, even the *indictment* can have that effect. People just do not want to do business with a corporation that has been indicted. An indictment can impose collateral consequences such as a bar on contracting with the government, or participating in the industry where the corporation formerly operated.²¹ Over-deterrence, thus, comes at a price. Costs to shareholders, to the economy, to the community in which the corporation is located, to employees, as entities that formerly contributed to a thriving organization, that may disappear forever.

What about retribution? If the Justice Department believes that a crime has been committed by an agent of the corporation, that agent should be prosecuted. But who gets punished, who hurts, when a corporation is convicted? The shareholders and the employees, whether blameworthy or not. I wrote an essay several years ago, in which I set forth some of these principles, and I entitled the essay, "The Blameless Corporation."²² It was an interesting concept, and I spoke to some students, I think at Georgetown Law, and they were aghast that a corporation should ever be considered blameless. So this is the kind of context we operate in today.

Pulling these strands together, I think that every prosecutor considering indicting a corporation should ask, at a minimum, the following two questions:

1. Is a corporate criminal prosecution really necessary? In other words, given the availability of civil sanctions against the corporation, and

²¹ See Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035 (2008) ("Federal law, for example requires all federal agencies to debar or suspend any contract with any indicted contractor or its affiliate, regardless of whether the indictment is in any way related to the agency's contract. Similarly, indicted organizations may become ineligible to receive federal aid. Apart from debarment, a corporate indictment may also result in the corporation's loss of licenses, permits, or ability to participate in entire areas of regulated commerce, including accounting, banking, health care, law, and other industries.").

²² Larry Thompson, *The Blameless Corporation*, 46 AM. CRIM. L. REV. 1323 (2009).

civil and criminal sanctions against individual bad actors, does a corporate criminal prosecution really serve the goals, of deterrence and retribution?

2. If so, do the benefits of a conviction outweigh the costs to the government of taking the case to trial, and the costs to shareholders and employees from the corporation's likely demise?

If a prosecutor asks these two fundamental questions, and honestly considers them, then I believe based on all my experience as a defense lawyer and as a prosecutor; that in most cases, there is no good or sound policy reason for a corporate criminal prosecution. There are effective and viable alternatives.

IV. PROBLEMS WITH PROSECUTORIAL DISCRETION

While I believe that most government officials are fair and high-minded in making these sorts of determinations, there are forces at work that can create a temptation for even the most sensible of these prosecutors to deviate sometimes. Those forces are by no means unique to corporate prosecutions, but the greater stakes in dealing with a corporation and its innocent employees and shareholders makes them all the more important.

First, as Norman alluded to in his opening remarks, we live in a world dominated by the media, where catching the public eye and the public imagination can be the ticket to greater success and sometimes political success. For example, we all know that some—not all—state attorneys general now make names for themselves through highly publicized prosecutions. I think we need to consider a policy of shunning publicity, particularly for criminal cases and actions and putative investigations. I will confess a high degree of consternation when I see and hear press conferences with highly sensationalized language being used by the prosecutor, well outside the four corners of the indictment or the written complaint.

Second, a prosecutor really ought to be aware of the awesome power her office wields over the grand jury process. We have all heard the saying that a prosecutor could get a grand jury to indict a ham sandwich. There is an element of truth to this, and it stems from the aspects of our grand jury system that have really gone unquestioned for too long. One example is the fact that defense counsel are excluded from the proceedings. Would there not be some restraining effect on potential excess if defense counsel were there just for observation, not to ask questions, not to participate in the proceeding, but just to be present? If the presence of defense counsel is allowed for lineups, and for witness identification, then why not grand jury proceedings? I think reform in this area is long overdue. In the meantime, prosecutors must approach grand juries with a certain humility in light of the largely unchecked power exercised in the grand jury room.

V. CORPORATE REGULATION

But I digress. Let me return to the subject at hand. I have criticized the premise upon which corporate criminal responsibility is based, and I have suggested that in many instances, deterrence and retribution are best served by some combination of corporate civil fines, and individual criminal and civil liability. But I do not want you to leave here today thinking that Larry Thompson is calling for more corporate regulation instead of more enforcement. To the contrary, I believe that corporate regulation tends to be overbroad and over-inclusive.

Targeting specific, individual wrongdoers for civil or criminal violations tends to do a better job of minimizing negative spillover that harms innocent third parties. If a corporate official commits a crime, he should be punished. The Justice Department and the SEC can target the official and enforce the laws and regulations. But I get a little leery when the response to *individual* acts of wrongdoing is to call for more regulation that affects everybody. Regulations, especially those found in multi-thousand-page legislation that gets pushed through the Congressional sausage factory without enough time for legislators to even read the bill, has a serious potential to overregulate innocent parties. And, as has been brought to my attention, these regulations not only impact the civil arena, but many of them actually do away with *mens rea*, which is a very disturbing development.

So, let me offer a hypothetical to you and one real-world example to illustrate my point. First, a hypothetical. Imagine 1% of corporate CFOs commit individual frauds against their companies that cost \$1,000,000 each to the corporation's shareholders and impose \$1,000,000 of cost on the public. Each of the frauds could have been detected with a \$100,000 compliance program. The public is outraged at this turn of events. It demands that Congress prevent future CFOs from defrauding it again. So Congress enacts legislation that makes every company implement that \$100,000 compliance program. Now, since only 1% of CFOs were engaging in illegal behavior, and the regulation requires *every* company to put the compliance program in place, think about it, society—perhaps—and shareholders, are far worse off with this kind of regulation than an individual enforcement action.

But that type of argument does not play well in our twenty-four hour news cycle, which focuses on scandal rather than efficiency or rationality. Now I readily confess, especially at an event sponsored by George Mason, that my example is not a particularly original one. Law and economics scholars have been making this same point for many, many years. At the same time, I can't help but think that the argument needs to be made again and again. The scandal-regulation cycle repeats itself over and over, and I have seen this throughout my career.

So let's talk about a real-world example. I fear that the latest round of reforms we have seen in Dodd-Frank are a prime example of overregulation in response to the bad acts of some corporate executives and some corporations. So, we now have a new law that is over 2,000 pages long. One major law firm published a 117-page *summary* of the Act.²³ Several legislators confessed to the fact that they did not even read the bill. And the law delegates extraordinary power—*extraordinary* power—to federal regulators. That same law firm summary I just mentioned, estimates that “the Act requires 243 rulemakings and 67 studies” after the Act has been passed, to be conducted by almost a dozen regulatory agencies.²⁴ This fundamental financial reform shifts immense power to already-powerful regulatory agencies that will be further empowered to regulate both good and bad corporate actions.

CONCLUSION

I am going to wrap up my formal presentation and prepared remarks and then open the floor for questions. I've tried to be a bit provocative in my remarks today, I've questioned some basic assumptions about whether and when charging a corporation with a crime is appropriate. I have argued that the ability of prosecutors to exercise power does not mean that such power should always be exercised, and I've suggested that overregulation is not the answer.

Many of you will think that my remarks today are contradictory, perhaps with my Justice Department memorandum. I don't think so, but perhaps you could say, that most of my remarks today might be traced back to that memo. But the public's reaction to the memo certainly emphasized different aspects of the memo than what I've been discussing here. And yes, I did enforce laws holding corporations criminally liable. But as the Deputy Attorney General, I was sworn to uphold all the laws, not just the ones that I favored. I think it would be a bad world for a prosecutor to just uphold the laws he or she favored, and ignore the ones that he or she did not like.

So, after viewing the issue of corporate criminal liability from every side for almost forty years of my career, I am comfortable telling you that overcriminalization is a problem. The problem is growing. Some of the basic assumptions that extended liability to corporations, I think have now

²³ *Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Enacted into Law on July 21, 2010* (Davis Polk & Wardwell LLP, Wash. D.C.), July 21, 2010, available at http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7e025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf.

²⁴ *Id.* at i.

been undermined. I hope that we can reverse the trend and perhaps allow corporations that are attempting to obey the law to have a little more certainty in carrying out their responsibilities and protecting the innocent shareholders and communities, which depend on these organizations. I think this conference is a good step beginning to get scholars and lawyers, and practitioners and judges together to come to grips with this important problem that we face. Thank you. I will try to answer any questions that you might have.