efforts that is available to few street criminals. Respectable offenders and their representatives play an active—many believe dominant—part in crafting the private standards, regulatory rules, and laws that circumscribe their conduct. And they do not sit idly by when the state and other parties try to curb their criminality; SLAPP lawsuits (Strategic Litigation Against Public Participation) and retaliatory actions against whistleblowers stand as powerful reminders of the determination of the privileged and powerful to conduct their affairs as they see fit. What is known about corporate codes of ethics gives reason also for concern about their willingness to regulate their own behavior; codes generally emphasize the importance of employee fidelity to organizational policies and norms but say remarkably little about the importance of compliance with legal norms. There appears, moreover, to be little realtionship between the presence of these codes and firm-level regulatory compliance.

The level of state commitment to and resources invested in rule enforcement plays an important part in shaping collective shared assessments of the risks of criminal behavior and, therefore, criminal opportunities. When the agencies and personnel nominally charged with curbing white-collar crime lack enthusiasm for the task or receive only minimal political and fiscal support for doing it, inevitably the belief grows among the privileged that they can break the law with impunity. As Henry Pontell, Kitty Calavita, and Robert Tillman point out, this was true of state capacity to respond decisively to massive crime in the savings and loan industry in the 1980s. The net result was that large numbers of corporate pirates either escaped punishment entirely or received little more than a slap on the wrist for their crimes.

The practical challenges of detecting, investigating, and convicting white-collar criminals are considerable, and this is true particularly where organizational offenders are the target. The organizational context of crime can make it extremely difficult to identify culpable individuals and to collect evidence sufficient for conviction. This raises investigatory and preparation costs. Drawing from his multistate research into corporate crime prosection, Michael Benson reinforces what was made apparent in screening and prosecuting S&L frauds: Decisions to prosecute are made in a complex calculus constrained by whether or not available resources are adequate to the challenge.

Despite the belief by many that white-collar offenders are responsive to the threat of criminal sanction, the bulk of state and private effort to control white-collar misconduct is rules that carry minimal professional or civil penalties for most forms of white-collar rule breaking; the body of statute law that citizens in their occupational roles and the organizations that employ them are expected to meet is small when compared with the volume of regulatory rules that confronts them. Regulatory enforcement, however, suffers from most of the same problems faced by police and prosecutors. Largely because of this, an alternative perspective on and approach to regulation and enforcement has gained support for state officials, for industry, and from regulatory investigators. Known as the compliance approach, advocates for this system of regulation and control of business interests suggest that regulatory enforcement is best accomplished when the enforcers work flexibly and cooperatively with those subject to regulation. The Australian government is engaged in a series of initiatives to maintain or enhance tax revenue streams, one of which is adoption of a compliance approach to enforcement. Valerie Braithwaite and John Braithwaite note the characteristics of their proposal for responsive tax enforcement and show how it will be applied in efforts to stem the loss of revenue to the cash economy and to gain greater compliance from corporations and high-wealth individuals.

The potential shortcomings of compliance strategies remain worrisome to many, however. Laureen Snider notes some of the reasons for these concerns, including that cooperative regulation takes place in a world of structured inequality and power that is not altered by the new regulatory approach. When they sit down with regulators to discuss cooperation and compliance, the privileged do so from a position of strength while agency personnel work under severe resource and political constraints. The bottom line on cooperative or responsive regulation has yet to be written.

Both the faces of white-collar crime and the control challenge it presents have altered fundamentally with the growth of the global economy and transnational corporations (TNCs). Although the signatories to international trade agreements typically pledge to adopt and enforce in their home countries elementary regulations for worker and product safety, the willingness of states to confront white-collar crime has waned substantially under the exigencies of competition and reassurances from business that oversight is heavy-handed, unnecessary, and costly. Police and prosecutors in most nations and local jurisdictions lack the budget, expertise, and other resources to pursue these cases. In addition, corporate owners and managers bent on gaining or maintianing weak regulatory oversight threaten relocation to countries with less restrictive regulatory regimes and the loss of jobs and tax revenues this would produce. States have moved significantly in the direction of strategies of cooperative regulation. The question raised by this development and by the growing dominace of large corporations is whether or not they now are beyond the law.

On Theory and Action for Corporate Crime Control

JOHN BRAITHWAITE AND GILBERT GEIS

. . . Criminal justice interventions to reduce street crime, whether mediated by principles of deterrence, rehabilitation, or incapacitation, can at best have

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only modest effects on the rate of offending. It will be argued in this paper that, in contrast, deterrence, rehabilitation, and incapacitation are viable strategies for fighting crime in the suites. . . . This argument will be advanced in the context of a more general set of propositions asserting that the conventional wisdom of criminology with respect to traditional crime should be inverted with corporate crime.

There also is a broader purpose in our presenting the six propositions which follow. We seek to establish that corporate crime is a conceptually different phenomenon from traditional crime. Corporate crime is defined as conduct of a corporation, or of individuals acting on behalf of a corporation, that is proscribed and punishable by law.[7] . . . The propositions that follow specify reasons why principles developed in relation to traditional crime should not be assumed to apply to corporate offenses. Once the domains are accepted as conceptually separate, the burden of proof shifts; the opponent of legislation to control corporate crime must show why caveats from traditional criminal law should be regarded as relevant to the control of corporate crime.

SIX BASIC PROPOSITIONS

Proposition 1

With most traditional crimes, the fact that an offense has occurred is readily apparent; with most corporate crimes, the effect is not readily apparent.

When one person murders another, the corpse is there for people to see; or at least the fact that a person has disappeared is readily apparent. When, on the other hand, a miner dies from a lung disease, people may never appreciate that he has died because his employer violated mine safety regulations. Inevitably, most such violations are undetected.[8] People who pay more to go to a movie because of price fixing among theater owners will not be aware that they have been victims of a crime. When taxes go up because Defense Department officials have accepted bribes to purchase more expensive ships or missiles than the country needs, no one knows that a crime has occurred and that we all have been its victims.

Such is the limited power of individuals for ill that when they perpetrate a traditional crime there is usually only one victim (or, at most, there are only a few victims) for each offense. These individual victims become acutely aware

[7] Following Sutherland (*White Collar Crime*), we take the view that to exclude civil violations from a consideration of corporate crime is an arbitrary obfuscation because of the frequent provision in law for both civil and criminal prosecution of the same corporate conduct. Conduct subject only to damages awards without any additional punishment (e.g., fine, punitive damages) is, however, not within the definition of corporate crime adopted here.

[8] Joel Swartz, "Silent Killers at Work," *Crime and Social Justice,* Summer 1975, pp. 15–20; W. G. Carson, "White-Collar Crime and the Enforcement of Factory Legislation," *British Journal of Criminology,* October 1970, pp. 383–98.

that another person has dealt them a blow. The structural reality of much corporate crime, in contrast, is one of diffuse effects. A million one-dollar victimizations will not generate the kind of public visibility that a single million-dollar victimization will.

Even when the effects of corporate crime are concentrated rather than diffuse, victim awareness is often not there. If a consumer pays an extra thousand dollars for a used car that has had its odometer turned back, he will almost never be aware of the fraud.[9] The consumer might think that he has been sold a lemon, but not that he has been a victim of business crime. Similarly, when patients die from using a dangerous drug that was approved by health authorities on the strength of a bribe from a pharmaceutical company, a practice common in many countries,[10] the crime is not apparent. Low visibility also follow from the fact that often the only witnesses to a crime are themselves implicated in the offense.[11]

This first proposition has important implications for the difference between how law enforcers must go about controlling corporate versus traditional crime. Traditional crime control is reactive. The police normally do not investigate until a citizen reports a victimization.[12] For corporate crimes, whose visibility is almost invariably masked through being embedded in an ongoing transaction, the reactive model must be discarded for a proactive enforcement stance.[13]

Proposition 2

Once an offense becomes apparent, apprehending a suspect can be difficult with traditional crime, but is almost always easy with corporate crime.

When a house is robbed, or when a car is reported as missing, it is often a difficult job for the police to find the burglar or the car thief. Great public ex-

[9] John Braithwaite, "An Exploratory Study of Used Car Fraud," in *Two Faces of Deviance,* Paul R. Wilson and John Braithwaite, eds. (St. Lucia, Australia: University of Queensland Press, 1978), pp. 101–22.

[10] John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (London, England: Routledge and Kegan Paul, in press), ch. 2.

[11] John Hagan, Ilene H. Nagel, and Celesta Albonetti, "Differential Sentencing of White-Collar Offenders," *American Sociological Review,* December 1980, pp. 802–20.

[12] Albert J. Reiss, Jr., *The Police and the Public* (New Haven, Conn.: Yale University Press, 1971) ch. 2.

[13] Carson ("White-Collar Crime and the Enforcement of Factory Legislation, p. 390) found that only 5 percent of Factories Act violations in Britain were reported to as opposed to discovered by, the Factories Inspectorate. Even with consumer affairs offenses in which there are victims who become aware of their victimization, a proactive approach is typically required to stop the offense before the offender disappears and aggrieved consumers begin to trickle into the agency. (See Philip G. Schrag, "On Her Majesty's Secret Service Protecting the Consumer in New York City," *Yale Law Journal,* July 1971, p. 1586). On proactive enforcement tactics generally, see Herbert Edelhertz, *The Investigation of White-Collar Crime: A Manual for Law Enforcement Agencies* (Washington, D.C.: Department of Justice, Law Enforcement Assistance Administration, 1977).

pense is incurred to achieve unremarkable clearnace rates for these types of offenses.[14] In contrast, in the unlikely event that a sick worker discovers his illness is the result of an industrial health violation at work, almost by definition the law enforcement agency can identify a corporate suspect—the worker's employer. Similarly, if it is discovered that a bribe has been passed to secure a particular defense contract, there is an immediate suspect, the corporation that benefits from the contract. There was no need for the police to print "Wanted" posters or to set up roadblocks to find the corporate suspect when it was discovered that bribes were accepted in many countries throughout the world to secure sales of Lockheed aircraft.

This second proposition more than counterbalances the first in its implications for the potential effectiveness of corporate crime control. Corporate crime investigators cannot enjoy the luxury of sitting back in their offices waiting for the telephone to ring to notify them of the offense, but they are saved the tribulations of identikit photos, fingerprinting, and all the other paraphernalia that burden police in pursuit of traditional types of suspects.

With the use of proactive enforcement, there are many ways in which the disadvantage of invisibility could be swamped by the advantage to the enforcement agency of not having to apprehend the suspect. Although odometer frauds are invisible to the victims, representatives of law enforcement agencies could readily observe the mileage readings of cars standing in used car lots and then check back with the former owners to establish the mileage readings at the time of sale. If the enforcement agency were in a position to deliver the cars to the company itself, it would not even have to rely on the memory of the former owners.[15]

Our first two propositions together may constitute an argument for tactics that might involve or border on entrapment.[16] Nevertheless, it is an argument that demands consideration in corporate crime cases. Under the reactive enforcement model for traditional crimes, entrapment is hardly necessary. Law enforcement agencies have quite enough offenses reported to them and need not create more. Should they decide that they do want to create more offenses, given how little the police know about who is committing most of them, deciding whom to entrap would be difficult.

In contrast, if one accepts the inevitability of a proactive enforcement model for white collar crime, investigators may have little choice but to create

[14] In 1976 in the United States, only 14.4 percent of motor vehicle thefts were cleared by arrest. For property crimes generally, the clearance rate was 18 percent; for violent offenses, it was 45.6 percent. *Sourcebook of Criminal Justice Statistics—1978* (Washington, D.C.: Law Enforcement Assistance Administration, 1979), p. 502.

[15] Ogren is one advocate of auto repair fraud targeting by undercover operations with rigged vehicles. Robert W. Ogren, "The Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle against White-Collar Crime," *American Criminal Law Review,* Summer 1973, pp. 959–88.

[16] On entrapment, see Sorrells v. U.S., 287 U.S. 435 (1932).

their own offenses. For some types of white collar crimes, entrapment may be one of the few ways of doing this. The present authors differ with respect to the FBI's tactics in the ABSCAM case; but consider the options available for the conviction of political bribe takers. The FBI does not have citizens calling the agency claiming to be victims of political bribes, yet it does have intelligence on who the corrupt politicians are. Such intelligence rarely is sufficient to sustain criminal charges. The use of entrapment ruses for corrupt politicians may be more necessary and less indiscriminate than is the entrapment of, say, drug users by the offer of a deal. It can also be argued that holders of public office and the primary beneficiaries of the economic system have a special obligation to obey the law and to resist temptation.

Readers may conclude that entrapment is unacceptable with respect to either white collar or traditional crime. However, the balance of considerations that lead to this conclusion under the proactive model of white collar crime enforcement should be very different than the factors weighed for the types of offenses that can be handled under the reactive model.

Proposition 3

Once the suspect has been apprehended, proving guilt is usually easy with traditional crime, but almost always difficult with corporate crime.

Especially for less serious traditional crimes, the police have little difficulty in obtaining a conviction, particularly when they are willing to plea bargain. Once the police have made up their minds that a person is guilty and deserves to go to court, a conviction usually will follow.[17] When enforcement officers decide that a corporation probably is guilty of an offense and deserves to go to court, a conviction is usually *not* the result. Indeed, it does not normally eventuate that the matter *will* go to court.[18] The high costs to the state of corporate prosecutions, which work against pursuing the case in court, may be not only financial (e.g., legal fees) but also political (e.g., votes and campaign contributions, which may produce understandable caution among conservative bureaucrats in dealing with powerful actors).

Even where these costs are deemed to be bearable, the government will often lose in court because the complexity of the law[19] or the complexity of the

[17] Only 2.8 percent of defendants in cases terminated before United States district courts in 1977 were found not guilty, *Sourcebook of Criminal Justice Statistics—1979* (Washington, D.C.: Law Enforcement Assistance Administration, 1980), p. 555.

[18] See Clinard et al., *Illegal Corporate Behavior,* p. 291; Carson, "White-Collar Crime and the Enforcement of Factory Legislation"; Ross Cransten, *Regulating Business: Law and Consumer Agencies* (London, England: Macmillan, 1979).

[19] See Adam Sutton and Ron Wild, "Corporate Crime and Social Structure," in *Two Faces of Deviance,* Wilson and Braithwaite, eds., pp. 177–98; John Braithwaite, "Inegalitarian Consequences of Egalitarian Reforms to Control Corporate Crime," *Temple Law Qaurterly,* vol. 53, no. 4 (1980), pp. 1127–46.

company's books[20] makes it impossible to prove the case beyond reasonable doubt. There is a considerable difference, for instance, between convicting a corporation that takes money by fraud and convicting an individual who takes it at the point of a gun: "Criminal intent is not as easily inferred from a taking executed through a market transaction, as it is from a taking by force."[21] Corporations, unlike individuals, have the resources to employ the legal talent to exploit this inherent complexity. Good lawyers who use complexity to cast "reasonable doubt" on the applicability of existing statutes to the behavior of their client also use complexity to protract proceedings and thereby push up the cost disincentives for the prosecution to continue with formal proceedings.[22]

In addition to the complexity of the law and the complexity of the books, there is the complexity of the organizational reality of corporate action. Every individual in a large organization can present a different version of what company policy was, and individual corporate actors can blame others for their own actions (x says he was following y's instructions, y says that x misunderstood instructions she had passed down from z, ad infinitum). So how can either company policy or any individual company employee be guilty?[23] Even if this is not what actually happened,[24] it is difficult for the prosecution to prove otherwise.

There is, in addition, the complexity of science. Pollution, product safety, and occupational safety and health prosecutions typically turn on scientific evidence that the corporation caused certain consequences. In cases that involve scientific dispute, proof beyond reasonable doubt is rarely, if ever, possible. Science deals in probabilities, not certainties. The superstructure of science is erected on a foundation of mathematical statistics which estimate a probability that inferences are true or false. Logically, proof beyond reasonable doubt that a "causes" b is impossible. It is always possible that an observed correlation between a and b is explained by an unknown third variable, c. The scientist can never eliminate all the possible third variables. Hence, to require proof beyond reasonable doubt that a violation of the Food, Drug and Cosmetic Act caused an observed level of drug impurity, which in turn caused fifty deaths, is to require the impossible.[25]

[20] See Adam Sutton and Ron Wild, "Companies the Law and the Professions: A Sociological View of Australian Companies Legislation," in *Legislation and Society in Australia*, Roman Tomasic, ed. (Sydney, Australia: Allen and Unwin, 1979), pp. 200–13; Abraham J. Briloff, *Unaccountable Accounting* (New York: Harper and Row, 1972).

[21] Gilbert Geis and Herbert Edelhertz, "Criminal Law and Consumer Fraud: A Sociolegal View," *American Criminal Law Review*, Summer 1973, p. 1006. See Holland v. U.S., 348 U.S. 121, 139–40 (1954); U.S. v. Woodner, 317 F.2d 649, 651 (2d Cir. 1963).

[22] For various examples of the use of delaying tactics by company lawyers, see Mark J. Green, *The Other Government: The Unseen Power of Washington Lawyers*, rev. ed. (New York: W. W. Norton, 1978).

[23] It may be that individual corporate actors are following standard operating procedures which were written by a committee, many of whose members are now retired, deceased, or working elsewhere. Consider Simeon M. Kriesberg, "Decisionmaking Models and the Control of Corporate Crime," *Yale Law Journal*, July 1976, pp. 1091–129.

[24] In *Corporate Crime in the Pharmaceutical Industry*, Braithwaite concludes that many corporations present to the outside world a picture of diffused accountability for law observance, while ensuring that lines of accountability are in fact clearly defined for internal compliance purposes.

The problem is illustrated by the federal OSHA statute. It requires proof that the violation was willful and caused death before a criminal conviction can stand. OSHA counsel explained to one of the authors that when fifty-one Research-Cottrell workers were killed by the collapse of scaffolding for a water tower, the fact that OSHA regulations had been violated was clear, the fact that workers died was clear, but proving beyond reasonable doubt that it was the violations (rather than other factors) that caused the scaffolding to collapse was another matter. The complexity of the forces that caused the scaffolding to collapse was such that it was represented by a computer simulation. OSHA counsel decided, undoubtedly correctly, that a computer simulation was more complexity than any jury could stand.

That the complexity of corporate crime and the power and legal resources of the defendants make convictions much more difficult than with traditional crime hardly needs to be labored.[26] This difficulty rather than the low visibility of offenses (Proposition 1) is the real stumbling block to effective corporate crime control. Consequently, it will be the barriers to conviction rather than those to discovery and apprehension that will be the focus of reforms considered in the final part of the paper.

Proposition 4

Once an offender has been convicted, deterrence is doubtful with traditional crime, but may well be strong with coroporate crime.

Specific must be distinguished from general deterrence. The former refers to the deterrence of the offender who is actually convicted. The case for specific deterrence is weak with traditional crime. Offenders who are incarcerated may be more embittered than deterred by the experience. They appear less likely to learn the error of their ways while in prison than to learn better ways

[25] See the discussion of this problem in relation to the Abbott case study, ibid., ch. 4.

[26] Compare Herbert Edelhertz, *The Nature, Impact and Prosecution of White-Collar Crime* (Washington, D.C.: National Institute of Law Enforcement and Criminal Justice, 1970); Christopher D. Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (New York: Harper and Row, 1975); Sanford Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations," *University of Chicago Law Review*, Spring 1963, pp. 423–26; "Comment: Increasing Community Control over Corporate Crimes: A Problem in the Law of Sanctions," *Yale Law Journal*, September 1961, pp. 280–93; Ralph Nader, Mark Green, and Joel Seligman, *Taming the Giant Corporation* (New York: W. W. Norton, 1976); Developments in the Law: "Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions," *Harvard Law Review*, April 1979, pp. 1243–61; Ogren, "Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases"; Saxon, *White-Collar Crime*. In civil law, note also Wanner's evidence that corporate plaintiffs, in a sample of 7,900 cases, win more, settle less, and lose less than do individual plaintiffs (Craig Wanner, "The Public Ordering of Private Relations: Part One: Initiating Civil Cases in Urban Trial Courts," *Law & Society Review*, Summer 1974, pp. 421–40; Craig Wanner, "The Public Ordering of Private Relations: Part Two: Winning Civil Court Cases," *Law & Society Review*, Winter 1975, pp. 293–306).

of committing crimes.[27] This is not likely to be true of persons convicted of corporate crime. A feature that distinguishes traditional from corporate crime is that the illegitimate skills (e.g., safe-cracking) involved in the former are learned in criminal settings (e.g., prison), while the illegitimate skills (e.g., concealing transactions in books of account) of the corporate criminal are learned in legitimate noncriminal settings. While the illegitimate skills of burglars may be developed while they are incarcerated, those of crooked accountants will simply become increasingly out of date as they languish in prison.

A major risk in apprehending the traditional criminal is that the stigmatizing process will push him further and further into a criminal self-concept. This is the contention of labeling theory.[28] Evidence such as that from the Cambridge longitudinal study of delinquency[29] has been interpreted as support for the labeling hypothesis. This study showed that boys who were apprehended for and convicted of delinquent offenses became more delinquent than boys who were equally delinquent to begin with but who escaped apprehension. West and Farrington note about their findings,

> Court appearances may aggravate already tense family situations, alienate youths still further from their teachers and employers, and discourage their more respectable companions of either sex from continuing to associate with them. The sanctions imposed by the courts in the shape of fines are likely to increase the delinquent's debts, thereby increasing the temptation to dishonesty, while doing nothing to teach him to manage his finances better. Even supervision by a probation officer can be a mixed blessing, if it helps to confirm the youngster's self-identification with delinquent groups.[30]

These labeling arguments cannot readily be applied to corporate offenders. They are likely to regard themselves as unfairly maligned pillars of respectability, and no amount of stigmatization is apt to convince them otherwise. One does meet people who have a mental image of themselves as a thief, a safecracker, a prostitute, a pimp, a drug runner, and even a hit man, but how often does one meet a person who sees himself as a corporate criminal? The young black offender can often enhance his status back on the street by having done some time, but the reaction of the corporate criminal to incarceration is shame and humiliation.[31]

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[27] Peter Letkemann, *Crime as Work* (Englewood Cliffs, N.J.: Prentice-Hall, 1973).

[28] Edwin Lemert, *Social Pathology* (New York: McGraw-Hill, 1951); Howard S. Becker, *Outsiders: Studies in the Sociology of Deviance* (London, England: Collier-Macmillan, 1963); Erving Goffman, *Stigma* (Englewood Cliffs, N.J.: Prentice-Hall, 1963).

[29] Donald J. West and David P. Farrington, *The Delinquent Way of Life* (New York: Crane Russak, 1977).

[30] Ibid., p. 162.

[31] Marshall B. Clinard, *The Black Market: A Study of White Collar Crime* (New York: Rinehart, 1952); Gilbert Geis, "The Heavy Electrical Equipment Antitrust Cases of 1961," in *Criminal Behavior Systems: A Typology,* Marshall B. Clinard and Richard Quinney, eds. (New York: Holt, Rinehart and Winston, 1967), pp. 139–51; Kenneth Mann, Stanton Wheeler, and Austin Sarat, "Sentencing the White-Collar Offender," *American Criminal Law Review,* Spring 1980, pp. 479–500.

Such an observation has important implications. Although the labeling hypothesis makes it unwise to use publicity as a tool to punish juvenile delinquents, it is sound deterrence to broadcast widely the names of corporate offenders. Corporations and their officers are genuinely afraid of bad publicity arising from their illegitimate activities.[32] They respond to it with moral indignation and denials, not with assertions that "if you think I'm bad, I'll really show you how bad I can be," as juvenile delinquents sometimes do.

Chambliss argues that white collar criminals are among the most deterrable types of offenders because they satisfy two conditions: They do not have a commitment to crime as a way of life, and their offenses are instrumental rather than expressive.[33] Corporate crimes are almost never crimes of passion; they are not spontaneous or emotional, but calculated risks taken by rational actors. As such, they should be more amenable to control by policies based on the utilitarian assumptions of the deterrence doctrine.[34]

Individual corporate criminals are also more deterrable because they have more of those valued possessions that can be lost through a criminal conviction, such as social status, respectability, money, a job, and a comfortable home and family life. As Geerken and Gove hypothesize, "the effectiveness of [a] deterrence system will increase as the individual's investment in and rewards from the social system increase."[35] Clinard and Meier, moreover, place particular emphasis on the "future orientation" of white collar criminals:

> Punishment may work best with those individuals who are "future oriented" and who are thus worried about the effect of punishment on their future plans and their social status rather than being concerned largely with the present and having little or no concern about their status. For this reason gang boys may be deterred by punishment less strongly than the white-collar professional person.[36]

In general, the arguments about the deterrability of individuals convicted of corporate crimes are equally applicable to the corporations themselves. Corporations are future oriented, concerned about their reputation, and quintessentially rational. Although most individuals do not possess the information necessary to calculate rationally the probability of detection and punish-

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[32] W. Brent Fisse, "The Use of Publicity as a Criminal Sanction against Business Corporations," *Melbourne University Law Review,* June 1971, pp. 250–79.

[33] William J. Chambliss, "Types of Deviance and the Effectiveness of Legal Sanctions," *Wisconsin Law Review,* Summer 1967, pp. 703–19.

[34] See Developments in the Law, "Corporate Crime," pp. 1235–36.

[35] Michael R. Geerken and Walter R. Gove, "Deterrence: Some Theoretical Considerations," *Law & Society Review,* Spring 1975, p. 509. See also Franklin E. Zimring and Gordon J. Hawkins, *Deterrence: The Legal Threat in Crime Control* (Chicago: University of Chicago Press, 1973), pp. 127–28; Johannes Andermes, "Deterrence and Specific Offenses," *University of Chicago Law Review,* Spring 1971, p. 545.

[36] Marshall B. Clinard and Robert F. Meier, *Sociology of Deviant Behavior,* 5th ed. (New York: Holt, Rinehart and Winston, 1979), p. 248.

ment,[37] corporations have information-gathering systems designed precisely for this purpose. Hence, conclude Ermann and Lundman, "business concerns have regularly engaged in price fixing . . . under the correct assumption that the benefits outweigh the costs."[38]

The specific deterrent value of fines can be questioned for both traditional[39] and corporate[40] offenders. A large fine imposed upon a poor property offender might leave him little option but to steal again so as to be able to pay the fine. With corporations the problem is to be able to set a fine large enough to have a deterrent effect.

> The $7 million fine which was levied against the Ford Motor Company for environmental violations was certainly more than a slap on the wrist, but it rather pales beside the estimated $250 million loss which the company sustained on the Edsel. Both represent environmental contingencies which managers are paid high salaries to handle. We know they handled the latter—the first seven years of the Mustang more than offset the Edsel losses. One can only infer that they worked out ways to handle the fine too.[41]

Although the fine itself may be an ineffective deterrent when used against the corporate criminal, other sanctions associated with the prosecution—unfavorable publicity,[42] the harrowing experience for the senior executive of days under cross-examination,[43] the dislocation of top management from their normal duties so that they can defend the corporation against public attacks[44]—can be important specific deterrents.

[37] Dorothy Miller et al., "Public Knowledge of Criminal Penalties: A Research Report," in *Theories of Punishment*, Stanley Grupp, ed. (Bloomington: Indiana University Press, 1971), pp. 205–26.

[38] M. David Ermann and Richard J. Lundman, "Deviant Acts by Complex Organizations: Deviance and Social Control at the Organizational Level of Analysis," *Sociological Quarterly*, Winter 1978, p. 64.

[39] Jocelynne A. Scutt, "The Fine as a Penal Measure in the United States of America, Canada and Australia," in *Die Geldstrafe im Deutschen und Auslandischen Recht*, Hans-Heinrich Jescheck and Gerhardt Grebing, eds. (Baden-Baden, Germany: Nomos Verlagsgesellschaft, 1978), pp. 1062–181.

[40] Trevor Nagel, "The Fine as a Sanction against Corporations" (Ph.D. diss., University of Ademide Law School, 1979); Laura Shill Schrager and James F. Short, "Toward a Sociology of Organizational Crime," *Social Problems*, April 1978, pp. 407–19.

[41] Edward Gross, "Organizations as Criminal Actors," in *Two Faces of Deviance*, Wilson and Braithwaite, eds., p. 202.

[42] Fisse, "Use of Publicity as a Criminal Sanction against Business Corporations"; Wayne L. Pines, "Regulatory Letters, Publicity and Recalls," *Food, Drug and Cosmetic Law Journal*, June 1976, pp. 352–59; John Braithwaite, "Transnational Corporations and Corruption: Towards Some International Solutions," *International Journal of the Sociology of Law*, May 1979, pp. 125–42; John E. Conklin, *"Illegal but Not Criminal"* (Englewood Cliffs, N.J.: Prentice-Hall, 1977), p. 132.

[43] Hopkins, in a personal communication concerning his interviews with Australian Trade Practices Act offenders, pointed out that executives reported the experience of testifying in court to be grueling. Andrew Hopkins, "Anatomy of Corporate Crime," in *Two Faces of Deviance*, Wilson and Braithwaite, eds., pp. 214–31. See also the Abbott case study in Braithwaite, *Corporate Crime in the Pharmaceutical Industry*, ch. 4. One informant said of his fellow executives who were acquitted in this case, "The guys who were defendants in that case some of them are basket cases today. They've never been the same since."

[44] This dislocation is even worse when top management is actually replaced because of a corporate crime scandal, something that happens not infrequently when the scandal is of major proportions.

General deterrence is an effect more difficult to establish empirically. General deterrence refers to the consequences of a conviction for those who are not caught, but who through observing the penalties imposed on others decide not to violate the law. The state of the evidence on general deterrence for common crime, and how scholars interpret that evidence, is in turmoil.[45] It seems fair to say, however, that there has been a growing disillusionment with how much crime prevention can be achieved through deterrence, particularly of offenders from lower socioeconomic levels. Disillusionment has progressed so far that, whereas once the conventional wisdom of conservative criminology demanded that high imprisonment rates be justified by deterrence, now incarceration conventionally is based on the idea of just deserts.[46]

The evidence on the deterrent effects of sanctions against corporate crime is not nearly so voluminous, but the consensus among scholars is overwhelmingly optimistic concerning general deterrence.[47] This may in part reflect an uncritical acceptance of the empirically untested assumption that because corporate crime is a notably rational economic activity, it must be more subject to general deterrence.

However, the faith in the efficacy of general deterrence for corporate crime is not totally blind, as can be illustrated by a number of instances of corporate reaction to enforcement strategies. For example, business executives in Australia were asked whether the introduction of the Australian Trade Practices Act of 1974, with its relatively severe penalties, affected their behavior.[48] Survey respondents claimed that the legislation caused them to abandon certain price-fixing agreements with competitors and introduce antitrust "compliance programs." A more sophisticated study by Block et al. found that U.S. Justice Department antitrust prosecutions in the bread industry had significant and notable specific and general deterrent effects on price fixing. The degree of deterrence was surprising, given that bread price fixers have never

[45] Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin, eds., *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington, D.C.: National Academy of Sciences, 1978); Jack P. Gibbs, *Crime, Punishment, and Deterrence* (New York: Elsevior, 1975). For an innovative perspective on the practical constraints of system capacity in making deterrence work in practice, see Henry N. Pontell, "Deterrence: Theory versus Practice," *Criminology*, May 1978, pp. 3–30.

[46] See Ernest van den Haag, *Punishing Criminals* (New York: Basic Books, 1975); James Q. Wilson, *Thinking about Crime* (New York: Basic Books, 1975); Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (New York: Hill and Wang, 1976); Richard G. Singer, *Just Deserts: Sentencing Based on Equality and Desert* (Cambridge, Mass.: Ballinger, 1979).

[47] See Clinard, *Black Market;* Marshall B. Clinard and Peter C. Yeager, *Corporate Crime* (New York: Free Press, 1980); Saxon, *White-Collar Crime;* Gilbert Geis, "Criminal Penalties for Corporate Criminals," *Criminal Law Bulletin*, June 1972, pp. 377–92; Developments in the Law: "Corporate Crime"; Richard A. Posner, *Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press, 1976); Kenneth Elzinga and William Briet, *The Antitrust Penalties: A Study in Law and Economics* (New Haven, Conn.: Yale University Press, 1976); Stephen A. Yoder, "Criminal Sanctions for Corporate Illegality," *Journal of Criminal Law and Criminology*, Spring 1978, pp. 40–58.

[48] G. JeQ. Walker, "The Trade Practices Act at Work," in *Australian Trade Practices*, John P. Nieuwenhuysen, ed. (London, England: Croom Helm, 1976), pp. 46–47. Walker refers to an unpublished survey by the Macquarie University School of Economic and Financial Studies.

been sent to jail and that fines average only 0.3 percent of the annual sales of the colluding firms. The Block et al. data suggest that deterrence is mainly mediated by civil treble damage suits that follow in the wake of criminal conviction.[49]

The most impressive evidence is from Lewis-Beck and Alford's study of United States coal mine safety enforcement.[50] Using a multiple interrupted time series analysis, these authors were able to show that the considerable increases in enforcement expenditure which followed the toughening of the mine safety legislation in 1941 and 1969 were both associated with dramatic reductions in coal mine fatality rates. The cosmetic 1952 Federal Coal Mine Safety Act, which actually arrested the rate of increase in Bureau of Mines enforcement expenditures, had no effect on fatality rates. Controls introduced into the regression models refute an interpretation that the historical trends are the result of technological advances in mining, changes in mine size, or variations in the types of mining operations. The most parsimonious interpretation of the data is that the rate of deaths from coal mine accidents is less than one-quarter of the rate of fatal accidents occurring before the 1941 legislation because of the deterrent effects of law enforcement.

Proposition 5

Although incapacitation is not apt to be very effective or acceptable for controlling traditional crime in a humane society, it can be a highly successful strategy in the control of corporate crime.

Traditional criminals can be incapacitated if the society is willing to countenance severe solutions. If we execute murderers, they will never murder again; or we can lock them up and never let them out. Pickpockets can be incapacitated by our cutting off their hands. Most contemporary societies are not prepared to resort to such barbaric methods. Instead, the widely used punishment is imprisonment for periods of months or years. Yet only partial incapacitation is in effect while the offender is incarcerated. Offenders continue to murder, to rape, and to commit a multitude of less serious offenses while they are in prison. Indeed, the chances of being a victim of homicide in the United States are five times as high for white males inside prison as for those outside.[51] And the partial incapacitation of prison lasts only as long as the sentence.

The limits of incapacitation as a policy become more apparent when we ask who is to be incapacitated. A substantial body of evidence shows that no matter how we attempt to predict dangerousness, the success rate is very

[49] Michael K. Block, Frederick C. Nold, and Joseph G. Sidak, "The Deterrent Effect of Antitrust Enforcement," *Journal of Political Economy,* June 1981, pp. 429–45.

[50] Michael S. Lewis-Beck and John R. Alford, "Can Government Regulate Safety: The Coal Mine Example," *American Political Science Review,* September 1980, pp. 745–56.

[51] Marvin Wolfgang, personal communication.

low.[52] Any policy of selective incarceration to "protect society" will result in prisons full of "false positives."

The most sophisticated study of the reduction in crime that might be achieved by incapacitation is by Van Dine, Conrad, and Dinitz.[53] For their Ohio cohort, a severe sentencing policy of a flat five-year term for any adult or juvenile convicted of a felony would have prevented only 7.3 percent of the reported crimes of the cohort. Such estimates are of limited value, of course, because there is no way of knowing how many unreported crimes might also have been prevented. Nevertheless, even under generous assumptions about the prevention of unreported crime, Van Dine et al. conclude that incapacitation can never be a cost-effective rationale for a tough sentencing policy. Notwithstanding this conclusion, Van Dine and his colleagues fail to take account of a variety of homeostatic forces, more recently considered by Reiss,[54] which further weaken incapacitative effects. For example, to what extent do criminal groups recruit new members to replace those who are incarcerated, or increase their own rate of offending to make up for the shortfall in criminal production arising from the absence of one member from the group? More fundamentally, studies such as that of Van Dine et al. make the false assumption that if 1,000 offenses were committted by offenders during a period of freedom, then 1,000 crimes would have been prevented if those people had been in prison for that period. The assumption is false because most offenses are not committed by lone offenders.[55] If the man who drove the getaway car in a robbery had been in prison, the robbery might still have gone ahead without him. For these additional reasons, we are even more strongly inclined to agree with the conclusion of Van Dine et al. that "we do not know how to bound a whole class of wicked people, and the evidence of this research suggests that we never will."[56]

Incapacitation is more workable with corporate criminals because their kind of criminal activity is dependent on their being able to maintain legiti-

[52] Ernst A. Wenk, James O. Robison, and Gerald W. Smith, "Can Violence Be Predicted?" *Crime and Delinquency,* October 1972, pp. 393–402; John P. Conrad and Simon Dinitz, eds., *In Fear of Each Other: Studies of Dangerousness in America* (Lexington, Mass.: Lexington Books, 1977); Joseph Cocozza and Henry J. Steadman, "Prediction in Psychiatry: An Example of Misplaced Confidence in Experts," *Social Problems,* February 1978, pp. 267–76; Murray L. Cohen, A. Nicholas Groth, and Richard Diegel, "The Clinical Prediction of Dangerousness," *Crime & Delinquency,* January 1978, pp. 28–39; Simon Oinitz and John P. Conrad, "Thinking about Dangerous Offenders," *Criminal Justice Abstracts,* March 1978, pp. 99–130; John Monahan, "The Prediction of Violent Criminal Behavior: A Methodological Critique and Prospectus," in *Deterrence and Incapacitation,* Blumstein, Cohen, and Nagin, eds., pp. 244–69.

[53] Stephen Van Dine, John P. Conrad, and Simon Dinitz, *Restraining the Wicked* (Lexington, Mass.: Lexington Books, 1979), pp. 17–34.

[54] Albert J. Reiss, Jr., "Understanding Changes in Crime Rates," in *Indicators of Crime and Criminal Justice: Quantitative Studies,* Stephen E. Fenberg and Albert J. Reiss, eds. (Washington, D.C.: Govt. Printing Office, 1980).

[55] Reiss points out that National Crime Survey data indicate that only 30 percent of offenders in victim-reported crime incidents were lone offenders. Ibid.

[56] Van Dine et al., *Restraining the Wicked,* p. 125.

macy in formalized roles in the economy. We do not have to cut off the hands of surgeons who increase their income by having patients undergo unnecessary surgery. All we need do is deregister them. Similarly, we can prevent people from acting in such formal roles as company directors, product safety managers, environmental engineers, lawyers, and accountants swiftly and without barbarism. Should we want only short-term incapacitation, we can, as Stone advocates, prohibit a person "for a period of three years from serving as officer, director, or consultant of any corporation. . . ."[57] Moreover, an incapacitative court order could be even more finely tuned. The prohibition could be against the person's serving in any position entailing decision making that might influence the quality of the environment. Corporate crime's total dependence on incumbency in roles in the economy renders possible this tailor-made incapacitation. It makes the shotgun approach to incapacitation for common crimes look very crude indeed. However, the substitution problems that plague traditional incapacitative models are also a major constraint on the efficacy of incapacitating individuals who have been responsible for corporate crime. If, for example, the corporation is committed to cutting corners on environmental emissions, it can replace one irresponsible environmental engineer with another who is equally willing to violate the law.

This is where court orders to incapacitate the whole organization become necessary. Capital punishment for the corporation is one possibility: The charter of a corporation can be revoked, the corporation can be put in the hands of a receiver, or it can be nationalized. Although corporate capital punishment is not as barbaric as execution of individual persons, it is an extreme measure which courts undoubtedly would be loath to adopt, especially considering the unemployment caused by terminating an enterprise (although this does not apply to nationalizing it). Even though court-ordered corporate death sentences may be politically unrealistic, there are cases where regulatory agencies through their harassment of criminal corporations have bankrupted fairly large concerns.[58]

A less draconian remedy is to limit the charter of a company by preventing it from continuing those aspects of its operations where it has flagrantly failed to respect the law. Alternatively, as part of a consent decree, a corporation could be forced to sell that part of its business which has been the locus of continued law violation. The participation of the regulatory agency in the negotiations would serve to ensure that the sale was to a new parent with an exemplary record of compliance.[59] This kind of remedy becomes increasingly useful in an era when the diversified conglomerate is the modal form of industrial organization. Forcing a conglomerate to sell one of its divisions would, in addition to having incapacitative effects, be a strong deterrent in cases where the division made sound profits. Deterrence and incapacitation can be achieved without harm to the economy or to innocent employees.

[57]Stone, *Where the Law Ends,* pp. 148–49.

[58]Schrag ("On Her Majesty's Secret Service") recounts how Detective, a publicly traded company which was defrauding consumers, was bankrupted in the aftermath of a "direct action" campaign by the New York City Department of Consumer Affairs. See below for a discussion of Schrag's "direct action" tactics against corporate offenders. Industrial Bio-Test, one of the largest contract testing laboratories in the United States, was bankrupted by the Food and Drug Administration after allegations had been made that it fudged data on the safety testing of drugs. Pharmaceutical companies ceased giving their toxicology testing contracts to IBT after the FDA warned them that data submitted to the agency that had been collected by IBT would be subjected to a special audit.

Effective incapacitative strategies for corporate crime are, therefore, possible. All that is required is for legislatures, courts, and regulatory agencies to apply them creatively, to overcome the conservatism that leaves them clinging to the failed remedies carried over from traditional crime. The goal of incapacitation illustrates better than any other how the effective and just means for achieving criminal justice goals cannot be the same with corporate crime as with traditional crime. Consider, for example, the application to the Olin Mathieson Chemical Corporation of a law that forbids offenders convicted of a felony from carrying guns. Mintz has described what happened after Olin Mathieson was convicted of conspiracy concerning bribes to get foreign aid contracts in Cambodia and Vietnam:

> It happened that there was a law which said in essence that a person who had been convicted of a felony could not transport a weapon in interstate commerce. This created a legal problem for Olin, because it had been convicted of a felony, was in the eyes of the law a person and had a division that made weapons for use by the armed forces. Congress resolved the dilemma by enacting a law that, in effect, got Olin off the hook.[60]

Here we are struck by the absurdity of automatically applying to corporations an incapacitative policy designed for individuals. It will be argued later that this absurdity of applying law governing the behavior of individuals to the crimes of collectivities is the fundamental impediment to effective corporate crime control.

Proposition 6

Even though rehabilitation has failed as a doctrine for the control of traditional crime, it can succeed with corporate crime.

The disenchantment of criminologists in the past two decades with rehabilitation as a response to traditional crime has been even more profound than has

[59]The coal industry is a classic illustration of how some corporations are well known to have a superior record of compliance compared with the performance of others. Generally, it is the mines owned by the large steel corporations, with the safety compliance systems they bring from their parent industry, that have superior safety performance. In 1978–79 Westmorland Coal Co. had an injury incidence rate seven times as high as the rate in mines owned by U.S. Steel. Ben A. Franklin, "New Effort to Make Mines Safer," *New York Times,* Nov. 22, 1980, pp. I.29, I.32.

[60]Morton Mintz, *By Prescription Only* (Boston: Houghton-Mifflin, 1967), p. 383).

the disillusionment with deterrence. The high tide of this change was the publication of the massive and detailed review of the efffectiveness of correctional rehabilitation programs by Lipton, Martinson, and Wilks.[61] Even though Martinson stated at a later time that the review should not be used to justify a wholesale rejection of rehabilitation as a goal for the criminal justice system, the raw data which aroused the mood of pessimism are still there for all to see; and since the publication of the review there has hardly been a flood of studies showing that rehabilitative programs really do reduce crime.

There is little reason to suspect that individuals responsible for corporate crime, or white collar crime generally, should be any more amenable to rehabilitation than are traditional offenders. As Morris noted,

> What would Jimmy Hoffa discuss with his caseworker, in or out of prison, relevant to Hoffa's psyche or the manipulation of power within a union? A discussion between Spiro Agnew and his probation officer, had any unfortunate been appointed to that task, is even more mind boggling.[62]

Althopugh rehabilitating individuals would seem as unpromising with corporate as with traditional offenders, rehabilitating the corporation itself is a different matter. Many corporate crimes arise from defective control systems, insufficient checks and balances within the organization to ensure the law is complied with, poor communication, and inadequate standard operating procedures which fail to incorporate safeguards against reckless behavior.[63] Sometimes these organizational defects are intentional, manifesting a conscious decision by the corporate hierarchy to turn a blind eye to corner cutting in order to get results.[64] Sometimes the defects reflect sloppiness or managerial negligence. The chief executive of a pharmaceutical company, for example, might consciously ignore a situation in which his quality control director was overruled by the production manager when a batch of drugs was rejected for want of purity. If the organization were reformed so that the person responsible for achieving production targets was no longer able to overrule quality control, and if only the chief executive officer could reverse a quality control finding, and then only in writing, the chief executive could no longer turn a blind eye to avoid the situation.[65]

Regulatory agencies have an arsenal of weapons with which to force corporations to correct criminogenic policies and practices. They can insist upon,

[61] Douglas Lipton, Robert Martinson, and Judith Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (New York: Praeger, 1975).
[62] Norval Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974), p. 20.
[63] Hopkins, "Anatomy of Corporate Crime"; Braithwaite, *Corporate Crime in the Pharmaceutical Industry.*
[64] Stone, *Where the Law Ends,* pp. 199–216.
[65] For a more detailed discussion of this kind of organizational defect, see Braithwaite, *Corporate Crime in the Pharmaceutical Industry,* chs. 3, 4, and 9.

for example, abolition of off-the-books accounts, multiple approvals for specified actions, routine reporting of certain matters to committees of outside directors, and the establishment of internal compliance groups who report directly to the board with recommendations for sanctioning individuals who fail to abide by corporate policies. Rehabilitation is a more workable strategy with corporate crime than with traditional crime because criminogenic organizational structures are more malleable than are criminogenic human personalities. A new internal compliance group can be put in place much more readily than can a new superego. Moreover, state-imposed reorganization of the structure of a publicly traded company is not so unconscionable an encroachment on individual freedom as is state-imposed rearrangement of a psyche.[66]

Hopkins, in the only systematic published study of the rehabilitation of corporate offenders, concluded that most companies prosecuted under the consumer protection provisions of the Australian Trade Practices Act introduced at least some measures to ensure that the offense did not recur.[67] Case studies based on interviews by Fisse and one of the present authors with executives involved in major corporate crimes in America confirm Hopkins's finding.[68] In the aftermath of public disclosure of corporate crimes and the ensuing scandals, many, although not all, corporations changed internal policies and procedures to reduce the probability of reoffending. Much of this corporate rehabilitation undoubtedly took place because of prodding by regulatory agencies. Large corporations tend to be responsive to the demands of regulators in making internal reform following the unveiling of a corporate crime in part because they want the pressure exerted by regulators to cease.[69]

A number of formal mechanisms can be used to bring about corporate rehabilitation: consent decrees negotiated with regulatory agencies,[70] probation orders placing the corporation under the supervision of an auditor, environmental expert, or other authority who would ensure that an order to restructure compliance systems was carried out;[71] or suspended sentencing of con-

[66] For a criticism of the rehabilitative model in these terms for individual deviance, see Philip Bean, *Rehabilitation and Deviance* (London, England: Routledge and Kegan Paul, 1976).
[67] Hopkins, "Anatomy of Corporate Crime."
[68] These data will be published in a forthcoming book by Fisse and Braithwaite on the effects of adverse publicity on corporate crime.
[69] As Galbraith points out, "In the American business code nothing is so iniquitous as government interference in the *internal* affairs of the corporation." John Kenneth Galbraith, *The New Industrial State,* 3d ed. (Harmondsworth, England: Penguin, 1978), p. 81.
[70] This technique has been particularly popular with the United States Securities and Exchange Commission. For a more refined version of this general approach, see Fisse's development of the idea of court-imposed "preventive orders." W. Brent Fisse, "Responsibility, Prevention and Corporate Crime," *New Zealand Universities Law Review,* April 1973, pp. 250–79.
[71] Comment: "Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing," *Yale Law Journal,* December 1979, pp. 353–75; John Collins Coffee, Jr., "Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions," *American Criminal Law Review,* Spring 1980, pp. 419–78.

victed corporations by the courts, contingent on their producing a report on the weaknesses of their old compliance systems and implementing new ones.[72]

DISCUSSION

It has been argued that the largely discredited doctrines of crime control by public disgrace, deterrence, incapacitation, and rehabilitation could become highly successful when applied to corporate crime. More generally, it has been argued that when the accumulated insight of criminology tells us that something is true of traditional crime, in many respects we can expect the opposite to be true of corporate crime.

Hence, there is reason for optimism that where we have failed with street crime, we might succeed with suite crime. . . . Because corporate crime is more preventable than other types of crime, the persons and property of citizens can be better protected; and restitution is a more viable goal for corporate than for traditional criminal law. Convicted corporations generally have a better capacity than do individuals to compensate the victims of their crimes.

Even though corporate crime is potentially more preventable and its victims are more readily compensated, there is no guarantee that either prevention or restitution will happen under traditional legal systems. This is because of our third proposition: Convictions are extremely difficult in complex cases involving powerful corporations. There are at least two ways of dealing with this problem. One is for regulatory agencies to achieve the goals of deterrence, incapacitation, and rehabilitation by nonprosecutorial means. They readily can do this if they have sufficient bargaining power. Consider the tactics of the Securities and Exchange Commission in the foreign bribery scandals of the latter half of the 1970s. In many cases the agency may have effected significant deterrence through the adverse publicity that followed public disclosure of the largest scandals,[73] a modicum of incapacitation in cases where corporations forced responsible senior executives into early retirement,[74] and a considerable amount of rehabilitation through consent or-

[72] Fisse suggests adjournment of sentence as a "back-door to enter the internal affairs of an offender" by reference to Trade Practices Commission v. Pye Industries Sales Pty. Ltd., A.T.P.R. 40-089 (1978); W. Brent Fisse, "Criminal Law and Consumer Protection," in *Consumer Protection Law and Theory,* Anthony J. Duggan and Leanna W. Darvall, eds. (Sydney, Australia: Law Book Co., 1980).

[73] While this adverse publicity may have had effects on company morale, such effects in most cases did not filter through to depress stock prices significantly. The stock market effects were somewhat more notable, however, with the companies named early in the foreign bribery campaign. Paul A. Griffin, "Sensitive Foreign Payment Disclosures: The Securities Market Impact" (mimeo; Graduate School of Business, Stanford University, June 1977).

[74] In some corporations (e.g., Lockheed, Northrop, Gulf) these included chief executive officers. The new chief executives in some cases really did seem to act as if they were the new broom attempting to sweep things clean.

ders that mandated audit committees of outside directors, outlawed off-the-books accounts, and led to other reforms which, although far from eliminating the prospect of bribery, certainly made it a much riskier and therefore less rational business practice.[75] At the same time, criticism of the agency on a number of grounds regarding the small number of cases referred to the Justice Department for prosecution assuredly was justified.[76]

In an illuminating article detailing why law enforcers so often choose to practice informal enforcement, Schrag discusses why he abandoned the prosecutorial stance that he brought to his position as head of the enforcement division of the New York City Department of Consumer Affairs.[77] A variety of frustrations, especially the use of delaying tactics by company lawyers, led to substitution of a "direct action" model for the "judicial" model. Nonlitigious methods which were increasingly used included threats and use of adverse publicity, revocation of licenses, direct contact of consumers to warn them of company practices, and pressure exerted on reputable financial institutions and suppliers to withdraw support of the targeted company. As Schrag points out, the dilemma of the direct action model is that it gets results without any regard for the due process rights of targeted "offenders."

An alternative to substituting the direct action for the judicial model is to reform the law so that the conviction of guilty corporations is made easier.[78] The precise nature of such reform is beyond the scope of the present paper. What we have attempted is to establish a case for the premise to undergird such a program of law reform: *The fact that a principle has been found to be justified in dealing with traditional crime is not a satisfactory rationale for its application to corporate crime.* If valid, the six propositions in this paper force the conclusion that corporate crime is a conceptually quite different domain from traditional crime. Consequently, we should never reject a strategy for controlling corporate crime merely because that strategy has been found wanting, on the grounds of either justice or efficacy, with traditional crime.

[75] Edward D. Herlihy and Theodore A. Levine, "Corporate Crisis: The Overseas Payment Problem," *Law and Policy in International Business,* vol. 8, no. 4 (1976), pp. 547–629. Note also Arthur F. Mathews, "Recent Trends in SEC Requested Ancillary Relief in SEC Level Injunctive Actions," *Business Lawyer,* March 1976, pp. 1323–52.

[76] Bequai, for example, says, "The SEC has been firing blanks. Who gets hurt in consent settlements? The SEC gets a notch on its gun. The law firm gets money, the public is happy because they read 'fraud' in the newspaper and think criminality right away. The company neither admits nor denies anything. It's the perfect accommodation. And it's all one big charade." August Bequai, "Why the SEC's Enforcer Is in Over His Head," *Business Week,* Oct. 11, 1976, p. 70.

[77] Schrag, "On Her Majesty's Secret Service."

[78] It is interesting to juxtapose this alternative against the "direct action" approach with respect to the due process protections available to targets of government sanction. Perhaps if corporations are not stripped of some due process protections so that convictions can become more possible, governments will increasingly be forced to take the "direct action" route, with its total absence of due process.

PANEL 18 Strategies for Getting Dangerous Products to Market

The Name Change
When a product is withdrawn from the American market, receiving a lot of bad publicity in the process, the astute dumper simply changes its name.

The Last Minute Pullout
When it looks as if a chemical being tested by the Environmental Protection Agency will not pass, the manufacturer will withdraw the application for registration and then label the chemical "for export only." That way, the manufacturer does not have to notify the importing country that the chemical is banned in the United States.

Dump The Whole Factory
Many companies, particularly pesticide manufacturers, will simply close down their American plants and begin manufacturing a hazardous product in a country close to a good market.

The Formula Changes
A favorite with drug and pesticide companies. Changing a formula slightly by adding or subtracting an inert ingredient prevents detection by spectrometers and other scanning devices keyed to certain molecular structures.

The Skip
Brazil—a prime drug market with its large population and virulent tropical diseases—has a law that says no one may import a drug that is not approved for use in the country of origin. A real challenge for the wily dumper. How does he do it? Guatemala has no such law; in fact, Guatemala spends very little each year regulating drugs. So, the drug is first shipped to Guatemala, which becomes the export nation.

The Ingredient Dump
Your product winds up being banned. Do not dump it. Some wise-ass reporter from *Mother Jones* will find a bill of lading and expose you. Export the ingredients separately—perhaps via different routes—to a small recombining facility or assembly plant you have set up where you are dumping it, or in a country along the way. Reassemble them and dump the products.

Adapted from: Mark Dowie, "The Corporate Crime of the Century," *Mother Jones*, November (1979): 23–79.

Prosecuting Corporate Crime: Problems and Constraints*

MICHAEL L. BENSON

This paper explores problems that local prosecutors confront in responding to corporate crimes. It is based on field studies conducted in Chicago, Illinois, Los Angeles, California, Duvall County, Florida, and Nassau County, New York in 1988 and 1989. At each site, attorneys in the local prosecutors office and representatives from the state attorney general's office were interviewed as well as officials from law enforcement and regulatory agencies. The interviews focused on the factors that constrain prosecutorial decision making and discretion in corporate cases.

Most illegal corporate conduct does not result in criminal prosecution (Clinard and Yeager, 1980; Sutherland, 1949). The reasons why corporate crimes often go unprosecuted and unpunished are complex. The special institutional features of business corporations make control of businesses a distinct problem from that of individuals in ordinary situations (Stone, 1975:7). Corporate offenses pose special investigatory and prosecutorial problems that make the successful application of the criminal law complicated and difficult (Shapiro, 1990; 1984; Levi, 1987; Rakoff, 1985; Stone, 1975). In addition, corporate crimes often are viewed as less serious than other crimes, especially those involving drugs, gangs, or violence. Finally, corporate offenders sometimes escape the criminal law because of their economic and political power (Reiman, 1979:139). Access to money and political pull enables corporations and the financial elites who run them to exert significant influence on law enforcement agencies. The failure of prosecutors to apply the criminal law to corporate crimes is caused by insufficient resources, competing priorities, legal constraints, the availability of alternative sanctions, and the political and economic influence of corporations.

INSUFFICIENT RESOURCES

Like most organizations, the prosecutor's office must pursue multiple objectives with limited technical, budgetary, and personnel resources. These resources can be severely taxed by the difficult and time-consuming process of

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