1 Crime, Responsibility and Corporate Society

Contemporary Problems of Accountability for Corporate Crime

Two major problems of accountability confront modern industrialised societies in their attempts to control wrongdoing committed by larger scale organisations.[1] First, there is an undermining of individual accountability at the level of public enforcement measures, with corporations rather than individual personnel typically being the prime target of prosecution.[2] Prosecutors are able to take the short-cut of proceeding against corporations rather than against their more elusive personnel and so individual accountability is frequently displaced by corporate liability, which now serves as a rough-and-ready catch-all device.[3] Second, where corporations are sanctioned for offences, in theory they are supposed to react by using their internal disciplinary systems to sheet home individual accountability,[4] but the law now makes little or no attempt to ensure that such a reaction occurs.[5] The impact of

[1] Our central concern is the position in relation to large-scale business enterprises and governmental entities. Much of the analysis is also relevant to other kinds of organisations, including accounting and law firms; see, e.g., Schneyer, 'Professional Discipline for Law Firms'.

[2] On corporate criminal liability see generally Leigh, *The Criminal Liability of Corporations in English Law;* Brickey, *Corporate Criminal Liability;* Coffee, 'No Soul to Damn No Body to Kick'; Fisse, 'Reconstructing Corporate Criminal Law'; 'Developments in the Law—Corporate Crime'. As to individual criminal liability for conduct performed on behalf of corporations, see generally Brickey, *Corporate Criminal Liability*, ch. 5; Braithwaite, *Corporate Crime in the Pharmaceutical Industry*, 318–28; Leigh, 'The Criminal Liability of Corporations and Other Groups', 274–83; Goodwin, 'Individual Liability of Agents for Corporate Crimes...'; Spiegelhoff, 'Limits on Individual Accountability for Corporate Crimes'; McVisk, 'Toward a Rational Theory of Criminal Liability for the Corporate Executive'.

[3] There is, however, the possibility of individual responsibility being enforced through civil action. See further Ming, 'The Recovery of Losses Occasioned by Corporate Crime'; Coffee, 'Beyond the Shut-Eyed Sentry'; Pennington, *Directors' Personal Liability*, ch. 8.

[4] See Elzinga and Breit, *The Antitrust Penalties*, 132–8; Posner, 'An Economic Theory of the Criminal Law', 1227–9; Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls'.

[5] See Coffee, 'Corporate Crime and Punishment', 458–60. As to the legal control over the internal affairs of corporations, see generally Shearing and Stenning, *Private Policing*; Henry, *Private Justice*; Honoré, 'Groups, Laws, and Obedience'; Kirkpatrick, 'The Adequacy of Internal Corporate Controls'.

enforcement can easily stop with a corporate pay-out of a fine or monetary penalty, not because of any socially justified departure from the traditional value of individual accountability, but rather because that is the cheapest or most self-protective course for a corporate defendant to adopt.

The central aims of this book are twofold: to examine the extent to which existing theories help to resolve the problems of non-prosecution of individuals and non-assurance of internal corporate accountability; and to advance a more responsive program for achieving accountability for corporate crime.

In discussing these issues we do not try to address the problem, formidable as it is, of responsibility for corporate crime in the context of fraud and other offences by confidence tricksters or scam merchants who abuse a position of control over their own tightly held company or who make use of a corporation as a tool for implementing their own criminal objectives.[6] The main concern in that setting is not the balance to be struck between corporate and individual responsibility, but the difficulty of taking timely and effective action against the individuals concerned.

Non-prosecution of individuals

The problem of non-prosecution of individual representatives of companies for offences committed on their behalf has become increasingly visible.[7]

The problem of non-prosecution of individual persons implicated in corporate crime was highlighted by the Hutton affair[8] in the United States (US). E. F. Hutton and Co., a brokerage firm, engaged in a widespread fraudulent scheme in which its bank accounts were overdrawn by up to $US270 million a day without triggering debits for interest; approximately 400 banks were defrauded of $US8 million. E. F. Hutton and Co. pleaded guilty to 2,000

[6] As described in, e.g., Copetas, *Metal Men*; Stewart, *Den of Thieves*; Pizzo, Fricker and Muolo, *Inside Job*; Freiberg, 'Abuse of the Corporate Form'. Consider also takeover power-plays, as graphically illustrated by Burrough and Helyar, *Barbarians at the Gate*.

[7] See Grabosky and Braithwaite, *Of Manners Gentle*, 189; Cohen et al., 'Organizations as Defendants in Federal Court'; US, National Commission on Reform of Federal Criminal Laws, 1 Working Papers, 180; Green, Moore and Wasserstein, *The Closed Enterprise System*, 167; Clinard and Yeager, *Corporate Crime*, ch. 12; Geis, 'The Heavy Electrical Equipment Antitrust Cases of 1961'; Smith, *Corporations in Crisis*, chs 5–6; Watkins, 'Electrical Equipment Antitrust Cases'; Mills, 'Perspectives on Corporate Crime and the Evasive Individual'; Fisse, 'Criminal Law and Consumer Protection', 183; Spiegelhoff, 'Limitations on Individual Accountability for Corporate Crimes'; Alexander, 'Crime in the Suites'; 'White-Collar Crime Booming Again', *NYT*, 9 June 1985, S. 3, 1, 6; 'Bhopal Disaster Spurs Debate over Usefulness of Criminal Sanctions in Industrial Accidents', *WSJ*, 7 Jan. 1985, 18; Safire, 'On Sutton and Hutton'.
There are of course numerous cases where individual officers and employees have been held criminally liable. See, e.g., *Guthrie v Robertson* (1986) ATPR 40–744; 'Anthony Bryant and Directors Fined $96,000', *SMH*, 15 April 1987, 38; Tundermann, 'Personal Liability for Corporate Directors, Officers, Employees and Controlling Shareholders under State and Federal Environmental Laws'. For the notable Film Recovery Systems case, see *Los Angeles Times*, 15 Sept. 1985, 1; *NYT*, 15 June 1985, 1.

[8] See US, HR, Committee on the Judiciary, Subcommittee on Crime, *E. F. Hutton Mail and Wire Fraud Case;* Carpenter and Feloni, *The Fall of the House of Hutton*; Safire, 'On Sutton and Hutton'.

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'.[9] The explanation given by the US Assistant Attorney General was this:

> In assessing the manner in which this case ought to be handled, our prosecutors started from the proposition that individuals ought to be held personally responsible for their criminal misconduct. This is our normal policy from which we deviate only when faced with a compelling reason to make an exception. Pursuing in court in this case the known individual authors of the swindle would have had some merit, but not at the expense of foregoing the opportunity to dictate the key terms of and seize without delay this extraordinary settlement. To prosecute the individuals would have required us to drop the settlement in favor of a protracted court fight that would have taken years to complete. That was the choice.[10]

This explanation was severely criticised by the Subcommittee on Crime of the House of Representatives Committee on the Judiciary.[11] In the opinion of the Subcommittee:

> The Department has, in prosecuting other cases, shown great tenacity and willingness to ignore cost considerations and significant adverse odds. Yet in Hutton, the prosecutors seemed overwhelmed by the fact that discovery would be time-consuming, ... that the case would be complex, and that it might take months to try. ... The Hutton plea contributed to a decrease in public confidence in the fairness of the criminal justice system—a pervasive feeling that defendants with enough money and resources can 'buy' their way out of trouble.[12]

There have been other conspicuous compromises of individual accountability in the US.[13] One of the more glaring was the deal made in 1981 to settle the McDonnell Douglas bribery affair concerning sales to Pakistani Airlines.[14]

[9] *Time*, 10 June 1985, 53; *NYT*, 13 Sept. 1985, 1. In Hong Kong's $US21 billion counterpart to the E. F. Hutton scam, the targets of prosecution were six individual conspirators, and the financial institutions involved; see *WSJE*, 11 Oct. 1985, 11. Consider, by contrast, the refusal of the US Justice Department in the early 1970s to accept a plea of guilty by Abbott Laboratories in exchange for the dropping of charges against five of the company's executives; see Braithwaite, *Corporate Crime in the Pharmaceutical Industry*, 117.

[10] US, HR, Committee on the Judiciary, Subcommittee on Crime, *E. F. Hutton Mail and Wire Fraud Case*, Hearings, Pt. 1, 99th Congress, 1st Sess., 1985, 643–4.

[11] US, HR, Committee on the Judiciary, Subcommittee on Crime, *E. F. Hutton Mail and Wire Fraud Case*, Report, 99th Congress, 2nd Sess., 1986, 159–62.

[12] Ibid., 161.

[13] The E. F. Hutton case is hardly an isolated episode in US enforcement practice. See US National Commission on Reform of Federal Criminal Laws, 1 Working Papers, 180 (referring to widespread compromise of individual responsibility in plea agreements); Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls', 857–98, 858–9 (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, *The Closed Enterprise System*, 167 (Antitrust Division preference for indicting corporations); Orland, 'Reflections on Corporate Crime', 513; Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, 45, ch. 14; *United States v FMC Corporation*, Criminal No. 80–91, US District Court, ED Pa., 1980.

[14] See generally Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, ch. 14.

Fraud and conspiracy charges against four top McDonnell Douglas Corp 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 US Assistant 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.[15]

Contrary to the orthodox line of prosecutors that their priority is to proceed against individuals and with corporations only secondary targets,[16] the statistics reveal a significant incidence of cases where individuals have not been prosecuted or, in the event of prosecution, have not been held liable.[17] In Clinard and Yeager's study of the incidence of corporate crime among large companies in the US in the late 1970s, it was found that in only 1.5 per cent of all enforcement actions was a corporate officer held liable.[18] 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 enforcement is directed at corporate entities rather than against their personnel.[19]

[15] Ibid., 163.

[16] Fine, 'The Philosophy of Enforcement'; Ayers, *The Processing and Prosecution of White Collar Crime by the States' Attorney Generals*, 61–2; BNA, 'White-Collar Crime: A Survey of Law', 369–70, n. 1719; Groening, *The Modern Corporate Manager*, 71, 239–40. Jail sentences are usually regarded as being far more effective as a deterrent than fines against corporations. See, e.g., Baker, 'To Indict or Not to Indict', 414. But see Elzinga and Breit, *The Antitrust Penalties*, ch. 3.

[17] See Cohen et al., 'Organizations as Defendants in Federal Court' (in 49 per cent of 1122 cases involving organisational convictions there was no individual co-defendant, and in 24 per cent of the cases there was a single individual co-defendant); Cohen, 'Corporate Crime and Punishment'; Cohen, 'Environmental Crime and Punishment'; American Bar Association, Final Report, *Collateral Consequences of Convictions of Organizations*, 87 (in 60 per cent of 73 cases surveyed some individual within the corporation was charged as well); Clinard and Yeager, *Corporate Crime*, 272; Whiting, 'Antitrust and the Corporate Executive', 986; Lewis, 'A Proposal to Restructure Sanctions under the Occupational Safety and Health Act', 1449–50; Dershowitz, 'Increasing Community Control over Corporate Crime', 291–3; Schrager and Short, 'Toward a Sociology of Organizational Crime' 410; Goff and Reasons, *Corporate Crime in Canada*, 94–5; Grabosky and Braithwaite, *Of Manners Gentle*.

[18] Clinard and Yeager, *Corporate Crime*, 272.

[19] See, e.g., *WSJE*, 29 Oct. 1985, 2 (plea agreement with Rockwell International Corporation *re* defence contract overcharging); *Asian Wall Street Journal*, 8 Jan. 1985, 5 (charge of involuntary manslaughter under Michigan law against General Dynamics but not corporate officials); 'The Complex Case of the US vs. Southland: To What Extent are Companies Liable for Their Employees' Crimes?', *Business Week*, 21 Nov. 1983, 108–11 (prosecution of Southland questioned given involvement of powerful top officials in offences alleged against company); *Financial Review*, 29 Aug. 1985, 27 (prosecution of Eli Lilly and Co. alone); *WSJ*, 30 March 1984, 15 (charges against officials of Hartz Mountain Corp. dropped when company pleaded guilty); *WSJE*, 10 Oct. 1985, 13 (US SEC proceedings against Kidder Peabody and its director of operations for allegedly misusing $US145 million in customer securities); 'Safety Agency Seeks Record Fine Against USX for Job Violations', *NYT*, 2 Nov. 1989, A10; 'Rockwell Pleads Guilty to Waste Dumping, Blasts US', *Los Angeles Times*, 27 March 1992, A14.

Non-prosecution of corporate executives is also prevalent in many other countries. In Canada, the pattern of enforcement under the Competition Act 1986 has been heavily oriented toward corporate defendants,[20] although Criminal Code offences are usually enforced against individuals.[21] Corporations are the targets of antitrust law enforcement in the European Community (EC).[22] In England, the conventional wisdom is that corporate criminal liability is of little practical significance as compared with individual criminal liability,[23] but there have been numerous cases in which companies alone have been prosecuted.[24] Moreover, the reputation of the English criminal justice system for holding individuals to account was blackened by the so-called Oilgate scandal surrounding the failure of the authorities to prosecute any of the persons responsible for the planned and persistent evasion by British Petroleum and Shell Oil of the British embargo on exporting oil to Southern Rhodesia.[25]

Systematic data are available from Australia where a study was made of the enforcement policies of 96 major business regulatory agencies.[26] Top management of each agency was asked if it had 'a policy or philosophy on whether it is better to prosecute the company itself as opposed to those individuals who are responsible within the company'. Twenty agencies said that they preferred to target the individuals responsible; for 41 the preferred target was the corporation;[27] five said they consistently tried to proceed against both

[20] See Goff and Reasons, *Corporate Crime in Canada*, 117–19; Stanbury, 'Public Policy Toward Individuals Involved in Competition Law Offences in Canada'.

[21] Canada, Law Reform Commission, Working Paper 16, *Criminal Responsibility for Group Action*, 33.

[22] See, e.g., 'EC Commission Sets Fines on Shippers in Africa Cartel', *WSJ*, 2 April 1992, 3; *Musique Diffusion Francaise SA, C. Melchers & Co., Pioneer Electronic (Europe) NV and Pioneer High Fidelity (GB) Limited v E. C. Commission* [1983] 3 CMLR 221; ECS/AKSO [1986] 3 CMLR 273; *Fanuc Ltd. and Siemens AG* [1988] 4 CMLR 945; *Eurofix Limited and Bauco (UK) Limited v Hilti AG* [1989] 4 CMLR 677; *Melkunie Holland BV* [1989] 4 CMLR 853; *Re the Welded Steel Mesh Cartel* [1991] 4 CMLR 13.

[23] See Williams, *Criminal Law*, 865; Hill, 'Recent Developments in Corporate Criminal Law in England'.

[24] See, e.g., *Tesco Supermarkets Ltd. v Nattrass* [1972] AC 153; *Alphacell Ltd. v Woodward* [1972] AC 824; *R v St. Margarets Trust Ltd.* [1958] 1 WLR 522; Carson, 'White-Collar Crime and the Enforcement of Factory Legislation'.

[25] See Bailey, *The Oilgate Scandal*; Bingham and Gray, *Report on the Supply of Petroleum and Petroleum Products to Rhodesia*; Box, *Power, Crime, and Mystification*, 46. For a sympathetic account of the decision of the DPP and Attorney General not to prosecute anyone, see Edwards, *The Attorney General, Politics and the Public Interest*, 325–34, which seems to turn British justice on its head. 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 ministers 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. Compare *Financial Times*, 11 Nov. 1985, 2 (magistrates in Palermo charge 475 Mafia suspects).

[26] See Grabosky and Braithwaite, *Of Manners Gentle*.

[27] For example, the Australian Tax Office. For a spokesman's description of the Office's policy and practice, B. Conwell, as quoted in Freiberg, 'Enforcement Discretion and Taxation Offences', 86–7.

the corporation and personnel concerned; and 30 had no policy or philosophy on the matter. The 20 agencies with a preference for individual liability were mostly in the areas of mine safety (where legislation often focuses liability on managers and supervisors)[28] and in maritime safety and maritime oil pollution regulation (where there is a tradition of viewing the ship's captain as the preferred target).[29] Thirty-eight of the 96 agencies had not proceeded against an individual during the previous three years (1981–84).

De facto immunity from individual criminal liability for corporate crime is also prevalent in Continental jurisdictions. In Germany, where the principle of individual responsibility for crime is so firmly entrenched that corporations are not subject to criminal liability,[30] the difficulty of prosecuting corporate officials is well recognised.[31] This has come about partly as a result of the Flick bribery case.[32] Representatives of Flick were alleged to have engaged in an extensive campaign of political bribery but, despite much protest in the media, only one person from the company was prosecuted. Memories go back to the Thalidomide prosecution in 1965, when nine executives of Chemie Grünenthal were indicted for involuntary manslaughter; after long delays in the trial process, the prosecution was eventually abandoned when the company paid $US31 million in civil compensation.[33] Today in Germany, administrative sanctions have become a mainstay of corporate regulation, especially in antitrust and environmental protection[34] and, where administrative sanctions are used, the usual targets are corporations, not individuals. The same dependence on administrative sanctions is apparent in EC enforcement, where total reliance is placed on corporate liability.[35] A stronger commitment to individual responsibility for organisational wrongdoing was often claimed of the old communist jurisdictions,[36] but it is unclear whether this was more

[28] See Coal Mines Regulation Act 1982 (NSW), ss. 160–2.

[29] See, e.g., Taylor, 'Criminal Liabilities of Ships' Masters'; Taylor, 'The Criminal Liability of Ships' Masters'; Warbrick and Sullivan, 'Ship Routeing Schemes and the Criminal Liability of the Master'.

[30] See Jescheck, *Lehrbuch des Strafrechts* 180–2.

[31] Muller, *Die Stellung der juristischen Person im Ordnungswidrigkeitenrecht*. In antitrust enforcement, the priority is to impose liability on individuals but the practice almost invariably is to impose liability on corporations.

[32] See generally Jung and Krause, *Die Stamokap-Republik der Flicks*; Horster-Philipps, *Im Schatten des Grossen Geldes*; Kilz and Preuss, *Flick: Die Gekaufte Republik*.

[33] See Knightley et al., *Suffer the Children;* Sjostrom and Nilsson, *Thalidomide and the Power of the Drug Companies*.

[34] See, e.g., Tiedemann, 'Antitrust Law and Criminal Law Policy in Western Europe'.

[35] See Kerse, *EEC Antitrust Procedure*; 'EC Commission Sets Fines on Shippers in Africa Cartel', *WSJ*, 2 April 1992, 3.

[36] In East Germany, for instance, administrative sanctions were used against state economic enterprises and individuals, with the emphasis on the latter. This was primarily because of the value attached to individual accountability, coupled with the relative ease of locating responsibility in a tightly structured environment where lines of accountability were clearly drawn. There was also a reluctance to use monetary penalties against state enterprises because of the risk of inflicting overspills on workers: Professor Erich Buchholz, Institute of Criminal Law and Criminology, Humboldt University, Berlin, personal communication, 30 Oct. 1985. See further Conklin, '*Illegal But Not Criminal*', 121–2.

the official line than a reflection of practice.[37] In environmental enforcement, some Eastern European countries made extensive use of administrative penalties imposed on the enterprise.[38]

At some level of abstraction government agencies often assert 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 practice is our concern, together with the implications of adopting a policy that is more honoured in the breach than in the observance. We do not suggest 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.[39]

There are of course numerous instances where corporate officers have been prosecuted, often successfully.[40] One notable US example is the widely publicised prosecution and conviction for murder of three executives of an Illinois company, Film Recovery Systems, whose operations had resulted in the cyanide poisoning of a worker.[41] 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. Another well-known English example is that of Ernest Saunders, the managing director of Guinness plc, who was convicted and sentenced to jail for offences relating to the manipulation of Guinness share prices to thwart a takeover by the Distillers Group. The main actors in this skulduggery were easy to identify; as in most cases of defensive measures against takeovers, relatively few people were in a position to call the shots.[42]

Compare these cases with Union Carbide's Bhopal disaster in India in 1984:[43] investigating exactly what happened at all relevant points down the

[37] For instance, in the former state of Yugoslavia it has been said that, often 'no one is responsible' for violations committed on behalf of economic enterprises: Professor Ljabo Baucon, Law School, University of Ljubljana, personal communication, 3 Oct. 1985. See also Schelling, 'Command and Control', 84–5.

[38] Sand, 'The Socialist Response'; Johnson and Brown, *Cleaning Up Europe's Waters*; Anderson et al., *Environmental Incentives*, 49.

[39] See, e.g., US House of Representatives, *White-Collar Crime* (testimony of Robert Fiske).

[40] See, e.g., Ermann and Lundman, *Corporate Deviance* (1st edn), 44 (Equity Funding prosecutions); Goldberg, 'Corporate Officer Liability for Federal Environmental Statute Violations'; Cohen, 'Environmental Crime and Punishment'; Schneider, 'Criminal Enforcement of Federal Water Pollution Laws in an Era of Deregulation', 667; *WSJE*, 13 Nov. 1985, 13 (charges against employees of Bindley Western); *Washington Post*, 3 Dec. 1985, 1 (General Dynamics Corp and four present or former executives indicted *re* defence contract fraud); 'Keating is Sentenced to 10 Years for Defrauding S. & L. Customers', *NYT*, 11 April 1992, 1.

[41] *Los Angeles Times*, 15 Sept. 1985, 1; *NYT*, 15 June 1985, 1. The convictions were quashed on appeal and a new trial ordered: *Illinois v O'Neill, Film Recovery Systems, Inc. and others* (1990) 55 NE 2d 1090.

[42] See further Hobson, *The Pride of Lucifer*.

[43] See, e.g., Muchlinski, 'The Bhopal Case'; Baxi, *Mass Disasters and Multinational Liability;* 'Evidence from Bhopal', *Multinational Monitor*, July 3, 1985, 1–7; *SMH*, 1 April 1985, 6.

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.[44] The same is true in many other contexts, some of the more obvious of which include the operations of the Bank of Credit and Commerce International (BCCI),[45] the savings and loan scandal in the US,[46] the deceptive practices of numerous government contractors in the US defence industry,[47] the Zeebrugge ferry disaster,[48] and the insurance-selling scam perpetrated by insurance companies against Australian Aboriginal people in North Queensland.[49]

Non-assurance of internal accountability within corporations

The second major problem of accountability for corporate crime is non-assurance that sanctions against corporations will result in due allocation of responsibility as a matter of internal disciplinary control.

In theory, the type of sanction usually deployed against corporations—the fine or monetary penalty—is supposed to pressure corporate defendants into taking internal disciplinary action.[50] An initial difficulty in some countries, including England, Australia and Canada, is that corporate criminal liability depends on the 'directing mind' principle,[51] which in practice means that large corporations are virtually insulated from criminal liability for serious offences.[52] This was in fact what happened in the Zeebrugge ferry case,[53] where the prosecution in England failed largely because of the insuperable obstacle of establishing that a directing mind had been criminally negligent. Putting aside that obstacle, however, there is no guarantee that monetary punishment will trigger any form of internal accountability.[54] This is a dark side

[44] See, e.g., *WSJE*, 8 Nov. 1985, 13 (claim by Jackson Browning, Union Carbide's vice-president in charge of health, safety and environmental affairs, that the disaster was caused by a reaction set off when 120–240 gallons of water were introduced into a storage tank by people whose identity is unknown, and that 'We have all but ruled out anything but a deliberate act'); *Financial Times*, 11 Nov. 1985, 3 (accusations that the disaster was caused by a cyanide gas leak). See generally 'Bhopal Disaster Spurs Debate over Usefulness of Criminal Sanctions in Industrial Accidents', *WSJ*, 7 Jan. 1985, 18; Walter and Richards, 'Corporate Counsel's Role in Risk Minimization'.

[45] See Chapter 7 in this book.

[46] See Mayer, *The Greatest Ever Bank Robbery*; Adams, *The Big Fix*.

[47] See Shirk, Greenberg and Dawson, 'Truth or Consequences'.

[48] See Chapter 7 in this book.

[49] See Chapter 7 in this book.

[50] See generally Posner, *Antitrust Law*, 225–8; Fisse, 'The Social Policy of Corporate Criminal Responsibility', 382–6; Stone, 'The Place of Enterprise Liability in the Control of Corporate Conduct', 29.

[51] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

[52] See Fisse, *Howard's Criminal Law*, 600–4.

[53] See *R v Stanley and others*, CCC No 900160, 19 Oct 1990; *R v HM Coroner for East Kent, ex parte Spooner* (1989) 88 Cr App R 10. Compare Bergman, 'Recklessness in the Boardroom'.

[54] See Coffee, 'Corporate Crime and Punishment', 458–60.

of corporate self-regulation about which little is known by outsiders.[55] A high degree of trust has been reposed in corporations to maintain internal discipline.[56] It is readily apparent, however, that companies have strong incentives not to undertake extensive disciplinary action. In particular, a disciplinary program may be disruptive,[57] embarrassing for those exercising managerial control,[58] encouraging for whistle-blowers,[59] or hazardous in the event of civil litigation against the company or its officers. Sometimes these incentives may be veiled by the claim that the problem has been sufficiently investigated and resolved by public enforcement action.[60] These factors have been discussed in the literature, but the law has failed to provide adequate means for ensuring that corporate defendants are sentenced in a manner directly geared to achieving internal accountability.[61]

The classic illustration of the ease with which corporate defendants can pay a fine and walk away from internal disciplinary action was the reaction of the Westinghouse Corporation upon being convicted and sentenced for its role in the US heavy electrical equipment price-fixing conspiracies of 1959–61.[62] Westinghouse decided against disciplinary action, partly on the ground of a watered-down version of the defence which failed in the

[55] For one empirical study see American Bar Association, Final Report, *Collateral Consequences of Convictions of Organizations*, 107–8 (according to the unverified responses of companies convicted and sentenced for federal offences over a two-year period, 41 per cent had since replaced senior management, 29 per cent had replaced middle management, 16 per cent had improved their peer review process, and 10 per cent had fired everyone responsible). See also Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, 60–1, 121, 154–5, 166–7, 172, 192–4, 209, 224, 234. Occasionally the responses become well known: see US, HR, Committee on the Judiciary, Subcommittee on Crime, *E. F. Hutton Mail and Wire Fraud Case*, Report, 99th Congress, 2nd Sess., 1986, 156–8. This report berated E. F. Hutton for failing to respond adequately to the extensive fraud committed on its behalf; ibid., 150–5, 159.

[56] See further Shapiro, 'Policing Trust'.

[57] Consider, e.g., the internal disciplinary inquiry described in McCloy, *The Great Oil Spill*.

[58] See, e.g., *Nation*, 18 Feb. 1961, 129 (editorial criticism of General Electric's top management after the company undertook disciplinary action against employees involved in the electrical equipment conspiracies).

[59] Coffee, 'Corporate Crime and Punishment', 459; Braithwaite, *Corporate Crime in the Pharmaceutical Industry*, 402.

[60] See Coffee, 'Corporate Crime and Punishment', 458–9. Such a claim was made by Westinghouse when it refused to take disciplinary action in the wake of the American electrical equipment price-fixing conspiracy prosecutions.

[61] Internal discipline is however one of a number of factors a court may take into account when determining sentence. See *Trade Practices Commission v Stihl Chain Saws* (Aust.) *Pty. Ltd.* (1978) ATPR 40-091; *Trade Practices Commission v Dunlop Australia Ltd.* (1980) ATPR 40-167; Freiberg, 'Monetary Penalties under the Trade Practices Act 1974 (Cth)', 13; 18 USC s. 3572(a)(4) (which provides that, when imposing a fine on a corporation, a court is to consider 'any measures taken by the organization to discipline its employees or agents responsible for the offense or to insure against a recurrence of such offense'); Coffee and Whitbread, 'The Convicted Corporation'.

[62] See Walton and Cleveland, *Corporations on Trial*, 103. The other companies involved, with the exception of General Electric, also refrained from internal disciplinary action. See Herling, *The Great Price Conspiracy*, 311.

Nuremberg trials: 'anybody involved was acting not for personal gain, but in what he thought was the best interests of the company'.[63] By contrast, the internal discipline by General Electric in response to the the heavy electrical equipment conspiracies was relatively severe.[64] 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'.[65]

Another prominent example was the refusal of American Airlines to blame publicly any individuals within the company when it incurred civil penalties of $US1.5 million for violations of Federal Aviation Administration aircraft maintenance requirements. One of the violations had been committed by flying an 'unairworthy' plane from which an engine had fallen when struck by a piece of ice from an unrepaired leaky toilet.[66] 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.[67] 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.'
>
> This playing down of individual accountability is in line with the comparative puniness of the fine. The FAA [Federal Aviation Administration] has collected $1.5 million from a company that had operating revenues of $5.3 billion in 1984 and record profits of $234 million for the first half of 1985. Not a dime came out of the paychecks of the invisible managers.[68]

Efforts were made by American Airlines to revise its maintenance procedures and to expand its maintenance team,[69] 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, 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're going to have people cut corners and have the kind of things that happened at American.[70]

[63] Ibid.
[64] Ibid., 96–101; Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, 192–3.
[65] US Senate, *Administered Prices* 17671–2.
[66] McCarthy, 'American: It's a Flying Shame', *WSJE*, 7 Nov. 1985, 1.
[67] McCarthy, 'American: It's a Flying Shame'.
[68] Ibid.
[69] *WSJE*, 7 Nov. 1985, 20.
[70] Ibid.