36. Corporations are more likely to be involved in regulatory than in *malum in se* offenses.
37. Engel, "Corporate Social Responsibility," examines several variations of the illustration in the text. Assuming that the flouting of law demoralizes and sets a bad example, society suffers some generalized welfare loss through law-breaking, over and above the losses directly attributable to the pollution per se. Those supplemental costs could, however, be accounted for in the level of fine; whether or not they were included in any particular instance would be one of the matters for the directors to consider in weighing the negative legislative signals against positive private benefits.
38. J. Simon, C. Powers and J. Gunnemann, *The Ethical Investor: Universities and Corporate Responsibility* (New Haven and London: Yale University Press, 1972), 171, develop something like this under the name of the "Kew Gardens principle," which is discussed in Engel, "Corporate Social Responsibility," 60-70.
39. One response to this last point is to reform the rules of limited liability; see Stone, "The Place of Enterprise Liability," 65-76. Another is to draw from the long-standing acceptance of limited liability the same conclusions one can draw from the fine level itself–that it reflects the considered, presumptively correct social judgment and ought not be specially accounted for by the private sector managers; see Engel, "Corporate Social Responsibility."
40. Stone, *Where the Law Ends*, 158-73.
41. Conscience and peer-group pressures need not be the only motivators. A well-designed system of directors and officers liability of a sort outlined in the text above might hold the directors personally liable for some egregious outcomes of which they had provable prior notice. The public directors, by injecting discussion of the problem at the board meeting, would pierce the information shield referred to earlier, and, by tainting the directors with knowledge, intensify the prospect of their personal liability. Query: Under what circumstances might we want to make some course of conduct unprofitable for the directors (and other agents) even if it might remain profitable for the company?
42. As opposed to the special public directors described in the text above.
43. There already exists authorization for some broad review of the borrower's management as a condition of federal bond guarantees: Emergency Loan Guarantee Act §6(b), 85 Stat. 178 (1971).
44. Consider the election to the Chrysler board of a high-level labor executive, a development of considerable note in the United States. While not required by the government, can anyone believe it was unrelated to that company's need for federal assistance and public goodwill and credibility?

CHAPTER 3
TAKING RESPONSIBILITY SERIOUSLY: CORPORATE COMPLIANCE SYSTEMS

John Braithwaite

Corporate social responsibility means two things. First, it implies corporate policies which demand organizational performance beyond the minimum required by law in areas such as consumer protection, environmental stewardship, occupational health and safety, discrimination and other labor-relations practices. Second, it requires internal compliance systems to ensure that such policies are put into practice. This chapter is concerned only with the second dimension of corporate responsibility.

This dimension has been relatively neglected by scholars, while libraries are filled with corporate ethics books concerning what the policies of responsible companies should be.[1] The imbalance is perverse because a company with voluminous and ethically sound policies to promote social responsibility but no mechanisms to enforce them is a greater danger to the community than a company with no corporate responsibility policies at all but adequate mechanisms for at least assuring compliance with the law. What companies do and how they are structured to channel behavior in prescribed directions is ultimately more important than what they say they should do.

The discussion of the systems that companies can put in place to improve prospects of legal compliance will be equally relevant to compliance with corporate values which go beyond the legal minimum. We will commence with a consideration of the role the board of directors can play. Then the role of openness and disclosure in corporate governance will be considered, followed by ways of dealing with structural pressures for unethical conduct, and finally the place of systems within the company designed specifically for the purpose of assuring compliance.

While it is all very well to identify the things which companies might do to improve compliance with their own ethical standards, there might not be grounds for optimism that companies will find such an investment worthwhile. Thus, the final section of the chapter explores the potential of mandatory internal compliance systems.

A Vigilant Board

The board of directors has an important role to play in ensuring compliance with ethical policies, but it is a mistake to exaggerate its importance. In the United States there is a large literature on the prospects of outside directors acting as superegos for the erratic ids of insiders.[2] Reflective of this concern is the fact that nonexecutive directors are more prevalent than in any other country.[3]

The corporate crime literature offers little hope of outside directors becoming effective superegos. With the hundreds of companies from many industries which disclosed foreign bribery to the Securities and Exchange Commission in the mid-1970s, in not one case was it discovered that an outside director had been apprised of the problem.[4] In contrast, in more than 40 percent of the SEC foreign payment disclosures, it was revealed that senior management was aware of the payments and the surrounding circumstances.[5] While most law schools educate their students about directors' duties and the decisionmaking power of the board, observers of corporate behavior continue to conclude that the board's influence is feeble.[6]

Coffee[7] has posited an analogy which captures the irrelevance of the board to preventing most corporate misconduct. Conventionally, the board is viewed as the corporation's "crow's nest." As such, it can spot impending problems on the horizon, but can hardly discover or correct troubles in the ship's boiler room below. Corporate crime and breaches of ethical standards occur in the boiler room and would rarely be noticed by directors whose job it is to scout the horizon looking for new investment opportunities, sources of finance, possible mergers, joint ventures, and the like.

The point about Coffee's analogy is that communications from both the crow's nest and the boiler room run to the bridge, where top management holds the helm. Strategic reforms will therefore sheet responsibility home to the bridge and ensure that communication channels to the bridge from the boiler room are free. There is certainly more hope for progress in this direction than by attempting to establish radical new communication channels from the boiler room to the crow's nest. Even if these new channels can be made to work, all the crow's nest can do is shout, while the bridge can take corrective action.

It follows that it is more important for reports from corporate compliance groups to be read and acted upon by the chief executive officer than by some social responsibility committee of the board. Undoubtedly, both would be desirable. But since both board and chief executive suffer from an information overload, choices must be made. Since the chief executive currently already has the greater ability to know about and correct law-breaking, measures to impose assurances that those on top will know, and measures to define responsibilities to act, should also concentrate on the chief executive.

Obviously, there are exceptions. It is surely preferable for the board, or an audit committee composed of outside directors, to review matters which touch on the personal financial interests of the chief executive,[8] such as loans to companies in which the latter has an interest.

A practical constraint upon corporate compliance groups reporting to a subcommittee of the board rather than to top management is that for most board members the monthly meeting is as much time as they are prepared to invest in their responsibilities. One also suspects that such a reporting relationship would encourage the chief executive to filter what went up to the board. Instead of a frank and efficient reporting system which guarantees that *someone* at the top is formally put on notice of wrongdoing, we increase the risk that no one will be formally notified. The chief executive may be informally notified (in his/her secret role as censor), but will rarely be held formally accountable where the company rules allocate responsibility to the board.

Outside directors have little interest in challenging the chief executive officer to stop interfering with the flow of information to them. Most of them are on the board because the chief executive put them there. Some might have the chief executive on their own board. Tacit understandings that "you keep your nose out of my internal affairs and I'll keep my nose out of yours" flourish.

The initiative which has been suggested by Ralph Nader, Christopher Stone, and others to cut through this cronyism is the government-appointed public-interest director. If the public-interest director is to get a meaningful picture of what is going on in the corporation s/he will need an investigative staff to dig out the facts. Management experts are generally apprehensive about tensions threatened by "shadow staffs" which are not answerable to the chief executive. Eisenberg[9] believes that such staffs would have an "institutionalized obligation to second-guess the management, but very limited responsibility for results." Their advice is frequently oriented towards placating the powerful barons they serve, and hence the result is to promote confusion in managerial environments which demand decisiveness.

These efficiency debits of the public-interest director concept are not fully answered by supporters such as Stone.[10] Stone suggests that public-interest directors and their staffs should be part of the corporate team in most normal respects. The public-interest director should also be a director for the corporation in the sense of assisting with general corporate goals such as profit and growth. Although the public-interest director is appointed to government, no one should be appointed who is not acceptable to the board. Stone suggests that public-interest directors should not turn over information uncovered in the course of their investigations to public authorities. Only if the company indicates an unwillingness to rectify a problem identified by the public-interest director should s/he go public or notify the government.

Certainly there is a difficult choice to be made. Consumers can have a director representing their interests who is no longer accountable to the public, sufficiently tame to be acceptable to management, and therefore in considerable danger of co-optation. Or they can have an aggressive public-interest director who is consequently frozen out of internal decisionmaking and who impairs managerial efficiency. The latter two deficiencies are related. If staff of the mistrusted public-interest director insist on attending a scheduled meeting, then a second (discreet) gathering will have to be convened to cover the same ground.

One wonders whether the public interest would be better served if consumerists, unionists, and environmentalists resisted co-optation and fought corporate abuses unmuzzled from outside the corporate walls. Naturally, corporate compliance groups which are under chief executive control are more likely to have their recommendations ignored than if a representative of the public interest were to know of the recommendations. The former kind of compliance group, however, is more likely to get the cooperation necessary to give it something worthwhile to report.

It might be better to have a compliance group which is "in the know" and which taints the chief executive with knowledge of illegalities by placing written reports on his or her desk. Public interest movements could then concentrate on enticing insiders to leak stories of chief executive officers ignoring compliance group reports. They can make allegations and call on the company to deny them. They can encourage whistle blowing. Constructing an artificial consensus between business and consumer groups by having public-interest directors as dedicated members of the company team may be less productive of corporate responsibility than outright conflict.

Critics of public-interest directorships have often likened the idea to having virgins run brothels.[11] Since the board is never really in charge of the modern corporation, a more appropriate analogy might be appointing a pacifist as an advisor to the general on how the troops are performing. While it does appear in some ways to be a structurally naive solution, it is one which should be piloted in a few companies and evaluated.[12] The armchair evaluation indulged in above is no substitute for empirical observation of what happens in a company when the public-interest director intervenes. The reform has not been tried and found wanting, but found wanting for lack of having been sufficiently tried.

Open Corporate Governance

An alternative to putting independent outsiders onto a board which conducts its affairs secretively is to chip away at this secretiveness so that all outsiders will have a clearer view of what is going on. As Joseph Pulitzer argued: "There is not a crime, there is not a dodge, there is not a trick, there is not a swindle, there is not a vice which does not live by secrecy."[13]

Over the past two decades the consumer movement has played an important role in lifting the veil of corporate secrecy by encouraging and supporting whistle blowers from within the corporation who expose wrongdoing to the public.[14] A growing number of jurisdictions have statutory provisions which protect whistle blowers against unfair dismissal and other abuses.

Another employee right which should be legally guaranteed is a right of research scientists to publish their findings even though the employer might object to such publication. This is a difficult area since it obviously would be undesirable to give scientists carte blanche to reveal trade secrets. Nevertheless, the very fact that some companies give their scientists a contractual right to publish so long as secrets are not revealed demonstrates that such difficulties are surmountable.[15]

In addition to laws guaranteeing rights to blow the whistle, an argument can be made for a duty to blow the whistle in certain extreme circumstances. This was the reasoning behind amendments to the Federal Criminal Code introduced in Congress in 1979. These amendments sought to make it an offense for "an appropriate manager" who "discovers in the course of business as such manager a serious danger associated with" a product and fails to inform each appropriate federal regulatory agency of the danger within thirty days.[16] The value of such a law would not be that it would punish guilty people, but that it would help lift the lid on dangerous products before they did any harm. It is conceivable that the existence of such a law in Germany could have prevented the thalidomide disaster, remembering that it takes only one person to blow the whistle.[17]

It would be foolish to put too much faith in whistle blowing of either the mandated or voluntary varieties. The informal social pressures against betraying the company or colleagues at work cannot be underestimated. Informers are often regarded with disdain even by the side to which they defect and frequently are viewed as misfits with low public credibility. From a company's point of view, whistle blowing is something to be prevented, because it undermines trust and confidence, and therefore open communications, within an organization. As Powers and Vogel have argued:

> The task of *ethical management* is to have anticipated the pressures which would give rise to the concealed and harmful practice, and to have helped create patterns of communication within the organization so that whistle-blowing would not be necessary.[18]

A fundamental requirement of effective internal compliance systems is that there be provision to ensure that "bad news" gets to the top of the corporation. There are two reasons for this. First, when top management gets to know about a crime which achieves certain subunit goals, but which is not in the overall interests of the corporation, top management will stop the crime. Second, when top management is forced to know about activities which it would rather not know about, it will often be forced to "cover its ass" by putting a stop to it. Gross has explained how criminogenic organizations frequently build in assurances that the taint of knowledge does not touch those at the top:

> A job of the lawyers is often to prevent such information from reaching the top officers so as to protect them from the taint of knowledge should the company later end up in court. One of the reasons former President Nixon got into such trouble was that those near him did not feel such solicitude but, from self-protective motives presumably, made sure he did know every detail of the illegal activities that were going on.[19]

There are many reasons why bad news does not get to the top. Stone[20] points out that it would be no surprise if environmental problems were not dealt with by the board of a major public utility company which proudly told him that it had hired an environmental engineer: The touted environmentalist reported to the vice-president for public relations! More frequently, the problem is that people lower down have an interest in keeping the lid on their failures. Consider how a "cover-up" of bad news about the safety and efficacy of a pharmaceutical product can occur.

At first, perhaps, the laboratory scientists believe that their failure can be turned into success. Time is lost. Further investigation reveals

that their miscalculation was even more extensive than they had imagined. The hierarchy will not be pleased. More time is wasted drafting memoranda which communicate that there is a problem, but in a gentle fashion so that the shock to middle management is not too severe. Middle managers who had waxed eloquent to their supervisors about the great breakthrough are reluctant to accept the sugarcoated bad news. They tell the scientists to "really check" their gloomy predictions. Once that is done, they must attempt to design corrective strategies. Perhaps the problem can be covered by modifying the contraindications or the dosage level? Further delay. If the bad news must go up, it should be accompanied by optimistic action alternatives.

Finally persuaded that the situation is irretrievable, middle managers send up some of the adverse findings. But they want to dip their toes in the water on this. Accordingly, they first send up some unfavorable results which the middle managers earlier predicted could materialize and then gradually reveal more bad news for which they are not so well covered. If the shockwaves are too big, too sudden, they'll just have to go back and have another try at patching things up. The result is that busy top management get a fragmented picture which they never find time to put together. This picture plays down the problem and overstates the corrective measures being taken below. Consequently, they have little reason but to continue extolling the virtues of the product. Otherwise, the board might pull the plug on their financial backing, and the sales force might lose faith in the product which is imperative for commercial success.

In addition, there is the more conspiratorial type of communication blockage orchestrated from above. Here, more senior managers intentionally rupture line reporting actively to prevent low-level employees from passing up their concern over illegalities. The classic illustration was the heavy electrical equipment price-fixing conspiracy of the late 1950s:

> Even when subordinates had sought to protest orders they considered questionable, they found themselves checked by the linear structure of authority, which effectively denied them any means by which to appeal. For example, one almost Kafkaesque ploy utilized to prevent an appeal by a subordinate was to have a person substantially above the level of his immediate superior ask him to engage in the questionable practice. The immediate superior would then be told not to supervise the activities of the subordinate in the given area. Thus, both the subordinate and the supervi-

> sor would be left in the dark regarding the level of authority from which the order had come, to whom an appeal might lie, and whether they would violate company policy by even discussing the matter between themselves. By in effect removing the subject employee from the normal organizational terrain, this stratagem effectively structured an information blockage into the corporate communication system. Interestingly, there are striking similarities between such an organizational pattern and the manner in which control over corporate slush funds (in the 1970s foreign bribery scandals) deliberately was given to low-level employees, whose activities then were carefully exempted from the supervision of their immediate superiors.[21]

The solution to this problem is a free route to the top. The lowly disillusioned scientist who can see that people could be dying while middle managers equivocate about what sort of memo will go up should be able to bypass line management and send the information to an ombudsman, answerable only to the board or chief executive, whose job it is to receive bad news. General Electric, Dow Chemical, and American Airlines all have such short-circuiting mechanisms to allow employees anonymously to get their message about a middle management cover-up to the top.

The ombudsman solution is simply a specific example of the general proposition that if there are two lines to the top, adverse information will rise up much more often than if there is only one. For example, if an independent compliance group answering to a senior vice-president periodically audits a laboratory, scientists in the laboratory have another channel up the organization through the audit group. Naturally, the middle managers responsible for the laboratory would prefer that they, rather than the compliance group, give senior management the bad news.

There are also ways of creating *de facto* alternative channels up the organization. Exxon has a requirement that employees who spot activities which cause them to suspect illegality must report these suspicions to the Law Department. Say a financial auditor notices in the course of his or her work a memo which suggests an antitrust offense. In most companies, auditors would ignore such evidence because it is not their responsibility and because of the reasonable presumption that they are not expected to be experts in antitrust law. Exxon internal auditors, however, would be in hot water if they did not report their grounds for suspicion to the Law Department.

Once a violation is reported, there is an obligation on the part of the recipient of the report to send back a determination as to whether a violation has occurred, and if it has, what remedial or disciplinary action is to be taken. Thus, the junior auditor who reports an offense and hears nothing back about it knows that the report has been blocked somewhere. He or she must then report the unresolved allegation direct to the audit committee of the board in New York. To date this free channel to the top has never been used by a junior auditor. The fact that it exists, however, and that everybody is reminded annually that it does, makes it less likely that it will have to be used. The most effective control system is one incorporating such strong situational incentives to compliance that it never has to be used.[22]

In reaching the conclusion that procedures to get bad news to the top of the corporation are more important than unrealistic aspirations about widespread blowing of whistles to the outside world, it is important not to stray from our purpose of assessing openness of corporate life to outside scrutiny as a route to social control. The most influential type of openness strategy beyond whistle blowing is the social audit.[23]

In its extreme manifestation, social audit means placing dollar values on the social benefits and costs the corporation's activities impose on the wider community during a given year. Thus, for example, the wealth generated by the company must be discounted for any harm to the environment caused in generating the wealth. The idea is quaint and impractical, not to mention its ensnarement by the economist's propensity to allow the more measurable to drive out the more important.

Nevertheless, enhanced disclosure of pertinent facts about the corporation's social performance is an important route to sharpened social responsibility. Responsible companies should be willing to enter into social contracts with unions, consumer, environmental, and other public-interest groups to disclose on a comparable basis from year to year key social performance indicators which would enable the groups to monitor corporate performance. Companies concerned about affirmative action should negotiate with womens' groups the terms of disclosure in annual reports of appointments, promotions, and pay increases for women. Environmental groups might be involved in framing public disclosure guidelines for effluent levels and investment in clean-up, unions in guidelines for reporting accident rates and average exposure levels for ambient hazards, and consumer groups in guidelines for disclosure of product recalls and statistics on consumer complaints.

Why should any company voluntarily expose itself to the risk of public criticism for deteriorating performance under these kinds of public-interest criteria? One reason might be that it is so committed to improving performance on such criteria that it is willing to make the investment to ensure that performance in fact improves. It is prepared to put itself under pressure of risking criticism from outsiders to do so. It is keen to make sure before the event that public-interest groups will be convinced when performance does improve that this is not a statistical fiddle concocted by the public relations department. If performance really changes for the better, and the improvement is accepted as such by the corporation's critics, then self-respect and morale might be enhanced within the corporation and respect for the corporation and its values by external publics might also be nurtured. Certainly, there are many corporations and executives who crave neither self-respect nor respect from the community, but for those who do, voluntary disclosure as part of a social contract negotiated with the relevant publics of the corporation is part of taking corporate responsibility seriously.

Watching Pressures for Irresponsibility

The corporate world is littered with irresponsible companies which have responsible policies. One reason for this is that performance pressures often force middle managers to act irresponsibly if they are to achieve corporate goals.[24] This was illustrated in my research on corporate crime in the pharmaceutical industry:

> Take the situation of Riker, a pharmaceutical subsidiary of the 3M corporation. In order to foster innovation, 3M imposes on Riker a goal that each year 25 percent of gross sales should be of products introduced in the last five years. Now if Riker's research division were to have a long dry spell through no fault of its own, but because all of its compounds had turned out to have toxic effects, the organisation would be under pressure to churn something out to meet the goal imposed by headquarters. Riker would not have to yield to this pressure. It could presumably go to 3M and explain the reasons for its run of bad luck. The fact that such goal requirements do put research directors under pressure was well illustrated by one American executive who explained that research directors often forestall criticism of long dry spells by spreading out discoveries–scheduling the programme so that something new is always on the horizon.
>
> Sometimes the goal performance criterion which creates pressure for fraud/bias is not for the production of a certain number of winners but simply for completing a predetermined number of evaluations in a given year. One medical director told me that one of his staff had run 10 trials which showed a drug to be clear on a certain test, then fabricated data on the remaining 90 trials to show the same result. The fraud had been perpetrated by a scientist who was falling behind in his workload and who had an obligation to complete a certain number of evaluations for the year.[25]

One might say that this is an inevitable problem for any company that is serious about setting its people performance goals. But there are great differences in the degrees of seriousness of the problem. At one extreme are companies that calculatedly set managers goals that they know can only be achieved by breaking the law. Thus, the pharmaceutical chief executive may tell the regional medical director to do whatever has to be done to get a product approved for marketing in a Latin American country, when he or she knows this will mean paying a bribe. Likewise, the coal mining executive may tell the mine manager to cut costs knowing this will mean cutting corners on safety.

The mentality of "Do what you have to do but don't tell me how you do it" is widespread in business. Eliminating it is easy for executives who are prepared to set targets which are achievable in a responsible way. It is a question of top management attitudes, to which we will return later. IBM is one example of a company which Brent Fisse and I found to have the approach to target setting which I have in mind.[26] IBM representatives do have a sales quota to meet. There is what is called a "100 Percent Club" of representatives who have achieved 100 percent or more of their quota. A majority of representatives make the 100 Percent Club, so the quotas are achievable by ethical sales practices. IBM in fact has a policy and program for ensuring that targets are attainable by legal means. Accordingly, quotas are adjusted downwards when times are bad.

As Clinard found,[27] unreasonable pressure on middle managers comes from the top, and most top managers have a fairly clear idea of how hard they can squeeze without creating a criminogenic organization. In the words of C. F. Luce, Chairman of Consolidated Edison: "The top manager has a duty not to push so hard that middle managers are pushed to unethical compromises."[28]

Specialized Compliance Functions

In a recent research project, I identified the five American coal mining companies with the lowest accident rates in the industry for the early 1980s (U.S. Steel, Bethlehem Steel, Consolidation Coal Company, Island Creek Coal Company, and Old Ben Coal Company) and set out to discover what it was about their safety compliance systems which made them so successful.[29]

"You can't cookbook safety," Bethlehem Steel's Director of Safety said to me during one interview. He was becoming a trifle annoyed with my constant questions about the place of safety within the organization – who answers to whom and the like. The Senior Vice-President for Operations, Coal, also felt my questions were misguided. He pointed out that even though Bethlehem was a leader in safety performance, there might be very little that other companies could learn from Bethlehem in terms of formal structures because each company has a unique history, a unique set of personalities in senior positions, and different organization charts; consequently, each must find a unique solution to the problem of the place of safety within its structure.

The criticism was apt. In these interviews I suppose I was in search of some magic formula that would be evident in all of the companies with the very best safety records. Then perhaps it would be possible to enact laws to require other companies to adopt this same formula.

One hunch was that the safety leaders would be companies which granted their inspectors independence by having them answer to a safety department rather than to the mine superintendent. The theory here was that safety would less likely be compromised when the inspector could only be overruled by another safety professional rather than by a line manager whose primary concern was production. In fact, it was found that at U.S. Steel and Island Creek, inspectors at the mine, chief inspectors at the district level, and the senior safety person at the corporate level, all reported directly to the line manager at their level. At Island Creek only a dotted line connected safety staff at different levels of the organization to each other. At the other extreme Old Ben showed only a dotted line from inspector to mine superintendent while solid lines connected the inspector to the director of safety and the director of safety to the Manager, Corporate Safety. Consol had an unusual compromise with one set of safety staff reporting to line managers and another set reporting through staff channels to the Vice-President, Safety. Bethlehem had yet another sort of compromise, namely, mine inspectors having a solid line to the divisional manager of Safety and Health and only a dotted line to their mine superintendent, while the divisional manager of Safety and Health answered not to a corporate safety person, but to his or her divisional general manager.

In other words, there were five companies, all safety leaders, among which existed the whole range of conceivable reporting relationships for safety staff within the organizational power structure.

The companies also had quite different approaches to enforcing compliance with their safety rules. U.S. Steel's approach was quite punitive, with employees frequently being dismissed or given days off without pay for failing to comply with safety standards. Consol also not infrequently adopted this punitive stance, while the other three positively rejected such punitiveness in building motivation for safe practices among employees. Island Creek was different from the others in the way they used financial carrots rather than disciplinary sticks to encourage safety. While none of the other companies made explicit payments to employees for achieving improved safety, they did to varying degrees incorporate safety performance into the overall evaluation of managers for promotion or bonus.

The size of safety staffs was another variable on which the five companies were quite different. At one extreme was Consol with a safety staff which peaked at 300; at the other, U.S. Steel with a staff of 35. On the one hand, Consol achieved a striking improvement in accident rates after trebling its safety staff; on the other, Old Ben achieved an even more remarkable improvement by reducing and rationalizing its inspectorial force.

In summary, the place of safety in the formal power structure of the organization, the human resources dedicated to safety, the punitiveness with which safety was enforced, and the use of tangible rewards for safety performance varied radically among the five safety leaders.

What then did the five companies have in common?

Even though the place of safety departments in the formal organizational structure was quite varied, for all of the companies it was clear that safety personnel had considerable informal clout. Moreover, in all cases this derived from a corporate philosophy of commitment to safety and communication of the message that top management did not perceive cutting corners on safety to achieve production goals as in the interests of the corporation. When a company inspector recommended that a section of a mine be closed down because it was unsafe, in all of these companies it was considered inadvisable for line managers to ignore the recommendation because of the substantial risk that top management would back the safety staff rather than themselves.

In all of the companies the line manager, not the safety staff, was held accountable for the safety of his work force. A universal feature was also the clear definition of the level of the hierarchy which would be held responsible for different types of safety breakdowns. They were all companies that avoided the problem of diffused accountability: People knew where the buck stopped for different kinds of failures.

Control over safety programs was also relatively decentralized in all five companies. This came as a surprise because some of these are renowned as highly centralized corporations. Pointing out how ironical it was that control over safety was so decentralized, one Bethlehem Steel executive said: "Bethlehem is probably close to the most centralized corporation in the United States."

However, while the companies had decentralized control over safety, they also had centralized assessment of the safety performance of line managers. All companies carefully monitored each mine and each district to ascertain whether their accident and fatality rates were improving or worsening compared to the performance of other mines and districts. Again, different companies achieved this centralized monitoring of performance in different ways. Monthly criticism and self-criticism sessions were held at U.S. Steel whereas Bethlehem relied on routine daily telephone calls from the Senior Vice-President, Operations, while safety targets for Old Ben executives were set by head office. But in all companies the sense that the head office was intensively monitoring their safety performance was pervasive.

Four of the five corporations had a set of programs which built-in guarantees that safety training/supervision and communication and rectification of safety problems were working as they should. These included formal requirements for writing safe job procedures, basic training, individual safety contacts between supervisors and subordinates, detailed employee safety records, and accident investigation and audit (Island Creek being an exception in the last-mentioned area).

The company which did not have all of these formal safety programs was the smallest one, Old Ben. It may be that smaller companies can have great success at minimizing accidents simply by having a charismatic manager of corporate safety who enjoys the backing of top management (this is certainly true in the case of Old Ben), while larger companies must depend on more formal organizational guarantees. In Weberian terms, larger corporations cannot rely on charismatic leadership to achieve their goals, at least not in the long term, and must opt for some sort of routinization of charisma.[30]

In the final analysis, the conclusions about what these five companies had in common could be regarded as mundane. They were companies which: (1) gave a lot of informal clout and top management backing to their safety inspectors; (2) made sure that clearly defined accountability for safety performance was imposed on line managers; (3) monitored that performance carefully and let managers know when it was not up to standard; and (4) had mostly formal (informal in the case of Old Ben) programs for ensuring: (a) that safety training and supervision (by foremen in particular) was never neglected; (b) that safety problems were quickly communicated to those who could act on them; and (c) that a plan of attack existed for dealing with all identified hazards.

It remains to be seen whether empirical work on internal compliance systems in other industries would confirm my findings from coal mining. The importance of the attitude of top management for the ethical climate of companies is not without support in other industries, however. It was the most repeated theme which emerged from my 131 interviews with pharmaceutical executives:

> He [the chief executive] sets the tone and the rest of management fall in line. The ethical standards of anyone other than him don't matter so much. Well, unless you have one of those companies where an old guy at the helm has a right hand man making all the real decisions [American executive].[31]

Baumart[32] found that executives ranked the behavior of their superiors in the company as the principal determinant of unethical decisions. In a fifteen-year follow-up of Baumart's work, Brenner and Molander[33] found that superiors still ranked as the primary influence on unethical decisionmaking. Half of the 1977 sample of executives believed that superiors often do not want to know how results are obtained, so long as the desired outcome is achieved. Clinard's middle managers also repeatedly argued that it was "top management, and in particular the chief executive officer (CEO) who sets the ethical tone."[34]

Governmentally Mandated Internal Compliance Guarantees

If it is the case that "you can't cookbook compliance," that compliance systems will only be effective to the extent that they are consonant with the culture of the corporation concerned, then scope for government intervention to mandate effective compliance systems is limited. Let us assume that future research confirms my findings that what matters is a top management commitment to back up the judgment of compliance staff against line managers, to impose clearly defined accountability for compliance on line managers (as opposed to compliance staff), to take a personal interest in monitoring compliance performance, and to insist on programs to guarantee training with respect to compliance, plus unblocked communication concerning compliance breakdowns. What can governments really do to foster these things?

Governments can require companies to have a compliance staff, but the critical element of the success of such compliance groups seems to be not its size or its location in the formal structure of the organization, but how much informal backing it has from top management. Governments find it difficult to influence the latter. Nevertheless, as Hagan and Scholtz point out:

> By requiring pharmaceutical companies to hire certified personnel to direct premarket clearance experiments for new drugs, the FDA has strengthened the professionalization and intracorporate power of company researchers . . .[35]

Governments can require companies to lodge with enforcement agencies a clearly defined set of accountability principles to indicate who will be held responsible for different specified types of noncompliance. This possibility is the topic of another paper.[36]

We have seen that governments can legislate for a more open window on corporate misfeasance by protecting whistle blowers and mandating whistle blowing on life-threatening corporate misconduct. Disclosure of selected social performance indicators (pollution levels, accident rates, minority hiring rates, consumer complaints, etc.) can also be required.

Governments can also insist that training take place in certain areas (e.g., compliance with industrial safety rules). While this can be worthwhile, there is little to prevent an irresponsible company from carrying out the training in a perfunctory fashion.

Internal procedures can be mandated to stop blockages of bad news from reaching the top. Such mandatory internal procedures could be modelled on those of Exxon, discussed earlier. But it is difficult for the government to guarantee that employees will all be told of their rights and duties to report blockages direct to the board audit committee or of their duty to insist on a written reply from their superior on what has been done with a reported breach of legal or ethical standards.

Governments can require that companies have plans to deal with breakdowns in compliance. For example, the Environmental Protection Agency requires oil companies to have Spill Prevention Control or Countermeasure Plans.[37] But governments cannot do a great deal to guarantee that the plans are sufficiently well thought out to deal with the contingencies a particular company is likely to face or to ensure

that the company will not try to cover up a minor spill rather than put their plan into action.

In most of these areas governmental requirements that internal compliance systems be effective can never be as important as top management commitment to making the systems effective. This has two implications – a conservative one and a punitive one.

The conservative implication is that regulatory agencies should engage in maximum consultation with top management of companies in the industry to build commitment to agency goals, be they environmental improvement, combatting discrimination in employment, or improving occupational health and safety. This is indeed a strange proposition to be advanced by an author who for the past few years as a consumer activist has faced the frustration of bureaucrats being responsive to the concerns of business about new laws or standards, while neglecting those of consumer groups. Undoubtedly, more consultation with industry implies a very real risk of more regulatory capture. Probably, though, the benefit of enhanced top management commitment to the regulatory outcome desired is worth that risk. In any case, an addition to the already considerable consultation with business could be matched by a quantum increase in consultation with public interest groups (in some cases from a base of zero consultation).

More important than the amount of dialogue with business by regulators is the question of who will be the business representatives targeted for dialogue. We have concluded that it is the chief executive and other top management of companies whose commitment is crucial. Yet throughout the world the trend has been for intermediaries – outside lobbying firms, in-house "directors of regulatory affairs," or trade associations – to deal with government on behalf of business. The trouble with these intermediaries is that they have an economic interest in confrontation. As Robert Reich has persuasively argued, conflict between a client and a regulatory agency means money for the lobbyist, and the more prolonged and bitter the conflict, the greater the monetary reward.[38] Bitter, drawn-out confrontations with regulators erode the commitment of business to regulatory goals. Lobbyists are reluctant to nip disagreement in the bud by working with regulatory agencies on compromises which would leave all parties happy with and committed to the rules. On the contrary, as Reich has observed, "they can do far better by waiting until regulatory action has begun (or even by quietly encouraging it) and then going into battle with guns blazing."[39]

Regulatory agencies can deal with this problem by making clear their reluctance to consult with lobbying professionals and their desire to have direct discussions with the top management of companies subject to the regulations imposed. After the Hawke Labor government was elected in Australia in 1983, it adopted a package of measures to discourage lobbyists. This included a cabinet decision that "Ministers should as far as possible . . . ensure that lobbyists who make personal representations to them are accompanied by the principals they represent."[40] The government's attitude has tended to be that if industry wants to persuade us, then let the captains of industry put their case directly to us. The result has been a Labor government, at least for its first two years, with a better rapport with business and a superior capacity to lock business into accepting its policies than previous conservative governments. Professional purveyors of conflict have lost a good deal of their significance in business-government negotiations in Canberra.

In addition to the suggestion that top management commitment to regulatory goals ought to be strengthened by maximum government dialogue directly with chief executives, commitment at the top also can be enhanced by sheeting home the consequences of corporate wrongdoing personally to the chief executive. Virtue arises from both belief in the value of being virtuous and fear of the consequences of being sinful. Unfortunately, the latter consequences are rarely felt by chief executives of large corporations. Penalties for corporate violations of the law are typically imposed on the corporation, often in the form of fleabite fines which might ultimately be paid for by consumers; and when individuals are punished as well, they are normally more junior employees.

The employees who perpetrate crimes on behalf of the corporation frequently are responding to performance pressures that only the chief executive is able to change. Often it is only the chief executive, after opening his shut eye, to see that unreasonable performance expectations are being obtained by flouting the law, who can insist that the law be obeyed. In these circumstances, chief executives should be indicted on the basis of wilful blindness, a form of fault accepted as equivalent to knowledge.[41] Additionally, a more stringent basis of responsibility should be introduced. An important step toward rendering chief executives more vulnerable in this way was taken in *Park*,[42] a decision of the U.S. Supreme Court in 1975.

John Park was the chief executive officer of Acme Markets, a national food retailer with 36,000 employees. He was charged with violating the Food, Drug and Cosmetic Act by allowing food to be stored in a rodent-infested Baltimore warehouse. The crucial question was whether Park could be held responsible for a rodent problem in Baltimore when his office was in Philadelphia. In 1972 Park had received a letter from the Food and Drug Administration (FDA) complaining of conditions in the Baltimore warehouse. Park called in his vice-president for legal affairs who informed him that the Baltimore division vice-president "was investigating the situation immediately and would be taking corrective action and would be preparing a summary of the corrective action to reply to the letter." Hence, the defendant claimed he had done all that could reasonably be expected of a chief executive officer to rectify the problem. Nevertheless, when the FDA reinspected the warehouse and found that the problem had not been rectified, Park was charged.

The FDA contention was that Park had failed to ensure that his company had adequate procedures for guaranteeing hygienic warehouse conditions. The Supreme Court upheld Park's conviction and the fine of $50 on each of five counts. In doing so the court reaffirmed the view in *Dotterweich*[43] that where dangers to public health are involved, "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." So the *Park* decision interpreted the Food, Drug and Cosmetic Act as imposing on the chief executive of a large corporation a duty of foresight and vigilance and an obligation to ensure that measures to prevent or correct violations are implemented. The *Park* decision falls just short of imposing a standard of strict liability on the chief executive officer. In effect, *Park* recognizes a defense of impossibility: If the defendant can show that he or she exercised extraordinary care, liability is avoided on the basis of "powerlessness."[44] Thus, on facts such as those which arose in *Park*, absolute reliance on any single individual, no matter how trustworthy, is insufficient to satisfy the standard of care required; the chief executive officer is expected to ensure compliance personally.[45]

The *Park* decision was controversial because it highlighted the question whether statutory offenses should be defined so as to depart from the common law principle that individual criminal responsibility requires proof of personal *mens rea*. For an offense which is the subject of only a relatively small fine, such a departure can be justified for the sake of protecting human health. But there is provision for imprisonment under the Food, Drug and Cosmetic Act. So the *Park* decision could lead to jail for an executive in similar circumstances though, as yet, it has not produced this result. The imprisonment of people who lack blameworthy intent seems counterproductive because of the real risk of undermining public commitment to the moral force of the criminal law. At the other extreme, when ordinary citizens see unemployed people going to prison for minor theft and the chiefs of large corporations go unpunished for recklessly endangering the public health, this also undermines respect for the law.

The *Park* decision is objectionable because it permits the imprisonment of individuals for acts of which they had no knowledge or reckless suspicion. However, a criminal standard of extraordinary care is much less objectionable if the sanctions that can be imposed on individuals do not run to incarceration.[46] Merely to fine a corporate officer may not be effective (companies have many ways of indemnifying employees for fines or monetary penalties) but there are other possibilities short of imprisonment, notably a sentence of community service.

The strength of the *Park* decision is that it shifts responsibility to the people who can make a difference. This is not to belittle the importance of continuing to punish more junior employees and corporate entities for offenses committed by them. It is simply to say that if we wish to maximize the compliance impact of additional investment in enforcement, the most productive targets will be chief executives.

It is the chief executive who usually manages to get his or her photograph in the business magazines when record earnings are announced. Accordingly, perhaps the best contribution that could be made to strengthening corporate compliance systems would be regular appearances in the business magazines of pictures of chief executives charged with corporate offenses.[47] What president would not give full backing to an environmental affairs director against intransigent factory managers if it will reduce the risk of a presidential mug shot in *Fortune*? Even a mug shot in the *Funeral Directors' Gazette* might be the ultimate in mortification if one's reference group is funeral directors.

NOTES

1. E.g., Tom L. Beauchamp and Norman E. Bowie, eds., *Ethical Theory and Business* (Englewood Cliffs, N.J.: Prentice-Hall, 1979); Richard T. DeGeorge and Joseph A. Pichler, eds., *Ethics, Free Enterprise, and Public Policy: Original Essays on Moral Issues in Business* (New York: Oxford University Press, 1978); Leonard Silk and David Vogel, *Ethics and Profits: The Crisis of Confidence in American Business* (New York: Simon and Schuster, 1976).
2. See the reviews by A. A. Sommer, Jr., "The Impact of the SEC on Corporate Governance," *Law and Contemporary Problems* 41 (1977): 115-45; Noyes E. Leech and Robert H. Mundheim, "The Outside Director of the Publicly Held Corporation," *Business Lawyer* 31 (1976): 1799-1838.
3. W. Van Dusen Wishard, "Corporate Response to a New Environment," *Law and Contemporary Problems* 41 (1977): 222-44.

4. U.S. Senate, *Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices; Hearings of Banking, Housing and Urban Affairs Committee*, 94th Cong., 2d Sess., 1976. See also De Mott's account of how the government-appointed Emergency Loan Guarantee Board failed to become aware of Lockheed's foreign bribery escapades: Deborah A. De Mott, "Reweaving the Corporate Veil: Management Structure and the Control of Corporate Information," *Law and Contemporary Problems* 41 (1977): 182-221.
5. Marshall B. Clinard and Peter C. Yeager, *Corporate Crime* (New York: Free Press, 1980), 279-80; John Collins Coffee, Jr., "Beyond the Shut-Eyed Sentry: Towards a Theoretical View of Corporate Misconduct and an Effective Legal Response," *Virginia Law Review* 63 (1977): 1105.
6. Melvin Aron Eisenberg, "Legal Models of Management Structure in the Modern Corporation: Officers, Directors and Accountants," *California Law Review* 63 (1975): 375-439; Myles L. Mace, *Directors: Myth and Reality* (Boston: Harvard Business School Division of Research, 1971); S. Prakash Sethi, Bernard Cunningham, and Carl Swanson, "The Catch-22 in Reform Proposals for Restructuring Corporate Boards," *Management Review* (January 1979): 27-41.
7. Coffee, "Beyond the Shut-Eyed Sentry," 1140.
8. Noyes E. Leech and Robert H. Mundheim, "The Outside Director of the Publicly Held Corporation," *Business Lawyer* 31 (1976): 1823-26.
9. Eisenberg, "Legal Models of Management Structure," 390.
10. Christopher D. Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (New York: Harper, 1975).
11. E.g., James Q. Wilson, quoted in Ovid Demaris, *Dirty Business: The Corporate-Political-Money-Power Game* (New York: Avon Books, 1974), 442.
12. Sommer, "The Impact of the SEC on Corporate Governance," has made a start by an evaluation of such minor examples of "public-interest directors" as have already existed. The most famous instance is the court-mandated appointment of outside directors to the board of Mattel, Inc.
13. Quoted in David Boulton, *The Grease Machine* (New York: Harper & Row, 1978), 253.
14. See generally Ralph Nader, Peter J. Petkas, and Kate Blackwell, eds., *Whistle Blowing* (New York: Grossman, 1972); Alan F. Westin, ed., *Whistle Blowing! Loyalty and Dissent in the Corporation* (New York: McGraw-Hill, 1981).
15. John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (London: Routledge & Kegan Paul, 1984), 107.
16. See e.g., S.1722, 96th Cong., 2d Sess., 1617 (1979).
17. See Phillip Knightley, Harold Evans, Elaine Potter, and Marjorie Wallace, *Suffer the Children: The Story of Thalidomide* (New York: Viking Press, 1979).
18. Quoted in Norman Bowie, *Business Ethics* (Englewood Cliffs, N.J.: Prentice-Hall, 1982), 144. Italics in original.
19. Edward Gross, "Organizations as Criminal Actors," in P. R. Wilson and J. Braithwaite, eds., *Two Faces of Deviance: Crimes of the Powerless and Powerful* (Brisbane: University of Queensland Press, 1978), 203.

20. Stone, *Where the Law Ends*, 190.
21. Coffee, "Beyond the Shut-Eyed Sentry," 1133.
22. For a more detailed account of this system at Exxon, see Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (Albany: State University of New York Press, 1983), 171-81.
23. See e.g., Frederick D. Sturdivant and Larry M. Robinson, *The Corporate Social Challenge: Cases and Commentaries*, rev. ed. (Homewood, Ill.: Irwin, 1981), 145-50; Clark C. Abt, *The Social Audit for Management* (New York: Amacom, 1977); David Imberg and Peter McMahon, "Company Law Reform," *Social Audit* 1 (2) (1973): 3-17; Lee J. Seidler and Lynn L. Siedler, *Social Accounting: Theory, Issues and Cases* (Los Angeles: Melville, 1975); Douglas M. Branson, "Progress in the Art of Social Accounting and Other Arguments for Disclosure on Corporate Social Responsibility," *Vanderbilt Law Review* 29 (1976): 539-683; Robert W. Ackerman, *The Social Challenge to Business* (Cambridge: Harvard University Press, 1976), Ch. 2.
24. For the leading exposition of the role of middle managers in corporate crime, see Marshall Clinard, *Corporate Ethics and Crime: The Role of Middle Management* (Beverly Hills: Sage, 1983). See also Donald R. Cressey and Charles A. Moore, *Corporation Codes of Ethical Conduct* (Santa Barbara: Dept. of Sociology, University of California, Santa Barbara, 1980), 48.
25. Braithwaite, *Corporate Crime in the Pharmaceutical Industry*, 94.
26. Fisse and Braithwaite, *Impact of Publicity on Corporate Offenders*, 209.
27. Clinard, *Corporate Ethics and Crime*, pp. 91-102, 140-44. Cressey and Moore, *Corporation Codes of Ethical Conduct*, also found that all 25 auditors they interviewed felt that the example of top management was a critical factor in ethical conduct.
28. Quoted in Clinard, *Corporate Ethics and Crime*, 142.
29. John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (Albany: State University of New York Press, 1985).
30. See Max Weber, *The Theory of Social and Economic Organization*, ed. T. Parsons (New York: Free Press, 1964), 64-71, 363-73.
31. Braithwaite, *Corporate Crime in the Pharmaceutical Industry*, 351.
32. R. C. Baumart, "How Ethical are Businessmen?" in Gilbert Geis, ed., *White-Collar Criminal* (New York: Atherton, 1968).
33. S. N. Brenner and E. A. Molander, "Is the Ethics of Business Changing?" *Harvard Business Review* 55 (1) (1977): 59-70.
34. Clinard, *Corporate Ethics and Crime*, 132.
35. Robert A. Hagan and John T. Scholtz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies," in Keith Hawkins and John M. Thomas, eds., *Enforcing Regulation* (Boston: Kluwer-Nijhoff, 1984): 67-95.
36. John Braithwaite and Brent Fisse, "Varieties of Responsibility and Organizational Crime," *Law and Policy* 7 (1985): 315-43.
37. The oil companies must follow EPA guidelines in preparing their Spill Prevention Control or Countermeasure Plan, but the plan is reviewed by the agency only if a spill occurs. In normal circumstances, the plan need only be certified by a professional engineer, who must attest that the plan accords with good engineering practices. See 40 C.F.R. § 112.3(d) (1981). The guidelines can be found in 40 C.F.R. § 112.7 (1981). For some other examples of government-mandated plans to deal with breakdowns in compliance, see John Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control," *Michigan Law Review* 80 (1982): 1483-90.

38. Robert B. Reich, "Regulation by Confrontation or Negotiation?" *Harvard Business Review* 59(3) (1981): 82-93.
39. Ibid., 88.
40. *Government Decisions About the Establishment of a General Register of Lobbyists, A Register of Lobbyists Who Act on Behalf of Foreign Governments and Their Agencies, and Guidelines for Ministers Regarding Their Dealings With Lobbyists*, Australia, Senate, *Hansard*, 6 December 1983, 3297-98.
41. See Larry C. Wilson, "The Doctrine of Wilful Blindness," *University of New Brunswick Law Journal* 28 (1979): 175-94; Brent Fisse, "Responsibility, Prevention, and Corporate Crime," *New Zealand Universities Law Review* 5 (1973): 255-57.
42. United States v Park, 421 U.S. 685 (1975).
43. United States v Dotterweich, 320 U.S. 277 (1943).
44. United States v Park, 421 U.S. 660, 673 (1975).
45. United States v Park, 421 U.S. 660, 678 (1975).
46. Colin Howard, *Strict Responsibility* (London: Sweet & Maxwell, 1963), Ch. 2.
47. For more detailed discussion of the role of adverse publicity directed at both chief executives and other targets in improving corporate compliance, see Brent Fisse, "The Use of Publicity as a Criminal Sanction Against Business Corporations," *Melbourne University Law Review* 8 (1971): 107-50; Fisse and Braithwaite, *Impact of Publicity on Corporate Offenders*; Clinard and Yeager, *Corporate Crime*, 318-22; Francis E. Rourke, *Secrecy and Publicity: Dilemmas of Democracy* (Baltimore: John Hopkins Press, 1961), Ch. 6.