efforts that is available to few street criminals. Respectable offenders and their representatives play an active—many believe dominant—part in the crafting of 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 with legal norms. There appears, moreover, to be little restraint in the cleanup 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 Hames, 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 makes 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 prosecution, 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 directed at private standards and a small number 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. Lauren Stiller 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 waxed 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 jurists lack the budget, expertise, and other resources to pursue these cases. In addition, corporate owners and managers bent on gaining or maintaining 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 dominance of large corporations is whether or not they now are beyond the law.

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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

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 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. 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. 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

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9 Following Sutherland (White Collar Crime), we take the view that to exclude civil violations from a consideration of corporate crime is an arbitrary obscuration because of the frequent practice of the same civil and criminal sanctions on the same corporate conduct. Conduct subject to these sanctions is, however, not within the definition of corporate crime adopted here.


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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. 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, 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.

This first proposition has important implications for the differences between how law enforcers must go about controlling corporate versus traditional crime. Traditional crime is reactive. The police normally do not investigate until a citizen reports a victimization. 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.

**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-
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penance is incurred to achieve remarkable clearance rates for these types of offenses. Moreover, in the unlikely event that a sick worker discovers his illness, it may prevent the proper administration of business at work. Almost by definition, the law enforcement agency can identify a corporate suspect—the company's employee. Similarly, if it is discovered that a bribe has been passed to secure another defense contract, there is an immediate suspect, the corporation that benefited 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 countervails 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 identifying 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 imposter 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

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14 In 1976 in the United States, only 14.4 percent of motor vehicles thefts were cleared by arrest.
For property crimes generally, the clearance rate was 18 percent; for violent offenses, it was
Enforcement Assistance Administration, 1976), p. 95.

15 Osgood is an advocate of auto repair fraud targeting by undercover operations with rigged vehi-
cles. Robert W. Osgood, "The Ineffectiveness of the Criminal Sanction in Fraud and Corruption
Cases: Losing the Battle against White-Collar Crime," American Criminal Law Review, Sum-


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 necessary and less indiscriminate than 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 crimes, 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 even tute 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 law19 or the complexity of the
company's books 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." 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 protect proceedings and thereby push up the cost disincentives for the prosecution to continue with formal proceedings.

In addition to the complexity of the law and the complexity of the book, 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. (P 67) Even if he was following y's instructions, y says that z misunderstood instructions he had passed down from a, ad infinitum. So how can either company policy or any individual company employee be guilty? Even if this is not what actually happened, 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 scientists can never eliminate all the possible third variables. Hence, to require proof beyond reasonable doubt that a violation of the Food, Drug and Cosmet Act caused an observed level of drug impurity, which in turn caused fifty deaths, is to require the impossible.

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; 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. 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 corporate 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

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23See the discussion of this problem in relation to the Abbott case study in ibid., ch. 4.
25The Public Ordering of Private Laws: A Critical Review of the Federal Trade Commission's Corporate Criminality and the Federal Trade Commission's Corporate Criminality, in Corporate Crime in the Pharmaceutical Industry, Bresnahan 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.
of committing crimes. 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., prisons), 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 content of labeling theory. Evidence such as that from the Cambridge longitudinal study of delinquents 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 your 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 probation officers can be a mixed blessing, if it helps to confirm the youngster’s self-identification with delinquent groups.”

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, or 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.

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40 Ibid., p. 162.
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 crimes, and how scholars interpret that evidence, is in turmoil. 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.

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. 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. Survey respondents claimed that the legislation caused them to abandon certain price-fixing agreements with competitors and introduce antitrust "containment 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

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24 Socioeconomic and environmental conditions 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.
25 Although the fine itself may be an ineffective deterrent when used against the corporate criminal, other sanctions associated with the prosecution—unfavorable publicity; the. [text cut off]
27 These interviews were done by the authors with the cooperation of the Australian Trade Practices Act enforcement officers.
29 Hopkins, "In a personal communication concerning his interviews with Australian Trade Practices Act enforcement officers, 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 Kelling, eds., pp. 184-185. See also the courts case study in Britishcrimes, Corporate Crime in the Pharmaceuticals 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 hot but still in today. They've never been the same since."
30 This disillusion 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.

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been sent to jail and that fines average only 0.3 percent of the annual sales of the offending 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.69

The most impressive evidence is from Lewis-Beck and Alford’s study of United States coal mine safety enforcement.68 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 the hypothesis 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.61 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


 Marvin Wolfgang, personal communication.

low.62 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 Dinst.63 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 cost-effective outcomes, more recently considered by Reis,64 which further weaken incapacitative effects. For example, to what extent do criminal groups recruit new members to replace those who are incapacitated, or increase their 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 committed by offenders during a period of time that 1,000 crimes would have been prevented if those people had 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.65 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 and other 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.”66


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 Somo advocates, prohibit a person "for a period of three years from serving as officer, director, or consultant of any corporation...." 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 tailormade 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.

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. 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.

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...."

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

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73Sterno, Where the Law Ends, pp. 146-49.
74Schrug ("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 Schrug'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 falsified 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.

75The 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 performances. In 1972-73 Westmoreland 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. 30, 1965, pp. 1,28, 1,32.
the disillusionment with deterrence. The high tide of this change was the publication of the massive and detailed review of the effectiveness of correctional rehabilitation programs by Lipton, Martinson, and Wilks.41 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 esecwrench, in or out of prison, relevant to Hoffa's psyche or 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.42

Although rehabilitative 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.43 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.44 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 override quality control, and if only the chief executive 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.45

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

40For 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).
41Raphael, "Anatomy of Corporate Crime."
42These data will be published in a forthcoming book by Fisse and Bruttivaeth on the effects of adverse publicity on corporate crime.
44This 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 Fries, "Responsibility, Prevention and Corporate Crime," New Zealand Universities Law Review, April 1973, pp. 253-70.
discussed corporations by the courts, contingent on their producing a report on the weaknesses of their old compliance systems and implementing new ones.

DISCUSSION

It has been argued that the largely discredited doctrine 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 traditional concept of crime control has failed, it is time to consider new ways of thinking about corporate 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 corporate crime. . . . Because corporate crime is more preventable than other types of crime, the persons and property of citizens can be better protected; and retaliation is a more viable goal for corporates 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 adequately compensated, there is no guarantee that either prevention or retaliation 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 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 affected significant deterrence through the adverse publicity that followed public disclosure of the largest scandals, a modicum of incapacitation in cases where corporations forced responsible senior executives into early retirement, and a considerable amount of rehabilitation through consent orders.

Footnotes:


2Banks, for example, says, “The SEC has been firing blanks. Who gets hurt in consent settlements? The SEC gets a含 in its gun. The law firm gets money. The public is happy because they read ‘fraud’ in the newspaper and think ‘corruption’ right away. The company neither denies anything, it’s the perfect accommodation. And it’s all one big charade.” August 1976.

3In some corporations (e.g., Lockheed, Northrop, Gulf), these included chief executive officers, attempting to sweep things clean.

4In some corporations (e.g., Lockheed, Northrop, Gulf), these included chief executive officers, attempting to sweep things clean.

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### 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.


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**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, Duval County, Florida, and Nassau County, New York in 1988 and 1989. At each site, attorneys in the local prosecutors office were interviewed 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 (Cinard and Yager, 1988; Sutherland, 1949). The reasons why corporate

**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