Corporate evil: a story of systems and silences

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1. Introduction:

Corporate evil often wears an impersonal, bureaucratic face. Corporations frequently operate through complex and opaque systems that simultaneously give effect to, yet also deflect attention from, their organisational purposes, values and beliefs. Thus even very egregious and repeated wrongdoing that benefits a corporation may be framed in terms of an 'administrative error'. Consistently, corporate culpability is frequently framed in terms of organisational 'omissions' and 'deficiencies' rather than in positive terms of blameworthiness and responsibility. Generally, these narratives are facilitated by structural silences: information silos within the organisation that fracture knowledge between individuals or prevent knowledge of misconduct reaching the corporation's formal human 'alter egos'.

The purpose of this chapter is to challenge these narratives, using the corrective lens of 'Systems Intentionality'. This model of corporate blameworthiness proposes that corporations manifest their states of mind through their systems of conduct, policies and practices.[1] It enables us to interrogate, understand, and rebut corporate strategies of 'interpretive denial' that seek to cast egregious misconduct in terms of administrative error or inadvertence. On this approach, systems are inherently purposive and reveal corporations' knowledge through their objective design. It follows that omissions and gaps, and structural silences, built into a system may be understood as matters of organisational choice. This has profound consequences for understanding the nature of corporate evil.

The chapter proceeds in Section 2 by identifying narratives of interpretive denial that cast corporate blame in terms of bureaucratic 'failings', thereby potentially denuding the misconduct of qualities of positive wickedness. Section 3 outlines the model of Systems Intentionality and explains how it challenges such narratives. Section 4 contains two examples of the very different perspective, or counter-narrative, this model brings to quintessentially bureaucratic evil. The first example concerns the notorious real-life practice of Australian banks charging fees for no services through automated systems. Here, the absence of human hands in the till seemed to frustrate any characterisation of the corporate 'takings' as knowing or deliberate. The second example lies in the heartland of literary fiction, in Franz Kafka's *The Trial*.[2] Here, the object is to demonstrate the radically different, more sinister and

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[1] Elise Bant, 'Culpable Corporate Minds' (2021) 48 *University of Western Australia Law Review* 352; Elise Bant and Jeannie Marie Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15 *Journal of Equity* 63; Jeannie Marie Paterson, Elise Bant and Henry Cooney, '*Australian Competition and Consumer Commission v Google*: Deterring Misleading Conduct in Digital Privacy Policies' (2021) 26 *Communications Law* 136; Elise Bant, 'Catching the Corporate Conscience: A New Model of "Systems Intentionality"' [2022] *Lloyds Maritime and Commercial Law Quarterly* 467; Elise Bant, 'Reforming the Laws of Corporate Attribution: "Systems Intentionality" Draft Statutory Provision' (2022) 39 *Company & Securities Law Journal* 259; Elise Bant, 'The Culpable Corporate Mind: Taxonomy and Synthesis' (ch 1), 'Systems Intentionality: Theory and Practice' (ch 9), 'Modelling Corporate States of Mind through Systems Intentionality' (ch 11) and, with Jeannie Marie Paterson 'Automated Mistakes' (ch 12), all in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing 2023); Elise Bant and Rebecca Faugno, 'Corporate Culture and Systems Intentionality: Part of the Regulator's Essential Toolkit' (2023) *Journal of Corporate Law Studies* (forthcoming).

[2] This assumes that as complex organisations there are, inevitably, structural and behavioural similarities between corporations and other group agents, such as the Court and indeed State actors, which are relevant to ascertaining group mental states, agency and, ultimately, responsibility: see, eg Christian List and Philip Pettit, *Group Agency: The Possibility, Design and Status of Corporate Agents* (Oxford University Press 2011) and below at n 4. This does not deny that legal responsibility rules (such as available primary claims and defences) might differ between group types, but asserts that it is possible to identify group mental states through a similar analytical framework.

purposive characterisation of the depicted Court bureaucracy that becomes possible through the lens of Systems Intentionality. This reading challenges more broadly the standard framing of real-life 'Kafka-esque' organisations in terms of senselessly complex and deficient bureaucratic processes.[3] Rather, these processes manifest clear organisational values, choices and intentions. The hope is that, taken together, the examples illustrate the utility of Systems Intentionality as a way of unmasking organisational blameworthiness, in all its guises.

2. Corporate Narratives of Interpretive Denial

The sorts of narratives of denial the subject of this chapter, which hinge upon impersonal bureaucratic organisational structures, are not, of course, limited to corporations.[4] And they may have a particularly powerful, and dangerous, impact upon important questions concerning the moral and legal accountability of individuals for actions undertaken for their particular collective or community.[5] Thus Hannah Arendt commented that, on some views, it is 'the essence of totalitarian government, and perhaps the nature of every bureaucracy… to make functionaries and mere cogs in the administrative machinery out of men, and thus to dehumanise them'.[6] As she observed, given that the law demands a guilty mind or intention as a condition of committing a crime, the transformation of individuals into elements in a system is remarkably effective in obscuring the true nature of individual culpability involved.[7]

Arendt was particularly concerned to understand the implications of this conversion for individual responsibility. The following analysis also touches on this important issue. However, its primary concern is to consider the implications of a bureaucratic system, and associated deflective narratives, for the culpability of the organisation that deploys them. In particular, is it necessary to identify an individual repository of fault who represents, or instantiates, the guilty corporate mind? Currently, the law's attribution rules largely support such an approach. The effect, when dealing with corporate bureaucracies, is to find a ready means to frame a story of serious misconduct so as to deflect, diminish and disavow corporate responsibility for egregious misconduct.

Drawing upon Stanley Cohen's taxonomy of denial, Penny Crofts has powerfully explored a range of strategic narratives offered by large Australian corporations to negate and diminish their history of egregious misconduct.[8] This chapter focuses on the identified strategy of 'interpretive denial,'[9] by which corporations accept that they have engaged in (or sometimes been implicated in[10]) some sort of repeated

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[3] See, eg, 'Kafkaesque' (*Merriam Webster.com Dictionary*) <https://www.merriam-webster.com/dictionary/Kafkaesque> accessed 19 March 2023: having a 'nightmarishly complex, bizarre, or illogical quality'; 'Kafkaesque' (*Collins Dictionary*) <https://www.collinsdictionary.com/dictionary/english/kafkaesque> accessed 19 March 2023: marked by a 'senseless, disorienting, often menacing complexity'.

[4] See above (n 2); see also Penny Crofts, 'Strategies of Denial and the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services' (2020) 29 *Griffith Law Review* 21, 23, drawing on Stanley Cohen's analysis applied to State actors, see Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Polity Press 2001). For an example applying Systems Intentionality to evasive narratives offered by the Commonwealth of Australia, see Elise Bant, 'Submission to Robodebt Royal Commission' (Royal Commission into the Robodebt Scheme, October 2022), available at <https://unravellingcorporatefraud.com/publications/law-reform-submissions/> accessed 19 March 2023.

[5] See, eg, Mary Midgley, *Wickedness: A Philosophical Essay* (rev edn, Routledge 2001) ch 3 generally and, in particular, 51–53 on 'Losing the Individual' to corporate (collective) perspectives.

[6] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin 2006) 289.

[7] ibid, 277. See further Tim Peters, ch xxx in this volume.

[8] Crofts, 'Strategies of Denial' (n 4).

[9] ibid, 30–32. See also V Comino, ch xxx in this volume, discussing narratives that seek to re-characterise corporate wrongdoing and its responses.

[10] Eg Crown Resorts companies 'facilitating' money laundering by criminal elements outside of the corporation: State of Victoria, *Victorian Royal Commission into Casino Operator and Licence* (Report, October 2021) (VCCOL) vol 1, 171–78.

and harmful misconduct, but characterise it in terms of an 'administrative mistake' or 'systems error'. Where blameworthiness is conceded, it is generally framed in terms of omissions and deficiencies, thereby relegating it to the level of organisational negligence or bureaucratic ineptitude.

As Crofts separately notes, this tactic has been hugely successful at disabling conceptions of corporate wickedness dependent on proof of some positive and culpable mental state:

> The positive model is insufficient to cope with the likely causes of harm by large organisations in the 21st century. In many cases of systemic harms, it is the lack of knowledge and care, and/or the failure of policies and procedures, that is culpable.[11]

This deficit narrative is arguably enabled by the law's individualistic attribution rules, which generally require a human locus of fault upon which corporate culpability depends.[12] In large and complex corporations, knowledge, and hence responsibility, is often diffused between individuals, teams and departments.[13] Information silos may prevent free passage of information, ensuring that it is kept below board level or from the nominated 'responsible' officer in the official organisational hierarchy. Silence is golden. A classic example is where unlawful or harmful practices routinely are not reported 'up the line' to the responsible officer.[14] Another is where the corporate hierarchy omits any direct reporting line between an on-ground area of operation and responsible officers.[15] Under conventional attribution principles, these structures and practices ensure that the corporation's 'directing mind and will' remains safely ignorant of the corporation's wrongdoing until (at best) after the event, thereby whitewashing the corporate conscience of prior fault. Conversely, where wrongdoing is exposed, the corporate practice may be to hang an individual scapegoat, caught carrying out the general practice.[16] Further, individual cogs in the organisational wheel may have little idea of how their roles contribute to the corporation's broader business model(s). If they are following established (even if not formal) practice, they may well assume that their conduct is unremarkable. It follows that they may not know to stop, or to report, or to declare their activities to a 'responsible officer'.[17]

Further, corporate processes are increasingly automated. There may be little human contribution to the corporate conduct carried out on a daily basis through these systems. This has led to another related set of exculpatory narratives, again drawing on the language of 'systems errors'. These include the assignment of corporate blame to defective 'legacy systems', or 'off the shelf' algorithms, that are difficult (that is, expensive and/or time-consuming) to correct or replace. Since automated systems are

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[11] Penny Crofts, 'Three Recent Royal Commissions: The Failure to Prevent Harms and Attributions of Organisational Liability' (2020) 42 *Sydney Law Review* 395, 421.

[12] See generally, Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, April 2020) (ALRC Final Report) ch 4; Law Commission, *Corporate Criminal Liability* (Options Paper, 10 June 2022) ch 3.

[13] Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56 *Southern California Law Review* 1141, 1189.

[14] State of New South Wales, *Review of The Star Pty Ltd: Inquiry Under Sections 143 and 143A of the Casino Control Act 1992 (NSW)* (Report, 31 August 2022) vol 1, 9 [48], 28 [148], 29 [155]–[156], 256 [271]. See also L Siraganian, ch xxx in this volume.

[15] See, for example, 'Board Review of Cultural Heritage Management' (*Rio Tinto*, 25 August 2020) <https://www.riotinto.com/en/news/releases/2020/Rio-Tinto-publishes-board-review-of-cultural-heritage-management> accessed 19 March 2023, characterising the 'siloing' of indigenous heritage information within its corporate structure as a 'fatal flaw' and a 'defect in the information management system': at [40]–[41]. cf Elise Bant and Jeannie Marie Paterson, 'Rio Tinto and the Anatomy of Corporate Culpability' (*Pursuit*, 11 September 2020) <https://pursuit.unimelb.edu.au/articles/rio-tinto-and-the-anatomy-of-corporate-culpability> accessed 19 March 2023.

[16] For examples, see Sarah Derrington and Samuel Walpole, 'Culpable Ships' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing 2023), 358, 371; Bant, 'Catching the Corporate Conscience' (n 1) 494 and V Comino, ch xxx in this volume. cf Siraganian (n 14).

[17] Eg the casino aggregation practices under consideration in VCCOL (n 10) 83–84 [3.113]–[3.119], 88 [3.164]–[3.167], 174–178 [6.87]–[6.102] and Bant, 'Reforming the Laws of Corporate Attribution' (n 1) 274.

neither human, nor (properly understood) computer 'agents',[18] but mere tools of the corporation, this strategy seems particularly effective in reducing corporate blameworthiness to, at most, a negative model consisting of corporate failure.[19] As there are no human persons involved, there is no hook from which to hang the guilty corporation.

As Crofts has separately argued, a 'negative' account of wickedness can capture such forms of misconduct:

> The negative account conceives of evil as privation, something missing, dearth or failure. The negative model of wickedness provides a philosophical foundation for the conception of organisational failure as culpable. Organisations are most likely to inflict systemic harms due to a failure to prevent and a failure to adequately respond to harms. The negative model of culpability provides a means to redefine 'responsibility practices', emphasising that it is this failure to act that has caused the systemic harms, and it precisely this failure that is culpable.[20]

This is an important and powerful insight. It explains how corporate narratives of interpretive denial, which cast misconduct in terms of bureaucratic 'failings' and 'mistakes', can be rebutted to expose a negative form of corporate wickedness. The following sections argue, however, that it is possible to go even further and understand 'deficient' systems in terms of positive mental states.[21] This enables corporate wrongdoing to be characterised, and condemned, in terms of positive wickedness. Omitted processes may not be a matter of forgetfulness or inattention, but an intrinsic aspect of a system's design, necessary to achieve the corporation's true ends. Consistently, information silos and other structural silences may shout the corporation's intentions in ways that cannot be ignored.[22] Through this lens, the exculpatory narratives of interpretive denial are disabled, enabling the full, expressive power of the law's condemnation of positively culpable mental states held by corporations.

3. Systems Intentionality

A. Outline

For present purposes, it is only necessary to sketch the outlines of the model of 'Systems Intentionality', in order to appreciate the counter-narrative of organisational blameworthiness it offers. In brief, Systems Intentionality proposes that corporations manifest their states of mind through their adopted and deployed systems of conduct, policies and practices. As I have explained elsewhere:

> A 'system of conduct' is the internal method or organised connection of elements operating to produce the conduct or outcome. It is a plan of procedure, or coherent set of steps that combine in a coordinated way in order to achieve some aim (whether conduct or, additionally, result). A 'practice' involves patterns of behaviour that are habitual or customary in nature. A practice may cross over into a system, where the 'custom' or 'habit' has become an embedded process or method of conduct. Finally, corporate 'policies' partake of the same nature of systems, but can be understood as generally operating at a higher level of generality. These manifest overarching and high-level purposes, beliefs and values. They

[18] Paterson and Bant, 'Automated Mistakes' (n 1) 255, 267–268.
[19] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) (FSRC Final Report) vol 1, 139.
[20] Crofts, 'Three Recent Royal Commissions' (n 11) 421–422, drawing on Midgley (n 5).
[21] Crofts has more recently also expressed this view: see Penny Crofts, 'Crown Resorts and the Im/moral Corporate Form' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing 2023). For implications for 'Failure to Prevent' offences, see Bant, 'Taxonomy and Synthesis' (n 1) 3, 31, 33–34 and Bant and Faugno (n 1).
[22] See generally Elise Bant and Jeannie Marie Paterson (eds), *Misleading Silence* (Hart Publishing 2020). Corporate strategies of concealment may be deceptive on this approach: for interesting potential examples in the context of legal professional privilege, see E Campbell ch xxx in this volume.

> embody and reveal the overall corporate mindset, which is then instantiated or operationalised through corporate systems at more granular and event- or conduct-specific levels.[23]

The basic idea at the core of this model is extremely simple.[24] Natural persons routinely use systems of conduct to guide their decision-making and, hence, conduct. Common examples are recipes, directions on a map, and notations or records. These 'external decision supports' enable a person to achieve their purpose: to make a cake, find a location, or recall how to do something.[25] Similarly, corporations utilise systems of conduct to enable them to achieve their corporate purposes. The trick is that this is the *only* way in which corporations can do so (other than acting entirely randomly and trusting to chance). Corporations lack a natural mind, or memory, so are wholly dependent on systems of conduct to engage purposefully with the real world. It is hence unsurprising that core default rules concerning the role of the board of a company, or the shareholders in general meeting, address the need to create corporate decision-systems to transform the corporation from a passive shell to an operational legal person.

B. Corporate Mental States

This simple idea offers some powerful insights for understanding the spectrum of corporate mental states. I explore these in detail elsewhere.[26] Here, I merely outline their significance for 'general' intentionality and actual knowledge, as the most basic building blocks for other, more complex mental states and normative conceptions (such as mistake, 'specific' intention, dishonesty and recklessness).

Firstly, the model contends that corporations manifest (that is, reveal and instantiate) their general intentions through their adopted systems of conduct. Systems of conduct are inherently purposive: this is the very nature of a system. An unintended system is a contradiction in terms. Language gives this away: systems are 'plans', 'strategies', or 'methods' of achieving some aim, whether that is conduct (for these purposes, a 'general' intention to act) or, additionally, some specific outcome(s) through that conduct (a 'specific' intention).[27] The starting point for any analysis, therefore, once a system of conduct is identified, is that the corporation has a general intention to engage in that conduct.

This immediately challenges corporate narratives that frame systems of conduct as unintended, accidental or mistaken.[28] It is not impossible for patterns of behaviour, which are themselves neutral as to intention, to mimic systems of conduct.[29] For example, repeated corporate behaviours or outcomes may be purely coincidental. But once patterns of behaviour are determined to reflect, or be the observable consequences of, a *system* of conduct, that conduct is necessarily intended.

It is also possible to deploy a system by mistake (for example, where an employee presses a wrong button, initiating a payment or deduction system). So genuine 'systems errors' are not impossible.

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[23] Bant, 'Modelling Corporate States of Mind through Systems Intentionality' (n 1) 231, 245–246. Policies, on this analysis, most closely resemble the Australian concept of 'corporate culture,' perceptively discussed in V Comino, ch xxx in this volume. See also Bant and Faugno (n 1).

[24] See further Bant, 'Catching the Corporate Conscience' (n 1) 471–477.

[25] Mihailis E Diamantis, 'The Extended Corporate Mind: When Corporations Use AI to Break the Law' (2020) 98 *North Carolina Law Review* 893.

[26] See in particular Bant, 'Modelling Corporate States of Mind through Systems Intentionality' (n 1) and Bant and Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (n 1).

[27] See, eg, *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045 [91] (Reeves J) and Bant, 'Systems Intentionality: Theory and Practice' (n 1).

[28] Intention and mistake are not necessarily exclusive: mistakes commonly involve 'vitiated' intention, where one of the reasons for action is contrary to the true facts, so intention is undermined but not absent: see further Bant, 'Modelling Corporate States of Mind through Systems Intentionality' (n 1) 232–235 and 248–249. Mistakes of law and fact both count as reasons for relief: by contrast, ignorance of the law is no excuse (or defence) to liability: see generally James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, Oxford 2016) Chapter 8. The sorts of (systems) errors considered here are inherently factual, being mistakes as to the fact of the corporation's intended behaviour, not its (lawful or unlawful) quality.

[29] Bant, 'Systems Intentionality: Theory and Practice' (n 1) 189–192.

However, once a system of conduct is prima facie established, the analytical starting point is that the conduct is intended. The evidential onus then lies on the corporation to substantiate any allegation of mistake or accident (for example, through an employee witness admitting to accidental deployment of the system).[30]

A further consequence of this analysis is that since a system of conduct is, by definition, intended, a corporation will know at least its broad outline and the key features required for it to be deployed. Absent proof of mistake or similar, a corporation cannot sleep-walk a system of conduct.[31] This means that the starting point for any inquiry is that corporations know the nature of the conduct in which they are engaged through those systems. That is, corporate knowledge of the key features of a system, and the fact of its operation, is implicit in its successful deployment by the corporation. This applies as much for organically developed practices as it does for systems that operationalise 'on the ground' some higher-level corporate policy.

Again, this significantly challenges corporate narratives that characterise the corporation as ignorant (and therefore innocent) of its conduct conducted through its own systems. On this approach, information barriers that prevent responsible officers from actual knowledge of the corporation's misconduct do not necessarily protect the corporation itself from that knowledge, although the officer's ignorance may (depending on the circumstances) mitigate the officer's liability for breaches of their own duties. Similarly, scapegoating individuals on the grounds that they have been discovered performing the corporation's own practices no longer operates as an effective diversion of organisational blameworthiness.[32] This does not mean, of course, that individuals' responsibility for harmful conduct is automatically excluded: the 'cog in the wheel' excuse is not thereby endorsed.[33] Rather, it means that the individual's responsibility must arise from and reflect their own personal or positional fault.[34] This may be of a quite different order to that of the corporation.

Finally, it will be apparent that the analysis removes another helpful and liability-reducing corporate narrative of deficiency: namely that the corporation's formal policies and processes were entirely ethical and robust but that there was some (relatively innocent or merely careless) failure to embed these 'on the ground'. Rather, any analysis of corporate mindsets must start with the actual, de facto or instantiated system of conduct. Formal corporate policies however remain relevant as a statement of fact, or representation, of the corporate state of mind. It follows that a significant gap between formal policy, or the textbook 'standard operating procedures' of a company, and the reality of its corporate intentions and knowledge as manifested through its daily systems, may constitute a form of misleading or, in some cases, deceptive conduct.[35]

C. Systems of Omissions

We are now in a position to consider the character of corporate structures that exclude or omit key processes. This is necessary if we are to dismantle many corporate strategies of interpretive denial, which frame misconduct in terms of failures to convey information or to correct misconduct, and hence organisational negligence.

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[30] See below at n 41.

[31] FSRC Final Report (n 19) vol 1, 157: fees for no services were 'part of an established system and were not matters of accident'.

[32] See Bant, 'Catching the Corporate Conscience: A New Model of "Systems Intentionality"' (n 1) 484, 492–95.

[33] Arendt (n 6) 289. See further Siraganian, ch xxx in this volume, on the distinctive fault that may attach to individuals embedded within evil corporate practices.

[34] See below n 81.

[35] See, eg, *Competition and Consumer Act 2010* (Cth) sch 2 s 18 (prohibition on misleading or deceptive conduct in trade or commerce); *Magill v Magill* (2006) 226 CLR 551, 567 (Gleeson CJ), 574 (Gummow, Kirby and Crennan JJ) (tort of deceit).

As we have seen, systems of conduct necessarily reflect a general corporate intention. Critically, however, understood as integrated steps and processes, systems of conduct will often comprise *both* positive and negative, and proactive and reactive, elements.[36] Primary (and seemingly positive) systems (for example, a marketing strategy or fee deduction system) themselves necessarily entail the adoption of certain steps *and* omissions of others. It is the coordinated *set* of processes taken as a whole, framed holistically as a system of conduct at a certain level of generality, which constitute intended conduct.[37] It is, therefore, potentially a(nother) false narrative to frame corporate systems solely in terms of positive conduct, which has separately been affected by unintended or careless omissions or deficiencies. Omissions may form an intrinsic part of a system's overall design.

The insights offered by this analysis for bureaucratic wrongdoing are now explored through two examples.

4. Counter-narratives of Corporate (Ir)responsibility

A. Fees for No Services

The first example was spotlighted in the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.[38] A number of leading Australian banks[39] extracted 'fees for no services' from customers through automated systems, over extended periods of time. Many such fees were for life insurance charged after the customer had died. Typically, before the Commission, bank executives emphasised the individual honesty and work ethic of their employees and, by extension, the corporation itself. Consistently, they framed the misconduct in terms of administrative mistakes or systems errors, arising from 'legacy' systems which were difficult to change. They were willing to admit to truly remarkable corporate incompetence in these terms rather than suffer the suggestion of dishonesty.[40]

Through Systems Intentionality, however, another analysis is possible. The customers were natural individuals whose circumstances would be prone to change. Corporate knowledge of that fact was patent in the banks' own systems: it was the reason why the customers sought life insurance, after all. Notwithstanding, the banks' automated systems operated as 'set and forget' models, the default setting for which was to 'keep taking fees until manual intervention'. Tellingly, the banks had no, or no functional, manual audit or oversight systems. Consequently, there was no means to correct the consequence that, given clients would die, the authorised fees would inevitably degenerate into unlawful takings.

On the Systems Intentionality approach to such scenarios, the proactive elements of the systems ('takings') are prima facie intentional conduct. There was no apparent error in the deployment of these positive systems.[41] As designed, they kept taking until stopped.[42] Alongside the proactive features sat reactive elements of the systems: the omitted audit and remedial processes. This analysis expands the level of generality at which the 'fees for no services' systems of conduct are conceptualised and assessed to encompass both proactive and reactive components. This is entirely appropriate, given that the

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[36] Brent Fisse, 'Reactive Corporate Fault' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing 2023) 139; Bant, 'Taxonomy and Synthesis' (n 1) 3, 5.

[37] See further Bant, 'Systems Intentionality: Theory and Practice' (n 1) 183, 192.

[38] FSRC Final Report (n 19) vol 1, 139–57, discussed in Bant, 'Catching the Corporate Conscience: A New Model of "Systems Intentionality"' (n 1) 487–90; Bant, 'Culpable Corporate Minds' (n 1) 361–68, 385–87; Crofts, 'Three Recent Royal Commissions' (n 11).

[39] Or, more broadly 'financial service providers'.

[40] FSRC Final Report (n 19) vol 1, 139.

[41] cf *Australian Securities and Investments Commission v AMP Financial Planning Proprietary Limited* [2022] FCA 1115 [47] (Moshinsky J), accepting a coding error led to fees for no services. As the judge remarked, this did not explain the highly culpable failures to audit and remedy the operation of the system: [52]–[54].

[42] An alternative system default setting manifesting an ethical mindset would be to stop 'taking' until authorisation was confirmed.

systems were designed to roll out over long periods, with respect to many customers, to the substantial benefit of the corporations.[43]

Seen from this integrated perspective, where a professedly expert corporation (such as a leading bank) deploys positive elements of a system that are objectively apt to produce a harmful outcome and omits related audit or remedial processes, this omission can be understood as a matter of corporate choice. The package of conduct is thus revealed as knowing and deliberate. While it is not possible to do more than sketch the barest outline here, such findings may invite further conclusions on the nature of the corporation's culpability. For example, the corporation deploying the system may be considered reckless as to the harms caused by its conduct,[44] in the sense that: (a) it has a general intention to engage in the conduct; (b) it has knowledge of the harmful outcome (unlawful takings) that the conduct is patently apt to produce; and (c) its decision to proceed with the conduct in light of that known risk is unreasonable. In some cases (depending on the facts), it will be open to conclude that the harmful outcome is specifically intended (in the sense of chosen, rather than desired), so that the system manifests a predatory mindset.[45] This may be so where the harmful outcome is not merely likely, but inevitable, and the corporation continues to deploy the system, without adjustment, in the face of repeated notice of harm.

Each case (and system) must be assessed on its own terms, but this example suggests how defective systems need not, nor should they, be solely understood in terms of organisational negligence. Further, automation does not necessarily diminish corporate culpability as a form of 'computer error'. To the contrary, automation of key processes itself represents a corporate choice. Indeed, the 'default settings' for those systems also manifest corporate choices, often at critical ethical pressure points.[46] Systems Intentionality thus gives us a new vocabulary to develop a powerful counter-narrative that expresses a full spectrum of corporate blameworthiness in such cases.

B. The Trial

For the second example, I draw on and interpret aspects of Kafka's *The Trial*[47] through the lens of Systems Intentionality. To the extent that this constitutes an addition to the burgeoning body of law and literature analysis of this landmark novel,[48] it is important to be clear about its limited aims. The text[49] is widely recognised as offering an iconic vision of bureaucratic evil: a faceless, impersonal and labyrinthine Court that operates seemingly at random, without apparent rationale, to devastating

[43] On the temporal perspective, see Fisse (n 36).
[44] On conceptions of recklessness and Systems Intentionality, see Bant, 'Modelling Corporate States of Mind through Systems Intentionality' (n 1) 235–239, 250.
[45] On specific intention, see ibid 235–239, 246–248.
[46] See also Paterson, Bant and Cooney (n 1) on Google's data harvesting default settings; on automation and systems intentionality, see Paterson and Bant, 'Automated Mistakes' (n 1).
[47] Roberto Buonamano, 'Kafka and Legal Critique' (2016) 25 *Griffith Law Review* 581, 591: 'The essence of the trial is process, as the semantics of the German title for the novel (Der Process) suggest. And as is insinuated throughout the novel, the legal process is inexhaustible.'
[48] See Patrick J Glen, 'The Deconstruction and Reification of Law in Franz Kafka's Before the Law and the Trial' (2007) 17 *Southern California Interdisciplinary Law Journal* 23, 23–26.
[49] I have used the translation by Willa and Edwin Muir: Franz Kafka, *The Trial* (Willa Muir and Edwin Muir (trs), Compact Books 1994). cf Roman Altshuler, 'Kafka's "Trial" Gets New Translation' (*The Harvard Crimson*, 9 October 1998) <https://www.thecrimson.com/article/1998/10/9/kafkas-trial-gets-new-translation-pithe> accessed 19 March 2023, and below at n 51.

effect.[50] Thus, at the outset of *The Trial*, the accused, K, is arrested for no clear reason.[51] As he tries to navigate the Court's justice system, he initially denounces the 'great organisation' of engaging in 'senseless proceedings' against innocent persons through its corrupt officials and employees.[52] On this reading, the innocent are victims of endemic and unresponsive organisational negligence. However, as the novel and Court processes unfold, Systems Intentionality suggests a more sinister and purposive characterisation, with clear lessons for interrogating real-life bureaucratic mindsets.[53]

In this counter-narrative, Kafka's Court manifests through its web of processes a concerted and malign intention with respect to all those accused. Specifically, the Court knowingly and deliberately inflicts a form of prolonged psychological torture on every accused that results, inevitably,[54] in their death or destruction. While the following analysis focusses on this general intention, the characterisation prompts further, chilling possibilities in the text, which merit brief mention here. Thus, as the outcome for every accused is known and inevitable, it may be that the Court also specifically intends their destruction, as a necessary sacrifice to a greater end.[55] This particularised intention need not require knowledge of specific victims or their characteristics, or an emotional desire for their destruction.[56] The fact that there is 'nothing personal' in K's destruction may only emphasise the brutality of the organisation.[57] Further, the seemingly ad hoc targeting of individuals such as K, together with the inescapable and destructive effect on them of the Court's processes, suggests that the ultimate end or purpose of this intended conduct is a broader coercive and tyrannical social control.[58] From this perspective, the inevitable, dawning realisation of their fate, which must be experienced by all those who stand accused, and are thereby condemned, is one of the most cruel and effective elements of the process. As Arendt observes, in her examination of another evil bureaucracy, 'the system which succeeds in destroying its victim before he mounts the scaffold… is incomparably the best for keeping a whole people in slavery.'[59]

Turning to the text itself, Kafka identifies the critical features of the Court's system, relevant for this analysis, which ensure it operates effectively to destroy the lives of those accused ensnared within it. A key feature is its impenetrable nature: information about the trial process is fractured and dissipated amongst the Court agents and broader legal participants. The system's information silos epitomise the 'diffused responsibility' that we have seen characterises many modern, complex corporations. Consistently, in *The Trial*, none of the Court's members, employees or agents actually understands fully how the system operates. An example is the mere 'difference of opinion' between judge and advocate

[50] Eg Mark Spilka, *Dickens and Kafka: A Mutual Interpretation* (Indiana University Press 1963); Randy Hodson and others, 'Rules Don't Apply: Kafka's Insights on Bureaucracy' (2013) 20 *Organization* 256; Yi Yang, 'Beyond Weber and Kafka: Conceptualizing a Critical Realist Model of Bureaucracy' (2022) 54 *Administration & Society* 500.

[51] Compare the Mitchell translation 'for without having done anything ***truly*** wrong he was arrested'. The Muir translation omits 'truly'. As discussed by Altshuler (n 49), this critical word may suggest that K has committed some wrong, which he does not recognise or acknowledge. This would be significant for determining the Court's intentions.

[52] Kafka (n 49) 54, the Court, its capitalisation emphasising its separate persona.

[53] cf Hodson and others (n 50) 259.

[54] As the priest explains, 'the proceedings gradually merge into the verdict': Kafka (n 49) at 232; see also Glen (n 48) 62.

[55] See preceding section. Certainly, the manifested state of mind would likely satisfy the conception of recklessness outlined earlier.

[56] Bant, 'Modelling Corporate States of Mind through Systems Intentionality' (n 1) 250 and *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226, (2005) 148 FCR 132, 140–41 [33], 142–43 [43], discussed in Bant and Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (n 1) 81–82.

[57] Compare Arendt (n 6) 26.

[58] Suggesting an affinity with Orwell's 1984.

[59] Arendt (n 6) 12 (quoting David Rousset).

over whether the proceedings against another accused, Block, have even started.[60] Another is the insight that no judge has access to the Court's final judgments, which are not recorded.[61] It is therefore structurally impossible for K to understand the nature of the charge against him, or how best to fight it, from those operating within the system. None of these features are accidental or 'senseless', on this interpretation. Rather, they are aspects of the system's 'choice architecture'[62] geared to operate, consistently and in a coordinated way, to the Court's true ends.

On a Systems Intentionality analysis, the fact that the formal procedures of the Court are not how it operates in practice is another, very significant feature of Kafka's creation. On this interpretive approach, it is necessary to assess objectively the de facto operation of the Court's constituent processes, through which it manifests its true nature and purposes. However, this poses a seemingly hopeless paradox, since even experts on the law are reduced to 'bewilderment'[63] on this subject. Ultimately, it is the Court painter, an outsider, who explains the true nature of the Court's processes to K and so also, from the perspective of Systems Intentionality, allows the reader to undertake an objective assessment of the Court's state of mind. The painter is, by birth and training, a describer and interpreter of the system, who therefore has 'the confidence of the Court'.[64] He is also the sole person to ask K the question 'Are you innocent?'[65] As K comes to understand, that question is irrelevant to, and unanswerable within, the system to which he is subject.

The painter reveals that the Court's formal system is quite distinct from the Court system in practice.[66] Contrary to appearances, no amount of pleading or proof before the judges will persuade them of K's innocence.[67] However, it is 'quite a different matter with one's efforts behind the scenes'.[68] The painter identifies and describes in detail the three forms of acquittal that might, in theory and practice, be obtained: definite, ostensible and indefinite postponement.[69] The painter's long 'experience' of Court practice is that no-one within or outside of the system can assist in getting a definite acquittal. The only factor that may count is the innocence of the accused. Yet there is no means to establish that innocence.[70] 'Legends' of definite acquittals cannot be cited before the Court. Moreover, if a definite acquittal is granted, all Court documents simply vanish from sight and are destroyed.[71] Unfortunately for K, the other, more likely possibilities of ostensible and indefinite postponement only offer the certainty of prolonged psychological torture. Both entail the uncertain and never-ending navigation of labyrinthine, hidden practices of the Court, in the hope of avoiding final sentence. And from final sentence, it seems, there is no appeal to the higher Court.[72] The very existence of this reputed higher Court serves as a final, vicious twist in the process, simultaneously offering apparent due process while denying it as a matter of course.

We have seen previously that, through the lens of Systems Intentionality, this dissonance between the formal representation of an organisation's state of mind (here, that the Court is concerned with K's innocence or guilt, and acquittal is a real possibility) and the reality of its intentions can be understood as a form of misleading or deceptive conduct. This fundamental deception can be understood as a key design feature of the Court's processes, and part of what discloses its malevolent intention. The dawning

[60] Kafka (n 49) 217.
[61] ibid 171.
[62] Paterson, Bant and Cooney (n 1) 138.
[63] ibid 240.
[64] ibid 163.
[65] ibid 165. See also Arendt (n 6) 21.
[66] Kafka (n 49) 170.
[67] ibid 166–67
[68] ibid 167
[69] ibid 169–180.
[70] ibid 171.
[71] ibid 176.
[72] ibid 256.

realisation of the hopelessness of his position is part of K's gradual destruction.[73] Indeed, the omission of any further description of the trial process, before the conclusion of the novel in K's submission to his execution, from this perspective makes perfect sense. The trial could have no real bearing on the end-point of the system, and hence the Court's ultimate purpose. It could only constitute a staging post, or procedural dogleg, providing another psychological wound en route to K's inevitable destruction.

Finally, the critical distinctions drawn by Systems Intentionality between formal and de facto practices also cast a potentially interesting light on the roles and culpabilities of the individual employees and the agents of the Court embedded within its system. We have seen that this is likewise a matter of significant concern for corporate misconduct. An example is the warders' claim that it is 'a tradition that body-linen is the warders' perquisite, it has always been the case'.[74] When they are punished for taking K's clothing, one pleads that he was only following the example of his senior colleague, 'my teacher, for better or worse.'[75] Yet the tradition was, in reality, forbidden, and if disclosed 'punishment is bound to follow'.[76]

This duality need not be inconsistent: an organisation may tacitly permit some wrongdoing, and even encourage it, on the understanding that if the behaviour should ever be revealed that its individual authors will be scapegoated.[77] Hence the warder's whipper explains that the punishment is 'as just as it is inevitable'.[78] K protests that he doesn't 'in the least blame [the warders], it is the organization that is to blame, the high officials are to blame'.[79] The whipper is unmoved: what K says 'sounds reasonable enough… but I refuse to be bribed. I am here to whip people and whip them I shall.'[80] From the perspective of Systems Intentionality, this statement reflects his loyalty to the organisational ethos and purpose: his personal ethos and rationality is suspended in his role within the Court's system.[81] As explained previously, this does not excuse the whipper from personal or positional responsibility, on the ground that that he is a mere cog in the Court's machine. But Systems Intentionality invites further and deeper enquiry into the role and responsibilities of the petty official and officious bureaucrat who contributes to a greater and coordinated system of conduct, which itself manifests organisational intention.[82]

Conclusions

The object of this chapter has been to demonstrate how Systems Intentionality offers a means to construct a principled, analytical counter-narrative of corporate strategies of interpretive denial, which commonly cast egregious misconduct in terms of administrative error or inadvertence. It reveals the spectrum of corporate mental states hiding behind the bureaucratic facade, with significant implications for liability doctrines in which defendant states of mind are key requirements.

[73] ibid 243.
[74] ibid 95.
[75] ibid 97.
[76] ibid 95.
[77] Derrington and Walpole (n 16) 351, 371.
[78] Kafka (n 49) 95.
[79] ibid 97.
[80] ibid.
[81] See also the priest's comment at ibid 244 that he 'belong[s] to the Court'. Compare again with Arendt (n 6): Eichmann's 'extraordinary diligence in advancement' was his abiding motivation: at 287; see also at 22, 25–6, 56–57. On the conundrum of separating and reconciling personal and positional responsibility, see Peters in this volume and, by contrast, Matthew Harding, 'Associations and Moral Responsibility: Some Ground-Clearing' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing 2023).
[82] See further Bant, 'Submission to Robodebt Royal Commission' (n 4).