Understanding Crime and Criminal Justice

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Chapter 5

Accountability and the Control of Corporate Crime: Making the Buck Stop

Brent Fisse
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Within modern industrialised societies corporate crime tends to be dealt with by applying public sanctions to the corporation, on the assumption that the organisation can then be left to discipline the individuals responsible. However, the law makes little or no attempt to ensure that this happens. This has led some to argue that sanctions should be directly applied to responsible individuals in the case of corporate criminal activities. There are a number of problems with this position. Considerable practical difficulties confront outside investigators in sheeting home responsibility to individuals within large and complex organisations, where the cooperation of the corporation itself is not forthcoming. Moreover, it may not always be a just and effective means of social control. The more promising approach would seem to be in structuring public enforcement systems in such a way as to activate and monitor the private justice systems of corporate defendants. A number of the ways in which this can be achieved are discussed.

Contemporary Problems of Accountability for Corporate Crime

Two major problems of accountability (Hart, 1968: 211-227) confront modern industrialised societies in their attempts to
control corporate crime. First, there is an undermining of individual accountability at the level of public enforcement against corporate crime, with corporations rather than individual personnel often being the prime targets of prosecution. In effect, the traditional value of individual accountability is frequently displaced by the short-cut of using corporate responsibility as a catch-all device. Secondly, where corporations are sanctioned for offences, in theory they are supposed to react by using their internal disciplinary systems to sheet home individual accountability, but the law now makes little or no attempt to ensure that such a reaction occurs. Much faith is pinned on the private justice systems of organisations (see generally Henry, 1983: Pospisil, 1971) yet their operation is delegated to haphazard entrepreneurial discretion.

The danger of “headlessness” (Geyelin, 1985; Kafka, 1985) in systems of collective social accountability has repeatedly been stressed, as by H.D. Lewis in the aftermath of the massacre at My Lai:

“Where all are responsible no one is responsible, thus we tend to lapse into a state of moral indifference or acquiescence which can be one of the greatest ills to afflict a society. In the confusion and perils of our social existence today there are few things that need to be kept more persistently and firmly in our minds than the fact of our personal responsibility in all the situations in which we may find ourselves. The renewal of the sense of personal responsibility, in private as in public concerns, is a very urgent need of our time” (Lewis, 1972: 143-144).

Observations to similar effect have been made in the immediate context of corporate crime enforcement. Thus, in his message to Congress on 20 January 1914, President Wilson severely criticised the failure of the Sherman Act to strike at what he took to be the real villains behind antitrust offences:

“We ought to see to it, and the judgment of practical and sagacious men of affairs everywhere would applaud us if we do see to it, that penalties and punishments should fall not upon the business itself, to its confusion and interruption, but upon the individuals who use the instrumentalities of business to do things which public policy and sound business practice condemn. Every act of business is done at the command or upon the initiative of some ascertainable person or group of persons. These should be held individually responsible, and the punishment should fall upon them, not upon the business organisation of which they make illegal use” (51 Congressional Record 9074 (1914)).

When the Supreme Court in United States v. Park 421 U.S. 685 (1975) imposed a demanding standard of care and supervision upon corporate executives under the Food, Drug and Cosmetic Act, some commentators saw this as the coming of a much-needed new deal in personal accountability:

“The just allocation of fault is an essential ingredient in building a credible, healthy society. The growth of giant corporations with their multiple layers of bureaucratic responsibility has significantly complicated the critical process of fixing blame. The faceless quality of contemporary bureaucracies has had an important, though largely unexplored, impact on law enforcement. Fixing responsibility on a single manager or a small group of managers has received only passing attention from law makers and law enforcers” (McAdams and Tower, 1978: 67).

More recently, the E.F. Hutton scandal has provoked many reaffirmations of the value of individual responsibility. In the opinion of Senator Howard M. Metzenbaum, the non-prosecution of any Hutton executives meant that “something has gone awry” at the Department of Justice. “What kind of a department is this?” he asked. “If you wear a white collar you don’t get prosecuted” (New York Times, 13 September, 1985: 11). More philosophical was the reaction of Thomas Donaldson, a leading writer on business ethics:

“What we are seeing, as corporations get larger and larger, is a breakdown in the lines of accountability. We have created some superstructures in business that are wildly complex, and we have not tried them yet” (Alexander, 1985: 53; see also Donaldson, 1985: Ch. 6).

Perennial as the hope of individual accountability has been, the law has turned a blind eye to reality. The way in which legal

1. “Crime” is taken to mean a criminal offence or civil violation under existing law, and “corporate crime” crime which is legally attributable to a corporate entity or any individual persons acting on its behalf. See further Sutherland (1983: Ch. 1); Simon and Etzioni (1963: 22-23); Geis (1985: 74-75); Orland (1980).

2. As one commentator has cynically observed in general of responsibility for corporate conduct: “In the West decision-making is presented as individualistic until adversity proves it collective” (Clark, 1979: 130).

3. Cf. Temby (1986), where, in an address purportedly concerned with accountability in the area of corporate crime, buck-passing through corporate liability is not mentioned.
liability is structured today often confers a de facto immunity on
corporate managers, who are typically shielded by a corporate
entity which takes the rap.

If the corporate form is used to obscure and deflect responsi-
bility, whether intentionally or unintentionally, the growth of
corporate activities in industrialised societies poses an awesome
risk of escalating breakdown of social control. This breakdown is
already acutely evident in domains like tax compliance (Australia,
1985; Cooper, 1985; Frieberg, 1986) and toxic waste regulation
(Block and Scarpitti, 1985). Buck-passing is increasingly fostered
not only by a burgeoning corporate birthrate (measured by new
certificates of incorporation) (Stone, 1985) but also by tendencies
for the majority of the population to work in corporations of
increasing size and complexity.8 A corporate society finds it easier
to hide its skeletons in closets, and in a big corporation the closets
are just that much more numerous and obscure.

Non-Prosecution of Individuals

The non-prosecution of individuals has recently commanded
much attention in the United States, largely in the wake of the
E.F. Hutton and Co. case in 1985.5 Hutton and Co., a brokerage
firm, engaged in a widespread fraudulent scheme which overwrote
its bank accounts by up to $US270 million a day and gave the
firm interest-free use of the money; approximately 400 banks were
defrauded of $US8 million (Time, 10 June 1985: 53; New York
Times, 6 September 1985: 1, 30). Hutton pleaded guilty to 2,000
felony counts of mail and wire fraud and, under the plea
agreement, agreed to pay a $US2.75 million fine and to reimburse
the banks. No individuals were prosecuted despite the admission
of the Justice Department that two Hutton executives were
responsible for the fraud “in a criminal sense.”6

4. One might well ask why, if the corporate birthrate increases rapidly while the
human birthrate remains stable, does not the average person work in smaller
companies? While merger activity among the largest companies has steadily
increased the proportion of the population employed by mega-corporations,
there has at the same time been a proliferation of tiny companies with just a
few directors, many of them empty shells, at the bottom of the range. These are
widely used as vehicles for corporate crime to protect individuals from liability.
In Victoria, companies registered increased from 165,007 in 1983 to 193,726 in

5. See “White-Collar Crime Booming Again” New York Times, 9 June 1985: 3,
1, 6; see also “Bhopal Disaster Spurs Debate Over Usefulness of Criminal

6. Time, 10 June 1985: 53; New York Times, 13 September 1985: 1. It is
noteworthy that in Hong Kong’s $US21 billion counterpart to the E.F.
Hutton scam, the targets of prosecution were six individual conspirators and
not the financial institutions involved. See Wall Street Journal Europe, 11
October 1985: 11.

There have been other conspicuous compromises of individual
accountability.7 One of the more glaring was the deal made in
1981 to settle the McDonnell Douglas bribery affair with Pakistani
Airlines (Fisse and Braithwaite, 1983: Ch. 14). Fraud and
conspiracy charges against four top McDonnell Douglas executives
were dropped in return for a guilty plea by the company to
charges of fraud and making false statements. Under the plea
agreement, McDonnell Douglas incurred a fine of $US55,000 and
agreed to pay $US1.2 million in civil damages. This agreement
was entered into at a meeting between the United States Associate
Attorney-General and representatives of the company. The
prosecutors in the case (who had not been invited to the meeting
and who subsequently resigned from the Justice Department) were
of the view that the liability of the four executives had been
“bought off” by the settlement (Fisse and Braithwaite, 1983: 163).

Contrary to the orthodox line of prosecutors that their priority
is to proceed against individuals and that corporations are only
secondary targets,8 the statistics which have been compiled reveal a
high incidence of cases where individuals have not been
prosecuted or, in the event of prosecution, have not been held
liable.9 In Clurin and Yeager’s study of the incidence of corporate
crime among large companies in the United States during the late
1970s, it was found that in only 1.5 per cent of all enforcement
actions was a corporate officer held liable (Clurin and Yeager,
1980: 272). Moreover, in addition to the E.F. Hutton case and
other well-known instances of failure to proceed against
individuals, any corporate crime-watcher’s pile of newspaper
clippings will contain numerous reports of cases where

7. The E.F. Hutton case is hardly an isolated episode in United States
enforcement practice. See United States National Commission on Reform of
Federal Criminal Laws (1976: 180, referring to widespread compromise of
individual responsibility in plea agreements); Knakman (1984: 858-859,
discussing “iron law” of tort and criminal liability that “[l]iability risks, if
unchannelled, ordinarily attach to the legal entity (the corporation) rather
than to its officers, employees, or agents”); Green, Moore and Wasserstein
(1972: 167, Antitrust Division preference for indicting corporations; Orland
(1980: 518), Fisse and Braithwaite (1983: 45, Ch. 14: United States v. F.M.C.
Corporation, Criminal No. 80-91, United States District Court, E.D. Pa., 1980.
Contrast the refusal of the Justice Department in the early 1970s to accept a
plea of guilty by Abbott Laboratories inc/exchange for the dropping of charges
against five of the company’s executives (see Braithwaite 1984).

Groening (1981: 239-240). Gail stories are usually regarded as being far
more effective as a deterrent than fines against corporations. See for example,
Baker, (1978: 414); but also see Elzinga and Brett (1976: Ch. 5).

9. See Clurin and Yeager (1980: 272); Whiting (1980); Lewis (1982:
1494-1495); Dershowitz (1961: 291-295); Schrager and Short (1978: 410); Goff
and Reams (1978: 94-95); Grabosky and Braithwaite (1986).
enforcement is directed at corporate entities rather than against their personnel. Non-prosecution of corporate executives is also a fact of enforcement practice in many other countries. In Canada, the pattern of enforcement under the Combines Act and anti-pollution legislation has been heavily oriented toward corporate defendants (Goff and Reasons, 1978: 117-119), although Criminal Code offences are usually enforced against individuals (Canada Law Reform Commission, 1976: 33). In England, the conventional wisdom is that corporate criminal liability is of little practical significance as compared with individual criminal liability (Williams, 1961: 865), but there have been numerous cases in which companies alone have been prosecuted. Moreover, the reputation of the English criminal justice system for holding individuals to account has been blackened by the so-called Oligate scandal surrounding the failure of the authorities to prosecute any of the persons responsible for the systematic and persistent evasion by British Petroleum and Shell Oil of the British embargo on exporting oil to Southern Rhodesia.


12. See Bailey (1970); Bingham and Gray (1978); Box (1983: 46). For a sympathetic account of the decision of the D.P.P. and Attorney-General not to prosecute anyone, see Edwards (1984: 325-334). If Edwards’ position is accepted, companies and their officers can expect not to be prosecuted provided that they operate via complicated organisational structures (preferably with the dirty work done through foreign subsidiaries), and procure several minions or high-ranking members of the public service to condone their behaviour. For law officers of the Crown, the message seems to be that the more pervasive and intricate the deviance and corruption, and hence the more difficult the task of investigation and trial, the more justifiable the exercise of the discretion not to prosecute. British justice has been turned on its head. Cf. Financial Times, 11 November 1985: 2 (magistrates in Palermo charge 475 Mafia suspects).

13. Muller (1985). In antitrust enforcement, the priority is to impose liability on individuals but the practice almost invariably is to impose liability on corporations.

enforcement, where total reliance is placed on corporate liability (Kerse, 1981). A stronger commitment to individual responsibility for organisational wrongdoing is often claimed in socialist jurisdictions, but it is unclear whether this is more an official line than a reflection of practice. In environmental enforcement, some Eastern European countries rely very heavily on administrative penalties imposed on the enterprise (Sand, 1973; Johnson and Brown, 1975; Anderson, Keeze, Reed, Stevenson and Taylor, 1977: 49).

This is not to deny that at some level of abstraction for some government agencies there is a policy to proceed against individuals as a matter of priority but such policies are generally a mystification. The frequent non-prosecution of corporate officers in this area is our concern, together with the implications of adopting a policy that is more honoured in the breach than in the observance. It is not being suggested that prosecutors have no justification for targeting corporations rather than individuals. On the contrary, there are many reasons, theoretical as well as practical, why there is often little or no choice but to focus on corporate defendants (see United States, House of Representatives, 1979: 187-188 (testimony of Robert Fiske)).

There are of course numerous instances where corporate officers have been prosecuted, often successfully. A notable example is the widely-publicised prosecution and conviction for murder of three executives of an Illinois company, Film Recovery Systems, the operations of which had resulted in the cyanide poisoning of a worker (Los Angeles Times, 15 September 1985: 1, New York Times, 15 June 1985: 1). In this case, however, the company was a small concern and it was much easier for the prosecution to obtain incriminating evidence against the top managers than is typically the position where a large or medium-sized corporation is involved. Compare the Bhopal disaster (see, for example, Sydney Morning Herald, 1 April 1985: 6): investigating exactly what happened at all relevant points down the company’s lines of accountability for production plant safety would require a sizeable task force of investigators and even then the location of individual responsibility would not necessarily be clear.

Non-Assurance of Internal Accountability within Corporations

The second major problem of accountability for corporate crime—non-assurance that sanctions against corporations will result in due allocation of responsibility as a matter of internal disciplinary control—is less patent than the first but has become a matter of increasing concern. In theory, the type of sanction usually deployed against corporations—the fine or monetary penalty—is supposed to pressurise corporate defendants into taking internal disciplinary action (see generally Posner, 1976: 225-228; Fisse, 1978: 382-386; Stone, 1980: 29). However, there is no guarantee that monetary punishment will trigger such a response (Coffee, 1980: 458-460; Hopkins, 1978). A defendant may simply decide to pay the fine or monetary penalty and let sleeping dogs lie. Here it should be realised that corporations have incentives which inhibit disciplinary action. In particular, a disciplinary programme may be too disruptive (consider McCloy, 1976), too embarrassing for those exercising managerial control, too dangerous a stimulant to whistle-blowing (Coffee, 1980: 459; Braithwaite, 1984: 402), or too fertile a source of subsequent civil litigation against the company or its officers. In short, the impact of enforcement by means of monetary sanctions against corporations can easily stop with a

15 In East Germany, for instance, administrative sanctions are used against state economic enterprises and individuals, with the emphasis on the latter. This is primarily because of the value attached to individual accountability, coupled with the relative ease of locating responsibility in a highly structured environment where lines of accountability are clearly drawn. There is also a reluctance to use monetary penalties against state enterprises because of risk of inflicting overspills on workers. (Professor Erich Buchholz, Institute of Criminal Law and Criminology, Humboldt University, Berlin, personal communication, 30 October, 1985). See further Conklin (1977): 121-122.

16 In Yugoslavia, for instance, it has been said that often “no one is responsible” for violations committed on behalf of economic enterprises. (Professor Ljubo Bacoon, Law School, University of Ljubljana, personal communication, 3 October 1985). See also Schelling (1974: 84-85).

17 See for example, Ermann and Lundman (1982: 44, Equity Funding prosecutions); Schneider (1987: 667), Wall Street Journal Europe, 18 November 1985: 13 (charges against employees of Bindley Western); Washington Post, 15 December 1985: 1 (General Dynamics Corporation and four present or former executives indicted re defence contract fraud).
corporate pay-out, not because of any socially justified departure from the customary emphasis placed on individual accountability, but rather because that is the cheapest or most self-protective course for a corporate defendant to adopt.

The classic illustration of the ease with which corporate defendants can pay a fine and walk away from internal disciplinary action is the reaction of the Westinghouse Corporation upon being convicted and sentenced for its role in the heavy electrical equipment price-fixing conspiracies of 1959–1961. Westinghouse decided against disciplinary action, partly on the ground of a watered-down version of the defence which failed at Nuremberg: “Anybody involved was acting not for personal gain, but in what he thought was the best interests of the company” (Herling, 1962: 311). By contrast, the internal discipline exacted by General Electric was relatively severe (Walton and Cleveland, 1964: 96–101; Fisse and Braithwaite, 1983: 192–193). All persons implicated in violations of corporate antitrust policy were disciplined by substantial demotion long before any of them were convicted. Those who were later convicted were asked to resign because: “The board of directors determined that the damaging and relentless publicity attendant upon their sentencing rendered it both in their interest and the company’s that they pursue their careers elsewhere” (United States Senate, 1961: 17671–17672).

Much more recently, American Airlines refused publicly to blame any individual within the company when it incurred civil penalties of $US1.5 million for violations of Federal Aviation Administration requirements (one violation had been committed by flying an “unairworthy” plane from which an engine had fallen when struck by a piece of ice from an unrepaiored leaky toilet) (McCarthy, 1985; Wall Street Journal Europe, 7 November 1985: 1). A spokesman for the company said that no one had been fired as a result and indeed no one could be identified as accountable for the maintenance breakdowns because “management systems” had been involved (McCarthy, 1985). As Colman McCarthy observed, the buck stopped with the corporation:

“Under this general absolution, we are asked to believe that no living, breathing humans were responsible for designing and maintaining the planes. Nor was it the failure of any live human employees to fix the leaky toilet that caused the engine to fly off over New Mexico. That was a ‘design malfunction’.

20. See Walton and Cleveland (1964: 103). The other companies involved, with the exception of General Electric, also refrained from internal disciplinary action. See Herling (1962: 311).

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This playing down of individual accountability is in line with the comparative puniness of the fine. The Federal Aviation Administration has collected $US1.5 million from a company that had operating revenues of $US3.3 billion in 1984 and record profits of $US234 million for the first half of 1985. Not a dime came out of the paychecks of the invisible managers.” (McCarthy, 1985).

This is not to deny the importance of the efforts reported to have been made by American Airlines to revise its maintenance procedures and to expand its maintenance team (Wall Street Journal Europe, 7 November 1985: 20), but a maintenance system without accountability for non-compliance is unjustifiably dangerous, particularly in so cost-sensitive a business as running an airline. Thus, C.O. Miller, a former director of the transportation board’s aviation safety bureau has questioned the strength of American’s resolve to run a tight airship:

“There’s nothing wrong with trying to save money, but if cost-cutting is the only message that comes through to your employees, then you are going to have people cut corners and have the kind of things that happened at American” (Wall Street Journal Europe, 7 November 1985: 20).

Non-assurance of accountability internally within corporations is hardly a uniquely American legal phenomenon. A telling Australian illustration is Trade Practices Commission v. Pye Industries Sales Pty Ltd (1978) A.T.P.R. 40-089, a decision of the Australian Federal Court. Pye was found to have committed resale price maintenance in violation of the Trade Practices Act 1974 (Cth), and the court adjourned the matter for sentence. At the sentencing hearing, the court was able to conclude that at the time of violation: “There was an almost total lack of supervision or interest by the board of directors in the conduct of their management and executives in relation to resale price maintenance” (Wall Street Journal Europe, 7 November 1985: 20). However, the court was left in the dark as to the nature of the company’s disciplinary and other responses to the violation; the company itself had not come forward with relevant evidence, and the evidence that had emerged from the trial was largely confined to the issue of whether a violation had been committed. The court, after describing the violation as “ruthless”, then imposed a penalty of $US120,000, the maximum being $US250,000. This split down the middle represents an optimistic feat of judicial divination because, for all the court said it knew, the company’s reactions might have been so unresponsive as to warrant a much higher penalty.
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The extent to which corporations fail to insist on accountability in response to being fined is now impossible to say. Empirical research in this area has been limited and some companies refuse to divulge what has or has not been done to punish insiders (see, for example, Fisse and Braithwaite, 1983: 166-167). This dark side of corporate self-regulation usually becomes visible only if a company is forced to open up the public by put pressure or by threats from enforcement agencies. Thus, the E.F. Hutton scandal led the company to make an independent internal investigation, which was conducted by Griffin Bell, former United States Attorney-General. The subsequent report found 15 individuals accountable, and recommended fines of between $US 25,000 and $US 50,000 for six branch managers, as well as periods of probation. Hutton adopted the report and released it publicly, thereby prompting two top officials to resign (see New York Times, 6 September 1985: 1).

Sporadic attempts have been made by the law to enter the black box of corporations by means of non-monetary sanctions aimed directly at achieving effective internal accountability (Stone, 1975: 189, 192, 205-206). Mandatory injunctions have been used for this purpose from time to time, most notably by the United States Securities and Exchange Commission in its campaign against bribery in the mid-1970s (see Herlihy and Levine, 1976, Coffee, 1977: 1115-1117). A number of corporations were required to establish special review committees for the purposes of conducting investigations and initiating appropriate internal action. The most celebrated example is that of the Gulf Oil Corporation, a special review committee of which prepared a 298-page report detailing the misuse of $US 12 million for payment to United States and foreign officials, and the role played by various Gulf officials (McCloy, 1976).


23. Inducing internal accountability by threat was partly the strategy adopted by the Securities and Exchange Commission in its Voluntary Disclosure Programme in the bribery crisis of the mid-1970s. However, that programme did not require publication of full details of internal accountability for bribe payments but merely generic disclosure of the amount and purpose of questionable payments. See United States Securities and Exchange Commission (1976: 6-7); Herlihy and Levine (1976: 584-594); see generally Wolff (1979).

24. See further Hochstetler (1984); Stone (1986); Braithwaite (1983); Fisse (1986).

Toward Accountability: Realising the Limitations of Individualism

Given the “headlessness” and buck-passing which now prevails in the social control of corporate crime, what might be done to help ensure greater accountability? The die-hard individualist solution (Individualism) is to abolish corporate liability and to rely on individual criminal liability (Lederman, 1985). This solution seems forlorn for a number of reasons, including (1) the capacity of organisations to cover-up internal accountability, (2) the collectivist nature of decision-making in some corporate cultures, and (3) the egalitarian bias of trying to combat corporate crime by putting all the effort into prosecuting individuals.

Individualism presumes that accountability within companies is easy for enforcers to determine. However, organisations have a well-developed capacity for obscuring internal accountability if confronted by outsiders. Regulatory agencies, prosecutors and courts find it difficult and even impossible to unravel lines of accountability after the event because of the incentives personnel have to protect each other with a cover-up. As Braithwaite concluded from an earlier study:

"companies have two kinds of records: those designed to allocate guilt (for internal purposes), and those for obscuring guilt (for presentation to the outside world). When companies want clearly defined accountability they can generally get it. Diffused accountability is not always inherent in organisational complexity: it is in considerable measure the result of a desire to protect individuals within the organisation by presenting a confused picture to the outside world. One might say that courts should be able to pierce this conspiracy of confusion. Without sympathetic witnesses from within the corporation who are willing to help, this is difficult. In the pharmaceutical industry, at least, the indictment of senior executives for corporate crimes has almost invariably been followed by their acquittal, even when the corporation is convicted" (Braithwaite, 1984: 324).

The data which led to this conclusion included the following:

“One quality control director claimed with pride that his information system was so good that: ‘When a drug is produced which does not meet specs, we can find who is to blame 95 per cent of the time.’ I replied: ‘That surprises me. I
would have thought that on a production line with such a large number of people, it would be possible for every individual who might be blameworthy to find someone else who they could blame.` `No. The records are so good that we can pinpoint who it is. Everyone records what they do at every stage. We have a man full time on tracing back through the records sources of problems` (Braithwaite, 1984: 138).

Outside investigators face many handicaps in getting to the truth compared to insiders. They have a rather limited capacity to arrive unannounced or to surreptitiously inspect a workplace without arousing suspicion. Outsiders can rarely match the technical knowledge insiders have of unique production or documentation processes. Internal investigators’ specialised knowledge of their employer’s product lines make them more effective probers than outsiders who are more likely to be generalists. Their greater technical capacity to spot problems is enhanced by a greater social capacity to do so. Inside compliance personnel are more likely than outsiders to know where the bodies have been found buried after earlier crises, and to be able to detect cover-ups. This is rather like the difference between the capacity of government inspectors and that of internal compliance staff in the pharmaceutical industry to get answers:

“Our instructions to officers when dealing with F.D.A. inspectors is to only answer the questions asked, not to provide any extra information, not to volunteer anything, and not to answer any questions outside your area of competence. On the other hand we [the corporate compliance staff] can ask anyone anything and expect an answer. They are told that we are part of the same family, and unlike the government, we are working for the same final objectives” (Braithwaite, 1984: 137).

Private justice systems have a superior capacity to finger the culpable partly because of their capacity to trap suspected wrongdoers. The quality assurance manager of a pharmaceutical company gave one of the authors of this chapter the following illustration. His assay staff was routinely obtaining test results showing the product to be at full strength. When they found a result of 80 per cent strength, the laboratory staff would assume that the assay was erroneous, simply mark the strength at 100 per cent, and not recalculate the test, or so the manager suspected. The manager’s solution was periodically to “spike” the samples with understrength product to see whether his staff would pick out the defects. If not, they could be dismissed or sanctioned in some other way.

Another example of the greater effectiveness of internal inspectors concerns a medical director who suspected that one of his scientists was “graphiting” safety testing data. His hunch was that the scientist, whose job was to run 100 trials on a drug, instead ran ten and fabricated the other 90 so they would be consistent with the first ten. The medical director possessed investigative abilities that would have been practically impossible for an outside investigator. He could verify the number of animals taken from the animal store, the amount of drug substance that had been used, the number of samples that had been tested, as well as other facts. His familiarity with the laboratory made this easy. As an insider, he could probe quietly without raising the kind of alarm that might lead the criminal to pour an appropriate amount of drug substance down the sink.

To the extent that corporations have capacities both clearly to identify who is responsible for internal purposes, and to create a smokescreen of confused responsibility for external purposes, a strategy which compels the corporation rather than the court to do the internal sanctioning will have merit. To the extent that we change the incentives for the corporation from an interest in covering-up to incentives to open-up, crime control will be enhanced.

A second assumption of Individualism is that individual responsibility is necessarily a just and effective means of social control. This assumption requires substantial qualification. Collective forms of responsibility are common in traditional Japanese corporations and there is no evidence to suggest that the compliance record of such corporations has suffered as a result. On the contrary, a culture of collective and cohesive decision-making within corporations may be less prone to violation than an individualistic corporate culture wherein staff members have more latitude to depart from corporate policy. Put another way, corporate accountability does not necessarily amount to “headlessness”: stringent controls can be administered on the basis of collective decision-making, with all the participants within the collective unit clearly identified.

It should also be realised that legal principles of individual responsibility cannot be expected to work very well if they are inconsistent with principles of accountability within organisations (Braithwaite and Fisse, 1985: 315-343). This problem has been illustrated in a study of some of the varieties of legal and organisational responsibility for corporate crime to be found in Japan and other jurisdictions:

“A good example of incompatibility between legal and organisational principles of individual responsibility is
apparent from a case described to us by Idemitsu Kosan, Japan's largest oil company. There had been a bad accident at the company's Tokuyama refinery. The government prosecuted a foreman who allegedly caused the accident by making a mistake. In law, the foreman was responsible. In fact, however, he was acquitted when the general manager of the plant (the captain of the ship) testified that he was totally to blame. There was no possibility that the general manager could be regarded at fault since, from where he stood, the accident was totally unforeseeable. Yet how could the court convict the foreman when his boss insisted that they had the wrong man, that 'I'm the guilty one'? Instead, the formal law was bent to accommodate the social reality of blaming within the corporation. And the social reality of captain of the ship responsibility within Idemitsu was subsequently confirmed by what happened to the general manager. After the acquittal of the foreman, the general manager stayed on at the refinery for only a year to implement a new programme of occupational safety training. At the end of this period he resigned to take the blame and voluntarily declined to receive his bonus for the year. The corporation found him a slightly less senior position at head office. One of the Idemitsu directors reflected upon the event, commenting: 'We are like a family. If a young son commits a crime, the father must bear blame' (Braithwaite and Fisse, 1985: 323-324).

The basic point underlying the Idemitsu example is that the law cannot be expected to work smoothly if it cuts against the grain of the environment to which it applies. As Lawrence Friedman has maintained, a law that is compatible with its environment is more likely to be effective:

"a law which goes against the grain, culturally speaking, will be hard to enforce and probably ineffective. Prohibition is the hackneyed example. But the converse is equally true. Laws that make use of the culture and draw on its strength can be tremendously effective. When a legal system contrives to cut with the grain, it multiplies its strength" (Friedman, 1975: 108).

Given the growing trend for United States and other Western companies to "go Japanese", in the sense of introducing more collectivised, bottom-up systems for corporate decision-making (see, for example, Lorenz, 1985a and 1985b; Reeves, 1986), it is now a question of practical as well as theoretical interest whether the customary value attached to individual accountability should be qualified and, if so, in what particular way.

Another major assumption of Individualism is that the greater the pressure toward enforcing individual criminal liability the more egalitarian the application of the law (Braithwaite, 1982a: 61-85). The thinking behind the egalitarian pretensions of Individualism is that by doing away with corporate liability there will be less chance of individual liability being compromised by cosy deals in which the company pleading guilty and managers are let off the hook. However, this line of thought fails to heed the egalitarian implications of abandoning corporate liability and trying to prosecute large numbers of corporate personnel.

It is a truism that the criminal justice system is faced with many more allegations of crime than it can ever be expected to handle. The conventional solution to this overload is to try to tackle only the more important cases; in the argot of prosecutors, there must be "prioritisation". For street crime, this strategy has some chance of working. The more serious offences can be given priority, and for each offence particular priorities can be established with reference to such matters as gravity of harm and degree of personal fault. Moreover, the application of these priorities is unlikely to cause much difficulty: the facts on the face of the record usually give solid clues as to what happened and whether the defendant behaved egregiously. And, if the question of responsibility becomes a central issue at trial, the inquiry is focussed on one individual (or, in joint trials, typically a small handful of defendants) and is unlikely to subvert justice by putting too great a strain on enforcement resources. For corporate crime, the same kind of strategy can be formulated but in practice will soon become myth. The most serious cases of corporate harm-causing (for example, a Bhopal or Seveso) involve complex issues of individual responsibility which, if put to trial, will require months or even years of investigation and courtroom battle.25 Challenges like this confound the conventional prosecutorial wisdom that serious cases ought to be prosecuted seriously.26 From this can be derived a general theorem of corporate criminal justice: The more extensive the harm committed by a corporation and the larger the size of the organisation, the lower the probability of individual criminal liability and the less extensive its distribution.

Little can be done to overcome this inegalitarian bias by recharging the batteries of individual liability. Worse, if scarce enforcement resources are taken away from the imposition of


26. For one exception see Financial Times, 11 November 1985: 2 (magistrates in Palermo charge 475 Mafia suspects).
corporate liability and reallocated to the pursuit of individual defendants, the balance of power in the social control of corporate crime is likely to become even less egalitarian than at present: resources would be invested in the costly, resource-intensive task of chasing individuals instead of easing the problem by proceeding against corporations where it is too difficult to mount effective prosecutions against individuals. By proceeding against corporations there is at least some hope of achieving individual accountability at the level of internal corporate discipline (see further Coffee, 1981: 386-459).

**Toward Accountability: Making the Buck Stop**

A more promising approach for achieving accountability for corporate crime would be to structure enforcement so as to activate and monitor the private justice systems of corporate defendants (see generally Canada, Law Reform Commission, 1976: 31; South Australia, Criminal Law and Penal Methods Reform Committee, 1977: 361-362). Already under the present law one aspiration of corporate criminal liability is to catalyse internal discipline, especially where organisational secrecy, numbers of suspects and other such considerations make it difficult or even impossible to depend on individual criminal liability (see Posner, 1976: 225-228; Fisse, 1978: 382-386; Stone, 1980: 29). The challenge ahead is not so much to improve individual criminal liability as it is to harness the police power of corporations by adopting the paradigm of enforced corporate self-discipline (cf. Braithwaite, 1982b: 1466-1507).

The need for some mechanism to ensure effective imposition of individual responsibility as a matter of internal corporate discipline has long been recognised. As the Law Reform Commission of Canada has explained, corporate liability is potentially an efficient dispenser of individual accountability:

“In a society moving increasingly toward group action it may become impractical, in terms of allocation of resources, to deal with systems through their components. In many cases it would appear more sensible to transfer to the corporation the responsibility of policing itself, forcing it to take steps to ensure that the harm does not materialise through the conduct of people within the organisation. Rather than having the state monitor the activities of each person within the corporation, which is costly and raises practical enforcement difficulties, it may be more efficient to force the corporation to do this, especially if sanctions imposed on the corporation can be translated into effective action at the individual level” (Canada, Law Reform Commission, 1976: 31).

How can this be done? One approach is to make corporate liability to punishment conditional partly on failure to achieve internal accountability. Where an offence is shown to have been committed by or on behalf of a corporation, courts could be empowered to send the company away to conduct its own inquiry as to who was responsible within the organisation and to take internal disciplinary measures against those responsible. If the corporate defendant returned with a credible report on what it has done to discipline those responsible (and to rectify defective management systems and to compensate victims) then no corporate punishment would be imposed. If the reaction of the company was unsatisfactory then both the company and its top managers would be subject to criminal liability for their failure to comply with the terms of the court. The range of punishments for corporate defendants would include court-ordered adverse publicity, community service, and punitive injunction (i.e. an injunction which puts punitive pressure on a company by requiring it to take some demanding form of preventive action, such as devising innovative techniques for achieving compliance and putting them in place). Checks and balances would be necessary for minimising scapegoating and other conceivable risks of abuse within private justice systems.

Another model for triggering internal corporate discipline is John C. Coffee’s proposal that internal disciplinary measures be a condition of corporate probation (Coffee, 1981). Coffee’s starting point is the Gulf Oil report on bribery, prepared by an outside counsel, John J. McCloy. Its impact was to trigger substantial internal reforms at Gulf and to hasten the resignation of some senior officials named in it. So, asks Coffee, why not make McCloy-style reports a routine part of corporate crime enforcement?

The mechanism favored by Coffee is placing corporate defendants on probation, subject to a condition that they employ outside counsel to prepare a report which names key participants and outlines in readable form their modus operandi. Alternatively, the vehicle could be a presentence report.

27. For a brief review of the historical background see Fisse, 1978: 382-386.
28. Top managers would be prime targets for enforcement if the court were to pinpoint them, by nomination in advance, as responsible for the required programme of internal inquiry and disciplinary action.
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"The suggestion, then, is that the presentence report on corporate offenders be prepared in considerable factual depth in the expectation that such studies will either find an audience in their own right or, more typically, provide the data base for investigative journalism. This approach permits the government both to avoid the ethical dilemma of itself being a publicist, and to rely on the more effective public communication skills of the professional journalist. In a sense, this approach integrates public and private enforcement." (Coffee, 1981: 431).

The presentence report would be distributed to stockholders, and thereby in effect to the world at large.

Coffee concludes that adverse individual publicity in a McGloin-style report can deter culpable or negligent managers on three distinct levels:

"First, the manager suffers a loss of public and self-respect, which some research suggests is the most potent deterrent for the middle class potential offender. Secondly, adverse publicity substantially reduces the official’s chances for promotion within the firm. Competition for advancement is keen within almost all firms, and competitors of the culpable official can be relied upon to use such adverse publicity about their rival to their own advantage. Securities and Exchange Commission proxy disclosure requirements may pose a further barrier to such an official’s advancement. Finally, disclosure of the identity of the culpable official also invites a derivative suit by which any costs visited on the firm can be shifted (at least in part) to the individual. Here again private enforcement is desirably integrated with public enforcement through the linking mechanism of disclosure" (Coffee, 1981: 433).

The approach suggested by the models outlined above—using collective liability as a lever for pushing internal accountability out into the open—would be responsive to the problem of non-prosecution of corporate managers which is now pandemic in modern societies. Justice for individuals would be meted out by private justice systems monitored, as a safeguard against inaction or scapegoating, by the public justice system. This seems the best practicable way of getting the right heads on the chopping block. When an offence is proven to have been committed by or on behalf of a corporation, it is not unreasonable that the cost of fully investigating the reasons for the offence be borne by that corporation rather than by taxpayers in general. Investigation costs are important, because they are the prime reason why regulatory agencies typically settle for corporate convictions, leaving individual liability in the too-hard basket. Cost aside, there is also the question of sanctioning efficacy. Even though the sanctions available to private justice systems—fines, dismissals, demotions, shame—may be less potent than some of those available in the public arena, it seems much better to have weaker sanctions hitting the right targets than stronger sanctions some targeting the wrong targets. In any case, if one believes that shaming delivered by peer groups are more effective sanctions than formal punishments delivered by the state, then private justice systems might even be seen as providing more potent sanctions.

Using collective liability as a lever for pushing internal accountability out into the open would also be responsive to the second major problem of unaccountability with which this chapter is concerned—the inability of corporate sanctions, as presently deployed, to provide any real assurance of accountability at the level of internal corporate discipline. The approach suggested is of course geared to making the corporation itself responsible for investigating and reporting on internal discipline following an offence, and to enforcing that responsibility. Unlike the inscrutability of fines against companies, a court order requiring internal discipline to be undertaken would expressly communicate the message that it is the responsibility of the corporation to ensure accountability. The strategy here is to rely on the good-will of corporations while at the same time to make it plain that lack of good-will will be severely punished. Why? Because the law imposes more stringent expectations of responsibility on corporations, most of them rise to the challenge of meeting those expectations. If, on the other hand, the law treats corporations as

29. See Braithwaite’s argument that shaming by intermediate groups such as corporations and families is a more important crime control weapon than sentences imposed by the state (Braithwaite, forthcoming).
30. As Tittle concluded from his major empirical work on deterrence: “To the extent that individuals are deterred from deviance by fear, the fear that is relevant is most likely to be that their deviance will evoke some respect or status loss among acquaintances or in the community as a whole.” (Tittle, 1960: 198). Beyond this study, the perceptual deterrence literature generally demonstrates a much stronger effect of informal sanctions on deviance than formal legal sanctions. See Aker, Krohn, Lamo-Kaduce and Radojevic (1979); Anderson, Chiricos and Waldo (1977: 103-114); Kraut (1975); Meier and Johnson (1977); Jensen and Erickson (1978); Burkett and Jensen (1975); Meier (1982); Paernoster and Ioannou (1986); Paernoster, Sizemore, Chiricos and Waldo (1985b); Paernoster, Saltzman, Chiricos and Waldo (1983a); Williams (1985); Bishop (1984).
unworthy of trust to put their houses in order, then that will be a self-fulfilling prophecy. It may be speculated that most companies have both a strong animus towards being good corporate citizens and a strong resentment of governments which assume them to be otherwise. If this is so, courts which operate from the starting assumption that corporations have good faith to right the wrongs of the past will mostly have that trust rewarded. Moreover, where the court has the sentencing axe poised over the corporation, the detection of abused trust can be readily remedied by allowing the forces of gravity to operate on the axe. On the other hand, when the state treats corporations as incorrigible, managerial resentment, and hence resistance and cover-up, are inevitable. The community has little to lose from trust in the shadow of the axe, and a lot to gain.

The proposals outlined require much development if they are to have any chance of successful implementation. Indeed, there is a whole host of matters which need to be mopped up within the paradigm of enforced corporate self-discipline. Three of the more significant problems which require consideration are (1) internal or external investigation, (2) scapegoating, and (3) diversity of individual and collective internal accountability within organisations. Justice cannot be done to these and other issues in the pages available to us here, but we can at least foreshadow some of the directions which might be taken.

We disagree with Coke's suggestion that internal investigative inquiries should always be spearheaded by an outsider, such as court-appointed counsel. An outside counsel loisted on the corporation by the court in some cases be able to get to the bottom of who was responsible for what with the active cooperation of the corporation. But in many cases she may not: as an outsider she may not get the cooperation required. Generally speaking, the corporation, and not a court-appointed counsel or probation officer, should be responsible for investigating and reporting upon internal responsibility for the offence. Outsiders rarely understand the culture of an organisation. Investigators imbued in the corporate culture will be quick to grasp that X is an area of corporate accountability guided by collective responsibility requiring a collective sanction, while Y might seem on paper to be a committee decision, "everyone knows" that a key individual really made the decision with the committee being a rubber stamp. Under the time pressures a court would be likely to impose while a corporate sentence is suspended, it is difficult to imagine an outsider genuinely coming to grips with the subtleties of an unfamiliar corporate culture. Thus, the risk will be enhanced of the buck being made to stop at the wrong place. By the wrong place, we mean a place which, under the shared understanding of actors in the organisation, is not the locus of responsibility. The corporate culture, partly on the basis of formal lines of authority and partly on the basis of informal understandings, defines which individuals and groups are responsible. It is they who should be sanctioned because it is they who had been put on notice within the corporate culture before the event that it was their responsibility.

More perplexing is the risk of scapegoating. Inside investigation teams are generally more capable of putting the right heads on the chopping block than are outsiders. But being more capable, they are not necessarily more willing. Inside investigators will be much more susceptible than outsiders to pressures from top management to get themselves or the corporation off the hook by crucifying a convenient scapegoat. The superior capacities of private justice systems to deliver just sanctioning of individuals and subunits within the corporation will only be delivered in practice if creativity is applied to the design of external checks and balances against scapegoating.

The scapegoating problem arises usually from those at the top of the organisation protecting themselves by sacrificing someone lower down. While insiders have the capacity to shift home responsibility to those who are agreed to be responsible, when it is found that the boss (or someone the corporation cannot afford to lose) is responsible, an alternative scapegoat may be set up.

What can be done about this? Our suggestion is that courts refuse to agree to corporate self-investigations unless certain guarantees of due process are met. The most critical guarantee required is this. At the stage of a draft compliance report for the court being prepared, it should be widely circulated around the organisation and an open meeting held within the organisation to discuss it. All who wished to attend this meeting should be able to do so, and any travel expenses should be met by the organisation. In particular, all persons subject to adverse comment in the draft report should be urged to attend and to invite any witnesses to speak on their behalf. One model for how such informal discussion on a draft report might be held is provided by pre-decision conferences on draft authorisations of anti-competitive conduct under the Australian Trade Practices Act.31

31. See ss 90A, 93A, Trade Practices Act 1974 (Cth). A draft determination is tabled in advance of these pre-decision conferences. All parties with an interest in the draft determination are able to attend and voice their criticisms of the draft in an informal atmosphere. Because the discussion is focussed on criticism of a draft determination rather than on a wide-ranging reconsideration of all the issues, these conferences rarely occupy more than one day and usually only a half day.
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The conduct of the meeting would be in the hands of the corporation, but representatives of the court and the prosecution would be invited to attend this meeting to check that principles of natural justice were observed. The court would communicate its wish that every person adversely reported upon in the report be called upon to speak in their own defence or otherwise to challenge the report in this open forum.

If the meeting were conducted in an oppressive manner, if representatives of the court and the prosecution were not invited to attend, if evidence of scapegoating emerged at the hearing, this would be reported when the court resumed to consider the company's final report, redrafted in light of criticisms made at the in-house meeting. The prosecution might then choose to call some of those who complained at the meeting to give further evidence to the court.

Of course, a report which was a white-wash of top management responsibility would result in the court adopting the most punitive response possible (for example, formally ordered adverse publicity over both the offence and the cover-up, coupled with a punitive injunction or community service order requiring the company to make up for its recalcitrance in some exacting and socially useful way). The literature on corporate crime provides many examples of corporations suffering more severe adverse publicity over a cover-up associated with an offence than they suffered from the offence itself. An open procedure which exposes the corporation to the risk of adverse publicity is quite a potent safeguard against scapegoating.

It does not, however, eliminate the problem of an executive being "bribed" to be a scapegoat voluntarily (as with the "vice-president responsible for going to gaol" in some American pharmaceutical companies). Even with consensual scapegoating, however, the open meeting exposes the corporation to some unpredictable risk that a whistle-blower will disclose the scapegoating in the presence of visitors from the court. This risk would be further enhanced if the prosecutor gave his telephone number to all present at the meeting and invited them to speak or write to him in confidence should they feel intimidated about getting up at the meeting.

The paradigm of enforced corporate self-discipline also requires attention to the diverse forms of accountability found in corporate cultures. Responsive as Coke's proposal is to the problem of ensuring that corporate criminal responsibility does in fact result in the effective allocation of individual responsibility, it should be realised that such an approach would not be compatible with all corporate structures. Let us assume, for instance, a corporate defendant that has "gone Japanese" in the sense of adopting a highly diffused, bottom-up, and consensual decision-making system. Pointing the finger of blame at a select range of guilty individuals in such a context could contradict the organisational structure of that corporation, thereby generating disrespect for the law within the organisation. The trap to be avoided here is assuming that private justice systems are only about locating culpable individuals.

The relevance of collective as well as individual internal disciplinary measures may be illustrated as follows. A transnational pharmaceutical company may have three research divisions, each run as "Adhocracies" (Mintzberg, 1979: Ch. 21)—one in Australia, one in France and one in the United States. Each of these research divisions might be attempting to innovate within a free-floating matrix management system in a way that makes it unjust to impose individual responsibility for a failure to report the side-effects associated with a new drug. Instead, collective blame fairly lies with the French team as a collectivity. Accordingly, corporate headquarters may sanction the French research team by cutting their budget and allocating the funds saved to the American and Australian teams. Or they might allocate to the French team all of the back-work research for the next year and save the exciting projects for the Australians or Americans; they might give away the pet project of the French to the Americans. Alternatively, they might impose a sanction in the Bureaucratic Politics tradition (see Kriesberg, 1976)—the French might lose their seat on the Corporate Research and Development Planning Committee to their arch enemies, the Australians. Insiders might know what would hurt the culpable individuals or subunit most without damaging the productive efficiency of the whole corporation. Outsiders are unlikely to understand this. They do not have the knowledge-base either to grasp what creative options there are for sanctioning the guilty research team in a way which would make them stop and think about the irresponsibility of their collective behaviour, or to assess whether the socially useful productive work of the corporation will be inhibited by the internal sanctioning recommended.

Concluding Reflections

The social control of corporate crime is unlikely to be effective unless the law can succeed in conveying the message that
individuals have individual responsibilities for corporate crime and that collectivities have collective responsibilities for corporate crime. Both messages might well be conveyed by imposing corporate liability mostly through public enforcement and individual responsibility mostly through private justice systems. Individuals would be subject to public prosecution unless given immunity as a condition of court-ordered internal corporate discipline but as at present prosecution would be rare. Collectivities within the corporation would be subject to private sanctioning where necessary to harmonise with a corporate culture of collective decision-making.

The world of corporate criminal justice envisaged is one in which all collectivities and individuals responsible for a corporate crime are exposed to publicly accountable sanctioning administered either by public or private justice systems. This exposure would extend to all relevant actors, whether corporations, divisions of corporations, foreign parents of the corporations, employees of the corporation in any part of the world or, where implicated, government agencies. It would also be a world in which those actors who now hide behind the corporate veil or behind their power to scapegoat would be forced to give an account of themselves, initially to their associates at work, and ultimately to society as a result of the interest of neighbours, family, and news media in the report publicly disclosed by the corporation.

This may be seen as a response to a crisis of formal criminal law, namely its inability to deal with the crimes of collectivities. The crisis arises primarily because formal law is rooted in the ideology of Individualism. Certain structural societal changes will make this crisis increasingly profound—the exploding corporate birthrate, the growing transnationalisation of corporations, the rise of Adhocracies as the leading edge corporations which respond to accelerating technological change with free-floating flux in organisational structure (Mintzberg, 1979: 451–467).

There are some theorists who see such crises of formal rationality in law as posing an evolutionary challenge to the legal system (Teubner, 1983). When formally rational law—law which is highly codified, legalistic, individualistic, universalistic, and procedurally conventionalised—cannot cope with problems such as corporate crime, the law is assailed with a legitimation crisis (Habermas, 1975) and a rationality crisis. In this environment of growing crisis, experimentation with new legal models becomes possible, and when experiments are seen to solve problems which paralysed the old law, then the new legal model may be institutionalised throughout the society and incorporated in fundamental legal structures.

Nonet and Selznick (1978), for example, see the crisis of formal rationality as ushering a progression to “responsive law”—a new legal model which combines purposiveness and participation. Teubner (1985), in a reconstruction of the work of Nonet and Selznick as well as that of Habermas (1981) and Luhmann (1970) posits an evolutionary challenge to formal law by “reflexive law”. For Teubner, formal law is about “the perfection of individualism and autonomy: establishment of spheres of activity for private actors” (Teubner, 1988: 257), while reflexive law is concerned with the “installation, correction and re-definition of democratic self-regulatory mechanisms” (Teubner, 1983: 230). Reflexive law “seeks to identify opportunity structures that allow legal regulation to cope with social problems without, at the same time, irreversibly destroying valued patterns of life” (Teubner, 1983: 274). It does this by allowing the law to become a “system for the coordination of action within and between semi-autonomous social subsystems” (Teubner, 1983: 242).

Our vision of catalysing internal corporate justice systems is very much a shift toward Teubner’s reflexive law. Yet while we can agree that there is a growing crisis of formal rational law in the corporate arena, we cannot accept that this creates any functional imperative for a new participatory evolutionary stage.

33. There could be formal grants of immunity or an informal understanding that individuals would be immune unless otherwise stated. Stanley Sporkin, former Director of Enforcement at the Securities and Exchange Commission, was a defender of informal guarantees of immunity under voluntary disclosure programmes. In describing the way he handled the foreign bribery voluntary disclosures of the 1970s in the United States, he said that formal immunities were not needed because “the rules of the game were widely known” (interview with Fiske and Branthwaite, November 1981; cf. Wolff (1979).

34. Stone (1985: 13); Coleman (1982: 10–13). Coleman shows graphically that the number of profit-making corporations increased more than five-fold in the United States between the end of World War I and 1970, while the proportion of New York State Court of Appeals cases involving corporate actors rather than natural persons increased from 15 per cent in the mid-19th century to 50 per cent after World War I.

35. Blum (1982); Griev (1985); Edelhertz (1980); Solomon (1978); Tindall (1975); Borton and Goss (1978); Barnett and Muller (1975); Wheelwright (1986).

36. It was Max Weber who saw formal rational law, in these terms, as the creation of the 19th century (Rheinstein, 1954). Under the influence of the principles of formal rationality, capitalist legal systems evolved to deal with the crimes of private individuals rather than those of complex organisations. See Tigges and Levy (1977); Kamenka (1975); Stone (1975).

37. The distinction between legitimation crisis and rationality crisis is that the latter relates to the social-engineering capacities of the law while legitimation crises are about social identity and social norms (see Teubner, 1983).
which Teubner calls reflexive law and Nonet and Selznick responsive law.

Whether reforms in the direction of reflexive law occur or not will depend on how different constituencies see their interests as served by allowing the crisis of formal rational corporate law to continue. The legal profession is a relatively autonomous sphere of social power which might have an interest in opposing the partial de-professionalisation of justice involved in the kind of reflexive corporate law proposed. On the other hand, factions of the profession, such as judges who see their courts impossibly overburdened by the unworkability of formal rational law in the corporate arena and counsel for regulatory agencies, may see their interests as lying with a new order.

Some fractions of capital, such as the tax consultancy industry, will see their interests with the maintenance of the crisis of formal law. Intellectual leaders of the business community have, on the other hand, been among those who have advocated a shift away from formal law for regulating business toward more reflexive law in the form of monitored self-regulation, third-party auditing of compliance, and the like (United States, Regulatory Council, 1980). For many in the business community, the costs of onerous regulation and excessive litigation are bound up with the ideology of legalism in formal law.

While there is no evolutionary imperative toward reflexive law, and while reflexive law is functional or dysfunctional depending on whose interests one is bearing in mind, there does not seem any reason for believing that the kind of shift toward reflexive law proposed here is radical and therefore untenable. It is a proposal which should have appeal to a variety of interests because it would solve some problems which are beginning to reach crisis proportions in their eyes. At the end of the day, however, what is “functional”, what is the next “evolutionary stage”, counts for nought. What matters is how well these constituencies in favour of reform can mobilise against those which prefer a continuing crisis, a continuing impotence, of traditional formal corporate law.

38. More generally, Sutton and Wild have suggested that: “The more formal and complex the body of law becomes, the more it will operate in favour of formal, rational and bureaucratic groups such as corporations” (Sutton and Wild 1978).
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United States Senate (1961), Administered Prices, Parts 27 and 28, Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary, 87th Cong., 2nd Sess.


