

Organizational Crime and Republican Criminological Praxis*

*John Braithwaite***

I. INTRODUCTION

In this paper, I seek to telescope into a short space the essence of the theoretical, empirical and applied projects in which I have been engaged over the past decade concerning corporate regulation and how this is connected to my theoretical and empirical work. That essence I will argue is republican. This is a label that would not necessarily be accepted by many of my co-authors and colleagues in the political endeavours I will describe. What it describes is *my* rationale for being involved in them.

It is only recently that I started giving papers like this that bring together the most important things going on in two sides of my life—the ideas most important to me as a scholar and the struggles most important for the activist in me. I hope you will forgive a style that is unusually personal. The paper is highly selective in that it only talks about what I consider to be good ideas and successful struggles. No one will be surprised that there have been countless bad ideas and failed struggles along the way. Dishonesty I hope is not the main reason for suppressing them. A better reason is that there are some important ways that we learn more from successful models than from failures. I am committed to being what I call a model monger because I believe this is how the weak (like environmentalists) can achieve great victories against the strong (like business). Model mongers float a large number of reform models until they find one that strikes such a resonant appeal to the sense of identity of a people that it catches powerful adversaries off balance (Braithwaite, 1992). If one is an effective model monger, one will always have more defeats than victories.

Yet it is important for model mongers to be triumphal since triumphs

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**Professor, Australian National University, Canberra, Australia

are what others model and triumphalism is important to motivating the powerless, sustaining their self-efficacy to struggle against the odds. This is why it is also important to have a political vision, to engage in theoretically-driven model mongering. The academy of corporate crime researchers has not been very helpful to those engaged with practical struggles against corporate crime because of a disabling structural determinism that has tended to see the power of business as unassailable (contrast Snider, 1990, 1991). A sociology of modeling empowers by showing that the shape of the world is not fully determined by the push of a mute past; it is also shaped by the pull of humanly articulated futures (Braithwaite, 1992). Models have power independent of the resources of those who peddle them because model-mongering enables the weak to set the terms of reform debates when their models strike a responsive chord. Model-mongering delivers a structural advantage to the weak over the strong. Model-mongering is not for the strong because it is a tactic that is dangerously destabilizing of extant orderings of power.

The structure of the paper will be to:

- 1) Outline four perspective toward business regulation that I see as required for a republican:
 - (a) Taking crime seriously;
 - (b) Nurturing dialogue as an alternative to the criminal process;
 - (c) Pursuing empowerment;
 - (d) Seeing multiple motivations and contradictory regulatory effects.
- 2) Give three examples of republican praxis in Australia that engage to varying degrees with these principles:
 - (a) The new nursing home regulation;
 - (b) The new Trade Practices enforcement;
 - (c) The communitarian control of corporate crime in the pharmaceutical industry; and
- 3) Concludes by explaining the significance of such criminal justice and business regulation reforms for wider and deeper societal changes.

II. WHAT REPUBLICANISM REQUIRES

My co-author Philip Pettit bears most of the blame for developing the republican conception of liberty. We think the maximization of republican liberty should be the objective of criminal justice policy. Since we have outlined what such an objective means elsewhere (Braithwaite and Pettit, 1990; Braithwaite, in press; Pettit with Braithwaite, 1993), I will not repeat the dose here. The basic idea is that criminal justice systems ought

to be designed to maximize republican liberty or dominion. Dominion is a social conception of liberty that depends on structural and subjective assurance that the liberty is resilient. Egalitarianism is also built into the definition of liberty; one cannot enjoy dominion without equality of liberty prospects. The pursuit of republican liberty therefore entails very different policies from the pursuit of the individualistic freedom in liberalism. With only the loosest of justification in terms of the objective of maximizing dominion, I shall posit the four republican concerns that will be followed through into the instances of republican praxis discussed in Part III.

Taking Crime Seriously

What do republicans have to say to deconstructionists who insist that what is a crime is an arbitrary and historically contingent matter, reflecting perhaps the momentary perspective of those who hold the reins of political power? Republicans should not be dismissive of the deconstructionist's observation. But we think they should point out that the world would be a worse place (in terms of dominion) if we abandoned the concept of crime in contemporary societies. Good consequences are achieved by describing spouse assault or occupational health and safety breaches as crimes. My experience of negotiating some of the agreements discussed in Part III of the paper is that it is an empowering moment when one is dealing with resistant or chain-dragging executives to say: "Gentlemen [they always are] what we are talking about here is criminal conduct by your company." The concept of crime has deep traditional meanings in all Western societies which the consequentialist should want to put to good use. This, of course, is as true of consequentialists who want to destroy freedom (by calling flag-burning a crime) as it is of republicans who wish to defend it. But it is in my view an historically contingent fact that the criminalization increases liberty with respect to most of the types of conduct that are criminalized in contemporary Western societies.

Liberty, on the other hand, is poorly served by the way Western societies enforce the law against the conduct it criminalizes. A great deal of the conduct that we respond to as crime would be better responded to in the ways advocated by abolitionists—as troubles, problems of living, conflicts, and the like. So we do not have to choose between feminists who want to criminalize rape on the one side and deconstructionists or abolitionists on the other. We can, and should, have our cake and eat it on this issue. That is, we can *define* conduct of a certain type crime, while preferring not to *label* it as crime or punish it as crime in most of the cases where the conduct is detected. There is absolutely no tension

between participating in struggles to inject clarity into the criminal law while problematizing particular instances of conduct that might fit the definition. In the first enterprise, the deconstructionist will be foe; in the second, friend.

Like left realists, therefore, Pettit and I think that republicans should take crime seriously as a politically progressive concept. There is a progressive effect in writing a book called *Corporate Crime in the Pharmaceutical Industry* that upsets people in the industry because they do not think of the conduct described as criminal. At the same time, the republican must struggle against retributivists who want to treat crime as a master category: "If the conduct fits the definition of crime, it must be treated as a crime". As we have shown elsewhere, this essentialism must be resisted because it has had consequences for dominion (Braithwaite and Pettit, 1990).

Nurturing Dialogue as an Alternative to the Criminal Process

Republicans believe in dialogue, reasoning with wrongdoers, seeking to effect change by persuading criminals that the harm they are doing to others should stop and be compensated. Partly this is about the belief that voluntary change and internalization of moral commitment delivers superior protection to the community (when it can be obtained) than coerced change. But it is also about the value of dialogic, participatory social control itself within a meaningful community. This is where liberals think republicans are utopian. Liberals think the communities do not exist in contemporary societies to make dialogic social control a possibility. In this, the liberal is both myopic and politically mischievous—myopic because liberals do not look beyond geographical neighbourhoods in their search for community, mischievous because liberal individualist ideology has been the major destroyer of community during the past two centuries. Can't implies ought not when it comes to liberals looking for community. Republicanism is constitutive of community; liberalism is deconstitutive of it.

A variety of critical epistemologies also give good grounds for dialogue. I am afraid that epistemology does not interest me very deeply. I suppose I am a pragmatist in the sense defined by William James (1978: 32) of having "the attitude of looking away from first things, principles, 'categories', supposed necessities; and looking toward last things, fruits, consequences, facts." It seems to me that there are a good variety of critical epistemologies that, however different they are in other respects, converge on Japan's conclusion that political truth "is made in the course of experience". The contemporary subjectivist heirs to the Aristotelian themes of

phronesis and *praxis* are a varied bunch—Arendt (1958), Gadamer (1975), Habermas (1984), MacIntyre (1984a), Barber (1984). Yet as Bernstein (1983), Handler (1988) and Dryzek (1990) have pointed out, these writers converge on the conclusion that the way to tackle the dilemmas of truth and method is through dialogue. Hence, while Gadamer (1975) can cause us to wring our hands worrying that there is no objective knowledge that we can apply to resolve contradictions, he also tells us that through dialogue citizens can acquire hermeneutical understanding and that the greatest threat to such hermeneutical understanding is abdication to experts such as lawyers.

Bernard Barber (1984: 108) expresses well the conclusion that uncertainty in metaphysics need not imply paralysis in practical regulatory action:

“[T]he strong democrat would argue that the proper response to uncertainty and metaphysical failure is not passivity or toleration of all private judgments but rather a quest for forms of political judgment that do not depend on metaphysics, epistemologies, or independent grounds. The antidote to the loss of metaphysical faith is, precisely, politics, the cultivation of community judgment, rather than scepticism, anarchism, or that acquiescence of the modest that is called tolerance”

Indeed, a variety of objectivist philosophies also converge on the virtue of dialogic institutions. If you believe that liberty is an objective good that is subjectively experienced by individuals in different ways (as do Pettit and I), then there is virtue in institutions that empower individuals to discover and reveal their subjective liberty with others who might act to endanger or promote it. If you are an objectivist Popperian fallibilist, you must value dialogue for its capacity to draw out the refutation of falsehoods.

In short, there seem to be many grounds for doubting that truth and right will out from an objectivist, infallibilist political or legal program that rejects the need for dialogue. Hence, if I can be the crude pragmatist, to pursue non-dialogic programs of the good and the right with unswerving dedication seems to run the risk of many tyrannies and failures. Of course, the recent failures and tyrannies of Marxism remind us of this forcefully, as do the failures and tyrannies of Western criminal justice systems. Burke (1910: 277) had warned us of the multitude of misfortunes caused by “considering general maxims without attending to circumstances, to time, to places, to conjectures and to actors”; since “if we

do not attend scrupulously to these, the medicine of today becomes the poison of tomorrow."

My suspicion is that MacIntyre (1984b: 500-501) is right when he concludes that disagreement on basic ethical paradigms is frequently compatible with consensus on the moral status of specific practical questions. My enterprise here is a case in point: it is easier to get large numbers of people to agree that dialogue is a good thing than it is to get any substantial number of people to agree with a republican or hermeneutical or fallibilist theory of dialogue. We see this in the decisions of our highest courts, where the justices agree a lot of the time, but rarely agree for reasons that are based in identical values or common abstract philosophies. This is why deconstructionists can play such havoc with their work. But if we take MacIntyre (1988: 364-5) seriously, nihilism is not justified in the face of such deconstruction. This is because dialogue between incompatible traditions can see one tradition generate solutions for the second in terms that are coherent within the second tradition. After all the wooing and wondering among the justices, the supreme court decision, woven together from slender and contrary opinion, can knit a fabric of communal conviction that inspires civic purpose and practical problem solving. The outcome can generally be regarded as sensible, but for several philosophically incompatible reasons. In contrast, solitary criminal court judges who sentence corporations without any communal wooing and wondering about their remedy are at maximum risk of dishing up tomorrow's poison as today's medicine.

Pursuing Empowerment

For Habermas (1984), dialogic processes can only enable communicative rationality to the extent that inter-subjective reflective understanding is unconstrained by deception and domination. For most of us, Habermas's aspiration for uncoerced and undistorted dialogue among competent individuals is utterly utopian. Of course ideals can be useful as yardsticks for measuring progress even if they are never fully realisable. However, domination is such a recurrently intractable fact of life, the destruction of power such an impossible agenda¹⁾ that republicans are advocates of the alternative strategy of checking power with countervailing power (Braithwaite and Pettit, 1990: 87-88). Ayres and Braithwaite (1992) have argued for tripartism—fully empowering public interest groups as third players of the regulatory game with the state and the firm—as a strategy of checking

1) Destroying domination is an especially dismal agenda with corporate crime where large corporate actors are by definition centers of power.

of power. Tripartism is conceived as a strategy enabling the evolution of cooperation within negotiated regulation while preventing the evolution of capture and corruption. That is, tripartism is seen as a structural solution to the regulatory dilemma that the same conditions that make for win-win solutions through the evolution of cooperation also make for the evolution of capture and corruption.

Republicans believe in an enriched conception of citizenship. Freedom is constituted by an active citizenry. But because entrenched centers of power, particularly corporate power, often seek to crush active citizen groups, republicans must lobby for a republican state that proactively empowers and resources citizen groups. Because of the way freedom is defined for the republican, poor and powerless citizens cannot enjoy liberty in a world of great inequality of wealth and power. For this more fundamental reason, the politics of citizen empowerment via a vis corporate concentrations of power is central to the republican agenda.

Seeing Multiple Motivations and Contradictory Regulatory Effects

One reason republicans like to deal with problems through dialogue is that they have a preference for dealing with actors as responsible citizens. This extends to corporate actors, which the republican seeks to nurture as responsible corporate citizens. When we are dealing with responsible citizens, shame and pride are seen as having enormous regulatory power. Indeed, reintegrative shaming and the praise of virtue are seen as powerful in constituting responsible citizens (Braithwaite, 1989). The 18th century republicans were seen by their Hobbesian critics as naive in this regard. For Hobbes (1949) and Hume (1963), institutions could not be based on the hope that citizens would be responsible. Rather, they should be designed for knaves. Geoffrey Brennan and James Buchanan (1985: 59), argue in *The Reason of Rules* for institutions that economize on virtue. This they advocate because it is likely that the harm inflicted by those who behave worst will not be compensated for by the good of those who behave better than average. Against this, Ayres and Braithwaite (1992b), like Goodin (1980), argue that the trouble with institutions that assume people will not be virtuous is that they destroy virtue. My own observations of business regulatory inspectors, as with police on the streets, is that if they treat people as knaves, knavery is often returned in full measure. Makkai and Braithwaite (in press) in an article we will soon submit called "The Dialectics of Corporate Deterrence," fail to find a general deterrence effect for compliance of nursing homes with the law. What we conclude lies behind this, based on our fieldwork, is a group of cases where deterrent threats improve compliance and

another group of cases where it makes things worse. Burke told us about this—the medicine for today's case is poison for tomorrow's.

Some of the most brutish and nasty business people will put their best self forward, their socially responsible self, if they are treated as responsible citizens. Street level law enforcement, with either common or corporate crime, seems to me about getting people who have multiple selves to put their best self forward. But what about when they don't? Debate over punishment versus persuasion for dealing with corporate criminals has proceeded on both sides from a much too static analysis. The argument is that punishment is better than persuasion, or vice versa. Alternatively, the argument is the optimistic vision that we can pick which are the right cases for medicine and which for poison. I reject all three types of argument in favor of a dynamic strategy. This is: first persuasion (try to get the regulated actor to put their responsible self forward); second, when citizenship fails (as it often will) shift to a deterrent strategy; third, when deterrence fails (as it often will for reasons detailed elsewhere (Ayres and Braithwaite, 1992b; Makkai and Braithwaite, (in press), shift to incapacitation (e.g. corporate capital punishment). We would think it terribly crude if debates about the international regulation of states were transacted in the discourse of the optimal level of military threats. We expect, and get, even from our most simple minded political leaders, more subtle dynamic strategizing about the circumstances in which one shifts from persuasion to deterrent threats to incapacitative strikes.

In international relations, as in business-government relations, the best possible world is one where actors see themselves as having profound responsibilities for peaceful problem solving. The republican must aspire to nurturing responsible citizenship in pursuit of such a better world. However, the obligation of the republican to be vigilant on behalf of the dominion of the powerless requires that clear signals be given to business of the willingness to escalate to tougher and tougher law enforcement should there be abuse of the trust we expect of responsible citizens. Displaying (rather than threatening) an enforcement pyramid with a capacity for escalation to awesome incapacitative measures motivates cooperative regulation at the base of this pyramid (Ayres and Braithwaite, 1992a: Chapter 2).

III. REPUBLICAN PRAXIS

Now I will describe the recent implementation of these principles in three domains in Australia: quality of care regulation in nursing homes, trade practices enforcement, and misrepresentation with promotional

claims in the pharmaceutical industry. I will not discuss below the first principle, taking crime seriously, concentrating instead on the innovative, dialogic side of what has happened. Suffice it to say that in none of these areas has the criminality of the worst conduct been taken seriously enough. With nursing home regulation, there are Australian criminal cases, in some years running into double figures (if one adds state and federal cases). These in the past have resulted in wrist-slapping fines. Consequently, it is closing the nursing home down (the incapacitative option) that is most feared. This happens once or twice in most years. For the first time, we are seeing at present a major homicide investigation concerning the deaths of 21 residents in one home²).

If one adds state and federal enforcement, there are over a hundred criminal cases a year on the consumer protection side of trade practices enforcement. Again these result in wrist slapping fines. Imprisonment was removed as a sanction available under the Trade Practices Act in 1977. The antitrust side of the Trade Practices Act is not even criminal, though the civil penalties that can be imposed are much higher (\$10 million) than the fines in any Australian criminal statute. Of the three areas, misrepresentation of marketing claims for drugs has seen the most profound neglect of law enforcement. There have been botched investigations, but never a successful criminal prosecution in Australia in this area.

The New Australian Nursing Home Regulation

A radical transformation of nursing home regulation commenced in Australia in 1987. Together with Valerie Braithwaite, Toni Makkai, Diane Gibson, Anne Jenkins and David Ermann, I have been fortunate to have had a study of these changes running since before they started. Our role here has not been of pure scientists. We have been the primary consultants to the Australian government during this period, making many recommendations for changes, most of which so far have been adopted.

Our consultancy began just after the first feature of change was settled, a complete rewriting of the law. Essentially, the old input standards that required inspectors to measure the size of rooms, count toilets and report cob-webs in the laundry were scrapped and replaced with 31 very broad outcome-oriented standards. The first point to make about these standards is that they were consensus standards. They were written by a working group in a process of intense dialogue with the industry, consumer

2) No one has ever gone to jail for a nursing home quality of care offence, though people have been imprisoned for fraud in cases where ripping off the government benefits scheme was not unrelated to delivering care of shocking quality.

groups, trade unions and professional associations. The result has been an extraordinarily high level of industry commitment to the standards. Our survey of 410 nursing home managers found that for none of the 31 standards did fewer than 95 per cent of managers view them as desirable, and for most standards more than 90 percent of managers found them practical as well as desirable (Braithwaite et al., 1992). Hence, the dialogue over the standards succeeded in securing industry consensus and commitment, with a small number of (sometimes vocal) exceptions.

Support from the consumer movement was not so strong. The consumer movement had been largely responsible for whipping up the atmosphere of scandal that led to two government reports and then the reform. Many in the consumer movement (including me) suspected that the 31 standards were so broad and vague as to be unenforceable. Standards concerning "freedom from pain", "privacy", "dignity" and a "home-like environment", for example, seemed desirable but so inexplicit as to make enforcement impossible. In this we have been proven wrong. The level of enforcement, while it is still inadequate, has increased considerably with the shift from input to outcome standards (Braithwaite et al., 1992: Chapter 11).

The critics have also been found to be wrong in asserting that a shift to 31 broad outcomes would make consistency of ratings (*ergo* enforceability) impossible. The inter-rater reliability results are the most remarkable part of our findings. But first consider how radical is the shift we are discussing by comparing it to the situation in the United States. In the U.S., there are over 500 federal quality of care standards for nursing homes. These standards are enforced by state government inspectors who simultaneously enforce state standards, which in most jurisdictions exceed in number the federal standards. So we have inspectors whose job it is to check compliance with over 1,000 standards, compared with 31 in Australia.

How did the US come to have so many standards? The answer is complaints about inconsistency of ratings between one nursing home and another coming from the industry, and complaints about vagueness and unenforceability coming from the consumer movement. Historically, these complaints have been dealt with by splitting one broad, vague standard into two or more standards with words that look more specific. The large number of standards is the result of the pursuit of reliability. The irony is that as a cumulative historical process, it destroys reliability. Why? Because no inspection team has the time to truly check compliance with 1,000 standards. What compliance score you get depends on which subset of the standards the inspectors stumble into checking properly this time

round. The pursuit of reliability of the parts causes the unreliability of the whole. This when it is the whole that has the consequences—effecting sanctions, closures, bonuses for managers and Medicaid reimbursement in some states that increase Medicaid dollars for improved compliance.

I can summarize the results of the U.S. nursing home studies of the reliability of the citations issued by inspectors by saying that agreement of one team with a citation issued independently by another inspection team is the exception rather than the rule (Braithwaite et al., 1991). In contrast, we found the 31 Australian outcome-oriented standards to be rated extraordinarily consistently when the research team put its own trained inspector into 50 nursing homes to rate them independently at the same time as the government inspection team was in the home. Inter-rater reliabilities on total compliance scores ranged from .93 to .96 depending on how and at what point the coefficient was calculated (Braithwaite et al., 1991). Perhaps more remarkable, the average agreement of directors of nursing with the ratings given across the 31 standards was 92 per cent.

The key to the remarkable reliability of the Australian nursing home standards is dialogue at three levels: 1) with the residents of the nursing home; 2) with the staff and management of the home; and 3) dialogue within the team itself.

Dialogue with residents is, of course, very much about empowerment as well. A structural change that has been caused by the new regulatory process is that the proportion of Australian nursing homes with residents' committees has increased from under 20 per cent in the mid-80s to over 80 per cent by 1990. Most of these residents' committees are still not working very well at genuinely empowering residents (Braithwaite et al., 1992: Chapter 8). However, as the most recent phase of the reform agenda, the government has committed substantial funds to supporting the work of nursing home advocacy groups; a primary objective of these groups will be to use the funds to assist residents' committees to become more powerful in institution policy-making. This month we have also put recommendations before the Minister to involve residents' committees more directly in the negotiation of plans of action to bring non-compliant homes back into compliance. One of the attractions of nursing home regulation to our research group is that it seemed to us a least-likely case study (Eckstein, 1975) of consumer empowerment. That is, one could not find a group more difficult to empower than nursing home residents. So if there is success with an empowerment strategy in this least-likely context, then there is hope for the strategy on a wider front.

The principal way that the new regulatory process empowers residents is that it is a resident-centered process. Australian inspectors spend a

much larger proportion of their time than U.S. or Canadian or British or Japanese nursing home inspectors³⁾ in sitting down with residents to get their definition of what the problems are in the nursing home. These resident definitions of the problem are what ultimately count when it comes to the reliability of compliance ratings, even though observation and interviews with staff are the more important source of the facts that underlie the problem definition.

Inspectors can become incredibly skilled at eliciting the perspectives of residents who are very sick, confused a lot of the time and even unable to speak. The micro-transaction of this empowerment is a fascinating subject that we have barely begun to write up (Braithwaite et al, 1992). Here I want to deal only with how dialogue constitutes reliability of compliance ratings. Consider the Australian standard that most often comes under attack for "subjectivity", the "homelike environment" standard. Where you get unreliability on a standard of this type is where inspectors follow "objective" protocols, such as in some American states where the number of pictures on the walls is counted. The latter protocol causes staff to plaster page after page of popular magazines around the walls of the institution! Subjectivity, not objectivity, is the path to reliability. A properly subjective approach on the homelike environment standard involves talking to residents about whether they feel free to put up personal mementos in an area they define as their private space, whether there are spaces in the facility that they feel are inviting and homelike for chatting with friends, whether they feel there are inviting garden areas they can use. In a resident-centered process, when the question arises, "But is this really an invasion of privacy?", the answer is discovered through a process of dialogue about what are the senses of privacy that are important to this particular resident. Dissensus is more likely when the question is resolved by pitting one inspector's conception of what privacy means against another's; consensus is more likely when the professional responsibility of both is to focus on the practical sense of privacy that is subjectively important to that resident in that situation. There will always be inconsistency in trans-situational "objective" judgements of whether privacy has been invaded. Resident-centered contextual dialogue about privacy outcomes, in contrast, can often reach reliable conclusions.

Dialogue with staff and managers is responsible for the remarkable level of agreement that both directors of nursing and proprietors show with the compliance ratings they are given. This occurs during the visit, but most critically it occurs at a "compliance discussion", a group meeting

3) We have done fieldwork with nursing home inspectors in these countries as well.

within 48 hours of the initial visit. Between the initial visit and the compliance visit, the process of within-team dialogue we discuss in the next paragraph has occurred. At the compliance discussion, the preliminary findings of the team are disclosed standard by standard to nursing home managers, sometimes staff and resident representatives, the proprietor or representatives from the church if it is a church home. Disagreements are sometimes heated, even to the point of shouting and tears. Both inspectors and managers always get extremely nervous before them. In fact, I get nervous when I attend as an observer. These are occasions that matter to these people. There is a ceremonial quality to them. Their professional pride is on display; they are at risk of shaming within a group that matters to them concerning fundamental issues of professional and business integrity. If it goes well for everyone, there is palpable elation afterwards. If serious allegations of fraud or neglect causing the death of a resident are put on the table, it is hard to describe the level of cross-cutting emotions that can be unleashed in the room.

Often debate will be opened on the third stage of dialogue at the compliance discussion. This is dialogue over the agreed action plan. The nursing home generally takes its non-compliance problems back to a full staff meeting and often a meeting of the residents' committee to discuss what should be done to fix it and prevent recurrence. The plan of action then comes as a proposal from the nursing home to the inspection team who either approve it or initiate further dialogue to modify it.

Dialogue within the team is systematic and structured. After the initial inspection of the home, the team of two or three or occasionally more, infrequently with a member of the supervisory staff, works through each of the standards to record the pluses and minuses they observed under that standard. This, of course, is precisely what is impossible in the US, with hundreds of standards. So the dialogue is disciplined in two ways: 1) by the standards and the need to write pluses and minuses for each of them; and 2) by the requirement to make judgements in terms of the outcomes that subjectively matter to residents. Some of the latter judgements are utterly uncontroversial, of course. You don't need to ask residents if the outcomes of being burnt in a fire or given someone else's drugs matter to them. Debate on food, however, must be disciplined against discussing what sort of food the inspectors like. The issue is what the particular residents in this facility like. These focus rules facilitate dialogue that generates rather robust agreement on the standards.

If, after all this dialogue, the nursing home is led toward enforcement action that it does not think is justified, a new round of dialogue can be triggered with a Standards Review Panel, consisting of departmental,

industry and consumer group representatives who were uninvolved in the first round of dialogue. These are very rare, however, as agreed action plans to correct agreed deficiencies are normally settled out of the first round of dialogue.

When dialogue fails, the standard deterrent sanction is withholding government benefits on new admissions to the nursing home for a period (usually until the problem is solved). If this fails, the nursing home can be closed. In some states, there is the intermediate incapacitative action of putting in a receiver or administrator to run the facility.

The evidence is quite strong in our opinion (Braithwaite et al., 1992), that the new approach to regulation has improved the quality of care in the Australian nursing home industry in a variety of important ways since 1987. We have seen that this new approach is based on (a) dialogue with stakeholders; (b) resident empowerment; and (c) a responsive enforcement pyramid. That is, it is based on the three features, beyond taking crime seriously, that I argued in the first half of the paper that republicans should pursue. Moreover, I am contending that the combination of dialogue, empowerment of victims and responsible pyramidal enforcement has effected real improvement in a troubled industry.

The New Trade Practices Enforcement

After our study of the 96 most important business regulatory agencies during the mid-80s, Peter Grabosky and I concluded that "No business regulatory agency in Australia has been able to impose as firm an enforcement orientation as the Trade Practices Commission... If the commission is captured and weak, then we can only say that it follows from our study that *all* Australian regulatory agencies are so." (Grabosky and Braithwaite, 1986: 91). Little did I know when we wrote this that by the time the book was published I would be a part-time Commissioner. The TPC spends more on litigation than any federal agency apart from the Director of Public Prosecutions. It has been in court at some time with most of Australia's largest companies and it wins most of the time. While Australian regulatory agencies are pretty benign by US standards, by Australian standards, the TPC displays an enforcement pyramid with tough options at the peak (like divestitures) that it shows a willingness to use. At the base of the pyramid, most complaints are dealt with by informal problem solving—the company replaces a consumer's defective product, desists from a practice, effects a product recall or withdraws an advertisement. It is at the intermediate level of the pyramid that the developments have been interesting from a republican point of view. I others of its type in a forthcoming book with Brend Fisse (Fisse and Braithwaite, in press):

Solomons' Carpets and the insurance frauds on aboriginal communities.

Solomons Carpets ran advertisements claiming a sale of up to \$40 per metre off the normal price. This representation was false; some of the carpets were no cheaper than the normal price. The matter came before the Trade Practices Commission in 1991. The Commission had difficulty deciding what action to take on this alleged breach of its Act. It was a less serious matter than others that were putting demands on its scarce litigation resources; it was also an area that the Commission did not regard as a top enforcement priority.

The Commission decided to offer Solomons an administrative settlement which included voluntary compensation for consumers in excess of the criminal fine that was likely should they be convicted. The facts of the matter made it fairly unlikely that any court would order compensation for consumers, but likely that a modest criminal fine would be imposed. All the Commissioners felt that Solomons would reject the administrative settlement because it would be cheaper for them to face the consequences of litigation. Even so, in the interests of consumers it was decided that the idea was worth a try. The Commissioners turned out to be wrong because of the error in assuming that such decisions are necessarily made by companies according to a deterrence cost-benefit calculus of the unitary corporation. Unknown to the Commission at the time, there was also a "soft" target within the company, namely the Chairman of the Board, the retired patriarch of this family company. For him, as a responsible businessman, it made sense to accept the Commission's argument that resources should be spent on correcting the problem for the benefit of consumers rather than on litigation and fines.

The chairman of the Board was dismayed at the prospect of allegations of criminality against his company, and was concerned for its reputation and his family reputation. He was also angry with his chief executive for allowing the situation to arise and for indulging in such a marketing practice. He sought the resignation of his chief executive and instructed his remaining senior management to cooperate with an administrative settlement that included the following seven requirements:

1. Compensation to consumers (legal advisers on both sides were of the opinion that the amount was considerably in excess of what was likely to be ordered by a court).
2. A voluntary investigation report to be conducted by a mutually agreed law firm to identify the persons and defective procedures that were responsible for the misleading advertising.
3. Discipline of those employees and remediation of those defective procedures.

4. A voluntary Trade Practices education and compliance program within the firm and among its franchises directed at remedying the problems identified in the self-investigation report on an ongoing basis and at improving Trade Practices compliance more generally.
5. An industry-wide national Trade Practices education campaign funded by Solomons to get its competitors to improve their compliance with regard to advertising of carpets.
6. Auditing and annual certification of completion of the agreed compliance programs by an agreed outside law firm at Solomons' expense.
7. A press release from the Commission advising the community of all of the above and of the conduct by Solomons that initially triggered the investigation. (The press release attracted significant coverage in most major Australian newspapers).

In addition, although it was not part of the deed of agreement, Solomons volunteered to conduct an evaluation study of the improvement (or absence thereof) in compliance with the Act by its competitors as a result of the industry-wide education campaign that it funded.

At low cost to taxpayers, the Commission adopted an approach that appears at this point to have improved consumer protection in a major Australian market. The company was required to undertake disciplinary action and to report the steps taken. The company was also required to provide compensation which victims would not otherwise have received (without compromising their right to take further private action). Added to these advantages, the Commission was able to promote general deterrence by publicizing the nature and costs of the settlement.

The Trade Practices Commission has taken the basic Solomons strategy much further by using it successfully in the largest consumer protection cases in Australian history. A number of insurance companies engaged in a widespread and systematic pattern of deceptive conduct which involved selling insurance policies to people living in remote Aboriginal communities.

Insurance agents misrepresented the terms of the investment policies sold and used unconscionable selling tactics. The vulnerability of poorly educated remote Aborigines to exploitation by authoritative men from the city in white shirts became clear during the TPC investigation. Victims tended to assume that it must have been them who had done something wrong. On occasions when the Commission investigators knocked on the front door, the victims would flee out the back door. Many shook continuously throughout their interviews and some cried with fear.

The insurance agents had cashed in on this vulnerability, a product of two centuries of white oppression and destruction of self-assurance. In one case, the customer was even told that he would go to jail unless he

signed the policy. False representations were made to Aborigines that they would need to commit some of their existing unemployment benefits to a savings investment plan because when they turned 65 they would no longer be eligible for government welfare support. The saddest false representation was that the policy would pay generous funeral benefits. This is a matter of profound religious importance to Aborigines who live in communities away from their country. When they die, they must be taken back to be part of their country forever. It can be prohibitively expensive to transport a body long distances along bush tracks. Hence the appeal of the false representations about funeral benefits.

There were many types of misrepresentations. One of the most common was that policy holders could get their money back in two years. In fact, administration costs absorbed all the premiums paid during the first two years. Another unfair practice was the failure to inform policy holders that their policies would lapse unless the premiums were paid regularly. In most instances the policies sold to the Aborigines lapsed because deductions from their wages could no longer be made when temporary employment ceased. In many cases the deductions from wages continued to be made notwithstanding that the policies had previously lapsed.

In the first round of settlements negotiated by the Trade Practices Commission, the local Aboriginal Community Council participated actively in the negotiation process and advanced a number of the key terms ultimately included in the subsequent deeds of settlement. Under the first deed, signed with Colonial Mutual (CML), refunds totalling \$1.5 million have been paid to some 2000 policy-holders affected, even where claims were barred by the three year limitation period. Victims are getting 15 per cent compound interest on their investments, a considerably higher rate than those prevailing at the time of the deed. Some victims have received payouts well in excess of \$10,000. CML also undertook to pay \$715,000 into an Aboriginal Assistance Trust Fund for the benefit of Aboriginal people including those in the communities affected by CML's unfair practices.

A further requirement of the deed was that CML conduct an internal investigation in order to identify any failings in the company's compliance program and the identity of the officers, employees or agents who had engaged in or who had contributed to the unfair practices. The company was then required to undertake appropriate remedial and disciplinary action and to report the action taken to the Commission. Another clause in the deed required specific action to be taken to ensure that disadvantaged persons understood the nature and content of any insurance policy offered to them. CML was also required to put a senior manager in

charge of compliance with the Trade Practices Act, to identify that person to the Commission, and to have him report annually on progress.

The Commission and CML released a jointly prepared media statement summarising the terms of the deed and called a press conference. The release spelt out CML's willingness to co-operate in resolving the matter. It also indicated the joint view of the signatories that the arrangement was in the best interests of the company, the Commission and the community. The more critical question for our purposes is what happened within CML as a result.

A cynic might be tempted to say that the CML deed largely left the company free to return to unconscionable sales tactics. The outcome within the organization does not support this to date. Members of the CML board insisted on a purge. Over 80 employees or agents have been dismissed, including a national sales manager and two state sales managers for Queensland and New South Wales and Tri-Global, a major corporate agency that is contesting its termination in the courts.

One question mark surrounding the CML deed of settlement is the confidential nature of the compliance and internal disciplinary report required to be filed with the Commission (for a more detailed discussion see Fisse and Braithwaite, 1993). Another concern is the limited individual criminal enforcement. One selling agent suffered a minor criminal conviction. However, there has been no initiation of criminal proceedings in relation to senior management.

The CML case and the related settlements in train represent a landmark in the development of enforcement strategies geared to achieving accountability for corporate law breaking. The Commission built upon the experience gained from the Solomons Carpets affair and negotiated its way to success in a complex and large-scale matter involving multiple major corporations, numerous corporate and individual agents of those corporations and thousands of largely illiterate victims located in some of the most inaccessible locations in a vast continent. There were legion evidentiary and procedural problems, particularly time limits on actions under the Trade Practices Act.

Beyond managing the sheer complexity and size of the case, the Trade Practices Commission's approach in the CML operation involved an advance over the Solomons strategy in a number of ways. Accountability was improved by having the agreed facts formally endorsed by a court of law. There was a quantum leap in the number of people compensated, in the educational commitment enshrined in the deed, in the rigour of the internal investigation, and in the number of people who lost their jobs as a result of the investigation. Most importantly, however, the case has trig-

gered a wider community campaign to reform insurance practices. Media coverage has been extensive. All levels of the Australian policy have been touched by the shocking practices publicly revealed by the case. Even the Prime Minister asked for a briefing on it. The Minister for Justice has given a Ministerial direction to the Commission to conduct a wider inquiry into the insurance industry and its sales practices. State consumer affairs agencies are examining their neglect of Aboriginal consumer education. Certain weaknesses which have been revealed in the Insurance Contracts Act and the Trade Practices Act are likely to be remedied by parliament. Feverish deliberations are under way within the industry itself about how to prevent such a damaging public relations debacle from happening again. Thus, the possibility of regulation through a licensing regime for agents is back on the insurance industry's agenda.

For some participants, the regulatory dialogue brought home their responsibility in a particularly compelling way. Top management found themselves directly confronted with the shame of the practices from which they and their companies had benefited. The media and the courts were not the only forums in which some found themselves exposed. The top management of Norwich, the second firm to sign a deed, were pressed into immediate contact with the victims as part of the process leading up to settlement. This was an exacting and conscience-searing experience. They had to take four-wheel drive vehicles into Wujal Wujal in the tropical North East of Australia, in order to participate in disputed negotiations during which the victims were given an active voice. Living for several days under the same conditions as their victims, Norwich's top brass had to sleep on a mattress on a concrete floor, eat tinned food, and survive without electricity during the daytime.

Processes of dialogue with those who suffer from acts of irresponsibility are among the most effective ways of bringing home to us as human beings our obligation to take responsibility for our deeds. Traditional courts, where victims are treated as evidentiary cannon fodder rather than given voice, have tended to be destructive of this human way of eliciting responsibility. These insurance cases illustrate how what Fisse and I call the Accountability Model leaves space for encounters with victims which can both communicate the shame of the wrongdoing and heal it through acceptance of responsibility and putting right the wrong.

Another important feature of the negotiation process leading to the CML settlement was the role played by Aboriginal Community Councils. Councils also held out for stringent terms of settlement and made detailed suggestions as to the contents of the deed. The role played was thus consistent with a strategy of tripartite enforcement in which consumer or

other representative groups have a voice in the course of enforcement action taken. One advantage of the tripartite model is that it helps to reduce the danger of enforcement agencies entering into cosy deals. This is the principle of countervailing power that is so important from a republican perspective.

Both the insurance cases and the Solomons case display a firm enforcement posture in the middle of an enforcement pyramid. They are both interesting in that they amount to net widening of a very productive sort. The negotiated settlement resulted in more of everything—deterrence, compensation, internal discipline, correction of standard operating procedures, compliance education, incapacitation, shame—than could ever have been achieved by a court case for these particular matters. Moreover, all of this was volunteered by the companies, though admittedly after some tough negotiating. But they volunteered so much more than they would have got away with in court fundamentally because top management stood up and said we want to be responsible corporate citizens. With the aboriginal insurance cases, that was partly because senior executives conducted negotiations out in remote communities where they met their victims and confronted the terrible life circumstances they had made worse. During the negotiations, all these companies said they wanted to use the money that would be lost from the debacle to put the problem right rather than spend it on lawyers to fight the Commission. That was what they said and that was what they did. The negotiating sessions were little shaming ceremonies, not completely unlike the nursing home compliance discussions, that treated top management as people who the Commission expected to act responsibly. When the Commission declined to treat them as knaves, knavery was not forthcoming; remorse and remediation beyond the requirements of the law was offered instead.

Again, we see here a strategy based on (a) dialogic problem solving; (b) empowerment of victims and (c) responsive pyramidal regulation escalating to criminal enforcement in the worst case. Rejecting this republican package in favour of standard liberal enforcement in the courts would have less impact on reform of the industry and would have left Aboriginal victims worse off.

The Communitarian Control of Corporate Crime in the Pharmaceutical Industry

During the first half of the 1980s, wearing my consumer movement hat, I was involved in various attempts through submissions to government inquiries to strengthen regulatory enforcement, by the Department

of Health and also by the Trade Practices Commission, concerning misleading claims in the promotion of pharmaceuticals. All these lobbying efforts failed. At the last failed attempt, a Public Service Board (1987) enquiry, the consumer movement could see that the enquiry was heading in a worrying direction. It was going to find that given that there was no practical hope of the government providing the resources to regulate marketing claims effectively, it was best to give up the pretence of doing so and give self-regulation a try. So we in the consumer movement switched tack. We reluctantly agreed to support a three year trial of self-regulation, but only on condition that (a) the industry commit to improving the self-regulation in a variety of ways; (b) that the Trade Practices Commission do an evaluation; and (c) that if the assessment of the trial period of self-regulation was found by the Commission to have been a failure, the government should find the resources to do the job of state regulation properly. The enquiry did indeed so recommend.

The results of the fairly rigorous Trade Practices Commission evaluation of the Australian Pharmaceutical Manufacturers' Association self-regulation scheme were published (Trade Practices Commission, 1992). The evaluation process was dialogic, culminating in a pre-decision conference to discuss a draft of the report that was attended by representatives of consumers, the medical profession and the industry. The Commission's conclusion, supported by all parties to the conference, was that the APMA's self-regulation had been more effective than government regulation had ever been in Australia. An independent chairman who had been recommended by the Commission had run the self-regulation scheme with greater toughness in terms of sanctioning than the government had managed (even if it was still inadequate). The scheme had mobilized greater expertise of oversight than the government ever did or could; it put in place systematic pre-publication clearance of advertisements that would never have been within the financial capacity of the government; and it was kept on its toes by both the pending TPC evaluation and repeated post-publication surveys of the percentage of ads that complied with the APMA Code conducted independently by the Australian Society of Clinical and Experimental Pharmacologists⁴. There is still a great deal to be done to improve the system as the Commission found in its report. However, the view that self-regulation had performed better than had government regulation before it is not just my view and that of the Commission. It is the view of every Australian consumer advocate I know who

4) R. F. W. Moulds and L. M. H. Wing (1989) "Drug Advertising", *Medical Journal of Australia* 150: 410-411.

has been involved in a hands-on way with issues of pharmaceuticals regulation. In fact, this year a survey was conducted by Health Action International (one of the networks of the International Organization of Consumers' Unions) of implementation of the WHO Ethical Criteria for Medicinal Drug Promotion in 42 countries⁵⁾. Australia obtained the highest score, with 26 out of a maximum possible 37 implementation points, followed by Sweden with 23, and with three countries scoring zero!

By no means do I take this as a parable showing that self-regulation is superior to government regulation. In principle, I still think government is better placed to run the regulation of pharmaceuticals promotion than an industry association. The moral of the story is meant to be that such things should not be decided in principle, but out of a process of dialogue. If the other side promises something better than can be obtained under your "fine principles" and delivers it, pat them on the back, tell them that you were wrong (led astray by the inappropriate application of the principle in the particular context) and encourage them to keep it up, to improve further. Regulatory policy should not be framed out of an abstract static analysis of what is the best strategy; it should be responsive to histories of success and failure to deliver the goods in a particular context. In the terms put forward in Ayres and Braithwaite (1992), we should stand ready to adjust responsively up and down a pyramid of regulatory strategies.

During the same period of history that all this was unfolding, there sprung up in Australia the Medical Lobby for Appropriate Marketing (MaLAM), an organization in which I am a member but not a key player. The key players are doctors. MaLAM's strategy has been simple.

Dr Peter Mansfield, the inspiration behind MaLAM, writes to a large number of doctors who are MaLAM members around the world with information about a product that is being marketed inappropriately by a particular company in a particular country. These medical professionals around the world then write to the company—generally at its first world headquarters, or in the country where the offence occurred, or in their own country—demanding an explanation for the alleged inappropriate marketing practice. A naive strategy, hard-bitten advocates of state deterrence might say. Not really. It is a strategy that works enough of the time to make it an extremely cost-efficient method of social control for activists with scarce resources. Writing letters is cheap. Moreover, it is a decent method

5) K. Harvey and D. Caradang (1992) *The Impact of WHO Ethical Criteria for Medicinal Drug Promotion: A Study by Health Action International (HAI)*. The Hague: International Organization of Consumers' Unions.

of social control based on reasoned appeal to corporate and medical responsibility. Actually, it is not a method of social control at all, but a method of dialogue. Sometimes MaLAM decides that they got it wrong and write back to the company with an apology. Pharmaceutical executives, even some of the very worst of them, do have a better side, a responsible side, to which appeals to professional and corporate responsibility can be made. When they don't take the opportunity to put their responsible self forward, there are other strategies available to advocacy groups—muckraking in the media and calls for state enforcement, for example, and in extreme cases threats of consumer or professional boycotts.

In addition to corporate executives having a socially responsible self that can surprisingly often be brought to the fore, pharmaceutical companies have self-interested reasons to listen and respond seriously to rising groundswells of professional concern about their marketing practices. Pharmaceutical companies survive in the marketplace by persuading physicians to prescribe their products. In other words, they depend for success on convincing health care professionals that they are trustworthy. Sometimes they make the judgement that the best way to promote their long-term success is to actually be trustworthy, to admit a mistake and put it right. Five of 17 MaLAM letters between January 1988 and June 1989 resulted in agreement by the company to alter claims or withdraw the product (Wade et al, 1989). This strike rate increased to 5 out of 9 for the period July 1989 to June 1990 (Mansfield, 1991).

The advantage of the MaLAM strategy is that it can be a strand in a web of controls over crimes with a transnational character that are beyond a classic state deterrence strategy. In another paper, I have attempted to show how MaLAM is interwoven with other threads to constitute such a web of international controls (Braithwaite, 1993). Moreover, Fisse and Braithwaite (1993) explain, illustrating with cases like the Bank of Credit and Commerce International, how state regulatory agencies and national courts might effect enforcement against transnational crime without depending on international laws or extraterritorial sweep of national laws. This is accomplished through courts mobilizing what I would call republican institutions that use: (a) the concept of criminality; (b) dialogue; (c) empowerment; and (d) enforcement pyramids that respond to the plurality of motivations and aspirations to conceptions of citizenship within a transnational corporation.

CONCLUSION

Republican criminology has a strategic role to play in a transition to

twenty-first century urban republics. it can show that republican ideas have potential for dealing even with our very worst problems and our most difficult people. With groups like nursing home residents, prisoners and young Aboriginal offenders it can show that coherent empowerment strategies can succeed even with the most powerless. The solutions, of course, are very different for each different type of problem and each different history of dialogue. Yet *liberté*, *égalité* and *fraternité* are still the crucial republican aspirations with a common relevance.

Liberté. The police (private and public) are both one of the greatest threats to freedom in contemporary societies and one of the institutions most crucial to assuring freedom. Large corporations that control private policing and the newest surveillance technology are such a deep threat to freedom that their worst excesses must be criminalized. A central republican task is to enshrine a bill of rights, which we in Australia still do not have. But we must avoid the mistake of the Canadian Charter of Rights and Freedoms, an eighteenth century bill of rights that applies only to public abuse of power, that fails to come to grips with the greater concentrations of power in private hands today.

Egalité. Incarcerating a few corporate criminals strikes a rather trivial blow for equality. Obversely, moving away from the whole notion of a myopically punitive criminal justice system can strike a major blow for the powerless. People often ask of my advocacy of family group conferences for dealing with youth crime: "What will this do for the deeper structural problems of Aborigines?". My answer is "quite a lot". In this, I am not mainly referring to the fact that finding jobs and educational opportunities for young offenders are important objectives of these conferences. What I am referring to is the fact that the criminal justice system is absolutely central to the oppression of Aboriginal people. In Australia, just as in the United States, we have more young black males in prison than in higher education. That is our human capital policy for black Australia. Family group conferences, as the program at Wagga Wagga shows, and as the Maori experience in New Zealand shows, are a genuine republican alternative to the punitive state (Braithwaite and Mugford, 1994). Because they are dialogic, they empower and enrich the lives of all who participate in them, including victims and the police. That is why the police have abandoned their traditional law and order posture to be leading supporters of the reform in Australia. Because Aborigines and the poor generally are over represented among both offenders and victims (including victims of corporate crime as in cases like CML), empowering institutions that give voice to offenders and victims and their families are profoundly redistributive of power. Giving poor offenders jobs

instead of jail is obviously the way to go. But so is it a stupid human capital policy to put our brightest and best corporate criminals in jail. Michael Milkin was one of the most talented people of the 20th century. He actually managed to transform world capitalism in the 80s with his idea of the junk bond. Aland Bond was one of the most talented, visionary people Australia has produced. What a waste to send Bond to jail instead of giving him a new public project rather more noble than winning the America's Cup, something that would benefit the poor in a major way—perhaps two decades of entrepreneurship on behalf of one of Australia's great charities, a major reintegrative feat of citizenship. Michael milkin actually proposed a community service project—working with the banks to come up with some creative solutions to the Third World debt crisis. If anyone could have done that, Michael Milkin—could have done it. So I think the United States may have made a tragic mistake in not taking the offer seriously—in putting retributive values ahead of egalitarian and republican values.

Fraternité. The trouble with the old socialists was structural determinism. They put people like Lenin in power to erect structures that would create a new socialist man. The top-down vision of this creation failed to see that, in the absence of prior work in constituting responsible citizenship from below, it was carpenters like Stalin who would be relied upon to build the structures. The structures failed for reason of the fallibilist critique of central control in Popper (1966), not to mention the subjectivist critique of objectivist tyranny (socialist man excluding women's truth). The structure-citizenship sequence in Marx must be replaced by a citizenship-structure sequence, or rather a developmentally recursive relationship between dialogue and structures. Republican citizenship still has profound appeal in the artistic traditions of Western peoples, whence the recent revival of *Les Misérables*. Caring citizenship and communitarian problem solving can have its power most forcefully affirmed if we can deploy it where it seems least deserved and least plausible—with Michael Milkin and Allan Bond. Just as there was no way of socialism escaping the fact that its future depended on the citizenship values of Stalins; there is no way of capitalism escaping the fact that its future rests with the citizenship of Milkins. Marxism and libertarianism share the same structural blindness to this fact.

Most importantly, I hope the examples of communitarian problem solving I have discussed show that republican thinking can lead us to ways of grappling with the quality of nursing home care, protecting powerless consumers and the safe use of medicines that actually work. Problem-solving strategies that evince respect for enriched conceptions of liberty,

equality and community can actually increase the institutional competence of our efforts to tackle the troubles we sometimes call organizational crime.

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