

## INEGALITARIAN CONSEQUENCES OF EGALITARIAN REFORMS TO CONTROL CORPORATE CRIME

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### INTRODUCTION

In some ways Watergate had a greater impact on the domestic affairs of other countries than it did on those of the United States. The United States had a growing government apparatus for the control of white-collar crime prior to Watergate, whereas in many countries, including Australia,<sup>1</sup> a significant effort to control white-collar crime emerged for the first time with the post-Watergate attitude toward the abuse of power.<sup>2</sup> It has been the social democratic parties of the capitalist democracies that have been at the forefront of campaigns to crack down on white-collar crime.<sup>3</sup> The last Labor Attorney General in the Australian national government took that position proclaiming he would change the focus of consumer affairs legislation from *caveat emptor* to *caveat vendor*. Social democrats assume that they are acting in the interests of their working class constituency by supporting legal controls on white-collar crime. Such controls are seen as an attempt to protect the powerless from the depredations of the powerful.

Often, however, these measures prove counterproductive. The corporate affairs commissions which the social democratic politicians so strongly supported, and which the conservatives equally vehemently opposed, frequently fall into a role in modern capitalism that is more concerned with protecting the corporation from crimes perpetrated by its employees or its creditors than with protecting employees and consumers from being victimized by the corporation.<sup>4</sup> In all developed

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1. State governments in Australia all manifested utter neglect of white-collar crime until the New South Wales Labor government elected in 1976 began a series of initiatives. Federal trade practices and consumer protection activism was also dormant until the Labor government's strengthening of the Trade Practices Act in 1974. See A. HOPKINS, *CRIME, LAW AND BUSINESS: THE SOCIOLOGICAL SOURCES OF AUSTRALIAN MONOPOLY LAW* (1978).

2. The 1975 United Nations Congress on the Prevention of Crime and Treatment of Offenders was the first in which one of the five agenda topics focused on white-collar crime.

3. In the United States, which has no significant social democratic party, it is probably true to say that the liberal sections of the Democratic Party have been most vocal in directing fire and thunder at white-collar criminals. Key figures in this movement have been Senator Kennedy and Congressman Conyers.

4. Arguably the United States has been an exception to this pattern, in that the concern to protect industry from white-collar criminals has been matched by a com-

countries we find that business interests have succeeded in making computer crime—a form of crime in which it is usually a corporation that is the victim<sup>5</sup>—one major preoccupation of the effort to control white-collar crime. The effect of the widespread use of public money to catch computer criminals is, in aggregate, to redistribute wealth from the average taxpayer to the companies that are saved from computer crime victimization.<sup>6</sup> It is conceivable that some social democratic politicians would adopt the attitude that corporations can afford to protect themselves from computer criminals if they were confronted with the reality of how the resources from their war against white-collar crime were being spent.

Most readers undoubtedly have been exposed to the above argument about how a campaign motivated by egalitarian sentiments can in practice have redistributive effects which are inequalitarian. This paper attempts to develop somewhat more sophisticated arguments to show how the nature of law is such that egalitarian attempts to control crimes of corporations can have the consequence of worsening both intranational and international inequality.<sup>7</sup> It will be argued that this occurs because such egalitarian efforts at control often increase the complexity of law and because it is large organizations rather than powerless individuals that can effectively exploit legal complexity. Law in some small way can shift the balance of power. So when the expression “inegalitarian consequences” is used, it can mean widening inequities in the distribution of wealth, or fostering greater inequality in certain types of suffering against which the law is designed to be a protection (e.g. occupational disease). The inequality can be between rich and poor individuals, or between powerful organizations and powerless individuals. All of these types of inequality have been concerns of the social democratic reformers.

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mitment to agencies such as the Occupational Safety and Health Administration and the Food and Drug Administration whose charter is clearly the protection of workers and consumers. Possibly this is because the United States is the only country in the world where consumer movements have achieved anywhere near the level of effectiveness of corporate lobbyists.

5. D. PARKER, *CRIME BY COMPUTER* (1976).

6. Galbraith has confessed that “In *The Affluent Society* I dealt with the starvation of the public services as though all services were alike. I did not see that this deprivation was great where public needs were involved, nonexistent where powerful industry pressed its requirements on the state.” J. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE*, viii (1973).

7. In this paper, therefore, the concern will not be with “white-collar crime,” as defined in the most influential formulations of either E. SUTHERLAND, *WHITE-COLLAR CRIME* (1949) or H. EDELHERTZ, *THE NATURE, IMPACT AND PROSECUTION OF WHITE-COLLAR CRIME* (1970), but with that subset of white-collar crime called corporate crime—law violations perpetrated by corporations or by corporate officers acting on behalf of the corporation. The paper is not concerned with criminal law in a narrow sense, but adopts a definition of corporate crime which includes civil as well as criminal violations.

The paper will go on to argue that there are certain reasons why only a small number of notably severe abuses by powerful corporations are selected for effective legal control in developed countries. One of the strategies which is then adopted by transnational corporations is to shift the abuses to the Third World. Hence, legal controls may have, for most purposes, strengthened the hand of those powerful organizations which can exploit legal complexity; while, for a few purposes, such controls protected powerless individuals in developed countries at the expense of even more powerless individuals in the Third World. Finally, it will be argued that such a theory does not have general applicability, and some attempt is made to specify the conditions under which it does apply. Before developing the theory, it is necessary to establish two propositions which underpin it. The first is that corporate crime in the 1980's cannot fully be understood by analyses which restrict their focus within one set of national boundaries; an international perspective is essential. The second proposition is that the effectiveness of legal controls depends upon the diffuseness or concentration of the interests which will be affected by the laws. Because a corporation tends to have a stronger interest in laws regulating its behavior than an individual whom such laws are designed to protect, such laws will inevitably tend to be ineffective.

## I. CORPORATE CRIME AND THE INTERNATIONALIZATION OF CAPITAL

It is projected that within the present decade seventy-five per cent of world trade and production will be controlled by three hundred or fewer transnational corporations.<sup>8</sup> Even at the beginning of the last decade, thirty-two transnational corporations<sup>9</sup> had annual sales greater than the gross national products of South Vietnam, Libya, or Saudi Arabia.<sup>10</sup> The internationalization of capital combined with the internationalization of communications (jet travel, telecommunications, satellites, etc.) is making the world a global village, albeit a divided one. The most critical legal problems, therefore, inevitably acquire an international character. When the *Torrey Canyon* was wrecked, causing coastal damage to both Britain and France, it was carrying

8. Note, *Control of Multinational Corporations' Foreign Activities*, 15 WASHBURN L.J. 435 (1976).

9. General Motors, Standard Oil (N.J.), Ford, Royal Dutch/Shell Group, General Electric, International Business Machines, Mobil Oil, Chrysler, Unilever, International Telephone and Telegraph, Texaco, Gulf Oil, Western Electric, United States Steel, Volkswagen, Westinghouse, Standard Oil (Calif.), Philips, British Petroleum, Ling-Temp-Vought, Standard Oil (Ind.), Boeing, Dupont, ICI, British Steel, General Telephone and Electronics, Nippon Steel, Hitachi, Radio Corporation of America, Goodyear, and Siemens.

10. L. BROWN, *THE INDEPENDENCE OF NATIONS* (1972).

117,000 tons of oil from Kuwait, was Liberian registered, American owned and chartered, sailed by an Italian captain and crew, grounded in international waters, contracted to a Dutch company for salvage, and destroyed by rockets of the British navy and air force.

The law, however, has not changed to reflect the increasingly international character of legal problems. One of the fundamental realities about law is that it is too slow-moving to keep up with rapidly changing technological and economic realities.<sup>11</sup> Legal institutions are designed to be stable and predictable, while economic institutions are designed to be rapidly adaptable to changing market conditions. Many scholars have pointed out that the law, lagging behind the corporatism of late capitalist development, remains fixed at the level of individualism.<sup>12</sup> In addition to being constrained by the datedness of its content, the effectiveness of law is also compromised by outmoded jurisdictional limitations. For example, Australia, a federation of six state governments, will for the first time in the 1980's confront the reality that most companies are no longer confined within the borders of one state with the establishment of the National Companies and Securities Commission.<sup>13</sup> This is at a time when the new structural reality is not interstate, but international.

The internationalization of capital has changed the very nature of corporate crime, but few scholars have attempted to study these changes.<sup>14</sup> Gross has implied that what is now needed is an interactionist analysis of relationships between people at corporate headquarters and managers at the periphery.<sup>15</sup> He observes that when subsidiaries run afoul of local laws, headquarters may disclaim responsibility, plead ignorance of local laws, or even make a virtue of a policy of allowing branches "autonomy":

Headquarters may insist that their subsidiaries meet certain profit (or other) goals, while at the same time making it

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11. See C. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975).

12. Unfortunately, almost all legal systems in the world have evolved to deal with the crimes of private individuals rather than those of complex organizations. See, e.g., *id.*; M. TIGAR & M. LEVY, *LAW AND THE RISE OF CAPITALISM* (1977); Fisse, *The Social Policy of Corporate Criminal Responsibility*, 6 *ADEL. L. REV.* 361 (1978); Kamenka, *Beyond Bourgeois Individualism: The Contemporary Crisis in Law and Legal Ideology*, in *FEUDALISM, CAPITALISM AND BEYOND* (E. Kamenka & R. Neale eds., 1975).

13. The United States does not seem to have a notably superior record in rapidly moving towards federal jurisdiction over patently interstate corporate activities. Campaigns for federal chartering of corporations seem to continue to fall on deaf ears. See Young, *Federal Corporate Law, Federalism, and the Federal Courts*, 41 *L. & CONTEMP. PROBS.* 146 (1977).

14. The work which Edelhertz is beginning to mount in this area will hopefully begin to remedy this deficiency. See EDELHERTZ, *supra*, note 7.

15. Gross, *Organizations as Criminal Actors*, in *TWO FACES OF DEVIANCE: CRIMES OF THE POWERLESS AND POWERFUL* 209 (P. Wilson & J. Braithwaite eds. 1978).

clear that headquarters can hardly be intimately acquainted with the laws of foreign countries. Hence, under the guise of "local autonomy" (which may be hailed as "throwing off the shackles of colonialism" by local enthusiasts), the subsidiary may be forced to engage in crime for which *they will be held responsible by their governments*. Meanwhile, headquarters (in New York, Tokyo, or Rotterdam), while hardly pleased with the result (loss of income), nevertheless escapes criminal prosecution. The enormous chaos created by Lockheed bribe payments to Japanese government officials nearly brought the government down, but at Lockheed headquarters in the U.S., the company was able to escape criminal liability.<sup>16</sup>

It is not difficult to understand how it might be rational for a transnational corporation to set goals for its subsidiaries that can only be achieved through law-bending or law-breaking. Corporate headquarters might be quite happy to act as an insurer, bearing the risk of any penalties that might be incurred by its subsidiaries throughout the world in the (correct) belief that every loss resulting from corporate crime will be more than offset by many illegal gains in other parts of the world.

While Gross' observations are important, there is a more basic distinction between transnational corporate crime and traditional white-collar offenses. I shall now attempt to argue that the way the transnational corporation deals with legal constraints is qualitatively different from most localized forms of white-collar crime in that the transnational's predominant strategy is law evasion rather than law violation.<sup>17</sup> Tax evasion is a useful paradigm for understanding transnational corporate crime. It is common knowledge that both individuals and companies frequently transfer income to tax havens outside of the national borders of the country in which they operate so as to avoid tax.<sup>18</sup> Related to this is the ubiquitous phenomenon of the transnational subsidiary in a low-tax country selling goods at a grossly excessive price to another subsidiary of the same transnational located in a high-tax country. This decreases the profits recorded in the high-tax country and concomitantly increases profits for the low tax subsidiary. Such shifting around of profits obviously may be quite legal from the perspective of each set of national laws. Equally obviously, these activities are frequently accompanied by a variety of devices for fraudulently misrepresenting profits. Our concern here is

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16. *Id.*

17. See also Braithwaite, *Transnational Corporations and Corruption: Toward Some International Solutions*, 7 INT'L J. Soc. L. 125 (1979).

18. See J. NEWTON, *TAX HAVENS* 2 (1977).

not with the legality or illegality of the avoidance-evasion strategies;<sup>19</sup> rather, it is with the way that the transnational plays off one set of laws against another to its own advantage and to the long-term disadvantage of both host countries. Each nation must then choose between the lesser of two evils—either to set lower company tax rates or risk having less company profits to tax.<sup>20</sup>

The tax evasion example clearly illustrates how the transnational corporation exploits differences in national laws to find the line of least resistance to achieving its ends. Another paradigmatic area where there are vast differences in the severity of legislation that restricts the activities of transnationals is the policing of new drug releases. Developed nations critically evaluate the results of exhaustive experimentation on animals and then humans before allowing a new drug to be marketed and usually conduct independent tests as well. Most Third World countries cannot afford to employ pharmacologists and toxicologists to check the accuracy of claims made by drug companies, nor even the bureaucrats to police the sale of untested drugs. It may therefore be rational for the transnational to initially market a risky drug in a Third World country. This was the case with the development of the contraceptive pill in the 1950's and 1960's where primarily Puerto Rican and Mexican women were used as the guinea pigs.<sup>21</sup> If people die, or suffer serious side effects, then at least the company has made a small amount of money while the going was good, and it has saved money on expensive laboratory testing of the drug. If people suffer few side effects from the drug, then the clinical trials from Third World countries can be used to justify entry into countries with somewhat more stringent regulations. In other situations, a reversed law evasion strategy may be appropriate. A product might be developed in the United States for the domestic market, then dumped on the Third World market when rejected as unsafe by an American regulatory agency.<sup>22</sup>

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19. Clearly, the legality of the strategies is for most purposes a crucial question, but here the point being made is that the existence of multiple legal systems makes the importance of the position taken by any one system a constraint of limited relevance.

20. See Laver, *Intergovernmental Policy on Multinational Corporations: A Simple Model of Tax Bargaining*, 5 EUR. J. POLITICAL RESEARCH 363 (1977).

21. The problem of international law evasion in the pharmaceutical industry will be dealt with extensively in a book on corporate crime in the pharmaceutical industry which I am writing at the moment.

22. For various examples of dumping by United States companies, see Dowie, *The Corporate Crime of the Century*, MOTHER JONES, November, 1979. It is not only Third World consumers who are the victims of American dumps. Australia has suffered from more than one dumping of infant pacifiers which faced rejection by the Consumer Product Safety Commission. See *id.* at 35, for a discussion of dumping in Australia of 120,000 unsafe teething rings.

Another classic example of the transnational law evasion paradigm is the company which evades tough pollution control laws in a developed country by shifting capital investments in the highly pollutive aspects of its operations to a developing country that has less stringent regulations. Barnet and Müller have discussed this phenomenon:

For "very high polluting plants such as nonferrous metals smelting and refining operations," Welles's research suggests, "pollution havens" in the underdeveloped world are going to provide an answer. (In Mexico City's English-language newspaper the State of Mexico advertises for polluters: "RELAX. WE'VE ALREADY PREPARED THE GROUND FOR YOU. If you are thinking of fleeing from the capital because the new laws for the prevention and control of environmental pollution affect your plant, you can count on us." The use of "pollution havens" is already well advanced. There are dozens of refineries along the 1,700 mile Caribbean coast. One petrochemical complex on the south coast of Puerto Rico belches smoke clouds as far as 90 miles away. The lovely island of St. Croix, according to the president of the Caribbean Conservation Association, "now gets oil spills two to three times a week.")<sup>23</sup>

Barnet and Müller have been the most influential proponents of the view that Third World countries more often than not suffer a net financial disadvantage from investment by transnational corporations. This is because transnationals supplant indigenous companies, attract both local and international loan financing away from local business, avoid taxes through transfer pricing, precipitate exchange rate crises, repatriate rather than reinvest profits, and engage in other practices which maintain dependence and inhibit the self-sustaining growth of Third World economies. Defenders of transnationals, on the other hand, point out that foreign investment in the Third World creates jobs, generates tax revenues, and improves balances of payments. The debate leads nowhere.

Obviously, some types of investment provide an aggregate benefit to the host economy and others impose a net cost. In cases where there is a financial benefit, it may be that the Third World country is acting in the interests of its citizens by tolerating the non-financial cost (*e.g.* pollution). This is not necessarily to say that the harm to the Third World from the redistribution of pollution will be counterbalanced by greater financial equity between developed and Third World economies. The financial benefits to the Third World will in a large proportion of cases be exceeded by the benefits to the developed

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23. R. BARNET & R. MÜLLER, *GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS* 344-45 (1975).

economy resulting from expanded markets. Hence, while the impact of international law evasion on the distribution of exploitative industrial practices is clear, its impact on the international distribution of wealth is a separate issue which can only be resolved through case-by-case investigation.

An important thing to understand about international law evasion activities is that, in addition to fostering international inequality by saddling the Third World with the most exploitative industries, they also foster intranational inequality between powerful corporations and powerless individuals in every nation of the world. The most important consequence of a pattern of international law evasion is not that workers or consumers will be victimized in the country where the transnational does finally decide to invest, but that all other countries become afraid to act against transnationals to protect its people lest an exodus of capital be precipitated.<sup>24</sup> Standards everywhere become depressed in response to the fear of capital flight.

## II. THE DIFFUSENESS OF INTERESTS

It is a commonplace observation that while the benefit from a company violation such as price fixing is concentrated in the hands of the company, the cost is dispersed over a large number of victims.<sup>25</sup> Thus, while it might not be worthwhile for the individual consumer to sue a company that has illegally overcharged several dollars for a product,<sup>26</sup> the same case might be worth millions of dollars to the company, which is therefore willing to employ the best lawyers to defend what could be the lifeblood of its success.<sup>27</sup> The diffuseness

24. Developed as well as Third World countries are caught up in these threats of capital flight. See, for example, a piece on threats by U.S. finance capital to withdraw from the Australian market unless there is a loosening of the regulatory stringency of the Australian Insurance Commissioner. *THE WEEKEND AUSTRALIAN*, Apr. 7-8, 1979.

25. See A. BEQUAI, *WHITE-COLLAR CRIME: A 20TH CENTURY CRISIS* (1978). M. CLINARD, P. YEAGER, J. BRISSETTE, D. PETRASHEK, & E. HARRIES, *ILLEGAL CORPORATE BEHAVIOR* (1979).

26. In some jurisdictions, of course, there is the possibility of class actions. See Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparative Contribution*, 25 *BUFFALO L. REV.* 643 (1976); Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281 (1976); Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and The "Class Action Problem"*, 92 *HARV. L. REV.* 664 (1979); Simon, *Class Actions: Useful Tool or Engine of Destruction*, 55 *F.R.D.* 375 (1973); *Developments in the Law, Class Actions*, 89 *HARV. L. REV.* 1318 (1976); *Class Actions*, Australian Law Reform Commission Discussion Paper No. 11 (1979).

27. Vice President Mondale, in an address to the Second Judicial Circuit Conference on September 10, 1977 indicated that he saw the diffuseness of interests reality as a most pressing concern for reformers: "Nothing is more destructive to a sense of justice than the widespread belief that it is much more risky for an ordinary citizen to take \$5 from one person at the point of a gun than it is for a corporation to take \$5 each from a million customers at the point of a pen."

of interests argument applies to most areas of corporate crime. Even a factory which is being asked to spend money to control the emission of a carcinogen is likely to be more protective of its interests than an individual who is threatened with the more serious consequence of cancer. This is because, whereas the expense to the company is certain, the risk of cancer to the individual may be only one in 10,000.

The government, like the individual consumer, has only diffuse interests in matters that are of great interest to its potential corporate adversaries. Corporate affairs and consumer affairs departments see so many corporate violations that are adversely affecting the interests of the community that any one of them represents only a tiny fraction of their concerns. We therefore end up with a confrontation between a government, which is prepared to devote only a small fraction of its resources to any one act of litigation, and a company, which may well be prepared to expend every resource available in what it regards as a legal fight to the death.<sup>28</sup> In such circumstances the company would be expected to win, but what in reality usually happens is that the government realizes the futility of an all-out legal battle over a matter involving the company's vital interests, so it either abandons the fight or uses whatever pressure it can muster in out-of-court negotiations. Civil servants who push on with such litigation may be rapped over the knuckles for involving the government in the expense of court cases which run for months or years.<sup>29</sup>

In almost all circumstances, therefore, large corporations engaged in economic crimes have considerable advantages over their potential legal adversaries. Large corporations usually have a concentrated interest in litigation affecting them, as well as the resources to fight. On the other hand, the governments of developed countries have only a diffuse interest in such litigation, though they do have the resources necessary to fight. Individuals (and often small companies) who are the victims of corporate crime typically have only a diffuse interest,

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28. Many authors have discussed the practical problems of governments in using law to control corporate crime. See EDELHERTZ, *supra* note 7; M. GREEN, *THE CLOSED ENTERPRISE SYSTEM* 162 (1972); R. NADER, M. GREEN AND J. SELIGMAN, *TAMING THE GIANT CORPORATION* 33-61 (1976); STONE, *supra* note 11; Braithwaite, *supra* note 17; Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 426 (1963); Levin, *Crimes Against Employees: Substantive Criminal Sanctions Under the Occupational Safety and Health Act*, 14 AM. CRIM. L. REV. 717, 736-37 (1977); Ogren, *The Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle Against White-Collar Crime*, 11 AM. CRIM. L. REV. 959, 961-75 (1973); *Developments in the Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1243-61 (1979); Comment, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 293 (1961).

29. See S. WEAVER, *THE DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION* (1977).

and also lack the resources to fight. Finally, in many ways, the governments of Third World countries are in the same situation as individuals in developed countries—they have a diffuse, though real, interest in corporate crime, but insufficient resources to undertake litigation against a transnational. The typical result is that no one challenges many of the crimes perpetrated by transnational corporations.

### III. MAKING THE GAME MORE COMPLEX FAVORS THOSE WITH MOST RESOURCES AND LEAST DIFFUSE INTERESTS

Now the point has been reached where it can be argued that even though efforts to expand laws limiting companies arise from the most egalitarian of ideals, they may produce the most inegalitarian of consequences both nationally and internationally. A first lead to how such a paradox is possible comes from work by Sutton and Wild<sup>30</sup> which applies Weber's<sup>31</sup> theories to company law.<sup>32</sup> Sutton and Wild point out that when reformist politicians enact laws to crack down on corporate criminals, one consequence is that they make the whole web of relevant law more complex. The proliferation of laws results in a proliferation of loopholes over which legal argument is possible and in increased costs of litigation to the extent that the law does become more complex. "The more precise a rule is, the more likely it is to open up loopholes—to permit by implication conduct that the rule was intended to forbid."<sup>33</sup>

Moreover, as Sutton and Wild observe, "[t]he more formal and complex the body of law becomes, the more it will operate in favour of formal, rational bureaucratic groups such as corporations. In one sense, therefore, 'law' and 'justice' may be fundamentally irreconcilable."<sup>34</sup> One important aspect of the formality of Western law is its predictability. That predictability is achieved by the doctrine of stare decisis—the precept that courts are bound by their own precedents and lower courts by the precedents of higher courts. This predictability is of much more value to the corporation lawyers who advise their clients on how to carefully circumvent the law than it is to the consumer who is quite oblivious to legal precedent. This idea is no more than a specific illustration of Ehrlich's general contention that "[t]he more the rich and the poor are dealt with according to the same legal

30. Sutton & Wild, *Corporate Crime and Social Structure*, in Wilson and Braithwaite, *supra* note 15, at 177.

31. See Weber's work in legal codification in M. WEBER, *ON LAW IN ECONOMY AND SOCIETY* (1954).

32. Sutton and Wild's discussion primarily relates to the New South Wales Companies Act, Securities Industry Act, and Crimes Act.

33. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 425 (1977).

34. Sutton & Wild, *supra* note 30, at 195.

propositions, the more the advantage of the rich is increased.”<sup>35</sup> Or, as Galanter has more colorfully expressed it, “[t]he sailor overboard and the shark are both swimmers, but only one is in the swimming business.”<sup>36</sup> Hence, the argument is that the more laws we have, irrespective of their content, the more the premeditated and rational decisions of corporations can turn the web of law to their advantage and to the disadvantage of “irrational” consumers and workers.<sup>37</sup>

This does not mean that it is impossible to enact particular laws which plug loopholes or simplify the law in some way. The distinction which must be grasped is that between the structure of law as a totality and the content of individual laws. An appropriate analogy is with organizations becoming larger and more bureaucratic as a consequence. It could be said that organizations need not inevitably become more bureaucratic as a result of having more people if the new people are committed to fighting bureaucracy. An organization might decide to appoint new managers who are strongly opposed to red tape. Each of these new managers, however, will require secretaries, clerks, research assistants, and other support staff who may not be as committed to cutting red tape as the manager. Irrespective of the nature of the individuals added to organizations, by the very fact of increasing the size of the organization the structural imperatives of bureaucratization are encouraged.

The enactment of laws to regulate corporate misbehavior is a good way of salving social democratic consciences. But the reformers soon find that enactment is easier than enforcement. Enthusiasm for the crack-down on white-collar crime rapidly wanes when the first prosecution under the new laws occupies a hundred days in court. This is exacerbated, of course, if the prosecution is unsuccessful. Government lawyers, who must in many ways be general practitioners, frequently cannot compete with corporation lawyers who spend their lives finding out everything there is to know about a narrowly delimited area of, for example, tax loopholes. In time, the legislation falls into disuse, but it remains on the statute books to render the body of law more complex.<sup>38</sup>

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35. E. EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 238 (1936).

36. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 363 (1975).

37. See, for example, Wanner's evidence that corporate plaintiffs in a sample of 7,900 civil cases win more, settle less, and lose less than individual plaintiffs. Wanner, *The Public Ordering of Private Relations Part I: Initiating Civil Cases in Urban Trial Courts*, 8 *LAW & SOC'Y REV.* 421 (1974); Wanner, *The Public Ordering of Private Relations Part II: Winning Civil Cases in Urban Trial Courts*, 9 *LAW & SOC'Y REV.* 293 (1974).

38. Of course there are many more general arguments about the undesirability of laws which are difficult and costly to enforce either because of their nature or

Of course, such legislation is most likely to be enforced in situations where the government perceives the corporation as doing relatively great harm to the nation or its citizens. When the government uses or threatens to use the full force of its dormant laws against a transnational, a common response is for the transnational to shift its activities to a more permissive country. In recent years, for example, there has been growing concern on the part of unions and governments in Western nations at the high mortality rates from cancer and asbestosis of workers who are exposed to high concentrations of asbestos dust.<sup>39</sup> This concern has resulted in pressure for the enforcement of widely violated safety standards.<sup>40</sup> In turn, these pressures have led asbestos users to relocate their operations in Third World countries.<sup>41</sup>

What is being suggested, then, is that it is only when cases of quite serious exploitation are brought to its attention that the Western government will enforce its otherwise largely unused legislation controlling companies. In such circumstances, if the Western government is determined to crack down on the transnational, then the transnational is likely to transfer its investment to a capital-starved Third World country. Unlike the developed economy, the Third World country's economy lacks indigenous means of capital formation, and its government is appropriately obsessed with the need to provide a favorable climate for foreign investment. It may lack the capacity to say no. A Third World country may even accept patently unbeneficial and exploitative industries in order to protect its reputation as a stable locus for foreign capital. The transnational finds that in the Third World country it is not plagued by corporate affairs investigators, pollution control officers, consumer affairs advocates, health department officials, or industrial safety inspectors. There is simply not the money for the government to be able to employ such people.

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because of who they are designed to control. Laws which become dormant are a waste of the legislature's scarce time, undermine confidence in the power of legal sanctions, and foster disrespect for law and the legislature. On the other hand, there are dangers in arguing for the repeal of disused laws without asking the question: Is repeal likely to lead in the long term to a weakening of the moral condemnation of such conduct? See Cross, *Unmaking Criminal Laws*, 3 MELB. U.L. REV. 415, 415-21 (1962).

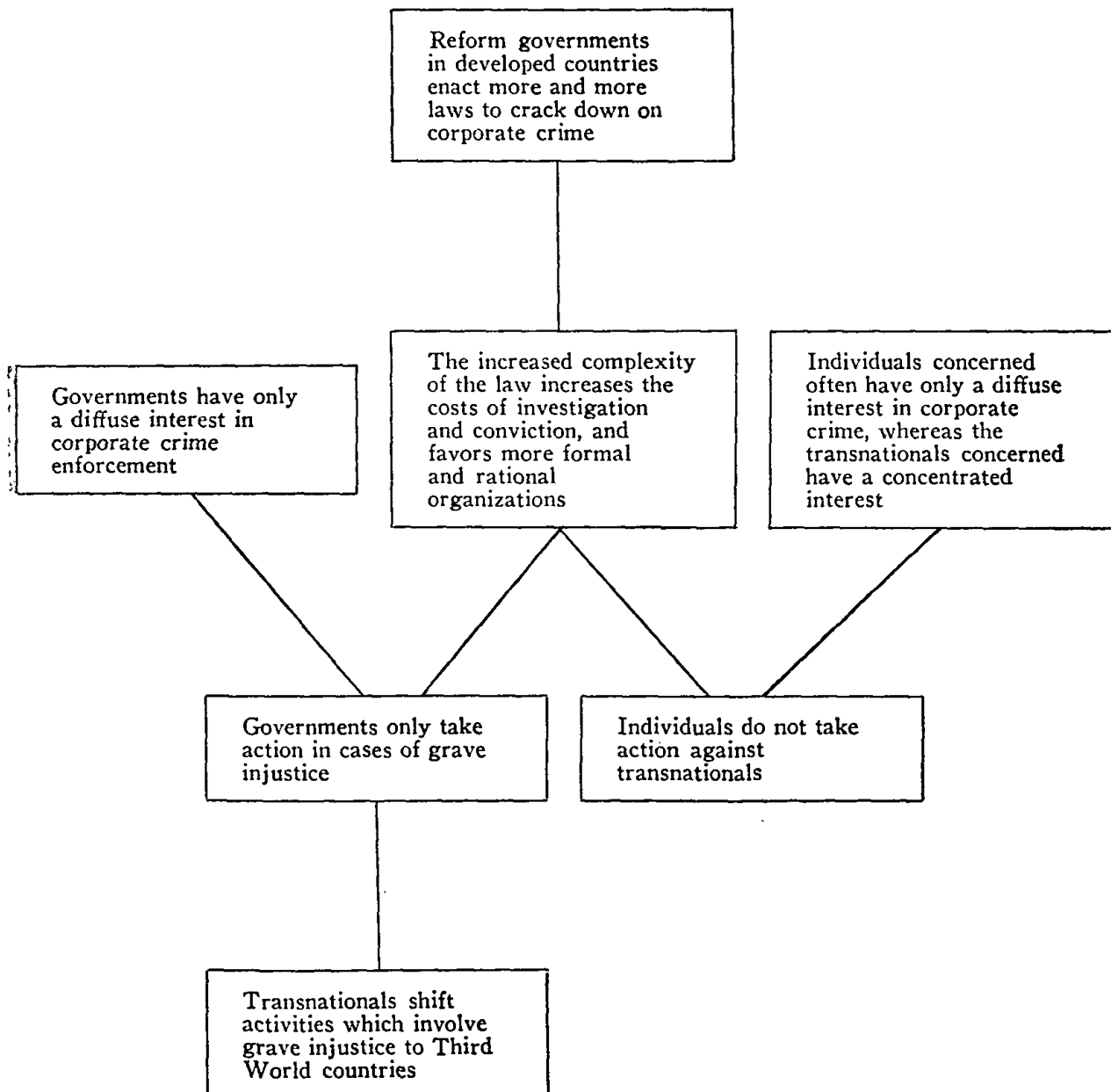
39. See P. EPSTEIN, *THE POLITICS OF CANCER* (1979). For a discussion of the way transnationals buy off union acquiescence with threats of shifting capital investment, see Kassalow, *Aspects of Labour Relations in Multinational Companies: An Overview of Three Asian Countries*, 117 INT'L LABOUR REV. 273 (1978).

40. In one Australian mine, asbestos dust concentrations were found to exceed the Australian safety standard by a factor of 30. Broadband, Australian Broadcasting Commission current affairs radio program, Sept. 29, 1977.

41. It is interesting to note that the largest manufacturer of asbestos products in Australia, the highly profitable James Hardie Company, has recently spent many millions of dollars in relocating some of its asbestos operations in Indonesia—a country not noted for the stringency with which it enforces safety regulations to protect workers.

FIGURE 1

SUMMARY SCHEMA FOR A THEORY OF HOW REFORMS  
TO CONTROL CORPORATE CRIME CAN INCREASE  
INTRA AND INTERNATIONAL INEQUALITY



It may be, therefore, that there is a two-fold irony to the activities of egalitarian legal reformers in developed countries who crusade for new laws to crack down on corporate crime. First, the enactment of these (largely unused) laws increases the complexity of the body of law, and thereby favors the formal and rational large corporations with their specialized departments full of legal experts over the less-directed consumers and workers. Second, one upshot of the (infrequent) threats by developed governments of prosecution under such laws is to spur a transfer of the most obviously exploitative of transnational operations to the Third World. Therefore, some attempts to control corporate crime might paradoxically foster both intra and international inequality.

#### IV. SETTING LIMITS TO THE ARGUMENT

The scenario summarized in Figure 1, however, does not represent a theory which has universal applicability to attempts to use law for the control of corporate crime. Indeed, most such reforms probably do not have paradoxically inegalitarian effects. Even Sutton and Wild in a recent paper accept this. They argue that greater codification and systematization of the rules defining what constitutes a "true and fair" keeping of company accounts is necessary for effective control of corporate accounting abuses.<sup>42</sup> To make it clear that I am modest about the breadth of applicability of the arguments represented by Figure 1, I shall suggest some areas where they patently do not apply.

Consider tax evasion. It hardly needs to be argued that the more complex tax law becomes, the more that body of law can be turned to advantage by the tax specialists of large corporations.<sup>43</sup> Hence, the intranational part of the argument seems applicable. But a consideration of the international aspect of the argument leads to the conclusion that the facts do not fit at all. If the United States government were to become extraordinarily tough and effective in the application of its corporate tax laws, then transnationals would shift more of their taxable income offshore. Some of it would go to Third World countries; much would go to tax havens. The effect would then be an egalitarian shift of income from a more affluent nation (the United States) to a number of less affluent nations. Of course, this conclusion must be

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42. Sutton & Wild, *Companies, the Law and Professions: A Sociological View*, in *LEGISLATION AND SOCIETY IN AUSTRALIA* (R. Tomasic ed.) (1979).

43. In many developed countries, including the United States, governments have established committees to consider ways of simplifying tax laws in part because of assumptions about the way that the wealthy exploit this complexity. Hickman, *Federal Tax Regulations—The Need to Expedite and Simplify*, 30 NAT'L TAX J. 313, 313-14 (1975); *Simplification Symposium*, 34 TAX L. REV. 1-77 (1978).

qualified by pointing out that the reality of international tax evasion makes all Third World countries wary of using taxation to effect a substantial redistribution of wealth from American companies to their own citizens.

There can be cases where an international law evasion strategy does shift exploitative activities to the Third World but where, on balance, the strategy could not be said to produce inegalitarian consequences. A Japanese transnational that relocates a plant from polluted Tokyo to a Third World pollution haven in some circumstances could be said to be equalizing the effects of pollution, indeed even lessening its impact through a policy of dispersion. This is not the case, though, if the lesser stringency of regulation in the pollution haven is sufficient to offset the limited benefits (in global terms) of dispersion. Nevertheless, if the industry is one which genuinely does benefit the Third World country, the social democrat might not regard the law evasion as producing inegalitarian effects. Again, it must be emphasized that each example must be weighed on its own merits. It would be foolish to consider any single illustration, no matter how clearly it supports either Figure 1 or a converse formulation, as an explanation of general applicability. To consider but one complication, a justification for exploiting pollution havens in terms of sharing the burden of pollution equally between the heavily industrialized and underdeveloped countries ignores the fact that the impact of any health deficit will be greater in a poor country with inadequate health care services.<sup>44</sup>

Consider a different example, one where the international side of the argument applies, but the intranational side does not: laws regulating the safe manufacture of drugs. Tough United States laws on drug quality result in considerable dumping of drugs that fail to meet domestic standards on the Third World. In addition, these laws are a factor in decisions by American pharmaceutical companies to locate manufacturing plants offshore, in countries such as Guatemala which effectively have no government regulation.<sup>45</sup> Thus, the international part of the argument holds up. Experience with the regulation of pharmaceuticals in the United States, however, contradicts the intranational part of the argument. The nature of laws delineating proper manufacturing practices for drugs is such that they generally have clear specificity of meaning and do not in any practical sense add to the complexity of law. It is difficult, for example, to see how a new

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44. There is also the moral argument that Third World countries do not benefit equally from the world's pollutive industries, so why should they equally share the social cost?

45. This matter will also be discussed in more detail in my forthcoming book on the pharmaceutical industry.

law requiring drug manufacturers to do a certain sterility test on all batches of drugs can be used to advantage by drug company lawyers. Such laws do not tend to open up new areas of legal argument, modify existing precedents, or require other laws to be enacted to cover their loopholes. In practice, company lawyers find it difficult to use the doctrines implicit in one part of the drug safety laws as justification for actions that evade other parts of the same body of law.<sup>46</sup> Thus, the only effect of the new laws seems to be to relieve government lawyers of the burden of proving such vague charges as "failure to implement adequate quality control measures."

It is essential, then, that social democrats who want to direct fire and thunder at corporate criminals ask themselves whether they are setting up the kind of inequalitarian scenario outlined in Figure 1. Sometimes the answer to that question will be yes; sometimes it will be no. At other times, the answer will be mixed: the scenario may apply in one aspect—either the intranational or international—but not in the other. Social democratic law reformers who are blind to the fact that this is a question which needs to be asked will never discover when their "egalitarian" policies to control corporate crime are likely to have inequalitarian effects.

One can only speculate on the general conditions that are likely to produce the paradox. On the intranational level, to the extent that corporate interests affected by a particular law are more concentrated, and to the extent that the interests of victims are more diffuse, one would expect enforcement of the law to be relatively ineffectual. In contrast, when victims can effectively mount class actions, the structural advantages of their corporate adversaries are attenuated.<sup>47</sup> Perhaps a team of sailors overboard has a better chance against a shark than a single sailor.

Analogous arguments might be built around Galanter's distinction between persons who have only occasional recourse to the courts ("one-shotters") and persons ("repeat players") who engage in many similar legal contests over time.<sup>48</sup> Galanter outlines a number of advantages that repeat players enjoy over one-shotters. Of particular

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46. At least this is the view expressed to me by practitioners of food and drug law whom I interviewed.

47. See note 26 *supra* for works discussing class actions. In addition, there are principles which do not add to the complexity of law, but rather put a focus on the existing body of law which places more power in the hands of those with more diffuse interests. For example, there is the notion in contract law, that standard form contracts (*i.e.*, adhesion contracts) should be interpreted most favorably to the weaker party; any ambiguities are resolved against the drafter of the document. See generally Slawson, *Standard Form Contracts and Democratic Control of Law-making Power*, 84 HARV. L. REV. 529 (1971).

48. Galanter, *supra* note 36.

relevance to the present discussion is the interest of repeat players in "playing for rules" as well as for immediate gains.<sup>49</sup> The one-shotter, because he or she is unconcerned about the outcome of similar litigation in the future, has little interest in that element of the outcome that might influence the disposition of the decisionmaker next time around. The repeat player, however, has considerable interest in the effect of a decision on future litigation. In time, therefore, the law tends to become more accommodating to the interests of repeat players. Hence, to the extent that in a given area of law corporations are repeat players and their adversaries are one-shotters, corporations may be better able to turn the web of law to their advantage. It is not always the case, however, that it is the corporate offender which has the advantage of being a repeat player. In the course of my research on the pharmaceutical industry, executives from large corporations complained of the fact that the Food and Drug Administration had established case law suitable to its interests as a prosecutor by picking off small companies (one-shotters) in strategic early cases.<sup>50</sup>

Further, the capacity of large corporations to turn the complexity of law to their advantage would seem to be greater when complexity of law is combined with complexity of the books, or is overlaid with organizational complexity. Certain organizational forms are inherently more complex than others—large organizations more so than small, transnational more so than national. In addition, some aspects of organizational life do not permit ready definition of lines of accountability. With a tax offense, the production manager, the taxation advisor, the finance director, the president, and the auditors may all in part be responsible for a violation for which no one of them fully accepts responsibility. On the other hand, it may be relatively easy to prosecute a quality assurance manager for a good manufacturing practices violation which falls neatly within his or her responsibilities.

Corporate offenders are more likely to be able to use legal complexity to their advantage when investigations, pretrial hearings, and other preliminaries are drawn out. As Sir Richard Eggleston has observed, pretrial hearings in such cases are frequently unproductive because corporate defendants are interested in confusing issues rather than clarifying them.

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49. *Id.* at 100.

50. If this is true, it should give pause to consumerists who criticize the FDA for overly concentrating on small-time violators. Geis summarizes the Nader investigation of the food industry as concluding that "rather than launch campaigns against major firms that routinely break the law, the FDA pursues small and inconsequential violators, so as to give the appearance of activity with a record of successful prosecution, while allowing major depredators to proceed unmolested." Geis, *Upperworld Crime*, in *CURRENT PERSPECTIVES ON CRIMINAL BEHAVIOR: ESSAYS ON CRIMINOLOGY* 129 (A. S. Blumberg ed. 1974).

I did not explain my reasons for thinking that pre-trial conferences would not be of much assistance if their success depended upon the defence making admissions; in fact, my reason for expressing this view was that I do not think counsel for the accused can be expected to make admissions in this class of case when his best chance of success is to make the whole so complicated that the jury is unable to say that it is satisfied beyond reasonable doubt.<sup>51</sup>

More simply, with the passing of time, witnesses' memories fail and aging defendants retire. The latter was well illustrated in 1975 when Gulf Oil was charged in connection with a Bahamian slush fund through which some \$12.3 million in largely illegal foreign political contributions had been channeled. Of the eleven executives with direct knowledge of the fund, only two remained with the company. Three had died and six had retired.<sup>52</sup> Because the government has the burden of proof, these effects of delayed and protracted proceedings work to the corporate defendant's advantage.

It might be that areas of the law characterized by a long history of running repairs, such as taxation, are those which corporations can most readily exploit. On the other hand, Food and Drug Administration lawyers with whom I have spoken contend that one reason they have been able to maintain a relatively strong bargaining position with their corporate adversaries is that, whenever a new set of regulations is issued under the Food, Drug and Cosmetic Act, all case law applicable to the old regulations is superseded. It may be that the complexity of case law is more critical than the complexity of legislation. As Townsend has remarked of United States antitrust law: "While the operative sections of the Sherman Act can be expressed in a few lines, its precedents can fill entire libraries."<sup>53</sup> It has been argued that corporate defendants enjoy reduced structural advantages in civil law countries in part because the disinclination in those jurisdictions to grant formal legal authority to judicial precedent reduces the number of mines in the legal minefield.<sup>54</sup>

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51. *White Collar Crime: Can the Courts Handle It?* 23 PROC. INST. CRIMINOLOGY, U. SYDNEY 13 (1977).

52. L. SOBEL, *CORRUPTION IN BUSINESS* 126 (1977).

53. J. TOWNSEND, *The Sherman Act and the Overseas Market Entry Strategy of Selected Multinational Manufacturing Corporations* (D.B.A. Dissertation, George Washington University, 1976).

54. This point was made at the Meeting of Experts on Topic III of the Agenda for the Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders: "Crime and the Abuse of Power: Offences and Offenders Beyond the Reach of the Law?", New York, July, 1979. It does not mean that complexity of case law is intrinsically more critical than the complexity of codes, but simply that eliminating cases as one of the parameters in decisions should, other things being equal, make for less complexity. Certainly it is not difficult to find examples of common law judges complaining about the weight of the large number of cases they must consider in reaching judgments concerning companies: "There is no

It is perhaps easier to specify the conditions under which the international side of the scenario depicted in Figure 1 is likely to hold up. Transnationals are less able to transfer their operations around the world to evade legal controls in industries where capital investment in fixed assets is high, where start-up costs are high, or where an experienced workforce is vital. In addition, there are other, more intangible constraints on a transnational's capacity to follow a law evasion strategy. Consider transfer pricing. Internal company politics frequently do not permit a corporation to set the optimal transfer prices suggested by its computer simulations. The general manager of a powerful subsidiary might be unwilling to see his or her paper profits diminished to bolster the profits of a corporate competitor who runs another subsidiary. Some companies entirely ignore the impact of taxes on transfer prices, arguing that simple and consistent pricing practices tend to minimize tax investigation problems.<sup>55</sup>

All of this is good news for those who wish to control transnational corporate crime. It means that transnational corporations have a less than perfect capacity to shift their activities around the world in order to evade legal constraints. The governments of the world therefore do not have to perfectly harmonize their laws in order to curtail the transnational from playing off one set of laws against another.<sup>56</sup> Indeed the practical economic constraints on law evasion are sometimes such that one country that sets higher regulatory standards can effectively impose its higher standards on all other countries in its region. To illustrate, a Central American Regional Director for one transnational pharmaceutical company has told me

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dearth of cases in this province of the tax law. So large is their number and disparate their facts, that for every parallel found, a qualification hides in the thicket. At most they offer tentative clues to what is debt and what is equity for tax purposes . . . ." *American Processing & Sales Co. v. United States*, 371 F.2d 842, 848 (Ct. Cl. 1967).

55. Shulman, *Transfer Pricing in the Multinational Firm*, EUROPEAN BUSINESS (Jan. 1969).

56. If the problem is that the transnational shifts operations to nations with little regulation, then the perfect solution lies with setting international minimum standards (for pollution, industrial safety, etc.) below which no nation is allowed to fall. But so long as the disparities in regulatory stringency are kept within certain limits the costs to the transnational of playing the law evasion game will be made to exceed the benefits. In fostering a modicum of international harmonization of controls, an internationalization of the consumer and trade union movements, acting as a countervailing force against the internationalization of capital, can play an important role. Gaedeke & Udo Udo-Aka, *Toward the Internationalization of Consumerism*, 17 CALIF. MANAGEMENT REV. 86-92 (1974). Blake, *Corporate Structure and International Unionism*, COLUM. J. WORLD BUS. 20-26 (March 1972). The launching of Ralph Nader's *Multinational Monitor* is a start. Clearly, the United Nations can also play an important role. The activities of the United Nations Center on Transnational Corporations in conducting workshops for officials from Third World countries on negotiation with transnationals is also a valuable beginning. My forthcoming book on the pharmaceutical industry will give detailed consideration to strategies for harmonizing internationally the regulation of drugs.

that when Costa Rica banned a suspected carcinogenic additive in one of its products, the company took the additive out of the product being distributed in all Central American countries, since the cost of special production runs for the Costa Rican market was prohibitive.

### CONCLUSION

In conclusion it must be admitted that no profound generalizations have been adduced as to when laws to control corporate crime will have inegalitarian effects and when they will not. Partly this is because of our nebulous understanding of corporate crime. One wonders, however, whether a search for such generalizations would ever bear fruit. Economists, after all, have tended to abandon the attempt to generalize about when investments will have certain national and international economic effects. Rather, they tend to look at particular investment proposals and consider the likely national and international effects of those specific investments given the structure of the economy at that point in time. Lawyers can surely not aspire to do more. Hopefully, the foregoing paragraphs have sensitized the reader to some of the issues that should be raised when an evaluation is made of whether a particular legal reform to control corporate crime might have unintended inegalitarian effects.

The analogy with economies is worth pursuing. Economists are now beyond arguing that because a country needs ball bearings it must be a good idea to build a ball bearing factory. They realize that before making such a decision the consequences for the structure of the economy, both nationally and internationally, must first be considered. How many legislators, though, are beyond arguing that because a particular form of conduct is severely damaging to the public interest, it must be desirable to enact laws to control that conduct?