

Regulatory Mix, Collective Efficacy, and Crimes of the Powerful

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Abstract

This article argues against abolitionism, then against excess in criminalization for white-collar and corporate crime. While the criminal label does useful work, it does that work better when combined with a wide range of regulatory tools. The best strategies create spaces where reformers inside criminal organizations and regulatory agencies are supported to acquire the collective efficacy to transform corporate cultures. This can happen relationally with civil society support, but it never happens sustainably if civil society and street-level regulatory pressure is not sustained. It is early days in our journey of learning how to sequence and mix strategies and how to empower the powerless to resist crimes of the powerful effectively and with justice.

Keywords

regulation, collective efficacy, corporate crime, war

Outline

The plan of this article is first to problematize abolitionism as an aptly progressive response to crimes of the powerful, first considering corporate crime, then war crimes in the second section of the article. Having argued for the importance of the symbolic power of the criminal law, the article then critiques excessive use of it. Imprisoning the powerful is not the main game for preventing crimes of the powerful. Indeed, the article then argues that corporate crime prevention is often accomplished in prosecutions that fail. Moreover, the deterrence effects that precede sentencing corporate offenders can be stronger than those that follow sentencing. Empirically, it is concluded that regulatory inspection works, but that is not mainly a deterrence effect; it is a cumulative effect of a mix of strategies inspectors deploy (Schell-Busey, Simpson, Rorie, & Alper, 2016). Regulatory mix becomes more richly effective when street-level regulators can draw practical support, monitoring, and political legitimacy from civil society. As with individual street crime (Sampson, Raudenbush, & Earls, 1997), collective efficacy within and outside offending organizations is critical to prevention (Jenkins, 1994). None of these accomplishments persist, however. The article concludes that if regulators go to sleep on endlessly returning to kick the tyres of corporate compliance, corporate crime renews. Finally, multidimensionality in regulatory strategy is argued to be the essence of effectiveness in curbing crimes of the powerful, be it war crime or corporate crime.

be an opposite to abolitionism, as others have pondered (e.g., Alvesalo & Toombs, 2002). It has shared with most feminist criminology the view that there is domination in viewing crimes of the powerful as not really criminal. Sutherland's project was to expose the pervasive character of white-collar crime and at the same time to reveal systematic refusal to criminalize it in regulatory practice, even when it fitted the definition of crime as a formal matter of criminal law. Early American debates raged over distinctions between corporate offenses which were enforced with civil penalties when they could have been criminally prosecuted, which most scholars agreed was white-collar crime, and corporate offenses which were not legally subject to criminal penalties, only civil sanctions. Most criminologists concluded that if there was privileging of corporate power in decisions not to define corporate lawbreaking as criminal, this should be contested; arguments should be advanced on why it should be criminalized; meanwhile, terms like civil penalty offences can be used in empirical research that tests theories of corporate crime, while also problematizing this practice.

The criminal label was often found to be more useful with crimes of the powerful than with crimes of the powerless (Braithwaite & Geis, 1982). During 10 years as a part-time Commissioner with Australia's national antitrust, consumer

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Against Abolitionism

White-collar and corporate crime scholarship has always been a critical vocation. Yet since Sutherland (1949), it has tended to

protection and consumer product safety authority I observed this. When the agency was involved in settlement negotiations or restorative justice conferences with corporate offenders, defendants would often take a lead from their lawyers in dismissing offences as a common business practice that is not serious even as they admitted that there was evidence to prove the offence. This would justify their proposing little by way of compensation to victims, public contrition, or corporate transformation. We would point out to them that what we were discussing here was a criminal offence. “Well maybe technically” they sometimes replied after a whisper in the ear from their lawyer, but this is not normally a matter that was sufficiently serious to be treated as criminal. The power of restorative justice in corporate cases becomes useful here. If victims are present, they tend to get angry at this point. They have a lot to say about how their victimization seems criminal to them. But even if victims are not present, it is good practice to ask in a settlement negotiation,

Do you think if victims of your offence were here that they would agree that this was not criminal? Do you think if we went to court with those victims the judge would agree with you rather than them that this was not a criminal offence?

When we saw the genuine shock to these offenders that victims and the regulator should see their conduct as criminal, the promise of the criminal label became clear. Just as it is clear when a feminist lawyer informs a man that he is guilty of the crime of assaulting his wife when he interprets this as just an argument; or guilty of the crime of rape when he says it was just a bit of fun that she enjoyed.

Observing exit conferences after nursing home inspections from the 1980s, I likewise saw the power of restorative justice when representatives of residents’ councils and relatives’ councils sat in the exit conference circle with inspectors, management, and staff representatives. Until they were challenged by residents and relatives, sometimes management saw their non-compliant practices as in the interests of residents. I saw an extreme example of this phenomenon with shocking practices by leading international and national insurance companies in misrepresenting the coverage of their life insurance policies to Aboriginal people in remote communities (Fisse & Braithwaite, 1993; Parker, 2004). They were practices that left the poorest people in Australian society even poorer. When the first case came to the Commission, I argued that this should be a criminal prosecution because the conduct was so serious. My colleagues on the Commission were worried that much of the worst conduct would fall over in court because victims with low literacy would not recall details under cross-examination from uptown lawyers, would not be able to find their insurance policy or produce other documentary corroboration, and sorting these problems persuasively would be resource-intensive in remote areas. They prevailed with the view that the restorative strategies I had advocated in other cases should be preferred.

What was interesting was that top management of this company, Norwich Union, genuinely seemed to believe that

consumers had freely chosen their insurance policies, and therefore, these policies were a help to them in making their circumstances more secure should they suffer an untimely death. When the CEO of Norwich Union travelled to these communities to meet victims as part of the restorative process, he quickly learnt that his techniques of neutralization were spurious. He became ashamed of what his company had done. He then instituted a range of reforms that had far higher costs than any criminal prosecution would have secured. He called a press conference, apologized sincerely to the Aboriginal victims, paid generous compensation to them all even when adequate documentation was lacking, established an Aboriginal consumer education fund to advance future prevention, fired a number of managers who were responsible and had misled him about what was going on in remote Australia, reformed the company’s own compliance practices and led insurance industry-wide regulatory reform. A number of criminal prosecutions of other insurers and their executives ensued, including one from Norwich Union. Great media interest was ignited by the Norwich Union press conference. This led to the prime minister calling us in to brief him on what was being done to ensure this did not happen again. Where regulator-led persuasion toward these outcomes had failed, victim-led, Aboriginal-led persuasion, and empowerment succeeded (at least until the next scandal that revealed this kind of criminal conduct by insurers was back three decades later). There are no such things as permanent regulatory successes. Regulatory work that keeps consolidating transformative victories like this one must always be one of the top priorities for an excellent regulator.

The point of this section is to show that with abuses of insurance companies or nursing homes directed at powerless consumers, abolitionism is a bad idea. Regulators, courts, and victims empowered in restorative justice conferences all need the symbolic power of the criminal label to get abuses to be taken seriously.

Of course, Sutherland’s larger aim in inventing the concept of white-collar crime was to transform criminological theory. Criminological theory in his day was overwhelmingly about crimes of the powerless. It still is. This constitutes criminology as a field flawed by a structural fracture. Without considering other kinds of white-collar crime, corporate crime continues to be responsible for much greater property loss and much larger numbers of deaths and serious injuries than street crime. Therefore, to exclude it from tests and systematic reviews of theories of crime is a recurrent farce.

As Mokhiber (2007, p. 1) put it with property offences: “The FBI estimates . . . that burglary and robbery—street crime—costs the nation \$3.8 billion a year . . . Health care fraud alone costs Americans \$100 billion to \$400 billion a year.” We can likewise make the point for crimes against the person by using the health-care industry alone. The U.S. pharmaceutical industry accounts for more deaths than all the deaths caused by street crime in the United States (Dukes, Braithwaite, & Maloney, 2014, chapter 7). Indeed, research fraud in relation to a single product can cause more than 100,000 deaths, compared to fewer than 20,000 lost to homicide in the United States each

year (Dukes et al., 2014, chapter 7; Gotzsche, 2013). The deeper corporate crime scholars dig, the more clear this truth becomes. Scholars like Friedrichs (2010) reveal disasters that are viewed as matters of consumer victimization by accident or incompetence, as in fact victimization by corporate crime. The Global Financial Crisis of 2008 is one example. The Titanic tragedy is another for which Friedrichs (2010, p. 2) points to forensic studies suggesting that a cause of the sinking in 1912 may have been cost cutting by a shipping company that authorized the installation of substandard rivets in the construction of the vessel.

War Crimes

The crimes of Richard Nixon at Watergate impelled renewed impetus to white-collar crime scholarship. This wave attracted many of the best criminologists of the 1970s and 1980s to join the tiny coterie of influential criminologists who had carried forward the Sutherland legacy in the 1950s and 1960s—Donald Cressey, Gil Geis, and Marshall Clinard. One of the ironies of this is that Watergate was nowhere near as serious a presidential crime as we have seen from many presidents, and Nixon was one of a small number of presidents who made a big difference to corporate crime enforcement by creating a number of important new regulatory agencies such as (the Environmental Protection Agency (EPA)). Watergate did not change the ethos of presidential impunity.

Even when the people of the United States came to view the 2003 invasion of Iraq as a great mistake, and a great wrong that made the world a less safe place, even when they came to accept that the pretext for the invasion of Iraq was fabricated, at no historical moment was there significant public support for charging President Bush (or Prime Minister Blair) with the crime of aggression under the laws of war. In my opinion, President Bush was much more guilty of the crime of aggression than some (not all) of the Japanese leaders accused of this crime who went to the gallows in the war crimes trials at the end of World War II. My opinion does not matter; nor does the opinion of many distinguished criminologists who have articulated in more sophisticated ways kindred diagnoses of that war (Barak, 2005; Green & Ward, 2004, 2009; Hagan, Kaiser, & Hanson, 2015; Jamieson & McEvoy, 2005; Kauzlarich, 2007; Kramer & Michalowski, 2005, 2006; Kramer, Michalowski, & Rothe, 2005; Rothe, 2009; Rothe & Friedrichs, 2006; Walklate & McGarry, 2016). I surmise that Americans who see the Iraq war as a terrible wrong today do not think of the war of aggression against Iraq as a crime that was “not in our name.” The majority of the American people supported it at the time, as did an overwhelming majority of the American Congress, including large numbers of leading Democrats like Hilary Clinton. When the surge was momentarily producing some progress in Iraq fighting in time for George Bush’s second Presidential Campaign, his warfighting helped him win. As opposed to the war as the American people became, they accepted that being president is a tough job and his crimes clearly were in the name of the American people. Worse than that, when whistle-

blowers like Chelsea Manning revealed the sordid details of state crime in Iraq, support for imprisoning the whistle-blowers has continued to be surprisingly strong.

One instance of suppression of the details, alarming in the way that the U.S. media did not communicate a fascinating story to the American people, relates to the “crime of Pearl Harbor” character of the invasion. The crime of Pearl Harbor was that Japan did not have the integrity to declare war against the United States before the attack of December 7, 1941. President Bush was no Pearl Harbor criminal; he called a press conference in which he gave Saddam Hussein 48 hours to avoid war by declaring the end of his regime and leaving Iraq. Long before that 48-hr ultimatum had expired, however, Australian troops had been asked to capture scud missile installations aimed at Israel because of intelligence indicating that Saddam planned to launch these into Israel as soon as hostilities commenced in order to draw Israel into the war. This Saddam hoped would draw other Arab states into a final showdown with Israel. Hilary Charlesworth and I asked Australia’s Prime Minister of 2003, John Howard, whether Australians should feel as uncomfortable with the Pearl Harbor character of this attack without an Australian declaration of war, as President Bush felt the American people might. No he replied. His legal advice was that in circumstances where a war ultimatum had been delivered and no response had been received indicating intent to surrender, it was legal under international law for Australian troops to take out those scud missile sites. He may be right. The point of the story is that there was little interest in Australia in knowing about this tricky implication of the decision to go to war, nor in the United States.

Even in the 2 years after Pearl Harbor, the United States manifested a more lofty morality concerning the laws of war than its ally, the United Kingdom. Churchill believed that a way to win the war was to break the morale of German civilians by pulverizing their cities with carpet-bombing that became fire bombing. Churchill was minded to do what Hitler did not do—use chemical weapons to defend Britain against a German invasion. Churchill wrote to his Chiefs of Staff in February 1943: “In the event of the Germans using gas on the Russians . . . We shall retaliate by drenching the German cities with gas on the largest possible scale” (Pruitt, 2017). Drenching with gas on the largest possible scale would have been a crime of chemical genocide. President Roosevelt and his key advisor, Chief of Staff George Marshall, did not buy any of this. As President he had in 1939 urged his allies against the approach Churchill came to execute in Hamburg and Dresden and attempt in Berlin. President Roosevelt had said in 1939 after the terror bombing of the civilians of Shanghai by Japan in 1937, and Guernica by the European fascists:

The ruthless bombing from the air of civilians in unfortified centers of population during the course of the hostilities . . . has sickened the hearts of civilized men and women . . . I am therefore directing this urgent appeal to every Government which may be engaged in hostilities publicly to affirm its determination that its armed forces shall in no event, and under no circumstances, undertake the

bombardment from the air of civilian populations or of unfortified cities, upon the understanding that these same rules of warfare will be scrupulously observed by all of their opponents. (Ellsberg, 2017, chapter 14)

Well before the end of World War II, the United States had totally abandoned this ethical stance. It embarked on a massive program of developing new nuclear weapons of mass civilian destruction, something Hitler had decided not to devote resources to because he rightly believed that Germany's war would be won or lost before they could be used. Churchill and China's Chiang Kai-shek pressured President Truman to use them against Japan. Most Americans believe dropping of atomic bombs on Hiroshima and Nagasaki was a terrible but necessary evil because it ended the suffering of World War II. Credible historians of World War II no longer believe that today and most members of the Joint Chiefs did not believe so at the time and opposed its use. Among the distinguished American military naysayers on dropping the bomb in 1945 were Dwight D. Eisenhower, Douglas McArthur, Paul Nize, Carter Clarke, William D. Leahy, Chester Nimitz, William Halsey, and Curtis LeMay (Ellsberg, 2017). The firebombing of the capital had killed massively larger numbers of civilians and instilled civilian terror at the center of power, so most U.S. strategic thinkers and most scientists involved in developing the bomb favored gradual acceleration of this terror, for example, by destroying shipping just outside Tokyo harbor with an atomic blast or just a submarine blockade. None of this was the main game of ending the war, however. The war was about to end because Russia had begun to attack Japan and was set to invade. Japan was poised to surrender when they did. Truman did not want this to happen, and the atomic bomb was aimed at deterring the Soviets for the purposes of the impending Cold War, more than at deterring the Japanese people.

Criminologists of war crimes have contributed nothing to moving North Atlantic Treaty Organization opinion away from the view of nuclear weapons as the necessary evil that ended World War II. Hiroshima and Nagasaki were war crimes directed at civilian terror, contrary to President Roosevelt's more ethical plea of 1939, but are not seen as war crimes by America and its allies. Since then, U.S. and Russian Presidential criminality has worsened and deepened. U.S. and Russian Presidents became inured to threatening other countries with complete destruction of their cities. If international courts rightly found Srebrenica and Rwanda to be genocides, then these are threats of much more massive genocides. Indeed, what all nuclear powers, including smaller ones like Britain, France, Pakistan, India, Israel, and North Korea, threaten against their enemies by pointing their nuclear arsenal against them is a genocide of much larger proportions than Hitler perpetrated in World War II. Our rather distorted noble narrative of World War II is that we fought it to end a genocidal regime. On the ashes of that victory, the allies built a world order based on mutual threats of genocide, even a "doomsday machine" on both

sides, that guaranteed genocidal responses to any nuclear attack (Ellsberg, 2017).

Progressive American criminologists can be comfortable with allegations that George W. Bush was a war criminal. But they are not always comfortable when it is said that President Barack Obama ruled and defended a world order based on mutual threats of genocide against all other societies, including nonnuclear states who renounce such threats as criminal. Of course, President Obama continued that status quo inherited from his predecessors in the same way he continued the crimes of 18 years of detention without trial now at Guantanamo Bay after money was paid to bounty-hunting Afghans who handed these sometime innocents over to be incarcerated there. The escalation of the extrajudicial drone assassinations in Pakistan, a country against which Obama never declared war, with targeting personally approved by him, was an escalation of Presidential criminality of his own choosing (Braithwaite & D'Costa, 2018; Sanger, 2012). In the last year of his Presidency, to Obama's great credit, he came to terms with his wrongdoing; he realized that he was killing large numbers of innocents for each Taliban leader hit in Pakistan. So he scaled back the program dramatically. Not before *The New York Times* showed that the Obama administration regarded "all military-age males [killed] in a strike zone" to be combatants "unless there is explicit intelligence posthumously proving them innocent" (Becker & Shane, 2012).

My own research revealed one example of a 16-year-old boy who was targeted in a car in which he was travelling with family members and killed by a drone after a restorative process persuaded the child *not* to join the Taliban in the aftermath of his innocent parents being killed in a U.S. drone strike. A senior U.S. journalist who observed this restorative process complained to the CIA about the boy's targeting, to which they replied that they did not believe he was a child. Instead of joining the Pakistan Taliban, the boy was persuaded in the circle to resist U.S. crimes by joining a camera project that collected photographic evidence of civilian atrocities in drone attacks. This was a serious enough sin for the White House to target and murder him.

Criminologists are today doing better at explaining the imperatives to solve problems by peaceful diplomacy to prevent cascades of war crimes, to avoid putting American Presidents in the position where they murder children in targeted air attacks in countries against which they have not declared war, where they threaten genocide, and perpetrate American Pearl Harbors. The period when criminologists turned their hands to this obligation after the Mai Lai massacre in Vietnam was quite short. There are encouraging signs since the equally counterproductive wars in Iraq and Afghanistan that the criminology of war has established a firmer foothold in criminology (McGarry & Walklate, 2019). Sutherland would be well pleased with this. The aim is not to stigmatize American leaders as war criminals, but in the spirit of reintegrative shaming theory, to invite them and their citizens to think of themselves as essentially good people who have done some bad deeds. We must aim to coax and caress people like former Vietnam War

Secretary of Defence McNamara to step forward and own evils in the way he did in *The Fog of War*, as his mea culpa documentary was titled. And we must aim to coax and embrace lower level whistle-blowers like Chelsea Manning and mid-level ones like Daniel Ellsberg (2017).

Against Criminalization Excess

We have discussed the interesting feature of the relationship of Americans and Britons who look back on former leaders like Richard Nixon, George W. Bush, and Tony Blair mostly without great affection, yet without wanting to see them as criminals. The British look back on Winston Churchill mostly with affection as a savior and certainly do not view him as a criminal. When it comes to Wall Street criminals who are less than genocidal, Americans and Britons love to see them as criminals. What is going on here? My interpretation is that citizens get to see something of the ethical complexity of political leaders, especially open ones like Presidents Obama and Bush, whereas they only get to see the evil side of corporate criminals who fall from grace. They get to know something of their President's children and partner, even their dog. The President's persona is presented to citizens, even by their media critics, as a complex accomplishment of good and evil.

In the case of Defence Secretary McNamara, his conversion to rejection of war as a normally effective tool of state power came too late to save any of Vietnam's lost souls. Still it teaches lessons forward to the next wars. In the case study of extrajudicial drone assassinations in Pakistan, critics did eventually appeal to President Obama for a change of policy: Many lives were saved and the United States became more effective in the contribution it made to defeating the Taliban in Pakistan (which by the end of his term was beginning to become much more successful than his failed military surge in Afghanistan). The *New York Times* and other media, an Ambassador to Pakistan who resigned because he was revolted by the drone campaign, did the most important work in preventing more of these U.S. state crimes. Obama had no fear of a criminal indictment for these crimes. Of course, international criminal law is not always irrelevant, but pressures from one's own media, one's own diplomats, and one's own people are repeatedly more important to stopping criminal conduct.

I was at a Columbia University conference on regulation in New York at the time that President Bush was preparing to invade Iraq. I suggested to the assembled regulatory scholars that perhaps we should march to the United Nations with placards reading: "What works? Regulatory inspection. What doesn't? War." Regulatory inspection does work in improving compliance with laws more than it should reasonably be expected to work (as the Schell-Busey, Simpson, Rorie, & Alper's [2016] meta-analysis shows). At a time when the average expected punishment cost of a U.S. Occupational Health and Safety Administration (OSHA) offence could be measured in cents rather than dollars (because of both low penalties and low detection probabilities) in rare, brief inspections that cover little of most of work sites, Scholz and Gray (1990) showed that

getting an OSHA inspection contributed significantly to improving corporate compliance. How could that be? How could it be rational to take any notice of an OSHA inspector? Surely, firms should just wait for the unlikely occurrence of detection and then write the check. One reason inspection worked was that regulatory inspection often delivers not by punishing people but by reminding them of their obligations to do things they know they should do and to energize them to prioritize them properly. Once I had a university safety officer enter my office. She gently chastised me for leaving a filing cabinet open while I chased around the office looking for something. I was so embarrassed to have to be reminded that it was an unsafe working practice to leave a filing cabinet open; I have never done it since. Regulatory inspection often works like that and in many other equally simple ways. There is a great multiplicity of mechanisms beyond deterrence.

In our systematic observational study of nursing home regulation in all Australian states, 30 U.S. states, and across the United Kingdom, we generated the list of mechanisms in Table 1 through which regulatory inspection frequently enough had positive effects on compliance with the law.

Reducing corporate crime is neither rocket science nor mission impossible when this multiplexity is pondered. Some of the Table 1 mechanisms are virtually costless. For example, praise of nursing home staff and managers by inspectors when something has been fixed or improved in our Australian study of 410 nursing homes significantly improved compliance and quality of care in the next 2 years (Makkai & Braithwaite, 1993). The evidence has long been brewing that "trigger pre-emption" effects are crucial on the above list of strategies. I know from being a fieldworker who often arrived at a nursing home before an inspection team arrived that staff are running around fixing things that should have been fixed earlier, even as inspectors are arriving in the car park. When the inspectors start in Wing A, likewise our research team would observe important things being fixed in Wing B, sometimes temporarily, sometimes more permanently. Compliance remediation to preempt sanctions was well-documented in empirical studies of enforcement cases enroute to court. Of Fisse and Braithwaite's (1983) case studies of corporations that had been through major adverse publicity scandals over corporate offences, only five suffered criminal prosecutions and few suffered significant financial impacts of the adverse publicity. Yet every one of them implemented some worthwhile reform in response to the crisis, and some implemented major reforms. Waldman's (1978) neglected early study of the impact of antitrust prosecutions found that some of the most positive changes in the competitiveness of markets came in cases that prosecutors lost. Waldman, like Fisse and Braithwaite, found systematic pre-emption effects in their empirical work. While an antitrust prosecution is incubating (often for years), defendant companies find that one of the best ways to defend themselves in court is to improve the competitiveness of their behavior. As it awaits trial, the firm sometimes pulls down barriers to entry to the industry that it had erected. It may cease retaliating against weaker competitors (as in desisting from predatory pricing).

Table 1. Strategies That Improved Nursing Home Compliance in Certain Observed Contexts.

Strategy	Process
Reminds	Tapping a staff member on the shoulder reminds of an obligation believed in but lost sight of.
Commits	Persuading someone who was not persuaded that compliance would benefit residents.
Shows	Shows how to do something necessary to compliance that the person does not know how to do.
Fixes	Inspector fixes something themselves (e.g., releases a restrained resident).
Incapacitates individual	Reports a professional to a licensing body that withdraws/suspends their license.
Incapacitates home	Withdraws/suspends license for home.
Protects future residents	Bans new admissions until problem fixed.
Management change	Orchestrates sale or management takeover of the home by signaling escalation up a regulatory pyramid.
Shames	Disapproves noncompliance.
Exposes	Reports noncompliance to the public on a website or the nursing home notice board, inducing either reputational discipline or market discipline, or both.
Praises	Congratulates improvement.
Deters	Imposes a penalty.
Wears down	Keeps coming back until the home wants closure to rid themselves of the inspector.
Changes resource allocation	Sanctions withheld only if there is a change in resource allocation.
Voluntary acceptance of responsibility on the spot	By asking a question, causes a professional to jump in and accept responsibility to put something right immediately. This and the next five are motivational interviewing effects.
Voluntary acceptance of responsibility in a plan of correction	Asking the right questions brings about a long-term plan that accepts responsibility.
Root cause analysis	Asking the right questions induces an insightful root cause analysis.
Trigger continuous improvement	Asking the right questions reveals the benefits of commitment to continuous improvement.
Trigger consultancy	Asking the right questions persuades the home to hire in help from a consultant.
Stimulate the home's deliberative problem-solving	Asking the right questions is a catalyst of problem-solving conversation at a staff meeting or other forum.
Triple loop learning	Inspector spreads generative learning from mistakes to one part of a facility from another and to one facility from another.
Educates	Provides in-service training on the spot.
Builds self-efficacy	Helps management and staff to see their own strengths.
Awards and grants	Nominating the home or staff for an award or grant.
Empowers	Empowers friends of compliance within the organization through some combination of the above strategies that put procompliance factions of the organization in the driver's seat.
Trigger preemption	The home fixes problems before the inspector arrives to preempt the deployment of any of the above strategies.
Trigger third-party engagement with any/all of the above	A word to an advocacy organization, a key shareholder, a lending bank, the media, a provider association, a tort lawyer, the ombudsman, the residents' council, and relatives.

It sometimes even eschews monopoly by actively inviting a competitor into the industry. And it very commonly improves antitrust compliance policies and fires executives responsible for past misconduct, all in the cause of winning its big case (Waldman, 1978).

Put another way, most specific deterrence effects precede corporate sentencing, precede trial, and as our nursing home inspection data demonstrate, can even precede the arrival of the inspector at the front door. As Fisse and Braithwaite (1983, p. 243) concluded from their empirical study, "When a company is struck by publicity concerning an alleged crime, it typically implements reform measures to persuade the government against following the publicity with a prosecution." More recent studies have concluded that contemporary corporations have become ever more sophisticated at gaming settlement negotiations, enforceable undertakings in Australian corporate law, and deferred prosecutions.

This is crystal clear in the case of the pharmaceutical industry. In 1984 (Braithwaite, 1984) and even more so in the years

immediately after (Braithwaite, 1993), I empirically assessed preemptive compliance reforms following major scandals as substantial. It is not that I was completely wrong during this time frame, but three decades later a pattern was clear that the same corporations (Pfizer being a prominent example) had been gaming settlement negotiations and Corporate Integrity Agreements ruthlessly (Dukes et al., 2014, pp. 227–229). Moreover, our team found that corporate criminality of Big Pharma had become much worse. This was not a result of declining criminal and civil sanctions because no industry suffered as large a surge in penalties before, during, and after the first decade of this century as a result of The False Claims Act delivering hundreds of millions and even billions of dollars in penalties to most Big Pharma corporations. American law enforcers became smug in Big Pharma cases that they were suddenly delivering such big corporate penalties and even occasionally sending industry criminals to jail with a frequency they had not delivered in the past. They were so pleased with themselves that they had improved postsentence deterrence

that they neglected presentence deterrence and paid scant attention to monitoring that agreed reforms were real rather than just plans on a piece of paper submitted to the court. Regulators did a poor job of consolidating their gains by monitoring long-run improvements or declines in compliance with the law. Regulators and prosecutors were not kicking the tyres; corporates were just writing the checks and moving on to the next cycle of offending. This way of viewing the history of gaming compliance with the law by the pharmaceutical industry, which is also clear with Wall Street's financial crimes (Braithwaite, 2019; Ford & Hess, 2008), leads to the multidimensionality analysis of the next section.

Regrettably, a comparable pattern is evident in other industries over the past 40 years. I was shocked when it was revealed in 2018 that nearly all of the insurance industry abuses in Aboriginal communities and a great variety of other Australian insurance industry crimes that the regulator had cleaned up by 1993 were back in a serious way. A Royal Commission (2019) into the banking and finance sector revealed a wide variety of forms of fraud and misconduct. By any absolute standard, the conduct was shockingly widespread criminality right across the largest financial institutions in Australia. There was a pattern of gaming enforceable undertakings that were highly comparable to evidence from this century on the gaming of Corporate Integrity Agreements in the North Atlantic (Ford & Hess, 2008; O'Brien, 2013). It was also shocking compared to where we regulators felt we had got the industry after a terrible period of scandal of the 1980s.

All that said, Australian banks did not quite betray the trust of the Australian people to the systemic degree that banks did in the United States, the United Kingdom, and many other European economies in the Global Financial Crisis of 2008. No major banks have collapsed or been bailed out by taxpayers for more than 30 years. Indeed, since 1900, the central bank has never acted as a lender of last resort; despite this, and quite unlike the rest of the world, no Australian bank depositor has lost deposits (Fitzgibbon & Gizycki 2001). Banks have infrequently during the past century been provided with loans to provide support to illiquid building societies (smaller players in the cooperative sector akin to U.S. Savings and Loans). Two state (provincial) government banks of small size were supported by state taxpayers during the 1990–1991 recession. Yet I surmise that the reason for Australian banks remaining sturdy in 2008 relates to a persistent historical cycle of reform in response to high-profile public enquiries into the financial sector more broadly. One reason Australian banks survived 2008 was that in the 2001 scandals associated with auditing by Arthur Andersen one large insurer crashed, its CEO was imprisoned, and a significant telecommunications company also collapsed. This led to yet another cycle of enquiry and reform after 2001 that was repeated again in 2018 through high-profile royal commissions into financial regulation after both the 2001 and 2017 scandals, as happened in the 20th century as well. Cycles of boom-related abuses and bust-related crashes are endemic to finance capital. Therefore, regular cycles of sharpened regulatory scrutiny, regulatory enforcement, and regulatory reform

are needed. So while it is disturbing how Australian big bank fraud has returned as bad as ever, how Australian banks have become like U.S. Big Pharma in their gaming of enforceable undertakings negotiated with financial regulators and approved by courts, I still submit that regular cycles of intensified oversight, particularly through Royal Commissions, have prevented the catastrophic levels of bank betrayals of trust that other economies have suffered.

Aged care also suffers cycles of shocking abuse and neglect, followed by reform and cycles of gaming the reforms, then a new cycle of nursing home scandals, and a renewed cycle of reform. This is true of both the United States and Australia. There is a tendency with each cycle to blame the last reform cycle for getting the reforms wrong. I tend to think the problem is one of profits going to the segments of the industry that become most adept at gaming the most recent generation of reforms, whatever they are. An example was a generally regressive, deregulatory set of aged care regulatory reforms in the late 1990s that nevertheless had the progressive reform of requiring nursing homes to find their own ways to demonstrate continuous improvement in various outcomes to inspection teams. By the time I visited nursing homes with inspection teams in 2004, the most aggressive gamers of the system had moved to what (Braithwaite, Makkai, & Braithwaite, 2007) called “continuous improvement ritualism,” gaming the construction of evidence of improvement with a plentitude of consultants specializing in this game playing.

The most impressive reform that we reported for the United States in the early 1990s was a steep reduction in the number of residents physically restrained: It declined from 42% of all nursing home residents in the United States being physically restrained in the late 1980s to 4% by early this century, with most of the decline occurring in the reforms of the first 2 years of the 1990s (Braithwaite et al., 2007, p. 44). This was driven by an inspiring social movement to “Untie the Elderly” and by retraining of street-level regulators to ask hard questions about why residents were being restrained. Inspectors recorded non-compliance when poor answers were given. There was also regulatory pressure during the 1990s to ensure that physical restraint was not replaced by chemical restraint. This vigilance meant that chemical restraint also halved in the early 1990s. In the 21st century, however, a new epidemic of chemical restraint has crept back into the system, in Australia and the United States, a matter on which our team is appearing before a new Royal Commission on aged care in Australia at the time of writing. The lesson here is again that, on a regular historical cycle, regulatory parameters must be reset to counter whatever forms of gaming have entered the system since the last cycle of reform. One simple dynamic that drives this is that, over time, Makkai and Braithwaite (1992) systematically show that inspectors who are tougher in their regulatory demands are the inspectors most likely to quit the job.

Even in the domains where the gains from regulation have been most stunning, we see what happens when regulators cease kicking the tyres. One profound historical regulatory accomplishment of the 20th century was making it 25 times

as safe to travel a distance by flying through the air than across the earth's surface (Vally, 2017). Yet a Trump administration can arrive to take regulatory pressure off a company like Boeing and hundreds of lives can be lost. A country like Australia that eliminated black lung disease as a cause of death for coal miners half a century before the United States in the 20th century can have it come back in the 21st century when the regulatory pressure was taken off. As recently as Braithwaite (2013), I could laud Australian coal mines for not losing a single miner in any accident in 4 of the previous 7 years, when economies like the United States and Britain could kill a thousand miners in a year a century earlier, while mining lesser amounts of coal than Australia today. Then, with the regulatory pressure off, with unions less potent and vigilant, Australia could lose four coal miners in the first 6 months of 2019. Again, a message is that responsive regulation can prevent corporate crime in the short- and medium-term, but not in the long-term, if regulators stop kicking the tyres at the street level.

For Multidimensional Regulation

The repeated experience of even the best designed of regulatory measures being gamed over time means not only that reform resets must be iterative; it should also mean that redundancy and mixed tools are imperative in regulatory design. This idea is that all regulatory instruments have deep dangers of counterproductivity. Therefore, a mix of regulatory tools must be deployed; on-site inspection and dialogue should be important in that mix so regulators keep in touch with which tools are no longer working. Responsive regulatory theory (Ayres & Braithwaite, 1992; Braithwaite, 2008) argues that the best way to deploy the mix is dynamically—so that, in sequence, the strengths of one tool are given a chance to cover the weaknesses of another. Good design of the pyramid means that the cut through of the most important tools, like prosecution, is not blunted through overuse. Moreover, responsive regulatory theory argues that good dynamic design of regulatory mix can mean that some tools lower in the pyramid help to sharpen the impact of others higher in the pyramid (Braithwaite, 2018). For example, a firm might be let off with a warning letter accompanied by securing agreement that if the inspector comes back in a few months and this problem has recurred, then management agrees that it will be fair for it to suffer the financial consequences of cutting off new admissions to a nursing home. This delivers greater legitimacy for the controversial action of closing the door on those awaiting admission, and it reduces litigation risks in enforcing it.

Schell-Busey et al.'s (2016) meta-analysis of corporate crime deterrence does not test the various dynamic ways of thinking about how legal compliance is secured, but its results are consistent with the message that mix and redundancy of regulatory tools are critical. Basically, their results show that tough deterrent penalties on their own do not work with corporate crime. The meta-analysis found increased regulatory inspections to be important in driving strong detection-driven deterrence. As Table 1 argues, these inspection effects may

drive diverse nondeterrence compliance mechanisms. Mixing regulatory interventions—with an enforcement quiver containing disparate arrows of deterrent and nondeterrent remedies—is what works in reducing corporate crime:

Our results suggest that regulatory policies that involve consistent inspections and include a cooperative or educational component aimed at the industry may have a substantial impact on corporate offending. However, a mixture of agency interventions will likely have the biggest impact on broadly defined corporate crime. . . . Single treatment strategies . . . have minimal-to-no deterrent impact at the individual and company levels. However, studies examining multiple treatments produce a significant deterrent effect on individual- and corporate-level offending. . . . Based on our results, we determine that a mixture of agency interventions is apt to have the biggest impact. (Schell-Busey et al., 2016, pp. 1–2)

What this important empirical contribution implies is that corporate crime deterrence is important, but only when it is embedded in a regulatory mix. The main game of corporate crime control is learning how to get this mix right and tuning its sequencing. We have some revealing qualitative research on how regulatory encounters unfold. While that helps illuminate this learning, evaluations of different mixes and different sequences for different circumstances are complex quantitative/qualitative work that has barely begun.

The multidimensionality message is also consistent with what we know from the transitional justice literature about what works in regulating organizational crimes against humanity by states or insurgents (Braithwaite, 2020), with multidimensional peacekeeping as more effective in regulating armed groups than any unidimensional strategy (Doyle & Sambanis, 2000, 2006), and with the suggestive evidence that wise integration of restorative justice with courtroom justice is likely to be more effective than relying on either alone for the prevention of conventional crime (Braithwaite, 2018).

Conclusion

All this means that corporate crime prevention has conceptual similarities with disease prevention by physicians. It helps when the doctor is aware of data on cancer treatments that are counterproductive. But our doctor is likely to recommend a variety of things to be done for which there is some evidence that they can help: perhaps multiple medications, regular inspections of bits of our body with different kinds of scans, more exercise targeted at getting weight off crucial bits, dietary changes, stress reduction, radiotherapy, chemotherapy, then at the right time cutting out some chunks of our body, followed by more targeted radiotherapy to mop up cancer not successfully excised, and so on. Evidence-based medicine provides guidance on which tools can be helpful and which are quackery. Yet it provides limited evidence on which mix to use in which sequence. Evidence is scant on which will have positive or negative synergies between different elements of the mix in our particular circumstances. We rely on a doctor with good

monitoring skills on an n of one patient, on good clinical judgment and good knowledge of quirks of our particular body and disease history.

A key implication of the Schell-Busey et al. (2016) meta-analysis is that for good corporate crime prevention we rely on regulators with inspection skills rather like that of the clinician. These are diagnostic and qualitative monitoring skills. Catalytic skills are also important, which is why responsive regulatory theory argues these days that regulators should be trained in motivational interviewing to help businesses find their own idiosyncratic motivations to comply and to transform their corporate culture to a more ethical one. A suite of meta-analyses on the effectiveness of motivational interviewing with other forms of compliance show impressive effectiveness (e.g., Lundahl, Kunz, Brownell, Tollefson, & Burke, 2010).

Ultimately, what all this means is that we should not think in too disciplinary a way as criminologists about how to prevent white-collar and corporate crime. Multidimensionality of prevention requires multidisciplinary in knowledge. A physician with a narrowly disciplinary mentality of a surgeon ends up with a blunt scalpel and a high ratio of dead to cured patients. Likewise, a regulator with the disciplinary mentality of a criminologist blunts prosecution as a Sword of Damocles, when they could be sharpening it (Braithwaite, 2018). Incompetent regulators can spend too much time fighting losing or nonstrategic litigation, putting insufficient resources into inspections and regulatory conversations (Black, 2002). During my years as a regulatory Commissioner, I worked with three Chairs and observed others who came before and after at close quarters from the 1970s. One who was recognized, not only by me, as less effective than other Chairs would take on any case where the illegal conduct seemed particularly morally reprehensible. These would accumulate to the point where Commission staff were overstretched. Then, a case would come along that was not as morally reprehensible as others, but that provided a strategic opportunity to transform an industry pattern of conduct that was normally hard to prove, but easy to prove in this particular case. That ineffective Chair would pass it over, concentrating on the accumulated nonstrategic cases that were overwhelming his enforcement staff, cases that he would often lose and that would change little in a structural sense about Australian business. His justification for passing over that case with transformative structural potential was that the conduct was less egregious than the cases he prioritized by default. That appeared a persuasive narrative. Yet the fact was that he was the Chair most captured by industry interests that this regulator ever suffered.

Competent regulatory *risk management* is the bread and butter of business regulatory competence; creative *opportunity management* to transform entrenched patterns of evils of corporate crime is the stuff of regulatory excellence (Braithwaite, 2017). It is achieved diagnostically and catalytically by a mix of means harnessed to purposive intent that delivers self-efficacy and collective efficacy to the reformers inside corporations and inside regulators (Jenkins, 1994).

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