

## **Criminal Accountability and Culture**

*Remarks as delivered by the Hon. Preet Bharara, United States Attorney, Southern District of New York*

Thank you for that kind introduction. It is true, Mr. Springsteen dedicated a song to me, which is the moment in my then nine-year-old son's life, for the first time he thought I was cool, so that was a nice thing.

I want to thank Tom Baxter for inviting me here. Now you're sort of in a different spot. Maybe your seat is different also, for that reason. And also to congratulate Mike Held who is the new General Counsel. People may not appreciate this. Mike and I actually go way back and were friends -- still are friends -- going back to a time when we were first- or second-year associates at different firms in New York.

So it's great to come back and be here speaking with Mike at the helm in the General Counsel's Office to show what a success story I am, that after 23 full years, I now still make less than a first-year associate.

So, talk about exercises in downward mobility.

People sometimes ask me why I come and speak to groups like this. I know there's a lot of people from private industry here in the financial industry and law firms who represent the financial industry, and they say, "Why do you come and speak to groups like this, given what your office does and you prosecute a lot of white collar crime?"

And it has occurred to me over time that I really like the sound of nervous laughter. Thank you for that.

So, I'm really pleased that the nature of this conference which I understand has been happening for three years is about culture. I think the culture matters in every kind of institution, not just financial institutions, but also in prosecutors' offices. Also in state legislatures. I can name at least one where that matters.

And it's something that needs to be talked about and thought about. This week, early this week, or two days ago, I was meeting with the court-appointed monitor of Riker's Island. And I think many of you may be aware that our Office has done a lot of work trying to fix a lot of problems at Riker's Island, notably the excessive use of force and the violation of inmates' constitutional rights, and that's incredibly important work that we do, not just the financial area at work.

And I sat with a monitor for an hour-and-a-half. You know what we talked about? We talked about culture. And even though it's the case there is a -- I think it's like a 63-page consent decree that has all manner of rules and regulations and things that the corrections officers and the institution itself, the Department of Corrections, is supposed to do and fix, we spend our time talking about the big picture and talking about culture because you're not going to fix a hedge fund that has a problem with criminality or misconduct. You're not going to fix a jail for that matter that has a problem with criminality or misconduct, unless you're talking about the big picture issue of culture.

So, I'm glad that you're all gathered here to talk about it and to think about it.

So, in my experience I feel like there are three culture areas that come up and where there might be deficiencies in institutions with respect to culture. And I have dubbed them the culture of minimalism, the culture of formalism, and the culture of silence -- all of which individually can be bad for any institution and can have negative consequences for an institution, and certainly in combination, can be devastating.

And we've seen that in the course of our criminal prosecution work time and time and time again.

So, what do I mean by the problem or the concern or the threat of a culture of minimalism?

It's to my mind the attitude on the part of people at a firm or any kind of institution, again for that matter, where we have to do the least amount possible to be in some kind of compliance with rules, whether they're prescribed by the institution itself or prescribed by a regulator or prescribed by a criminal statute, and get as close to the line as possible without going over it because that's how we maximize whatever it is that we are doing, whether it's making widgets or anything else.

My view is, and I think it's the view probably of people here, but not everywhere, that the best institutions, and certainly the best financial institutions, and most important financial institutions in the world, should aspire to something a little bit more than the minimum. And getting as close to the line as possible without going over it is a problem.

So, I think aspiring to the minimum is one of the chief threats of culture that you could have at any institution. I from time to time go and speak at business schools, and I like talking to folks at business schools who are future clients for some, future defendants for others. And I get this -- and I talk about this issue of aspiring to the minimum -- actually I speak to every first-year Harvard business student. I've done it for five years in a row, all 800 or 900 of them, and talk about some of these issues of culture in fact. And I talk about the problem of aspiring to the minimum and walking the line, and one time I got a question from a young student, clearly is going to go far, who said, "Mr. Bharara, you talked about making sure you don't cross the line, and that it's dangerous to get too close to the line. So my question to you is, exactly how far from the line do you recommend people stay?"

I said -- so my answer, 3-1/2 feet is good. The SEC says 7-1/2 feet, we say 3-1/2 feet. Obviously, I answered the question by explaining that I disagree with the premise of the question, and that you will inevitably run afoul of regulators and other people with even more significant powers, if that's how you think about things.

And it sends a terrible message, and I know this message is sent in a lot of institutions around the country and the world, and it can work for awhile, right? Getting as close to the line as possible. But people will invariably miscalculate and bad things will invariably follow.

A single-minded focus, I'm remaining an inch away from the legal line, is just asking for trouble. It's a dangerous thing to walk the line and to train other people to do it. And the analogy that I sometimes use is to think of it in the sense of trying to avoid a DUI -- a drunk driving arrest or conviction.

Now, if you're a very smart guy and you decide you want to drink and then drive afterwards, I suppose you could try to get as close to the DUI limit as possible. If you're a genius and figure out

what your Body Mass Index is, and what your rate of speed of drinking is, and how much food you have consumed, over what period of time, and I guess if you do that, from time to time, you might come in right under what the drinking limit is.

But if that's your policy and your approach, how long before that driver gets pulled over? How long before that driver blows the legal limit? How long before that driver kills someone on the highway, and how long before all the other people who went out drinking with that guy are doing the same thing and killing people on the highway?

Aspiring to the minimum is a recipe for disaster, and I think just like my office must be about more than attaining convictions, financial institutions must be interested about something more than just making money and maximizing profit in the short-term.

And that's not to say that business and financial institutions otherwise shouldn't be maximizing profit per shareholders and investors. Of course, they should, but sometimes it's useful to talk to folks in your institutions about risk because that's language that they understand.

There's a risk in doing that and people need to note that.

There's a business professor -- Noel Tichy -- who writes in his book, *The Cycle of Leadership*, quote, "successful leaders add value. No matter what level or what type of organization, the true measure of a leader is whether he or she has made the assets under control more valuable today than they were yesterday. A leader is given stewardship over assets in the form of people, capital, information, technology. Their job is to make them more valuable and to keep making them more valuable into the future," closed quote.

So, when people embark upon questionable practices, they add risk to the books. They risk making the assets of the organization worth considerably less and they are adding a potential catastrophic liability.

Sometimes I think it's useful when as a lawyer and a prosecutor to talk about these issues, to talk about them in terms that business people think about all the time. So, that's the problem, I think, of the culture of minimalism.

Second, I also feel that there's a problem you can sometimes have that I call the culture of formalism. So, exalting form over substance in one measure. You'll get no argument from me on the issue of whether or not formal rules are important. They are. And you have to have formal rules, and sometimes they have to be minute rules about how people conduct themselves and how an institution operates. But it's not just the case that formal rules are important. Fundamental principles are also.

And I think from time to time, we need to take a step back and think about the culture of our institution. Are we too much about box checking and not enough about gut checking?

I was once asked -- I was at the stock exchange and doing a presentation like this, and there was a Q&A, and a prominent person, who I will not name, asked me the question, "Now Mr. Bharara, I advise boards and directors of companies, and my question to you is, what percentage of time do you think the board should be focusing on issues of compliance?"

And I thought that was a mildly absurd question because it all depends. If you are an institution, a company, a bank, a hedge fund or a toy manufacturer for that matter, and you have never had a compliance issue, and the SEC has never come and talked to you, and nobody has ever been arrested at your firm, perhaps you're doing a good job and you don't have to worry about it so much. Although you always have to worry about it some.

On the other hand, if FBI agents have been coming on a semiannual basis and arresting people at your company in handcuffs, and there are 19 state attorneys general who are looking at your books, then you should probably spend a lot of time thinking about it.

And it occurred to me that what sometimes happens in institutions -- that people at firms think about compliance -- and I hate the word compliance. It's a terrible word. It's an uninspiring word.

But they think about compliance as some different thing from all the other things that you think about at a company. I don't think anybody would ever ask a different person the question, "What percentage of time do you think the board or the C Suite should be thinking about competition? Or should be thinking about innovation? Or should be thinking about morale or should be thinking about expansion? Whatever other business issue you're thinking about?"

I mean I don't know. If you are dominant in your field and you think no one else is going to compete with you, that's great, but if you were the manufacturer of an almost defunct Blackberry, you should have been spending a lot more time thinking about competition.

It's a function of circumstance and so I don't quite understand why it's the case that people within institutions, the sense I get, is they think about this issue of compliance as something completely -- obviously, it has its own features and details, but it's not something so completely different from other issues of risk to the company, and the kind of risk that we present sometimes is obviously an existential one.

So, at every institution in the criminal justice system, you need rules and regulations. I'm familiar with in my office with something called Title XVIII, which contains most of the criminal statutes that we have to follow in the country. But there's also something that we call a charter and it's called the Constitution. And the Constitution, or any charter for any organization, can't possibly tell you all the ways in which you're supposed to behave.

But you know what? You need to have that, too. And I think the same is true for institutions. You need to have all these compliance policies and manuals and training and everything else, but I think there also has to be some discussion and talk about first principles, and I know that happens at a lot of places, but I also know it doesn't happen everywhere.

Second point on that is I think it's incredibly important -- because I know we have some regulators here -- when you think about how your folks are supposed to be complying with what their obligations are, obviously if the regulators say you need to do X or Y, you should do X or Y because they get very mad when you don't.

But that shouldn't be the whole way that a compliance department, or the C Suite, or the Board of Directors thinks about how they conduct themselves with integrity and staying far away from the line.

Believe it or not, sometimes regulators are not clear. Sometimes regulators pass -- I hate to say this - - pass regulations that are not as wise as you might think they should be. And if you're only trying to please the regulator, you're still going to run into trouble otherwise, and the way I think about that often is, a problem you have in education, the reason you send -- you all went to school and have done very well, you make a lot more money -- the reason you send your children to school, hopefully, is not just so they do well on tests. You're hoping that they learn something about wisdom and they gain knowledge and they learn about curiosity and they develop judgment and skills beyond simply doing well on a test.

And so similarly, it's not enough -- it's like teaching to the test if all you're doing in training employees at an institution is make sure you don't run afoul of this regulation or that regulation. You need to do something more than that.

One time a hedge fund General Counsel at another forum, something like this, said something that I think was terrific. He said when anybody starts in our firm, in our hedge fund, I sit down with them, and I give them the manual and I give them a stern talk about making sure that they follow all of these things, which is great, it's terrific. But he did not say that among the things I tell them, the simple sort of charter-like, constitution-like message, is you're going to learn these rules and you're going to make sure you understand who you're supposed to consult with before you make a certain kind of trade, et cetera, et cetera, et cetera.

But one thing you should know about this place is that we, here, we don't lie, we don't cheat, we don't steal. And if you do that, you're going to be out. And sometimes it's important to have simple messages like that, and it's not something I say in a vacuum. From time to time, people come into our office and they're asking for lenience. And when we think about whether or not we're going to charge an institution as a whole, and I know some people think that institutions should never be charged, but sometimes the law allows for the charge of an institution. And we are supposed to consider a lot of different factors when we decide whether or not to do that.

If the conduct is very pervasive, if there's been recidivism, et cetera, and one question that I have asked more than once, and the deafening silence in response was significant and telling. And sometimes you get a good response, but the question is among many other questions is, could you point to an example --

Because they'll point to all their compliance manuals and they'll say we have 9,000 lawyers and they're all very good, some of them are alumni from your office, leave us alone. And the question is, "Can you point to a single instance -- an email, a talk, a speech, an anecdote -- in which the head of the firm, the hedge fund (in this case it was a hedge fund) ever said anything -- ever -- to the firm, to the employees of the firm, about whether or not integrity was important and doing things the right way was important?"

And it's kind of a stunning thing, where there's a roomful of prosecutors who have to hear from the General Counsel who says, "No, that's never been said. Ever."

So, again, rules and regulations are important. Compliance manuals are important. But these other things are important, too, and sometimes they can send a simpler and more profound message. That we're not just about formalism, we're about something more than that.

I think sometimes we assume too often that the people in our orbit are good and they're always good, that everyone understands the central importance of integrity. Just because the boss understands

integrity doesn't mean that everyone else understands it and understands that it's important to the boss.

And I know some of these things are obvious but in my experience I think repeating the obvious to people is important. If anybody here is in a committed relationship, you know that if the only time you ever told your spouse you love them was on the day of the marriage, you probably won't have the spouse for very long. And it's an obvious thing, that you think everyone understands, and the same with your kids.

You repeat these things, repeat the obvious things, a lot.

There is another business professor -- last business professor I'm going to quote from. Walter Bennis, who's written a lot of books for business leaders, in one he writes this:

"One thing that has become clearer than ever to me is that integrity is the most important characteristic of a leader, and one that he or she must be prepared to demonstrate again and again. Too many leaders -- corporate heads but church officials and leaders in countless other fields also -- forgot that they were under some scrutiny and that they could be called to account at any time. They forgot that some things being legal doesn't mean it's right."

And by the way, Prof. Bennis didn't say that leaders must be prepared to talk about integrity again and again. They must be prepared to demonstrate it again and again. Actions as usual speak louder than words.

And I submit -- and I say this to the business students that I speak to -- if you ever find yourself in a place where people think it's not necessary to repeat those simple things, or they're too cool to repeat those simple things, or it's corny to repeat those simple things, then I think you have a problem at the institution, and that often turns out to be correct.

So, profound integrity I think is important. It needs to be demonstrated, it needs to be talked about. People have to say when they hire folks how important integrity is. They have to look for it, they have to screen for it.

Another example from my business school talks is I had a student say to me, "I've interviewed with 10 firms on Wall Street, and of the 10 firms, only one asked me any question that in any way signified that they had any interest in whether or not I had integrity or that signified they cared about making it clear that they had integrity."

Which I know there's lots of other questions to ask about leadership and quantitative abilities, and people's resumes, and people's job experience. I do find it somewhat astonishing, particularly given all the things that are going on, that you can have large institutions, given particularly what the kind of existential threat can be, that are going through long interviewing processes, that I'm sure are dictated by very fabulous and smart consultants giving that impression to a Harvard Business School student.

So, I think it's important to say when you hire people, I think it's important to say when they come to the firm and not say it infrequently.

I think people need to know and feel it in their bones that the bosses will not tolerate lapses in integrity. That they'll be disappointed and angry at those lapses, that they will not look the other way, just because you have a good book of business in the short-term, and I think the same is true no matter what kind of institution you're talking about.

Whether it's a U.S. attorney's office, or a giant corporation, or an investment bank or a hedge fund, everyone from the mail room to the board room needs to understand and feel it in their bones that the bosses care about integrity. And every middle manager needs to feel the same way, and every supervisor needs to feel the same way also.

And I'm very fond of quoting a passage from a column by David Brooks of the New York Times in this vein on the culture of formalism, and he said, "It is worth noting that you can devote your life to community service and be a total schmuck." A couple of you are laughing too hard. "You can spend your life on Wall Street and be a hero understanding heroism and schmuckdom requires fewer Excel spreadsheets, more Dostoevsky, and the Book of Job."

Which doesn't mean you necessarily need to read more Russian writers, but you get the point.

Third and last culture point, the culture of silence. And I actually think this is one of the fundamental threats and issues for any institution going back to the history of -- the long history of the world because the lesson of history, generally, and of corporate scandals specifically, is that you can't legislate a culture of integrity, and that theme permeates all the various points I'm making. You cannot will it into existence simply by wishing for it.

Nor can you instill in the workplace with even the best drafted compliance policy or the most thoughtful statutory regime.

More specifically, simply by issuing periodic and formalistic admonitions, always rely on good people to come forward.

It's a sad fact but it's a real fact about life. There is all too often a human tendency to look the other way. A human tendency not to want to rock the boat. A human tendency to conform, to get along, to be a team player. There is the human desire to avoid ostracism that comes from speaking out. The desire to avoid being branded a troublemaker, or worse, a traitor.

People will sometimes go a long way to suppress many fine and courageous impulses, and they will make many bad choices to avoid the scorn of their colleagues and superiors. We see this all the time, whether we're looking at bad cops or bad correction officers or bad traders on Wall Street.

And when coupled with the more pragmatic concern of maintaining job security, putting food on the table -- those social forces that I just described can easily, and seemingly almost always do, overwhelm the initial impulse to do the right thing.

The compulsion to conformity and the impulse to obedience may tend to silence all but the most intrepid whistleblower. And I'm sure many of you have read the work of Stanley Milgram, but just consider the 1960 era experiments that he wrote about. Stanley Milgram at Yale, he himself was astonished that ordinary people would under the mundane conditions of an academic experiment blithely subject other human beings to tremendous pain by personally administering what they believed were high voltage shocks.

Why? Because a man in the lab coat told them to. Among other things, Prof. Milgram wrote this more than 50 years ago in the book, *Obedience to Authority*:

"This is perhaps the most fundamental lesson of our study. Ordinary people, simply doing their jobs and without any particular hostility on their part, can become agents in a terrible destructive process."

That's the dispiriting consequence of all of these forces, the phenomenon of silence, when what is called for is high decibel speech.

So the question for all of you, and for all of us, is as simple as this: how to create a culture in which good people say something or do something when they see bad conduct. And in which others will act when the whistle is blown, because after all, it doesn't matter how hard the whistle is blown if the players on the field are deaf or are wearing ear plugs.

As I've mentioned now a number of times, I go to the business schools and I talk to students about these things, and I say to them when I show up, "This is not completely a scared-straight program for white collar professionals," although it's a little bit that. And I say, "Look, I'm not here to direct my words to the ears of the two or three of you here who, statistically speaking, are likely to commit serious securities fraud. Although I know who you are. And we will follow you."

"But what I am here to talk about is to address my words to the ears of the vast majority of you -- maybe everyone in the room -- who are honest and honorable and have the best intentions and want to do things the right way and have integrity and care about integrity and care about honesty, but who history shows, and our cases show, remain silent when they see things going on."

And I want them to remember that moment when they think something fishy is happening down the corridor from them to trust their instinct.

They got to those positions and they got into those business schools because they're really smart, and you worry what happens over time. You get a bright young kid who comes into one of your institutions and they have these great instincts -- business instincts -- but moral instincts, and I've seen over time from cases that we've brought and people who come in and cooperate, how quickly that gets coopted by a bad culture at a firm.

And this goes without saying, but it's one of the obvious points I think we should make again and again, there would be less corporate crime and less painful consequences arising from the crime that does occur if more people said something early on rather than remain silent or look the other way.

Many historical examples are present and lots of psychological studies have been done to show that we are far more confident about our courage to speak up in times of crisis than we have any reasonable right to think of ourselves. That was true in the Milgram experiment, it was true more recently at Penn State, and it's a reason why I get the question from these business students who say, "What do I do if I see something that doesn't feel right?"

They ask it plaintively, and I know in some cases, they have particular episodes in mind when they're talking about it. And unless you think this is just hypothetical, most of the big cases that involve institutions that you read about in my office bringing, make this point better than I could in words.



Consider the Galleon Group, Bernie Madoff's firm, or any one of a number of the cases where many, many, many good people knew what was happening and didn't do anything about it. And not so much surprised when the FBI showed up.

Consider Deepwater Horizon for example, which is now the subject of a movie. Some years ago, according to a front page New York Times story, Deepwater Horizon employees said they often saw unsafe behaviors but only about half of the workers interviewed reported feeling that they could report actions leading to a potentially risky situation without reprisal.

The long-term solution, culture solution, for every firm lies in creating a corporate culture in which dissent is openly permitted, candor is duly fostered, and integrity is cultivated and even rewarded. And that means thinking about incentive structures, and I think some of the panels will talk about incentives, and I think that's important.

It's easier said than done. It's not something that happens in an instant, in a corporate culture. You can't magically transform it overnight just by talk. The project is long-term and it requires constant care and feeding.

So, those are the three culture areas that I worry about when I think about -- that I submit for your consideration. Culture is key. As I've said, the disturbing truth is that in the shadows of the most massive frauds are lurking all manner of enablers.

People who are helpful either to the perpetration of the fraud or to its concealment. So part of the job for many, many people in this room is to disable the enablers and ring the alarm bell early by shouting from the hill tops that business catastrophe awaits if attention is not paid and action is not taken.

The enablers -- this is how I think about them in my head -- are the ones who dutifully attend the training sessions and sign the compliance policies while perhaps thinking to themselves these rules are for the birds. These rules are just window-dressing. These rules are just something to showcase to prosecutors and regulators should one day the need arise.

And you need to figure out who those people are. Find out who they are and rehabilitate them or get rid of them. They are quietly adding risk to your books. They are invisibly enlarging your liabilities.

They are ticking time bombs and I started to talk this way some years ago. And I keep seeing examples of this happening, and you can't afford to wait until the SEC sues or the FBI arrests.

In fairness, sometimes the ticking time bombs are ticking in silence and in secret. That's certainly true. But often, there are people who know something is awry. Often people know something is amiss. There are signs, there are red flags. Sometimes those flags are downright crimson. And a familiar is repeated again and again as insiders sometimes fail to stand up or to sound alarms and thus too often create or tolerate the conditions present for corporate corruption.

It happens again and again. Someone provides the easy comfort of a professional opinion that nudges up against the edge of legitimacy, or someone aggressively exploits a vagueness in the tax code that pushes up against the bounds of proprietary, or someone creatively manipulates the numbers under an accounting theory, that strains the laws of mathematics. It happens every day.

Someone pushes the envelope or looks the other way or just fails to do his job as a professional. And time goes by and eventually the envelope pushing gets more and more aggressive, and the controls get less and less strict, and then finally the bad stuff really hits the fan.

The firm collapses or there are charges and then the firm collapses, or there is serious reputational damage, and thousands of Monday Morning Quarterbacks at the firm, on TV, in Congress wonder aloud what the heck happened.

Unfortunately, with the economic pressure to perform higher than ever, and with enforcement resources taxed to their limit, I can tell you that's true. Cultures conducive to corruption can develop with relative ease. I've seen it time and time again, and we have the convictions to prove it.

So, I believe, as I know you do, and the organizers of this conference do, that culture matters and that we're all in this together. Have a great rest of your conference.