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COMBATING COMMERCIAL CRIME

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Preface

In February 1986 a one-day conference on combating commercial crime,
organised by the editor of this book, was held in Auckland, New Zealand.
Six papers were presented:

Not Only Strangers Take You In by Roger Pitchforth

Insolvency Frauds by John Managh

Legal Professional Privilege: Maximising Self-protection by
Restructuring Corporate Communications by Brent Fisse

Computer Fraud: Legal Aspects of Prevention, Detection and
Punishment by John Lenart

Future Shock: Corporate Collapse, Malpractice and Fraud in the
Australian Futures Industry by Gordon Walker

Combating the Paper Career: Maritime Fraud by Rae Weston.

These papers appear in the *Massey Journal of Asian and Pacific
Business*, vol. 2, No. 1, February 1986.

In discussions over dinner on the nights before and after the
conference it became clear that we were all doing research in the
areas of our papers and that we shared an interest in pursuing the
topics a little further. The consistent focus of our discussion was the
need to fill a substantial gap in the available literature—the lack of
detailed information on common commercial crimes and of reasonable
strategies to combat them.

Mr Chris Holt, Managing Editor of the Law Book Company shared
our view and in a slightly expanded form this book represents the
product of our discussions in February 1986.

The authors who have contributed to this volume concur in the
view that combating commercial crime is a long-term war and that
within these pages we are able to deal only with known skirmishes.
“To think that the intelligence of crooks will not advance is to bet
dangerously”: V. Lewis, “Outsmarting Fraud”, *Asiabanking*, January
1985.

R.W.

Palmerston North
September 1987

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The directors' international travel, and the charging of it to a shell company could have been spotted if a reviewer of the accounts requested information behind the accounts particularly in the composition and the aging of the debtors ledger. If a reviewer has doubts about the authenticity of the information being supplied, resorting to an investigating accountant to independently review the matter is a possible solution.

Investigating Accountants

Investigating accountants are commonly used in the United Kingdom and to a much lesser extent in New Zealand. The investigating accountant will, at the request of the banker, at the company's expense and with formal agreement, carry out a quick, discreet and limited enquiry as to the state of the company's apparent solvency. The company's debtors ledger in terms of aging and composition will be reviewed. Stock levels in terms of retention of title, aging, obsolescence will be checked. Enquiry will be made as to whether GST and PAYE deductions have been fully accounted for. What provisions for holiday pay have been made is also a usual query. Also of considerable worth is a quick review of the company's creditors ledger. This is achieved by simply reviewing all of the statements available for the current month and for prior months. A review of the aging of creditors statements will indicate the company's indebtedness and show whether the company is struggling or not. In its totality such an enquiry made within the space of one or two days will either put the lenders' minds at rest in terms of their security not being undermined, or put the lenders on guard that the company has significant problems. Lenders neglect the latter warning at their peril.

In this situation, the poor quality hire-purchase agreements the company was entering into could be checked by obtaining from the finance house directly, with the company's consent, a copy of the debtors ledger printout provided by the finance company showing all existing discounted debtors the hire purchases. These show in terms of individual debtors the times, dates and dollar values of sums that are in arrears.

Conclusion

It is considered important that a supplier or lender of money to a company know the client. This means to know the physical operation, the location, as well as the quality of financial information being supplied as well as the calibre of the business's principal management. These things ought to be reviewed from time to time, particularly when dealing with a company on the basis of its unaudited financial accounts. If events occur which make the lender or supplier feel uneasy, they need to adopt a defensive approach whereby they make further enquiries which are capable of being done either independently or verified independently. In this case study the losses involved were, in the writer's view, substantially avoidable.

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Corporate Offences: The Kepone Affair

Brent Fisse
John Braithwaite

Introduction

A popular conception is that "companies don't commit offences, people do". In fact, companies are frequently prosecuted for offences and in law it is well settled that criminal liability applies not only to human beings but also to corporate entities.¹ In practice, it is often difficult and sometimes impossible for enforcement agencies to obtain convictions against individual managers and, from the economic standpoint of internalisation of costs, it can also be argued that unless a corporate enterprise is punished for offences committed on its behalf, the price of its goods and services will not reflect the true social cost of their production.

However, few areas of corporate regulation are more controversial than the use of the criminal law against companies. One major problem is that of finding a suitable means of punishment: companies cannot be executed or sent to gaol in any realistic sense, and the sanction almost always used—the fine—tends to be little more than a minor cost of doing business. Another major problem is attributing a guilty mind to a company: a company has no mind as such, but is a collective entity within which diverse human and organisational forces interact. As Baron Thurlow became famous for saying, a corporation has "no soul to damn and no body to kick".

The criminal law is a blunt weapon of social control and is best used in a limited range of cases where civil sanctions or remedies are

1. See generally Hochstedler, E. (ed.), *Corporations as Criminals* (1984); Coffee, J.C., Jr., "No Soul To Damn; No Body to Kick": An Unscandalised Inquiry into the Problem of Corporate Punishment" (1981) 79 *Michigan Law Review* 386; Fisse, B., "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 *Southern California Law Review* 1141; Braithwaite, J., *Corporate Crime in the Pharmaceutical Industry* (1984); Ermann, M. D. and Lundman, R. J., *Corporate Deviance* (1982); Clinard, M. B. and Yeager, P. C., *Corporate Crime* (1980); Stone, C. D., "The Place of Enterprise Liability in the Control of Corporate Conduct" (1980) 90 *Yale Law Journal* 1; Anonymous, "Developments in the Law—Corporate Crime: Regulating Corporate Criminal Behaviour Through Criminal Sanctions" (1979) 92 *Harvard Law Review* 1227.

insufficient.² Furthermore, obedience to law within companies typically depends not so much on the relatively remote deterrent threat of the criminal law as on the more immediate impact of internal control systems, the nature and extent of which have mostly been left in the hands of companies to devise for themselves.³ What exactly should companies do to achieve effective internal compliance?⁴ To what extent, if any, should the law intervene in internal corporate affairs and insist that particular preventive measures be adopted? Rather than intervening directly, should the heat of criminal liability be directed at the chief executive officer in such a way as to spark effective compliance within the organisation?

The Kepone case, *United States v. Allied Chemical Corporation*,⁵ highlights the practical and theoretical significance of these central issues. This case arose in the particular context of pollution offences but its implications are of general relevance to the social control of corporate harmcausing or risktaking.

United States v. Allied Chemical Corporation

The Kepone case arose from offences against the environment. A large quantity of wastes from the manufacture of Kepone, a pesticide akin to DDT, had been discharged into the waterways of Virginia. The discharges came initially from a plant of Allied Chemical Corporation, a leading manufacturer of chemicals, and later from the factory of Life Science Products Co., a small firm which had been formed by two former Allied Chemical employees to manufacture Kepone for supply to Allied Chemical. Although Kepone wastes had passed into the James River and its tributaries for many years (from 1966 to 1974), these discharges did not result in prosecution until 1976, after many workers at Life Science Products Co. had complained of severe shakes and other symptoms of Kepone poisoning stemming from appalling conditions at the Life Science plant.

Two indictments were returned by a federal grand jury in May 1976. The first charged Allied Chemical with 940 counts of violating the *Refuse Act* 1899 (U.S.) and the *Water Pollution Control Act* 1970 (U.S.) by discharging Kepone and other toxic materials without permits, and also one count alleging conspiracy with five of its employees

2. See further, Braithwaite, J., *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985).

3. See further, Stone, C. D., *Where the Law Ends: The Social Control of Corporate Behaviour* (1975).

4. See further, Braithwaite, J., "Taking Responsibility Seriously: Corporate Compliance Systems", in Fisse, B. and French, P. (eds), *Corrigible Corporations and Unruly Law*, Ch. 3.

5. 420 F. Supp. 122 (E.D. Va. 1976). For discussions of the Kepone affair, see Fisse, B. and Braithwaite, J., *The Impact of Publicity on Corporate Offenders* (1983), Ch. 6; Stone, C. D., "A Slap on the Wrist for the Kepone Mob" (1977) 22 *Business and Society Review* 4; Zim, M. H., "Allied's \$20-Million Ordeal with Kepone", *Fortune*, 11 September 1978, p. 82.

to violate pollution control laws. The second charged Allied Chemical, Life Science Co., two managers of Life Science Products, and the City of Hopewell on 153 counts of water pollution arising from Life Science's discharge of Kepone into the Hopewell sewerage system.

The conspiracy count against Allied Chemical under the first indictment was dismissed on the ground that a corporation cannot be criminally liable for conspiring with itself. However, Allied Chemical did not contest the 940 counts of water pollution in the first indictment. Trial proceeded on the 153 counts of water pollution under the second indictment, but Allied Chemical was acquitted because it had not been proven that Life Science Products was an agent for whose conduct Allied could be vicariously liable, and because there was insufficient evidence of intent to establish liability as an accomplice.

Judgment day

Sentencing Allied Chemical on the water pollution counts, Judge Merhige of the Federal District Court initially imposed a maximum fine of \$US13.25 million, subject to the rider that the sentence would be reconsidered in light of any action taken by Allied to alleviate the offences. Subsequently, the fine was reduced to \$US5 million after a submission by Allied Chemical that account be taken of its expenditure of \$8 million to establish the Virginia Environmental Endowment, a new non-profit corporation which would "fund scientific research projects and implement remedial projects and other programmes to help alleviate the problem that Kepone has created . . . and . . . enhance and improve the overall quality of the environment in Virginia . . .".

The Kepone offences exposed Allied Chemical to a barrage of adverse publicity before, during and after trial and sentence. The adverse publicity was understandable. Large quantities of Kepone residues had been dispersed throughout the James River, extending into Chesapeake Bay. Kepone was suspected to be a cancer-producing agent. Fish and wildlife had been contaminated by it. Fishing in the James, a river notable for its abundance of shad and oysters, had to be banned. And removal, let alone safe disposal of the Kepone residues was impractical: the costs of cleaning up the James were put as high as \$2 billion and, in any event, disturbing the river bottoms where the residues lay might have made the situation worse.

Another attention-getting factor was the size of the fine imposed upon Allied Chemical. A fine of \$US13.25 million was conspicuously large given the relatively small fines traditionally imposed for corporate crimes. Moreover, it nearly doubled the previous record fine of \$US7 million for pollution offences which had been imposed against Ford in 1973. Allied won a tax deduction of \$US4 million by donating the \$US8 million to establish the Virginia Environmental Endowment, but the tax deduction itself attracted some adverse publicity.

Confronted by a wave of unfavourable publicity, how did Allied Chemical respond? A conscious decision was made not to wage an aggressive counter-publicity campaign but rather to "hunker down", as

one executive described it, and to devise a superior environmental compliance programme. To some extent this decision was influenced by the political climate: the Kepone case occurred at the time of extensive debate about the *Toxic Substances Control Act* 1976 (U.S.). Although an aggressive counter-publicity campaign was not waged by Allied, the company did resort to a number of defensive measures. For example, Allied repeatedly maintained that it had no legal connection with or responsibility for the conduct of Life Science Products. However, moral responsibility for rectifying the injury or damage caused by Kepone was not denied (Allied Chemical spent \$US300,000 to detoxify the Life Science Products plant and \$US62,000 to assist Kepone-eradication research at the Medical College of Virginia). Another step was to issue a press release criticising the indictments:

The company's general record on environmental and safety policies has been excellent The scope of the criminal actions was unwarranted and unprecedented. The extreme reaction shown by the indictments appears to reflect official frustration over failure of regulatory agencies to coordinate their activities and perform their duties with respect to the events which took place at the Life Science Plant

Turnaround

Spurred on by the adverse publicity over Kepone, Allied reappraised and substantially revised its environmental compliance programme. In the words of one administrator in the Environmental Protection Agency, "the shock caused them to look around and tighten things up. They have accomplished that." By the end of 1981, when we interviewed a number of executives from the company,⁶ the reforms described below had been implemented.

An initial step was to upgrade the position of environmental affairs manager to the vice-presidential level. This was not an exercise in routine promotion, but a conscious, Kepone-induced move to place environmental compliance on the agenda of top management. As a result, more attention was paid to the environmental performance of plant managers, who carry the day-to-day burden of compliance. Some were replaced, Allied's comment being that "[Our] internal reviews are more rigorous than those of the federal agencies. This thicket of regulations hit us hard at the work place and you have to have people who are trainable to respond."

An Energy and Environmental Policy Committee of the board of directors was also established. This committee is chaired by an outside director, whose position has been compared to that of a junior partner in a big law firm. The committee has a small task force and calls upon an outside consulting firm, Arthur D. Little Inc., for assistance. The task force conducts on-site inspections of Allied's various plants and has direct access to the board. The main intention behind this

change was to ensure that there were no surprises at the top of the organisation. It should be remembered that Allied's board denied any knowledge of Kepone prior to the revelations of poisoning of workers in the Life Science plant; indeed even the environmental affairs manager reputedly had not heard of the product. According to an Arthur D. Little organisation specialist, Allied's managerial coverage of safety standards had since more than doubled.

We were shown examples of the reports made to the board by the Energy and Environmental Policy Committee. These were not very detailed; they recorded only the broad nature of the problems which had arisen, together with a brief indication of the action taken. However, two points were stressed about these reports: first, the function of directors was to direct and that of managers to manage; the board had to know that an effective compliance system was in place, a need which did not require that the board be buried in paper; secondly, the Energy and Environmental Policy Committee had an active role to perform in satisfying the board, assisted by a well-qualified director of environmental surveillance. It was emphasised that "You can't insulate the board by sending a non-knowledgeable person [to answer their questions]." The implication was that other companies avoid exposing their boards to environmental problems by interposing technically inept senior managers as filters between the board and top technical people.

A further important change was the introduction of a Toxic Risk Assessment Committee, partly in response to the *Toxic Substances Control Act* 1976 (U.S.), and partly in memory of Kepone. This committee was composed of a vice-president for medical affairs, a senior attorney, and a wide range of personnel from various relevant disciplines (for example, toxicology). All operating plants were required to submit a monthly report indicating whether or not there had been an environmental risk situation in the plant during the previous month. If there had, the details were required on a special form. Moreover, an obligation was imposed on all personnel, irrespective of rank, to fill out a special pink sheet detailing any risk situation they believed to be substantial. A supervisor had no authority to stop pink sheets from going up the line to the toxic assessment officer, a person far removed from the subunit subject to enquiry; cover-up was thereby rendered difficult. The risk assessment official then referred the pink sheet to the Toxic Risk Assessment Committee or dealt with it personally. Once an assessment was made, it was communicated back down the line. In practice this system was said to result in many unfounded complaints, but it was firm corporate policy that all complaints be received and answered, and that full documentation be kept on file. The point was made that, "You never destroy a complaint, no matter how frivolous or ridiculous."

In another move, Allied Chemical introduced an incentive scheme designed to motivate personnel to improve their efforts towards compliance. Executives were set non-financial as well as financial goals. Generally, a third of the bonuses of executives related to environmental

6. Fisse and Braithwaite, op. cit.

compliance, safety, antitrust, civil rights, and other non-fiscal goals. The amount of the bonuses depended on the level of the executive (bonuses for financial and non-financial performance could be as high as the base salary). The bonus was quantified partly on the basis of objective criteria, namely incidence of violations and injuries and amount of financial loss from civil or criminal judgments and settlements (violations and losses were booked against the division responsible). More enterprisingly, account was also taken of self-perceived, self-set, non-financial goals. For example, inspection of 20 plants might be set as a goal for the year by a member of the environmental surveillance director's task force and feedback from other personnel then used to judge the success of those missions. This reflected the underlying advice from Arthur D. Little that:

Environmental risk management is most effective when it is an integral part of the overall corporate business strategic planning and management processes. In this way corporate resources for dealing with environmental issues can be appropriately allocated and managed in the context of corporate goals, objectives and values.

Contrary to the conventional wisdom, Allied claimed that in practice quantifying performance under such an approach had not proven difficult.

The foregoing organisational reforms were supported by a variety of reinforcing and monitoring devices. A manual, *Compliance with the Environmental Laws*, provided a readable and comprehensive summary of federal and state environmental laws governing Allied's operations. It also proclaimed that every employee "is expected to adhere to the spirit as well as the letter" of the company policy to avoid unacceptable risks to human health or the environment, and to devise internal standards where existing regulation is inadequate; this proclamation was posted on bulletin boards in all plants.

These measures were complemented by a programme of seminars, lectures, films and workshops. Videotapes were used for in-house training to show personnel exactly to whom they should report suspected environmental problems and to highlight the legal and internal disciplinary implications of failing to make due report. For senior officials, business ethics seminars were often held (at Pleasantdale Farm, a company retreat). Typically, these seminars revolved around a well-chosen case study; one example we sighted was the Kepone case under faint disguise.

As well as upgrading its educative procedures, Allied introduced an environmental legal status report, which originated pre-Kepone in 1971. This provided a running account of where the company stood on environmental compliance, in much more detail than the standard reports that went to the board from the Energy and Environmental Policy Committee; it was a managerial rather than a directors' tool. Circulated regularly to a lengthy list of senior executives, the report aimed at "bubbling up" potential as well as actual problems of com-

pliance. Plants were commonly named and by implication criticised in this report, a practice said to be much feared because "people don't want their plants to be spotlighted negatively in a report that goes to top management".

But was anything done to guard against the risk of being associated with sloppy contractors of the kind exemplified by Life Science Products? Allied's response to this risk was to tighten up its procedures for outside contracts, one of several steps taken under a product responsibility programme designed to reduce the hazards of products during their development, manufacture, distribution and use. This precaution involved investigative review of supply contractors rather than supervision of their operations. To supervise the plant operations of a contractor like Life Science would be to attract the application of civil or criminal vicarious liability in the event of wrongdoing by that party, whereas limited intervention confined to careful selection and review attracts the protection of the general rule of non-liability for the conduct of independent contractors.

Allied's environmental compliance programme, as rebuilt in the wake of Kepone, received widespread acclaim. A representative of Arthur D. Little advised us that:

Independent of our work with Allied, I can affirm that I believe Allied Corporation has demonstrated leadership in the environmental management area, including environmental auditing. Their environmental review programme is soundly based, well managed, and is serving a very useful function for the corporation.

A head of the Environmental Protection Agency Enforcement Section regarded Allied as a leader in compliance programmes, noting that the company had done a great deal to assist the EPA in formulating effluent standards and other regulations. That opinion was shared by Allied's peers: several companies sought its advice and assistance.

The steps taken by Allied Chemical to improve its environmental control capacity became the subject of a congratulatory article in the *New York Times*. Soon thereafter, the same newspaper published this editorial tribute.⁷

PRAISE FOR AN EXPOLLUTER

Only a few years ago, Allied Chemical Co. was an industrial polluter of the public-be-damned type. One of its satellite companies that manufactured the pesticide Kepone turned out to have been unbelievably careless. It let workers become coated with hazardous dust that sickened them. Allied itself despoiled the Virginia countryside by illegally dumping the toxic chemical into a tributary of the James River. That forced health officials to ban fishing; dangerous residues may remain for decades. Ultimately, Allied was hit with one of the stiffest pollution fines ever levied. It had already paid out more than \$15 million in fines, donations and claim payments, and a major class-action suit is still pending. The damage to Allied's reputation was also serious.

7. *New York Times*, 28 January 1980, p. A16.

But sinners can repent and old dogs learn new tricks; it is a pleasure to report that Allied seems to have been converted into an environmental good guy. As reported in the *Times'* business pages the other day, Allied has overhauled its safety and environmental programmes. A high corporate officer is now in charge. Plant managers are rewarded for good safety records and replaced if they can't handle their new responsibilities. A committee of experts assess the potential hazards of everything Allied produces; several risky products have been abandoned or delayed.

Federal regulators are delighted. The Environmental Protection Agency praises the calibre of Allied's new safety managers and the company's co-operative spirit. The agency even touts Allied's committee for risk assessment as a model for other companies. Allied's once dismal record of injury and illness is now far better than the industry average.

No one can guarantee that there won't be another major mishap. But Allied Chemical deserves recognition for an impressive corporate turnabout.

Sanctions against Companies

Are fines, even multi-million dollar fines, necessarily effective in preventing repetition of pollution or other types of corporate offence? Are large fines likely to have unacceptable over-spill effects on workers and consumers? Is it desirable to allow a corporate defendant to make a contribution to a charity in lieu of paying a fine to the state? What exactly are the effects within a company that fines are supposed to achieve?⁸

Despite the obvious advantages of fines—ease of administration, preservation of corporate freedom to manage internal affairs, and generation of funds for enforcement—fines against corporations have often been criticised as being both ineffective and unjust.⁹ These criticisms not only raise serious doubts about the wisdom of resorting to a one-track regime of monetary penalties against corporate offenders,¹⁰ but also impel a search for alternative kinds of sanction.

8. See further, Kriesberg, S. M., "Decisionmaking Models and the Control of Corporate Crime" (1976) 85 *Yale Law Journal* 1091; Hopkins, A., *The Impact of Prosecutions under the Trade Practices Act* (1978); Fisse, B., "Reconstructing Corporate Criminal Law" (1983) 56 *Southern California Law Review* 1141 at 1147-67.

9. See further, Coffee, J. C., Jr., "'No Soul To Damn; No Body to Kick'" (1981) 79 *Michigan Law Review* 386; Yoder, S. A., "Criminal Sanctions for Corporate Illegality" (1978) 69 *Journal of Criminal Law and Criminology* 40; Fisse, B. and Braithwaite, J., "Sanctions against Corporations: Dissolving the Monopoly of Fines" in Tomasic, R. (ed.), *Business Regulation in Australia* (1984), Ch. 5; Braithwaite, J. and Geis, G., "On Theory and Action for Corporate Crime Control" (1982) 28 *Crime and Delinquency* 292; Dershowitz, A., "Increasing Community Control over Corporate Crime: A Problem in the Law of Sanctions" (1961) 71 *Yale Law Journal* 280.

10. See for example, Elzinga, K. G. and Breit, W., *The Antitrust Penalties* (1976).

*Monetary tunnel vision of fines*¹¹

Effective deterrence of corporate crime postulates sanctions that can strike at non-monetary as well as monetary motivations, notably the urge for power and the desire for prestige. Fines relate to these non-monetary motivations obliquely, not only because of their lack of direct impact upon non-financial corporate goals, but also because a large organisation must translate the overall goal of corporate profit into subgoals for its organisational subunits. Moreover, various personnel may have interests which diverge substantially from the goals of the corporation or its organisational subunits. For example, lower managers may falsify pollution compliance reports to avoid closure of an obsolete plant, thereby saving their jobs or reputations, but failing to maximise profits for the firm.

Fines are also inadequate in that they often fail to induce internal discipline and revision of defective standard operating procedures or compliance policies. Even when it is clear that a fine is designed to induce certain corrective measures, there is no guarantee that those measures will be implemented; the corporate offender must decide what course to adopt. The corporation has many courses of action from which to choose. For example, it may simply treat fines as recurring business losses, which may or may not have a salutary effect upon those personnel responsible. Or, it may institute an internal investigation without bothering about the imposition of any sanctions. A corporation could enact internal disciplinary procedures, or introduce preventive policies, but it has no obligation to do so. In short, by imposing fines courts maximise corporate freedom by trusting corporations to exercise adequate internal control, but that trust is misplaced when the defendants, through their criminal acts, have proven to be untrustworthy.

Another inadequacy of fines is that they convey the impression that permission to commit a crime may be bought for a price. This impression is the very antithesis of the traditional view of the criminal law as a prohibitory mechanism of social control. Offences are not merely commodities to be bought or sold but socially unwanted invasions of protected interests. No amount of money can make up for unwanted harm of the kind caused by the dispersion of Kepone wastes into the James River and Chesapeake Bay and one role of criminal liability in such a case is to subject the defendant's conduct to emphatic public disapproval. If a serious offence is punished merely by means of a fine the connotation is not so much disapproval as crimes for sale.

11. See generally, Coffee, J. C., Jr., "Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Punishment" (1980) 17 *American Criminal Law Review* 419; Byrne, J. and Hoffman, S., "Efficient Corporate Harm: A Chicago Metaphysic" in Fisse, B. and French, P. (eds), *Corrigible Corporations and Unruly Law*, Ch. 6.

Monetary obstacles against fines

A further problem of efficacy arises when corporate defendants do not have sufficient resources to pay the large fines that must be imposed to bring about the desired level of deterrence or retribution. Fines easily fall prey to a phenomenon that Coffee has described as the "deterrence trap".¹² This phenomenon occurs when the size of the fine that is necessary to deter effectively is larger than that which a corporation is able to pay. Coffee has elaborated as follows:

The crux of the dilemma arises from the fact that the maximum meaningful fine that can be levied against any corporate offender is necessarily bounded by its wealth. Logically, a small corporation is no more threatened by a \$[US]5 million fine than by a \$[US]500,000 fine if both are beyond its ability to pay. In the case of an individual offender, this wealth ceiling on the deterrent threat of fines causes no serious problem because we can still deter by threat of incarceration. But for the corporation, which has no body to incarcerate, this wealth boundary seems an absolute limit on the reach of deterrent threats directed at it. If the "expected punishment cost" necessary to deter a crime crosses this threshold, adequate deterrence cannot be achieved In short, our ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation's resources.¹³

Similarly, the social costs of an offence and the corresponding retributive fine may be far larger than the amount a corporate defendant is able to pay. In these cases, fines also fall into a "retribution trap":

[C]an we imagine any penalty short of revoking the corporation's right to sell drugs which would be commensurate to the harm caused by the fraud and deceit of a thalidomide disaster? Given what we know about how disapproving the community feels toward corporate crime, there may be many situations where the deserved monetary or other punishment bankrupts the company. The community then cuts off its nose to spite its face.¹⁴

Transmissibility of unwanted side-effects

A longstanding objection to fines against corporations is that their impact within the firm usually falls unjustly upon shareholders rather than managers. Managers are presumed to be better positioned than shareholders to exert control over wrongdoing and risktaking, and so should bear the greater burden of fines. Allen has voiced the objection forcefully:

But on whom does the burden of the fine fall? Certainly not directly on the guilty party within the corporate structure. On the contrary, it falls directly on the owners, the stockholders, who

12. Coffee, op. cit., "No Soul To Damn; No Body to Kick" at 389-393.

13. Ibid., at 370.

14. Braithwaite, J., "Challenging Just Deserts: Punishing White-Collar Criminals" (1982) 72 *Journal of Criminal Law and Criminology* 723 at 757.

ordinarily will have had no part in the commission of offences, will have been unaware that criminal acts were being committed, and, even if suspicious of criminal activity, will often have lacked the means to do much about preventing it.¹⁵

The problem of spillovers of fines onto consumers and other non-managerial persons is obvious. Depending upon the characteristics of the relevant market, heavily fining a corporation may lead to consumer price hikes, worker layoffs, and depression of community affluence and wellbeing.

The limitations of fines, described above should not be overstated; a conviction itself, regardless of the form of sanction, can be of significant deterrent and retributive value. Convictions strike at the desire for respectability and power as well as the desire for financial gain; they also signal the need for reappraisal and correction of internal control systems. Moreover, condemning a corporation by means of conviction imposes a stigma which, unlike monetary loss, cannot simply be written off as a business cost and passed on to others.

The deterrent and retributive impact of convictions alone, however, is limited. Corporate convictions are often not publicised through either the news media or through the convicted corporation's own channels of communication. Furthermore, even if public news of a conviction did cause a scandal, there is no guarantee that a corporate defendant would react by undertaking any effective programme of internal discipline or organisational reform.

Alternatives to fines against companies

Various alternatives to the fine have been suggested for use as sentences against corporate offenders. One is the equity fine, which forces a company to create an extra parcel of shares and to vest ownership of that parcel of shares in a state agency such as a crime victim compensation fund.¹⁶ Another is the adverse publicity order under which a company would be required to advertise specified details about its offence in the media.¹⁷ A further possibility is the punitive injunction or punitive order requiring a corporate offender to conduct internal disciplinary proceedings and to modify its compliance procedures in some innovative and demanding way.¹⁸ Yet another conceivable option

15. Allen, F., *Regulation by Indictment: The Criminal Law as an Instrument of Economic Control* (1978), p. 13.

16. Coffee, op. cit., "No Soul To Damn; No Body to Kick" at 413-424.

17. Fisse, B. and Braithwaite, J., *The Impact of Publicity on Corporate Offenders* (1983), Ch. 21.

18. Stone, C. D., *Where the Law Ends: The Social Control of Corporate Behaviour* (1975), Ch. 16; Fisse, B., "Responsibility, Prevention, and Corporate Crime" (1973) 5 *New Zealand Universities Law Review* 250; Geraghty, J. A., "Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing" (1979) 89 *Yale Law Journal* 353; American Bar Association, (1980) 3 *Standards for Criminal Justice* 18.162-63, 18.179-84; Coffee, op. cit., "No Soul To Damn; No Body to Kick" at 448-459; Fisse, op. cit., "Reconstructing Corporate Criminal Law", at 1221-26.

is the community service order, the effect of which would be to insist that a corporate offender use its own skills and resources to undertake a socially useful project vetted by the sentencing court.¹⁹ In what respects might each of these possible options be superior to the cash fine? In what respects might they be inferior?

Consider, for example, the potential of probationary or punitive injunctions if used to mandate internal disciplinary action or organisational reform. First of all, internal discipline orders would enable corporate offenders to be sanctioned in a manner responsive to the problem of maintaining individual accountability for corporate offences: unlike fines, this type of sanction would be targeted directly towards those personnel who had a hand in the offence subject to sentence.²⁰ Secondly, the deterrence trap which confronts attempts to impose heavy cash fines would largely be skirted by recourse to internal discipline or organisational reform orders: the deterrent impact of these sanctions would lie largely in financial or non-financial internal disciplinary sanctions and in detraction from corporate or managerial power, consequences which almost invariably can be borne by corporations without sending them into financial ruin. Thirdly, internal discipline and organisational reform orders would be much more congruent with non-financial values in organisational decision-making: corporate and managerial prestige would receive at least a glancing blow, and the micro-goals of organisational subunits would be immediately relevant to a probationary review of suspect standard operating procedures. Fourthly, as far as catalysing organisational reform is concerned, organisational reform orders could be used to insist that corporate defendants react in a manner responsive to any structural or other institutional problems which contributed to the commission of an offence.

Given these advantages over fines, there is a strong case for introducing probationary or punitive injunctions as a sanction against corporations. Numerous points of detail need to be settled and cast in suitable legislative form, but these should not distract attention from the need for a sanction capable of pressing upon the inner nerves of corporate governance.

To return to the sentences imposed for the Kepone offences, does it make sense to fine a governmental instrumentality like the City of Hopewell? Assuming that a governmental instrumentality has flagrantly or carelessly polluted the waterways, what kind of sanction would be most appropriate?

Write your own scenario describing how Allied and the City of Hopewell might conceivably have been punished by means of a probationary or punitive injunction if these options had been available to the sentencing court.²¹

19. Fisse, B., "Community Service as a Sanction against Corporations" (1981) *Wisconsin Law Review* 970.

20. Cf. McCloy, J. J., *The Great Oil Spill: The Inside Report* (1976).

21. Cf. Stone, op. cit., "A Slap on the Wrist for the Kepone Mob" (probation scenario); Fisse, op. cit., "Community Service as a Sanction against Corporations" (community service scenario).

Corporate Fault

It is a general principle of criminal liability that a person must act with a guilty mind in order to be held liable for an offence. In *United States v. Allied Chemical Corporation*²² the offences which Allied committed were statutory offences of strict liability and hence it was unnecessary for the prosecution to prove that Allied had acted with intention, recklessness or even merely negligence.

Strict liability avoids the problem of attributing a guilty mind to a company, but creates a serious risk of injustice.²³ Assume for argument's sake that Allied had taken all reasonable precautions to guard against the escape of pollutants from its premises and that despite these precautions, a pollutant still managed to escape via a new valve which unexpectedly broke down despite compliance with rigorous testing and bedding-in procedures. In this situation Allied would still be criminally liable because the relevant offences imposed strict liability. If you were a manager or employee of the company, what might your reaction be? Is it realistic to expect heavy fines or other stiff sentences to be imposed by the other courts if the offence does not require fault on the part of the corporate defendant?

On the other hand, it is very difficult to devise a workable concept of corporate fault.²⁴ One approach often adopted in the context of statutory offences is to hold a company vicariously liable for the intention, recklessness, or negligence of any employee or agent acting on its behalf.²⁵ Is this approach satisfactory? In what sense is the *company* at fault if fault can be proved merely on the part of one representative? Another approach, applied as a matter of general principle at common law, is to hold a company personally liable for the intention, recklessness or negligence of a top-level manager acting on its behalf.²⁶ Is this approach sound? In what sense is the *company* at fault if fault can be proven merely on the part of one top-level manager? Moreover, how likely is it that the top managers of large companies will be sufficiently involved in the acts of delegates to be in a position to know about the circumstances surrounding an offence? In the case of Allied, for example, could the prosecution have proved that any top-level manager intentionally, recklessly, or negligently allowed the Kepone wastes to escape?

22. 420 F. Supp. 122 (E.D. Va. 1976). See also *Alphacell Ltd v. Woodward* (1972) A.C. 824.

23. See further, Howard, C., *Strict Responsibility* (1963).

24. For the philosophical backdrop, see French, P., *Collective and Corporate Responsibility* (1984).

25. See for example, *R. v. Australasian Films Ltd* (1921) 29 C.L.R. 195.

26. *Tesco Supermarkets Ltd v. Natrass* [1972] A.C. 153; *Universal Telecasters (Qld) Ltd v. Guthrie* (1978) 32 F.L.R. 361; *Nordik Industries Ltd v. Regional Controller of Inland Revenue* [1976] 1 N.Z.L.R. 194; *Canadian Dredge & Dock Co. Ltd v. The Queen* (1985) 19 C.C.C. (3d) 1.

Reactive corporate fault

One possible way around these difficulties is to rely on the concept of reactive corporate fault, an approach which focuses on a company's reactions to unlawful conduct performed on its behalf rather than merely on a company's behaviour at or before the time when that unlawful conduct took place.²⁷

Consider in this light the Kepone case, *United States v. Allied Chemical Corporation*.²⁸ Because Allied was convicted under a statute that imposed strict responsibility, fault was relevant only to gravity of sentence. In the opinion of District Judge Merhige, Allied had been at fault at the time of the actus reus: "I disagree with the defendant's position that all of this was so innocently done, or inadvertently done. I think it was done because of what it considered to be business necessities, and money took the forefront." Yet it is not clear that the corporation intentionally or recklessly committed illegal acts of pollution. A few middle managers may have possessed mens rea, but, as we have seen, managerial mens rea alone does not indicate genuinely corporate blameworthiness.

Suppose, however, that upon proof of the actus reus of the pollution offences charged, the court had required Allied to prepare a compliance report detailing a programme of preventive and restitutionary measures which the company proposed to undertake in response to the violations. Suppose further that the compliance report was unsatisfactory to the court, or bent upon scapegoating rather than reforming. In this situation, the law would focus on the company's compliance programme in response to the prosecution rather than on what it intended at or before the time the actus reus was committed. Moreover, if notice were given to the company that its compliance report would be treated as a record of top-level corporate policy, the focus would be on corporate intention, rather than on the individual states of mind of one or more middle managers.

If the reactive strategies of corporations represent corporate policy in this way, unsatisfactory reactive strategies would display corporate mens rea and thus, in the absence of a good excuse, corporate blameworthiness. In other words, if the law looks to a corporate defendant to generate an active prevention and cure strategy, then an unsatisfactory response would indicate a non-compliant corporate policy which, in the absence of good excuse, is sufficiently blameworthy to warrant punishment.

Some may object that a concept of reactive corporate fault would result in excessive leniency toward corporations—why should corporate offenders be given a free bite at the apple of crime? Several responses may be made to this objection. First, the objection does not stem from existing reality. It assumes a command and sanction model of regulation, whereas negotiated settlement is the predominant model in prac-

27. Fisse, op. cit., "Reconstructing Corporate Criminal Law" at 1183-1213.

28. 420 F. Supp. 122 (E.D. Va. 1976).

tice today.²⁹ Secondly, the bite at the apple of crime would not be free under the scheme proposed. Civil means of regulation, such as mandatory injunctions, and remedial orders of compensation, would be the measures of first resort. These measures would apply before there is any proof of reactive non-compliance. Thirdly, reactive corporate fault is not advocated as an exclusive basis for establishing mens rea: mens rea or lack of corporate diligence at or before the time of the actus reus of an offence would also be a sufficient mens rea. Finally, offences defined in terms of vicarious mens rea or strict liability are not precluded when, as a matter of legislative policy, it is justifiable to impose liability without a showing of reactive or proactive corporate fault.³⁰

Internal Compliance

The experience many companies have had with problems of non-compliance³¹ has led to the development of various techniques of preventive law, including the use of sophisticated compliance systems. This is readily apparent from the impact the Kepone affair had on Allied Chemical, and the responses of Allied raise numerous questions of practical significance for modern business organisations.

Structuring and culturing compliance

What steps can a company most usefully take toward achieving compliance? What are the prime strengths and weaknesses of the approach adopted by Allied? In tackling these questions it should be remembered that although empirical research in this area is in its infancy some guidance is emerging. Consider the following summary, based on a study by Braithwaite of safety enforcement practices in the five United States coal mining companies with the lowest accident rates:³²

In the final analysis, the conclusions about what these five companies had in common could be regarded as mundane. There were companies which:

- (1) gave a lot of informal clout and top management backing to their safety inspectors;
- (2) made sure that clearly defined accountability for safety performance was imposed on line managers;

29. See for example, Hawkins, K., *Environment and Enforcement: Regulation and the Social Definition of Pollution* (1984), p. 3.

30. The standard example is safety legislation for nuclear power.

31. This may understate the criminal connotation of so-called "problems" of non-compliance. See for example, Cullen, F. T., Link, B. G. and Polanzi, C. W., "The Seriousness of Crime Revisited: Have Attitudes toward White-Collar Crime Changed?" (1982) 20 *Criminology* 83; Schrager, L. S. and Short, J. F., Jr., "Toward a Sociology of Organizational Crime" (1977) 25 *Social Problems* 407.

32. Braithwaite, J., "Taking Responsibility Seriously: Corporate Compliance Systems" in Fisse, B. and French, P. (eds), *Corrigible Corporations and Unruly Law*, Ch. 3.

(3) monitored that performance carefully and let managers know when it was not up to standard; and

(4) had mostly formal (although informal in one case) programmes for ensuring: (a) that safety training and supervision (by foremen in particular) was never neglected; (b) that safety problems were quickly communicated to those who could act on them; and (c) that a plan of attack existed for dealing with all identified hazards.

It remains to be seen whether empirical work on internal compliance systems in other industries would confirm these findings from coal mining. The importance of the attitude of top management for the ethical climate of companies is not without support in other industries, however. It was the most repeated theme which emerged from 131 interviews with pharmaceutical executives. As one American executive said:

He [the chief executive] sets the tone and the rest of management fall in line. The ethical standards of anyone other than him don't matter so much. Well, unless you have one of those companies where an old guy at the helm has a right hand man making all the real decisions.³³

Limits and potential of mandatory compliance

It is often said that companies cannot be trusted to introduce effective compliance systems and that the law should intervene to force them to do so by entering the black box of the organisation.³⁴ To what extent is governmentally mandated internal compliance feasible?

The most promising starting point here is the importance of the compliance efforts of top management. If it is the case that "you can't cookbook compliance", that compliance systems will only be effective to the extent that they are consonant with the culture of the corporation concerned, then scope for government intervention to mandate effective compliance systems is limited. Let us assume that future research confirms that what matters is a top management commitment to back up the judgment of compliance staff against line managers, to impose clearly defined accountability for compliance on line managers (as opposed to compliance staff), to take a personal interest in monitoring compliance performance, and to insist on programmes to guarantee training with respect to compliance, plus unblocked communication concerning compliance breakdowns. What can governments really do to foster these things?

33. Ibid., at pp. 52-53. See also Clinard, M. B., *Corporate Ethics and Crime: The Role of Middle Management* (1983).

34. Most notably Stone, *Where the Law Ends* (1975). Stone's thesis is anathema to those who believe that regulatory intervention is inherently inefficient. For a non-hysterical critique of regulatory intervention, see Kagan, R. and Bardach, E., *Going by the Book: The Problem of Regulatory Unreasonableness* (1981).

Governments can require companies to have a compliance staff, but the critical element of the success of such compliance groups seems to be not its size or its location in the formal structure of the organisation, but how much informal backing it has from top management. Governments find it difficult to influence the latter. Nevertheless, as Kagan and Scholtz point out:

By requiring pharmaceutical companies to hire certified personnel to direct premarket clearance experiments for new drugs, the [Food and Drug Administration] has strengthened the professionalisation and intracorporate power of company researchers. . . .³⁵

Governments can require companies to lodge with enforcement agencies a clearly defined set of accountability principles to indicate who will be held responsible for different specified types of non-compliance. This is a feature of coal mine safety legislation in Australia and conceivably this approach could be applied across a much broader front of corporate regulation. One disadvantage is that universalistic standards of corporate accountability tend to be too inflexible and insufficiently dynamic to reflect the diversity and capacity for change which typifies business organisation.³⁶

Governments can also legislate for a more open window on corporate misfeasance by protecting whistle blowers and mandating whistle blowing on life-threatening corporate misconduct. Disclosure of selected social performance indicators (pollution levels, accident rates, affirmative action outcomes, consumer complaints etc.) can also be required.

Governments can also insist that training take place in certain areas (for example, compliance with industrial safety rules). While this can be worthwhile, there is little to prevent an irresponsible company from carrying out the training in a perfunctory fashion.

Internal procedures can be mandated to stop blockages of bad news from reaching the top.³⁷ Such mandatory internal procedures could be modelled on the communication safeguards introduced by Exxon and many other companies.³⁸ But it is difficult for the government to guarantee that employees will all be told of their rights and duties to report blockages direct to the board audit committee or of their duty to insist on a written reply from their superior on what has been done with a reported breach of legal or ethical standards.

35. Kagan, R. A. and Scholtz, J. T., "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies" in Hawkins, K. and Thomas, J. M. (eds), *Enforcing Regulation* (1984), p. 67.

36. See further, Mintzberg, H., *The Structuring of Organizations* (1979); Braithwaite, J., "Enforced Self-Regulation: A New Strategy for Corporate Control" (1982) 80 *Michigan Law Review* 1466; Braithwaite, J. and Fisse, B., "Varieties of Responsibility and Organizational Crime" (1985) 7 *Law and Policy* 315.

37. See further, Coffee, J. C., Jr., "Beyond the Shut-Eyed Sentry: Towards a Theoretical View of Corporate Misconduct and an Effective Legal Response" (1977) 63 *Virginia Law Review* 1099.

38. See Fisse, B. and Braithwaite, J., *The Impact of Publicity on Corporate Offenders* (1983).

Governments can require that companies have plans to deal with breakdowns in compliance. For example, the United States Environmental Protection Agency requires oil companies to have spill prevention control or countermeasure plans. But governments cannot do a great deal to guarantee that the plans are sufficiently well thought out to deal with the contingencies a particular company is likely to face or to ensure that the company will not try to cover up a minor spill rather than put their plan into action.

In most of these areas governmental requirements that internal compliance systems be effective can never be as important as top management commitment to making the systems effective. This has two implications—a conservative one and a punitive one.

Regulatory consultation and commitment to compliance

The conservative implication is that regulatory agencies should engage in maximum consultation with top management of companies in the industry to build commitment to agency goals, be they environmental improvement, combating discrimination in employment, or improving occupational health and safety. Undoubtedly, more consultation with industry implies a very real risk of more regulatory capture. Probably, though, the benefit of enhanced top management commitment to the regulatory outcome desired is worth that risk. In any case, an addition to the already considerable consultation with business could be matched by a quantum increase in consultation with public interest groups (in some cases from a base of zero consultation).

More important than the amount of dialogue with business by regulators is the question of who will be the business representatives targeted for dialogue. We have concluded that it is the chief executive and other top management of companies whose commitment is crucial. Yet throughout the world the trend has been for intermediaries—outside lobbying firms, in-house “directors of regulatory affairs”, or trade associations—to deal with government on behalf of business. The trouble with these intermediaries is that they have an economic interest in confrontation. As Reich has persuasively argued, conflict between a client and a regulatory agency means money for the lobbyist, and the more prolonged and bitter the conflict, the greater the monetary reward.³⁹ Bitter, drawn-out confrontations with regulators erode the commitment of business to regulatory goals. Lobbyists are reluctant to nip disagreement in the bud by working with regulatory agencies on compromises which would leave all parties happy with and committed to the rules. On the contrary, as Reich has observed, “they can do far better by waiting until regulatory action has begun (or even by quietly encouraging it) and then going into battle with guns blazing”.⁴⁰

Regulatory agencies can deal with this problem by making clear their reluctance to consult with lobbying professionals and their desire

39. Reich, R. B., “Regulation by Confrontation or Negotiation?” (1981) 59(3) *Harvard Business Review* 82.

40. *Ibid.*, at 88.

to have discussions with the top management of companies subject to the regulations imposed. After the Hawke Government was elected in 1983, it adopted a package of measures in effect to discourage lobbyists. This included a Cabinet decision that “Ministers should as far as possible . . . ensure that lobbyists who make personal representations to them are accompanied by the principals they represent”. The Government’s attitude has tended to be that if industry wants to persuade us, then let the captains of industry put their case directly to us. The result has been a Labor government, at least for its first three years, with a better rapport with business and a superior capacity to lock business into accepting its policies than previous conservative governments. Professional purveyors of conflict have lost a good deal of their significance in business-government negotiations in Canberra.

Compliance liability at the top

In addition to the suggestion that top management commitment to regulatory goals ought to be strengthened by maximum government dialogue directly with chief executives, commitment at the top also can be enhanced by sheeting home the consequences of corporate wrongdoing personally to the chief executive. Virtue arises from both belief in the value of being virtuous and fear of the consequences of being sinful. Unfortunately, the latter consequences are rarely felt by chief executives of large corporations. As in the case of Allied in the Kepone affair, penalties for corporate violations of the law are typically imposed on the corporations, almost invariably in the form of fines which might be passed on to consumers or other luckless bystanders. When individuals are punished as well, they are normally more junior employees.

The employees who perpetrate crimes on behalf of the corporation frequently are responding to performance pressures that only the chief executive is able to change. Often it is only the chief executive, after opening his shut eye, who can see that unreasonable performance expectations are being obtained by flouting the law, who can insist that the law be obeyed. In these circumstances, chief executives should be indicted on the basis of recklessness, or wilful blindness, a form of fault accepted as equivalent to knowledge. Additionally, a more stringent basis of responsibility should be introduced. An important step toward rendering chief executives more vulnerable in this way was taken in *Park*,⁴¹ a decision of the United States Supreme Court in 1975.

John Park was the chief executive officer of Acme Markets, a national food retailer with 36,000 employees. He was charged with violating the *Food, Drug and Cosmetic Act* 1938 (U.S.) by allowing food to be stored in a rodent-infested Baltimore warehouse. The crucial question was whether Park could be held responsible for a rodent problem in Baltimore when his office was in Philadelphia. In 1972

41. *United States v. Park*, 421 U.S. 685 (1975).

Park had received a letter from the Food and Drug Administration (FDA) complaining of conditions in the Baltimore warehouse. Park called in his vice-president for legal affairs who informed him that the Baltimore division vice-president "was investigating the situation immediately and would be taking corrective action and would be preparing a summary of the corrective action to reply to the letter". Hence, the defendant claimed he had done all that could reasonably be expected of a chief executive officer to rectify the problem. Nevertheless, when the FDA reinspected the warehouse and found that the problem had not been rectified, Park was charged.

The FDA contention was that Park had failed to ensure that his company had adequate procedures for guaranteeing hygienic warehouse conditions. The Supreme Court upheld Park's conviction and the fine of \$US50 on each of five counts. In doing so the court reaffirmed the view in *Dotterweich*⁴² that where dangers to public health are involved, "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." So the *Park* decision interpreted the *Food, Drug and Cosmetic Act* as imposing on the chief executive of a large corporation a duty of foresight and vigilance and an obligation to ensure that measures to prevent or correct violations are implemented. The *Park* decision falls just short of imposing a standard of strict liability on the chief executive officer. In effect, *Park* recognises a defence of impossibility: if the defendant can show that he or she exercised extraordinary care, liability is avoided on the basis of "powerlessness". Thus, on facts such as those which arose in *Park*, absolute reliance on any single individual, no matter how trustworthy, is insufficient to satisfy the standard of care required; the chief executive officer is expected to ensure compliance personally.

The *Park* decision was controversial because it highlighted the question whether statutory offences should be defined so as to depart from the common law principle that individual criminal responsibility requires proof of personal mens rea. For an offence which is the subject of only a relatively small fine, such a departure can be justified for the sake of protecting human health. But there is provision for imprisonment under the *Food, Drug and Cosmetic Act*. So the *Park* decision could lead to jail for an executive in similar circumstances though, as yet, it has not produced this result. The imprisonment of people who lack blameworthy intent seems counterproductive because of the real risk of undermining public commitment to the moral force of the criminal law. At the other extreme, when ordinary citizens see unemployed people going to prison for minor theft and the chiefs of large corporations going unpunished for recklessly endangering the public health, this also undermines respect for the law.

The *Park* decision is objectionable because it permits the imprisonment of individuals for acts of which they had no knowledge or fore-

42. *United States v. Dotterweich*, 320 U.S. 277 (1943).

sight.⁴³ However, a criminal standard of extraordinary care is much less objectionable if the sanctions that can be imposed on individuals do not run to incarceration. Merely to fine a corporate officer may not be effective (companies have many ways of indemnifying employees for fines or monetary penalties) but there are other possibilities short of imprisonment, notably a sentence of community service.

The strength of the *Park* decision is that it shifts responsibility to the people who can make a difference. This is not to belittle the importance of continuing to punish more junior employees and corporate entities for offences committed by them. It is simply to say that if we wish to maximise the compliance impact of additional investment in enforcement, the most productive targets will be chief executives.

It is the chief executive who usually manages to get his or her photograph in the business magazines when record earnings are announced. Accordingly, perhaps the best contribution that could be made to strengthening corporate compliance systems would be regular appearances in the business magazines of pictures of chief executives charged with corporate offences. What president would not give full backing to an environmental affairs director against intransigent factory managers if it will reduce the risk of a mug shot in the *Financial Review*? Even a mug shot in the *Funeral Directors' Gazette* might be the ultimate in mortification if one's reference group is funeral directors.

In the Kepone affair it may be wondered whether John J. Connor, the then chief executive officer of Allied, failed to exercise the degree of care that would be required under the *Park* standard of extraordinary care; as mentioned previously, the top executives at Allied had never heard of Kepone until disaster struck the company and were not put on notice in the way that John Park was. The more important point, however, is that Allied and other companies have now established new benchmarks of internal control and, in light of these benchmarks, the chief executive officer who takes a shut-eyed view of compliance is, at the very least, negligent in the extreme.

43. Howard, C., *Strict Responsibility* (1963), Ch. 2.