

Some Reflections on Corporate Criminal Responsibility

Editor's Note: This article is extracted from Judge Kaplan's remarks made on the occasion of the presentation to him of the Stanley H. Fuld Award by the Commercial and Federal Litigation Section of the N.Y. State Bar Association on January 24, 2007. We are indebted to Judge Kaplan for his permission to publish these interesting and timely remarks.

Lewis A. Kaplan

Over the course of my career, we have seen a sea change in the use of criminal law in the business world.¹ When I was a little younger than I am now, government dealt with business misconduct principally by regulation and civil litigation. When there were criminal investigations, they typically proceeded in what by now is an old-fashioned way. The government got a tip or a cooperating witness. Grand jury subpoenas went out. Witnesses were turned or immunized. Cases were built. Sometimes indictments were returned. Even where corporations or other business entities were indicted, the potential consequences of conviction usually were such that mounting a defense was a feasible course of action.

That has changed. For a variety of reasons that are familiar to many of you, the return of an indictment against many public companies and other prominent organizations would threaten their very existence, regardless of whether they were guilty. In those cases, defending against criminal charges is not a viable option. The entity in such a case has little choice—it must make a deal with the government that avoids a criminal prosecution. This frequently means waiving the attorney-client privilege, firing employees whom prosecutors regard as culpable, paying large fines, and often accepting major changes to the manner in which the entity does business. We thus have moved, in some cases and in some degree, from a system in which prosecutors prosecuted and courts and juries decided guilt or innocence to a system in which prosecutors as a practical matter threaten business entities with unbearable extrajudicial consequences and thus exact acquiescence in the government's demands.

This is made possible by the conjunction of two principles. The first is the proposition that a corporation is a legal person and thus capable of committing a crime. The second is the fact that a corporation, however large, is guilty of a crime if even a single agent commits a prohibited act with the requisite mental state as long as that act was intended to benefit the corporation and was directly related to the performance of the kind of duties the agent had the general authority to perform.²

These principles, neither of which is self evident, have not been with us from the beginning of time. Blackstone said that corporations are incapable in their corporate capacities of committing crimes, although their members may be criminally liable in their individual capacities.³ Never-

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¹ See generally Leonard Orland, *The Transformation of Corporation Criminal Law*, 1 BROOK. J. CORP., FIN. & COM. L. 45 (2006).

² See LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS, Instruction 2-7.

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

theless, these principles have been with us for a very long time. The Supreme Court accepted the constitutionality of imputing criminal responsibility to corporations on agency principles in 1909.⁴ The concept of the corporation as a legal person is older than that. Thus, the environment in which corporate criminal liability became a matter of black letter law was very different from today. Certainly the Supreme Court, when it upheld the *respondeat superior* theory of criminal liability ninety-eight years ago, could not have conceived of anything like the *Arthur Andersen* case. It is, I suggest, time for an objective consideration of whether any change is warranted in present circumstances.

Let me begin with some disclaimers. First, these remarks are not about any pending case or any case that recently was dismissed.

Second, I have no more sympathy for corporate or white collar crime than for any other variety. When people commit crimes, they should be punished, regardless of whether their collars are white or blue. Moreover, crimes committed by white collar criminals out of a studied calculation of likely costs and benefits of engaging in the criminal behavior perhaps are especially reprehensible.

Third, I am not squeamish about the fact that the criminal process often, and quite appropriately, presents defendants and prospective defendants with choices between unpalatable alternatives. That is what happens whenever a criminal defendant accepts a plea bargain, and plea bargaining is not the only circumstance in which it occurs. But it is important to recognize that corporations and other business organizations are different than individuals and that the difference is relevant to the extent to which they should be treated in exactly the same way.

Although corporations are regarded by the law as persons, they are not persons in the same sense as those of us who live and breathe. They are collections of individuals and, often, other organizations that are bound together by complex webs of contracts and legal rights and duties. At a minimum, these collections include stockholders, directors, officers, and employees.

One consequence of this difference between corporations and individuals is that a criminal conviction of a corporation does not punish the wrongdoers. It punishes the stockholders and, in some cases, other corporate constituents. These groups bear the consequences regardless of whether they have any culpability. You don't have to look any further than the thousands of innocent former partners and employees of Arthur Andersen to see what I mean. But there are other, perhaps less obvious, examples. In the Adelphia scandal, to mention one, the bankrupt company, as part of a deal to avoid indictment, agreed to pay \$715 million to a government-established restitution fund. This deprived the bankruptcy estate of a vast sum that otherwise would have been distributed in accordance with the priorities applicable in bankruptcy. Some creditors were disadvantaged for the benefit of ultimate beneficiaries of the government's fund. While there was no error in the bankruptcy court's approval of the settlement with the government,⁵ the case illustrates the point that criminal prosecutions of corporations may injure innocent constituencies even more remote than stockholders and employees.

I do not question the application of conventional agency principles in the civil context. When the constituents of a corporation or business entity join together in a collective effort to make a profit, it seems entirely fair to require that the entity compensate anyone whom its actions injure,

⁴ N.Y. Central and Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).

⁵ Ad Hoc Adelphia Trade Claims Comm. v. Adelphia Commc'ns Corp., 337 B.R. 475 (S.D.N.Y.), *appeal dismissed as moot sub nom. In re Adelphia Commc'ns Corp.*, Nos. 06-1417-BK, 06-1738-BK, 2006 WL 3826700 (2d Cir. Dec. 26, 2006).

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just as it is entirely fair to require that the entity pay its debts. Such compensation is a part of the collective enterprise.

The criminal side may, and I emphasize the word “may,” be different. Most say that the criminal law serves a number of purposes. Criminal convictions afford an institutionalized means of exacting retribution. The punishment deters others from engaging in similar offenses. In some cases, as where an individual is imprisoned, it disables the offender from committing other crimes. So let us consider corporate criminal liability in terms of these purposes.

The first question is whether convicting corporations of crimes serves the purpose of institutionalizing vengeance. Certainly one can understand that punishing living and breathing criminals for their misdeeds satisfies the basic human desire to see the guilty pay for their crimes. Indeed, criminal law developed in part to avoid private vengeance by satisfying that desire. But that doesn’t seem to be much of a concern where the offender is a legal entity that is a “person” only in a metaphorical sense. And I wonder whether people who are victims of crimes committed by agents of a corporation feel better when the corporation is convicted of a crime than they would feel if the guilty individuals alone were convicted.

The case for corporate criminal liability appears differently when viewed from the standpoint of general deterrence. The empirical question is whether a board of directors or corporate managers would be more likely to ensure that subordinates conduct themselves in accordance with law if the company were subject to criminal conviction than they would be if the company could not be prosecuted criminally. It is an interesting question to which I do not pretend to have the answer. There is an arguable case, however, for the proposition that corporate criminal liability may have a deterrent effect on other companies, but I’m not sure it is something that is so obvious as to be taken on faith.

Specific deterrence is yet another matter. I wonder whether convicting a corporation of a crime has much effect, one way or the other, on the question whether it will engage in wrongdoing in the future unless, of course, the effect is to put it out of business. Certainly conviction of corporate agents who committed the wrongdoing would take them out of the picture quite effectively regardless of whether the corporation is prosecuted.

These are only some of the relevant considerations, and I quickly concede that I have only scratched the surface of a very complicated subject. I confess also that I do not have a view as to whether any change in the current state of the law would be advisable. I do suggest, however, that this is an appropriate subject for consideration, particularly in light of the devastating consequences of potential criminal liability that we first have seen only recently. ●