

OPENING REMARKS

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The question mentioned earlier this afternoon, “Did law solve the financial crisis?” is an interesting one in part, I suppose, because even if we debated it for far more time than we have allotted this afternoon, or even the more general question, “Does the law solve anything?” we would never reach a consensus. We all know that the law may prevent some people from acting in a particular way because they do not want to face the legal consequences of that action. And the law, as we all know, does provide for civil and criminal penalties if a person or a business violates the law, and that is what we will be discussing here in a few minutes. But I think what we ought to look at is the question, “Is the law solving the financial crisis?” and, from my perspective, the answer is yes. One portion of Joe Hogsett’s remarks references the United States Attorney’s Manual.¹ In addition to the section dealing with collateral consequences²—and as he mentioned, that has been on the books so to speak for many years, back when I started with the department—there is another provision. That other provision deals with whether the United States Attorney or the Assistant United States Attorney considering whether to charge a business should consider alternative remedies.³ Are there other civil or regulatory remedies or penalties that, in a sense, may get you the end result that a criminal prosecution would? And some of my remarks are going to echo a little bit of what you heard earlier today, and that is that offensive, even repugnant, conduct is not necessarily criminal conduct. Thus, just because a person is behaving in a morally or ethically offensive or wrongful way does not mean that he or she is going to be charged with a crime or even a civil penalty. Now, such conduct is deserving of private and public criticism and in some instances may even justify some sort of law enforcement action. But acting badly does not necessarily mean you have committed a crime. I am not saying as the character portrayed (I think it was by Michael Douglas) in the movie *Wall Street* stated, that “greed is good,”⁴ but to paraphrase, greed is not a crime. Greed is not a crime. We might be offended by it, we might find it repugnant, but being greedy is not criminal conduct. How one goes about feeding one’s greedy appetite or fulfilling one’s greedy needs—that is where, if you will, the rubber meets the road. That is where some people and some businesses cross the line from simply being greedy to committing a crime or violating some civil rule or regulation.

Now let us start with the fundamental premise, and I am going to disagree with Blackstone’s somewhat dated comment; a corporation can be charged with

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1. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/, archived at <http://perma.cc/T6C7-YKBM>.

2. *Id.* at 9-28.1000.

3. *See id.* at 5-11.115.

4. *WALL STREET* (20th Century Fox 1987).

a crime.⁵ One of the novel aspects I still have trouble getting my head around is that a corporation can even be charged with committing or being involved in a conspiracy involving its own employees and others. But those are general premises. So the obstacle, if one sees it as one in terms of bringing charges against big banks or big financial institutions, is not that they cannot be charged to begin with. They can be. They can be charged with criminal conduct.⁶ When there is probable cause to believe an individual has committed a crime, then that is deserving of reasoned consideration by a prosecutor or civil enforcement person. And the same is true for a business. When there is probable cause to believe a corporation has committed a crime, prosecution of that corporation is deserving of thoughtful consideration by the prosecutor. But as Joe mentioned, we entrust prosecutors, we entrust those responsible with civil enforcement, to exercise discretion. Now sometimes the result of that exercise of discretion leads to a decision not to charge a crime or to charge one crime and not another, or to seek a civil penalty or not to seek a civil penalty. As part of that penalty we do debar some, exclude some from serving on the board of directors of a bank for three years or five years, whatever the case may be.

I urge all of us to keep in mind that a prosecutor's job—and I am speaking broadly in terms of civil enforcers as well—is to seek justice. And of course that pursuit of justice, at times, means a criminal case is not going to be filed. Sometimes one is going to be filed. Now, when there are circumstances where the pursuit of justice means deciding not to file a criminal charge, sometimes the avenue to pursue is a civil or administrative penalty or sanction. And that is also part of what we will talk about this afternoon.

Now, a bit of a caveat if you will. Those of my brothers and sisters who are members of the defense bar, those of you who may aspire to the glorious position of being a criminal defense lawyer, will you take off your white hat and put on your black hat? I do not want to be misunderstood. Prosecution of criminal cases is good. At least it is good for the criminal defense business. It might not be good for XYZ Corporation or Bank One or whatever the case might be. So I do not want to be suggesting the opposite of that. Now I will offer a bit of an opinion and a word of advice which is not intended as a criticism of the media, but picking up somewhat on Joe's comments about the reactions to Attorney General Eric Holder's remarks: please, please do not decide whether someone should be prosecuted or whether someone should have been prosecuted based on what you hear or read in the media. Again I am not criticizing the media. I used to sit a desk not unlike Joe's—probably not as a big, probably not as fancy as his—but you would sit there as an Assistant United States Attorney and decide: "What is the right thing to do here? Is this probable cause? Yes, but can I prove the crime?" And what I want you to keep in mind if you have not been exposed to it before is that a prosecutor or someone responsible with enforcing civil rules and regulations knows a lot more of the back story than what you are going to get

5. *E.g.*, *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909).

6. *Bringing Criminal Charges Against Corporations*, U.S. Dep't of Justice (1999), <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF>.

in any news account, no matter how impartial that news account might be. The potential evidence, the possible evidentiary problems, the resources needed for a successful prosecution, the anticipated criminal penalties or alternatives to prosecution are often best known to prosecutors. Someone working in Joe's office today would say, "Well if I indict Bank X, what is going to happen?" Well the bank is not going to go to jail, but it may pay a fine of X amount of money. You can pretty well figure out what that penalty is going to be based upon the sentencing guidelines, or at least what the range is going to be. If you are thinking about charging a person, you can get a pretty good estimate of what jail time that person is looking at because of the sentencing guidelines. So the anticipated criminal penalties that would follow a criminal conviction are predictable. And, as we have talked a little bit about, there are other consequences beyond a prison sentence or a large fine. Does an indictment of this bank mean it is going to go out of business? Arthur Anderson was indicted, prosecuted, and the result was twenty-some thousand people out of work.⁷ The Supreme Court reversed.⁸ I am not saying that was a wrong decision or a bad decision, but that is part of what people who sit in Joe's seat have to consider. And it is an appropriate consideration. And Attorney General Holder was right on point.

Prosecutors and their civil and regulatory counterparts have more than enough tools in their respective toolboxes to enforce and punish or exercise deterrent signals, if you will, regarding the financial crisis. In my opinion there are enough statutes; there are enough rules; there are enough regulations on the books; there are enough tools in their toolbox. Now, people in Joe's position and other offices may want more resources, and I cannot speak to that. And they may want more agents to investigate, whatever the case may be. But this is not a resources question. This is, in a sense, a more fundamental question than that. But I do not think that more laws, more rules, more regulations, or increasing the maximum penalty for committing mail fraud or wire fraud, what have you, is the answer. More legislation may be appropriate in terms of reforming our financial industry, restructuring it, and preventing it from happening in the future, but I do not think we need it to go after those who committed crimes or crossed the line on the civil side.

One last thing: some of you may be sitting there thinking about the financial crisis. And some of you are probably young enough, and you are thinking, "Gosh, that is ancient history already," but if we think of it as 2008 and we are sitting here in 2013, and if you do any criminal work at all you may be thinking of the statute of limitations—what is going on there? Is the clock running out on pursuing some criminal cases? Probably not because there are specific statutes of limitations for certain crimes involving financial institutions, but even mail fraud and wire fraud, if it affects a financial institution, has a ten year statute of

7. A.C. FERNANDO, CORPORATE GOVERNANCE PRINCIPLES, POLICIES AND PRACTICES 243 (Pearson 2006).

8. *Id.*

limitations.⁹ So there is more than enough time if the facts and circumstances warrant it. So if you are sitting out there thinking, “Well this may be mildly interesting or very interesting, but these mortgage-backed problems happened in 2007 or 2008 and now it is 2013; has the shot clock not just about expired?” I wanted to mention that the answer to that is “no.”

9. 18 U.S.C. § 3293 (2006).