THE IMF: FOREVER IN ITS DEBT, Doug Bandow 4

ARE PHARMACEUTICAL ADS GOOD MEDICINE? Eric P. Cohen 8

IS TV ADDICTED TO DRUG COMPANY PR? Eugene Secunda 11

GIVING VOICE TO SHAREHOLDER CHOICE, Jayne W. Barnard 15

THE DUTY TO SAVE SUNKEN BOOTY, Paul Forsythe Johnston 18

LURING KIDS TO LIGHT UP, Mark Green 22

CRITICS FUME AT CIGARETTE MARKETING, Matthew S. Bromberg 27

THE CHARITY PURGE WHEN CORPORATIONS MERGE, Bartlett Naylor 29

IS CORPORATE CRIME WORTH THE TIME? Amitai Etzioni 32

ARE PLASTIC MAKERS BENDING THE TRUTH? Richard A. Denison 36

SELLING YOUR WILD OATS, Tim Loughran 39

FLYING THE UNFRIENDLY SKIES, David Nather 44

THE CHILDREN OF TODAY'S SWEATSHOPS, Linda Golodner 51

DETROIT FINALLY REVS UP FOR SAFETY, Maryann N. Keller 55

DAILY DANGERS AT THE DAILY NEWS, Jonathan A. Bennett 59

COMPANY PERFORMANCE ROUNDPUP 63

OPINIONS ON CURRENT READING 70

- James Armstrong • Walter F. McCanna • Milton Moskowitz • Jeffrey Zack

THE CORPORATE SIDESHOW 80
U.S. Sentencing Commission reaches a verdict.

Is Corporate Crime Worth the Time?

by AMITAI ETZIONI

Soon a corporation could be sentenced to do community work, be put on probation, and sentenced to pay fines — very heavy fines. Under new laws already developed by the U.S. Sentencing Commission, corporations such as Eli Lilly, whose sale of the antiarthritic drug Oraflex resulted in at least ninety-six deaths, would be fined as much as a quarter of a billion dollars instead of the $25,000 imposed in 1985.

Congress established the commission in 1984 to design guidelines to ensure greater uniformity in federal criminal sentencing. Now, in the final stage of its work (it must report to Congress by May 2 and its recommendations will take effect six months later unless Congress acts to block them), it just completed public hearings to decide not whether corporations ought to be punished more severely but which of two new methods it should adopt for penalizing them. One option provides for fines either two or three times the amount of damage caused by the corporation (or the illicit gains obtained).

Applying this option to the Eli Lilly case would result in enormous fines. At $2.5 million for each of ninety-six deaths, not an unreasonable estimate, the company would be fined $240 million. The other option sets fines on a sliding scale; the lower the offense, the less severe the fine. By this method, if a corporation such as Lilly were to be convicted for voluntary manslaughter, the fine could be up to $136 million per death.

No wonder the business community is up in arms. After largely ignoring the work of the commission, business has just awakened to the immense consequences of the proposed guidelines, and it is marshaling its troops, lobbyists, and public relations machinery.

CORPORATE LINEUP

"The proposed guidelines are extremely harsh, punitive and unwarranted, and will place many businesses on the threshold of insolvency," announced the National Association of Manufacturers (NAM). Joseph diGenova, a former U.S. Attorney for the District of Columbia, now in private practice, urged the commission to go back and further study corporate conduct. Frank McFadden, representing the American Corporate Counsel Association, described the proposals as "critically flawed." Victoria Toensing, special counsel for Hughes Hubbard & Reed, maintains that the "guidelines have a low threshold and overwhelmingly intrusive conditions. They are far from what Congress had in mind and far from realistic." All those who spoke for business interests maintained that corporations are, by and large, very law abiding. As John Borgwardt of Boise Cascade Corp. testified, "Many, if not most, organizations are composed of morally and ethically honorable people who genuinely try to com-

Amitai Etzioni's most recent book is The Moral Dimension (Free Press, 1988). He is University Professor at George Washington University and director of the Center for Policy Research.
ply with the law." Joseph diGenova agrees and testified that corporations "are extraordinarily law abiding."

A NAM representative argued that "the data to date has not turned up any significant variations in the sentences being given." Why should that matter? The commission was originally created because of dissatisfaction with the wide discrepancies in sentences imposed on individuals from state to state. A person could be jailed for twenty years for possessing a marijuana joint in Texas and receive a suspended sentence for the same crime in New York. Under the new system, which took effect November 1, 1987, the commission set minimum and maximum penalties that prevent judges in various parts of the country from handing down sentences that vary by more than 25 percent. Now, possession of a joint gets zero to six months.

**HEAVY LEVY**

Commissioner Ilene Nagel responds that the question for corporations is different — it is not so much whether fines levied for the same crime differ greatly and hence are patently unfair but whether or not they are currently inadequate. A Department of Justice study found that of almost 600 corporations monitored during 1975–1976, "over 60 percent had at least one enforcement action initiated against them."

My own study of the Fortune 500 industrial corporations showed that from 1975 to 1984, 62 percent were involved in one or more incidents of corrupt behavior, including price fixing, bribery, violation of environmental regulations, and tax fraud. Data Resources examined 130 stocks and found that 70 percent had run up shortly before takeovers were announced, suggesting that insider trading is rampant.

No wonder. Past fines were often puny. Between 1984 and 1987, the average fine imposed in all corporate cases was $48,000; 67 percent of these fines were $10,000 or less, including fines on corporations with billions of dollars worth of business. This allowed many corporations to treat potential fines as a "cost of doing business," indeed a small one. Thus, even if caught, they would still keep a good part of their illicit gains. Many corporations, when caught red-handed, often merely agreed to desist from illegal behavior in the future. "The fines were so small," explained diGenova, "that they were not worth the candle" (in other words, not worth bringing to trial). Nell Minow of Institutional Shareholder Services, Inc. observed that "the reason that corporate executives think they can get away with violations of the law is that there have been too many cases where they have."

Even if crimes occur, business representatives argue vehemently, corporations ought not to be punished
Scratch 'N Sniff Death

"The August 1989 issue of Marine Corps Gazette contains a full-page advertisement placed by Bel
Defense Systems Company, Inc. of Fort Worth. The
ad shows a Marine helicopter shooting a rocket
that sends a huge amount of shrapnel into an en-
emy helicopter. The ad states, 'No dogfight, no
long engagement. Just point and shoot and the
smell of victory is in the air.' Then the ad urges
readers who want to share that 'I wish' vision of
battle to 'Scratch here' and enjoy the smell of burn-
ing cordite." — Quarterly Review of Doublespeak,
January 1990

because generally the corporation and top manage-
ment are not involved. Earlyn Church, from Superior
Technical Ceramics Corp., told the U.S. Sentencing
Commission that her corporation, with fewer than
100 employees, retains seven well-qualified, full-time
professional engineers, at great expense, to fill out pa-
perwork and ensure compliance with various federal
laws. Given that "compliance with our laws is not al-
ways a simple and precise task," and violations may
occur accidently, why should the top managers of a
corporation be punished? Church urged that "manda-
tory fines should not be imposed on an organization
that has done everything reasonably possible to pre-
vent a crime." She has a point. The present version of
the commission guidelines allows for only a 20 per-
cent reduction in the fine under such mitigating cir-
cumstances. One could argue that under these
conditions, the corporation should only make restitu-
tion (because the damage must still be corrected) and
only the individual directly responsible should be
punished.

PROBATION POSSIBLE

However, not one business representative favored
either higher fines or other additions to existing pun-
ishment when a corporation systematically and know-
ingly violates the law under the guidance of those in
charge. Examples of such violations abound: Beech-
Nut, in which top managers clearly helped orchestrate
the systematic adulteration of apple juice sold for
infants; the Film Recovery Systems Inc. case, in which
three executives received homicide convictions for
the death of an employee who inhaled cyanide fumes
on the job because warning signs were removed; de-
fense contractors whose shoddily built weapons
"blow up in our boys' hands"; labs which perform
"sink tests" (dump blood samples in the sink and re-
port negative test results); or banks that launder drug
money day in and day out.

Instead, business lobbyists took aim at one of the
commission's most innovative ideas — the notion of
corporate probation. The commission recommends
that for a defined period (up to five years), the court
monitor a convicted corporation's conduct and de-
velopment of internal procedures to stop criminal activ-
ity. Such corporations will need judges' approval to
pay dividends, obtain new financing, or enter into a
merger with another corporation. Rarely imposed
now, corporate probation would become a common
sentence.

This idea greatly troubles the business community.
Toensing complains that the commission's effort to
"assure that a defendant not avoid the impact of a fine
by inappropriately passing the costs of such on to con-
sumers presumably authorizes courts and probation
officers to control corporate pricing structures. Su-
ervisory probation of legitimate business corporations is
virtually unprecedented." A representative of the Cor-
porate Counsel Association commented sarcastically
that judges are not experts in accounting and "do not
have the training, experience, or time to run compan-
ies in the manner the suggested conditions of proba-
tion would require."

"Many corporations regarded potential fines as a cost of doing business."

The truth may, again, lie somewhere in between.
The commission may have gone a bit too far in re-
quiring more detailed and frequent accounts than is ne-
cessary. But the basic idea seems to have merit. First, a
corporation that has shown a pattern of criminality, as
distinct from a one-time "incidental" violation, may
well deserve to be limited for a while from extending
its corporate culture by merging with or acquiring
other businesses. Additionally, it seems prudent to
add the designation of "on probation" to the basket of
punishments that can be meted out. Very likely, the
shaming effect it has for individuals and the warning it
provides to shareholders will encourage rehabilita-
tion. As Prof. Carl Mayer of Hofstra University Law
School testified, "The corporation, to avoid adverse
publicity, will have an incentive to reform its internal
operations to avoid criminal activity." Forcing corpo-
ations to set up internal guidelines and supervisory
schemes is surely a way to ensure greater integrity.
How can the punishment fit the crime?

"The goal in setting the guidelines," stated Commission Chairman William Wilkins, Jr., "was to provide incentives to corporations to voluntarily comply with the law."

Little has been heard about the idea of community service, an imaginative commission recommendation. The guidelines allow judges to sentence a corporation to community service related to repairing the damage caused by the offense. Imagine a corporation that adulterated baby food being required to send its employees, at the corporation's expense, to serve "organic" food to kindergarteners for two years; a corporation that fixed prices making its research labs available to the Consumer Union gratis; or a corporation that manufactured faulty arms sending its executives to work in military hospitals and funeral parlors.

SHAREHOLDER RESPONSIBILITY

Much worry has also been expressed by business representatives for "innocent shareholders" who they say will ultimately pay the cost of the fine. This should not stop the commission, however, because as many believe and the law dictates, shareholders are the ultimate source of power in corporations. Should they suffer from management that engages in illegal activities, they are free to replace these managers with executives of higher integrity. Though some argue that most shareholders have little effective power, greater influence could be wielded by representatives of institutions such as pension and mutual funds which hold large concentrations of shares.

Maybe the trickiest question of all is the relationship between punishing the executive and the corporation. Just imposing fines on a corporation may not sufficiently deter executives, suggests Dr. Sally Simpson of the University of Maryland's Institute of Criminal Justice and Criminology. Punishing both may be effective, but there seems to be a tendency for executives to withhold evidence of corporate culpability until they gain partial or full immunity. Thus, they trade a limited sentence for themselves with a severe one for the corporation. It all smacks of plea bargaining with the same unsavory and nondeterrent consequences. Could the commission require that both executives and corporations be punished and bar such trade-offs?

This debate about organizational sanctions comes at an opportune moment. Just as the attention of the country focused on civil rights in the 1960s and the environment in the 1970s, it is now increasingly concerned with the integrity of our public and private institutions. And corporations are held in very low regard. A 1985 New York Times/CBS News poll found that a majority of Americans believe that businesses engage in white-collar crime "very often." If Congress will indeed enact the new tougher guidelines, law and order may come to the corporate world. But don't count the business lobbyists out quite yet.