

## THE SOCIAL POLICY OF CORPORATE CRIMINAL RESPONSIBILITY

### 1. Introduction

Corporate criminal responsibility is at a critical stage of development. Increasingly it has become apparent that the present law rests upon conceptual and pragmatic considerations rather than functional analysis. Yet, despite an impressive body of discussion (which now includes the contributions of several major law reform agencies), opinion remains divided upon the fundamental question whether corporate criminal responsibility is justified given the notorious problems of devising satisfactory sanctions and criteria of responsibility. Even recent extensive examinations of the topic have led to markedly different conclusions. On the one hand, a number of commentators have supported the abolition of corporate criminal responsibility, usually on the ground that individual criminal responsibility, supplemented by appropriate remedial procedures, would constitute a sufficient weapon against corporate crime.<sup>2</sup> On the other hand, law reform agencies have come out in support of corporate criminal responsibility, but their views upon matters of scope and operation have varied widely.<sup>3</sup> These divisions of opinion perplex. As a matter of theoretical agitation, the major substantive problems of corporate criminal responsibility remain unresolved.<sup>4</sup> As a matter of practical concern, the questionable status of corporate criminal responsibility seriously compromises its efficacy at a time when our legal system has very few weapons capable of effectively preventing or remedying harms done by corporations.<sup>5</sup> Granted these perplexing deficiencies, where should

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1. Consider Williams, *Criminal Law: The General Part* (2nd ed., 1961), ch. 22; American Law Institute, *Model Penal Code* (1962), s.2.07; *Tentative Draft No. 4* (1955), 146-155; U.S., National Commission on Reform of Federal Criminal Laws, *Final Report* (1971), ss.402, 403, 3007; *Working Papers* (1970) I, 162-215; G.B., Law Commission, *Working Paper No. 44, Criminal Liability of Corporations* (1972); Canada, Law Reform Commission, *Working Paper 16, Criminal Responsibility for Group Action* (1976); S.A., Criminal Law and Penal Methods Reform Committee, *Fourth Report, The Substantive Criminal Law* (1978), 354-369; Stone, *Where the Law Ends: The Social Control of Corporate Behaviour* (1975); Leigh, *The Criminal Liability of Corporations in English Law* (1969); Leigh "The Criminal Liability of Corporations and other Groups", (1977) 9 *Ottawa L.R.* 247; Dershowitz, "Increasing Community Control Over Corporate Crime", (1961) 71 *Yale L.J.* 280; Kriesberg, "Decisionmaking Models and the Control of Corporate Crime", (1976) 85 *Yale L.J.* 1091; and Fisse, "Responsibility, Prevention and Corporate Crime", (1973) 5 *N.Z.U.L.R.* 250.
2. The foremost account is Leigh, *op. cit.* (*supra* n.1), although little consideration is given to alternative non-penal procedures. For more detailed accounts of non-penal procedures see Stone, *op. cit.* (*supra* n.1), esp. chs. 13-20; and Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations", (1963) 30 *U. Chi. L.R.* 423, 442; Hall, *General Principles of Criminal Law* (2nd ed., 1960), 351-359.
3. Compare American Law Institute, *op. cit.* (*supra*, n.1); U.S., National Commission on Reform of Federal Criminal Laws, *op. cit.* (*supra*, n.1); Canada, Law Reform Commission, *op. cit.* (*supra* n.1); S.A., Criminal Law and Penal Methods Reform Committee, *op. cit.* (*supra* n.1); and G.B., Law Commission, *op. cit.* (*supra* n.1).
4. For a review see S.A., Criminal Law and Penal Methods Reform Committee, *op. cit.* (*supra* n.1), 354-369.
5. See Cappelletti, "Vindicating the Public Interest through the Courts: A Comparativist's Contribution", (1976) 25 *Buff. L.R.* 643; and the references listed *infra*, n.187.

the path of reform lead? What appears to be necessary is extensive functional realignment of corporate criminal responsibility itself, or more satisfactory alternative approaches.<sup>6</sup> However, to be convincing, proposals for reform demand a more adequate understanding of present policy than has yet been articulated. Helpful as existing commentaries are, their treatment of policy is too brief and elliptical.<sup>7</sup> As a result, they stunt the growth of proposals for change, or worse, even encourage the debilitating habit of making corporate criminal law under the influence of juristic personality, vicarious or strict liability, and quack public remedies.<sup>8</sup>

The purpose of this article is to provide a more adequate account of the social policy of corporate criminal responsibility. The significant aims served by corporate criminal responsibility are taken to be as follows:

- (1) deterrence;
- (2) internal discipline;
- (3) specific prevention;
- (4) general prevention;
- (5) compensation, restitution, and restoration;
- (6) retribution; and
- (7) public information.

These aims are each elaborated in the main sections of this paper, but before proceeding it is necessary first to dispose of several matters of terminology and scope, and secondly, to indicate the relevance or otherwise of various old and new founts of explanation.

#### (i) Terminology and Scope

So far as terminology is concerned, there are several usages to be noted. "D" stands for a corporation accused of an offence. "X" represents an officer, employee or other agent, at any organizational level, in respect of whose mental state or conduct it is sought to hold a corporation responsible. "Agent" refers to all persons encompassed by the symbol "X". "Corporation" is not intended to include unincorporated associations and govern-

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6. Consider Seney, "The Sibyl at Cumae—Our Criminal Law's Moral Obsolescence", (1971) 17 *Wayne L.R.* 777, 844-853; Stone, *op. cit.* (*supra* n.1); S.A., Criminal Law and Penal Methods Reform Committee, *op. cit.* (*supra* n.1); Fisse, *loc. cit.* (*supra* n.1); Fisse, "Consumer Protection and Corporate Criminal Responsibility", (1971) 4 *Adel. L.R.* 113. Recently, it has been suggested that perhaps it is better not to face the policy issues squarely, essentially because only a rough, arbitrary approach may work: Leigh, *loc. cit.* (*supra* n.1), 298. But why declare ourselves bankrupt when there are many possible ideas to be developed and exploited? Cf. Moore and Tumin, "Some Social Functions of Ignorance", (1949) 14 *Am. Soc. Rev.* 787.
  7. Consider, with the benefit of hindsight, the working paper of the English Law Commission, *op. cit.* (*supra* n.1); Winn, "The Criminal Responsibility of Corporations", (1929) 3 *Camb. L.J.* 398; Welsh, "The Criminal Liability of Corporations", (1946) 62 *L.Q.R.* 345; Andrews, "Reform in the Law of Corporate Liability", [1973] *Crim. L.R.* 91. Nor is the neglect confined to law: moral philosophers have tended to exclude corporations from their celebrations (Goedecke, "Corporations and the Philosophy of Law", (1976) 10 *Jnl. of Value Enq.* 81). Cf. Edgerton, "Corporate Criminal Responsibility", (1927) 36 *Yale L.J.* 827; U.S., National Commission on Reform of Federal Criminal Laws, *op. cit.* (*supra* n.1); Leigh, *op. cit.* (*supra* n.1), ch. 9.
  8. For an overview of these mixtures see Williams, *op. cit.* (*supra* n.1), 862-864. See also the references *supra*, n.6. As to the development of corporate criminal responsibility, see Leigh, *op. cit.* (*supra* n.1), chs. 2, 3, 4; Elkins, "Corporations and the Criminal Law: An Uneasy Alliance", (1976) 65 *Kentucky L.J.* 73, 85-99; Note, "Corporations as Criminals", (1924) 88 *J.P.* 197; and Barnett, "The Criminal Liability of American Municipal Corporations", (1938) 17 *Oregon L.R.* 289.

mental instrumentalities although many of the considerations raised are pertinent to these forms of organization.<sup>9</sup> "Corporate crime" means crime committed on behalf of a corporation by an agent acting within the scope of his authority, as opposed to crime which is corporate only in the sense that it is committed by company promoters or personnel.

As to scope, this paper is confined to the reasons which now underlie corporate criminal responsibility. It does not attempt to explain the significance of these reasons for particular questions of ascription of responsibility (e.g., the criminal capacity of corporations of differing size and structure, and the application of various types of offence) or design and application of sanctions (notably fines, probation, community service orders, adverse publicity sanctions, and dissolution). Nor does it attempt to indicate the extent to which the law succeeds or fails to achieve its apparent aims, or the precise directions in which reform should proceed.

## (ii) *Founts of Explanation*

Terminology and scope aside, where should we look to ascertain the social policy of corporate criminal responsibility? The remainder of this introduction tests the waters of the following founts of explanation:

- (a) collective responsibility;
- (b) corporate personality;
- (c) juristic personality;
- (d) vicarious liability;
- (e) empirical studies;
- (f) comparative law;
- (g) models of corporate decision-making; and
- (h) informed judgment.

## (A) COLLECTIVE RESPONSIBILITY

Corporate criminal responsibility bears some affinity to the many forms of collective responsibility adopted throughout history. From primitive civilisation and biblical tales to the more recent responses to war crimes, insurgency, and unpopular political beliefs,<sup>10</sup> collective responsibility emerges as a device not uncommonly thought appropriate to overcome the problem of imposing individual responsibility upon the guilty members

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9. On the similarities between different forms of organization see Simon, *Administrative Behaviour* (2nd ed., 1965); Etzioni, *A Comparative Analysis of Complex Organizations* (1961); Jay, *Management and Machiavelli* (1967); Manning, "Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations", (1960) 55 *N.W.U.L.R.* 38, 39; American Law Institute, *Model Penal Code, Tentative Draft No. 4* (1955), 146, 152-154; Canfield, "Corporate Responsibility for Crime", (1914) 14 *Col. L.R.* 469, 472-473. Cf. *Heatons Transport Ltd. v. Transport and General Workers' Union* [1973] A.C. 15; *Tesco Supermarkets Ltd. v. Nattrass* [1972] A.C. 153; *United Brotherhood of Carpenters and Joiners of America v. U.S.* 330 U.S. 395 (1946).
  10. Mannheim, *Group Problems in Crime and Punishment* (1955), 44-53; Maitland, "The Law of Wales—the Kindred and the Blood Feud", and "The Criminal Liability of the Hundred", in Maitland, *Collected Papers* (1911) I, 202, 230; Ullmann, "The Delictual Responsibility of Mediaeval Corporations", (1948) 64 *L.Q.R.* 77; Jackson, *The Nürnberg Case* (1947), 95-119; Woetzel, *The Nuremberg Trials in International Law* (1960), ch. 8; Arens, "Nuremberg and Group Prosecution", [1951] *Wash. Univ. L.Q.* 329; Hermens, "Collective Guilt", (1949) 23 *Notre Dame L.R.* 431; Feinberg, *Doing and Deserving* (1970), ch. 9; Moore, "Legal Liability and Evolutionary Interpretation; Some Aspects of Strict Liability, Self-Help and Collective Responsibility", in Gluckman, *The Allocation of Responsibility* (1972), 51; French (ed.), *Individual and Collective Responsibility—Massacre at My Lai* (1972). Note also *Inter-Group Fighting Act*, 1977 (P.N.G.).

of a community or organization. However, the modern-day relevance of collective responsibility is limited.

Early instances of collective responsibility imposed upon tribes and communities rested upon the absence of a professional police force and the presence of a high degree of group solidarity.<sup>11</sup> A clear illustration is the system of frank-pledge, under which collective responsibility was imposed only if a guilty individual offender remained within the cloak of the group. These considerations are roughly approximated in the case of corporate criminal responsibility (given limited enforcement expertise and resources available against corporate crime, and also organizational pressures towards loyalty and conformity),<sup>12</sup> but the reasons for holding corporations criminally responsible today extend far beyond the problems of policing tribal communities.

More recent instances of collective responsibility are even further removed from corporate criminal responsibility for they reflect the special difficulties posed by war, guerilla activities or McCarthyism. Thus, the Nuremberg trials posed unusual problems of prosecuting very large numbers of war criminals and, in any event, collective responsibility was imposed merely to the extent of declaring certain entities to be criminal organizations.<sup>13</sup> The British resort to punishment of villages in Kenya and Malaya stemmed from the particular exigencies of determined guerilla warfare.<sup>14</sup> In the case of McCarthyism, the curbs placed upon communist political organizations presupposed pervasive guilt on the part of members, a condition rarely encountered in any form of large-scale organization, political or otherwise.<sup>15</sup>

#### (B) CORPORATE PERSONALITY

Attempts to explain corporate criminal responsibility have often turned towards corporate personality. However, theories of corporate personality have proved unhelpful, typically because they attempt to reduce a complex phenomenon to a simple insight or shorthand statement.<sup>16</sup> Corporateness is exaggerated in some theories, especially those described as realist, and understated in others, notably the fiction and bracket theories.<sup>17</sup> Even contemporary analyses of corporate personality shed little light upon corporate criminal responsibility. Linguistic functionalism, the approach favoured by H.L.A. Hart,<sup>18</sup> clutches at the straws of truth offered by words descriptive of corporations and their legal relations; insufficient account is taken of the real possibility that our linguistic assumptions about corporations are mistaken or simply ignorant. The recent contribution of Stoljar<sup>19</sup> is more informative but offers a highly suspect insight.

11. A point well made by Feinberg, *op. cit.* (*supra* n.10), 238-241. Another consideration is that, whereas persons associated with a corporation often share the proceeds from undetected offences, offences committed by members of tribes or villages were much less often a source of collective benefit.

12. Text and references *infra*, nn.61-64, 76-78.

13. See Jackson, *op. cit.* (*supra* n.10).

14. Mannheim, *op. cit.* (*supra* n.10), 48-50.

15. For pertinent materials see Emerson, Haber and Dorsen, *Political and Civil Rights in the United States* (1967) I, 79-192.

16. As to the influence of theories of corporate personality see Leigh, *op. cit.* (*supra* n.1), 3-8. On oversimplification and theories of corporate personality see Radin, "The Endless Problem of Corporate Personality", (1932) 32 *Col. L.R.* 643, 661-667.

17. For a convenient recent account see Stoljar, *Groups and Entities* (1973), ch. 12.

18. "Definition and Theory in Jurisprudence", (1954) 70 *L.Q.R.* 37, 49-59.

19. *Op. cit.* (*supra* n.17).

According to Stoljar's thesis, legal personality provides an inappropriate and misleading method of viewing corporations. Rather, a "committable common fund" is, and has been, the central important feature of limited liability companies, unincorporated associations, partnerships and other forms of corporation; it is "in a nutshell . . . what corporateness is all about."<sup>20</sup> Both criminal responsibility and tortious liability are seen in these terms:

"[u]nless persons act in concert as joint tortfeasors, or as principals or accessories in crime, they cannot as a group *commit* a tort or criminal offence, whether the group is incorporated or not . . . On the other hand, a group may *incur* certain liabilities, of a pecuniary or compensatory kind, where the group engages in an enterprise or activities which are lawful but which in their execution or management may either cause an injury to another or may constitute a statutory (criminal) offence. . . . The members incur [a] . . . diminished or derivative liability that penalizes them only through their common fund."<sup>21</sup>

However, whatever the position as a matter of tortious liability, the notion of a "committable common fund" is not obviously the essence of corporate criminality. This is suggested by the position of unincorporated associations: contrary to the logic of Stoljar's thesis, unincorporated associations are rarely subject to criminal responsibility.<sup>22</sup> We cannot persuasively answer why this is so until we know the particular reasons why the law has committed itself to corporate criminal responsibility in the case of incorporated associations. Indeed, once those reasons are known, the presence or absence of a "committable common fund" might come to be seen as a factor of only incidental relevance to the imposition of criminal responsibility upon corporations and other kinds of groups.<sup>23</sup>

### (C) JURISTIC PERSONALITY

Little needs to be said as to the explanatory force of juristic personality. Viewed sympathetically, juristic personality merely equates corporate and individual persons for the purposes of practical convenience and is neutral as regards underlying considerations of policy. Viewed more realistically, the equation it produces tends to be biased heavily towards individual persons, who are taken to provide a natural starting point for the design of rules or principles applicable to other species of juristic person. This bias is patent in the present law of corporate criminal responsibility, the development of which has often been motivated by "little more than a crude personification of the group".<sup>24</sup> Perhaps the clearest example is the principle which identifies the fault or conduct of superior officers as the "personal" fault or conduct of a corporation.<sup>25</sup> This principle, as endorsed by the House of Lords in *Tesco Supermarkets Ltd. v. Natrass*,<sup>26</sup>

20. *Id.*, 189.

21. *Id.*, 172.

22. *Bishop v. Chung Bros.* (1907) 4 C.L.R. 1262. However, in the U.S.A. partnerships are often held criminally responsible under statutory provisions: *U.S. v. A. & P. Trucking Co.* 358 U.S. 121 (1958).

23. Consider Canada, Law Reform Commission, *op. cit.* (*supra* n.1), 53-56; and the references *supra*, n.9.

24. Williams, *op. cit.* (*supra* n.1), 862.

25. For detailed criticisms see Fisse, "Consumer Protection and Corporate Criminal Responsibility", (1971) 4 *Adel. L.R.* 113.

26. [1972] A.C. 153.

sees corporations as having a small control centre manned by managerial neurons. This vision, which is blind to organizational theory and practice, amounts to an anthropomorphic illusion.<sup>27</sup> Here as elsewhere in the context of corporate criminal responsibility, the truth is that corporations are materially different from human persons, both in constitution and being. To rely upon anthropomorphic assumptions at the expense of corporate reality is simply to succumb to the myth of a metaphor.<sup>28</sup>

#### (D) VICARIOUS LIABILITY

Corporate criminal responsibility has been, and still remains, closely linked to vicarious liability in tort. Historically, the development of corporate criminal responsibility was much dependent on the application of civil principles of vicarious liability, one reason being the difficulty of attributing criminal states of mind personally to corporate bodies.<sup>29</sup> Although states of mind are now attributable personally to corporations under the identification principle, the results of applying that principle are so dysfunctional that vicarious corporate criminal responsibility retains much vitality.<sup>30</sup> Yet accepting that the influence of vicarious liability has been considerable, what underlying considerations of policy apply today? It is no answer to point to the policy behind vicarious liability, for it is implausible to suggest that the aims of civil and criminal law coincide.<sup>31</sup> What need to be explained are the distinctive reasons for resorting to the criminal law, which is not to say that compensatory and other remedial aims are irrelevant to the purposes of corporate criminal responsibility.<sup>32</sup>

#### (E) EMPIRICAL STUDIES

Empirical studies of corporate criminal responsibility are all too few.<sup>33</sup> Whether a lawyer concerned with the topic should attempt to provide his own information is debatable given the difficulty of acquiring and successfully applying the necessary sociological techniques. On the other hand,

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27. As to organizational theory and practice see Weber, *The Theory of Social and Economic Organization* (1947), 225-228, 335-339; Metcalf and Urwich (eds.), *Dynamic Administration* (1940), 146-160; Gordon, *Business Leadership in the Large Corporation* (1966), 76-80; Simon, *Administrative Behaviour* (2nd ed., 1965), 137, ch. 11; Galbraith, *The New Industrial State* (1967), ch. 6.
  28. Cf. Turbayne, *The Myth of Metaphor* (1962), *passim*.
  29. As to the early influence of vicarious liability see *R. v. Great North of England Railway* (1849) 9 Q.B. 315. For cases involving vicarious attribution of states of mind see *Moussell Brothers Limited v. London and North-Western Railway Co.* [1917] 2 K.B. 836; *R. v. Australasian Films Ltd.* (1921) 29 C.L.R. 195.
  30. Cf. the references *supra*, n.25. For an important statutory example see Trade Practices Act, 1974-1977 (Cth.), s.84. Consider also the general U.S. position at common law that corporations are vicariously responsible for the acts or mental states of their agents: *Continental Baking Co. v. U.S.* 281 F. 2d 137 (1960); *Commonwealth v. Beneficial Finance Co.* 275 N.E. 2d 33 (1971); *Standard Oil Co. v. U.S.* 307 F.2d 120 (1962). Cf. Note, "Criminal Liability of Corporations for Acts of their Agents", (1946) 60 *Harv. L.R.* 283.
  31. Cf. the position taken in the leading case of *New York Central & Hudson River Railroad v. U.S.* 212 U.S. 481, 494 (1909). See also *People v. Rochester Ry. & L. Co.* 88 N.E. 22 (1909); and Edgerton, *loc. cit.* (*supra* n.7), 835-836.
  32. Text and references *infra*, nn.185-230.
  33. The more important studies include Lane, *The Regulation of Businessmen* (1966); G.B., Law Commission, *Working Paper No. 30, Strict Liability and the Enforcement of the Factories Act, 1961* (1970); Carson, "The Enforcement of Factory Legislation", (1970) 10 *Brit. J. of Crim.* 138; Canada, Law Reform Commission, *Studies on Strict Liability* (1974), 73-137; Hadden, "Strict Liability and the Enforcement of Legislation", [1970] *Crim. L.R.* 496; Dickens, "Discretion in Local Authority Prosecution", [1970] *Crim. L.R.* 618; Schachter, *Enforcing Air Pollution Controls* (1974); Hopkins, "The Anatomy of Corporate Crime", in Wilson and Braithwaite (eds.), *The Two Faces of Deviance* (1978) (forthcoming); Hopkins, *The Impact of Prosecutions under the Trade Practices Act* (1978).

opportunities for effective collaboration with sociologists being as rare as they are, the only alternative is often perpetuation of ignorance.

The position taken here is to welcome further empirical studies but to challenge the wisdom of making any large-scale enquiries in the absence of more refined hypotheses than we now possess. In short, comprehensive theoretical preliminaries stand to promote the enlightened, or at least economical, pursuit of empiricism.

#### (F) COMPARATIVE LAW

Empirical poverty or desire thus confessed, to what extent might we depend upon comparative law? Abolitionist critics of corporate criminal responsibility have often made the point that Continental criminal codes make no general provision for corporate responsibility<sup>34</sup>. This point, however, is the product of meagre enquiry. The position under various Continental codes, although of interest, reflects only part of the comparative experience. We also need to be aware of the nature and rationale of what appear to be numerous statutory exceptions and the particular manner in which enforcement or other agencies deal with the problems of corporate crime.<sup>35</sup> Studies of these matters do not appear to exist. Until they do, it is premature to draw conclusions. Furthermore, assuming all the information were available, account would need to be taken of the views of several prominent Continental scholars who, in looking towards the law in English-speaking jurisdictions, have spoken in support of corporate criminal responsibility.<sup>36</sup>

For the purposes of this paper, we exclude the lessons of comparative law, not because they are unimportant, but because they are inconclusive unless made the subject of detailed, specialized enquiry.

#### (G) MODELS OF CORPORATE DECISION-MAKING

A more recent source of explanation is provided by models of corporate decision-making. This line of enquiry is promising but, as is apparent from the following critique of Kriesberg's valuable "Decisionmaking Models and the Control of Corporate Crime",<sup>37</sup> models of this kind inform by selective exaggeration.

Kriesberg's analysis, which is based substantially upon Allison's *Essence of Decision: Explaining the Cuban Missile Crisis* (1971),<sup>38</sup> specifies three models of corporate decision-making: the Rational Actor Model, the Organization Process Model, and the Bureaucratic Politics Model. Model I, the Rational Actor Model, postulates a unitary, rational decision-making process derived from neo-classical economic theories of the firm.<sup>39</sup> By

34. Notably Mueller, "Mens Rea and the Corporation", (1957) 19 *Univ. of Pitt. L.R.* 21. For additional convenient references and suspect comparisons see G.B., Law Commission, *op. cit.* (*supra* n.1), 12-15.

35. The author thus shares the views of Leigh, *loc. cit.* (*supra* n.1), 265-266. Several French and West German statutory exceptions are extracted in Silving, *Criminal Justice* (1971) II, 643-648. See also U.S., National Commission on Reform of Federal Criminal Laws, *Working Papers* (1971) III, 1491.

36. Hurwitz, *Bidrag til Laeren om Kollektive Enheders ponde Ansvar* (1933); Weber, "Über die Strafbarkeit Juristischer Personen", [1954] *Goldt. Arch.* 237; and the references cited in Mueller, *loc. cit.* (*supra* n.34), 34, n.69a(5).

37. (1976) 85 *Yale L.J.* 1091. Kriesberg himself concedes that the models "are not wholly realistic" but, *pace* Allison, provide "conceptual lenses" which magnify, highlight, or reveal certain aspects of the decision-making process and blur or neglect others (*id.*, 1100).

38. Another excellent work in this field is Steinbruner, *The Cybernetic Theory of Decision* (1974).

39. *Id.*, 1100-1101.

contrast, Model II (the Organisation Process Model) assumes the corporation to be "a constellation of loosely allied decision-making units", each with a primary responsibility for a narrow range of problems, the resolution of which is governed by standard operating procedures (SOPs) established by written or customary organizational rules.<sup>40</sup> By further contrast, Model III (the Bureaucratic Politics Model) sees corporate decision-making not in terms of rational process or set procedures but rather as "a bargaining game involving a hierarchy of players and a maze of formal and informal channels through which decisions are shaped and implemented".<sup>41</sup> These three models, which are not intended to be exhaustive, singly sufficient, or inflexible,<sup>42</sup> are taken by Kriesberg to have the following implications for the control of corporate crime.

Model I implies the relevance and efficacy of sanctions imposed upon the decision-making unit, the corporate entity, provided that the sanctions chosen relate to the particular values (e.g., profit, prestige, and stability) which the rational corporate actor is seeking to maximise. Model II strongly suggests that emphasis should be placed upon those personnel in a position to enact and supervise standard operating procedures, but is unclear as to the impact of sanctions against the corporation since the decision-making unit stressed is not the corporation but a sub-unit (e.g., a marketing group, a manufacturing division, or a research and development staff) and the individual personnel who shape and control the operating procedures of the sub-unit. For this reason, Kriesberg advocates more empirical research and, as an interim step, the same approach to sanctions against corporations as that applicable in the case of Model I. Model III (the Bureaucratic Politics Model) most strongly implies the relevance of individual criminal responsibility (the focus being upon individual interests and influences at all organizational levels), but nonetheless allows that sanctions against the corporate entity might provide a complementary constraining force, although one too blunt to accord at all precisely with the individualistic assumptions of the model.<sup>43</sup>

Kriesberg's models undoubtedly advance our understanding of corporate criminal responsibility. However, they are too exaggerated to command acceptance as a practical guide for lawmakers. In the case of Model I, the notion of a rational corporate actor conceives of the entity as the decision-maker, individual criminal responsibility being relevant only as a means of penalizing the entity.<sup>44</sup> To be frank but fair, this application of individualistic neoclassical theories of the business firm grossly undervalues the importance of individual criminal responsibility and, even in the case of one-man companies, personifies corporations to the point of anthropomorphic fantasy.<sup>45</sup> Model II seems more plausible but requires substantial qualification in so far as a threat of punishment against a corporation may be among the range of matters a corporate sub-unit resolves to handle or takes into account in devising and maintaining a particular type

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40. *Id.*, 1101-1103.

41. *Id.*, 1103-1105.

42. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (1971), 7-9, 245-277; and Steinbruner, *op. cit.* (*supra* n.38), 327-331, strongly in accord.

43. *Id.*, 1111.

44. Consider *id.*, 37-38.

45. Cf. Lee, "Corporate Criminal Liability", (1928) 28 *Col. L.R.* 1, 181, 198-199.



of standard operating procedure.<sup>46</sup> Moreover, even if we accept the existence of cybernetic sub-units isolated from rationally perceived threats of punishment, Model II fails to explain how the law should proceed where it proves impossible or unfair to hold individual cybernauts responsible for offences committed on corporate behalf. As to Model III, corporate criminal responsibility need not necessarily be regarded as a blunt instrument which challenges the individualistic assumptions of the model. On the contrary, by delivering penalties to guilty personnel on a wholesale basis or, more to the point, by inducing a corporation to undertake internal discipline, it reflects those individualistic assumptions to a greater degree than is possible by resort to individual criminal responsibility alone (see discussion of internal discipline, *infra*).<sup>47</sup>

These exaggerations point directly to a further limitation of Kriesberg's emphasis upon theories of decision-making, namely undue selectivity. Interesting as Kriesberg's models are, they are too preoccupied with law-making from a rational actor position. In reality, the law, no less than its corporate subjects, is strongly influenced by its own kinds of standard operating procedures and bureaucratic politics. Standard operating procedures, exemplified by juristic personality and vicarious liability, provide legal methods of control sufficiently general to deal with a wide range of possible needs.<sup>48</sup> By contrast, Kriesberg approaches the control of corporate crime not from the standpoint of the law's needs, but rather the selective angle of theories of decision-making. As a result, his models seem to parade in an unreal world of ample enforcement resources, non-existent jurisdictional boundaries, and readily scaled barriers of organizational resistance. Moreover, the citizens observing this parade appear to be so fully acquainted with the style of corporate crime that for them the aim of general prevention almost passes out of regulatory fashion. As to the bureaucratic politics of corporate criminal responsibility, attention should be drawn to the interplay between criminal and civil aims: corporate criminal responsibility now serves a number of significant compensatory and other remedial purposes.<sup>49</sup> To ignore this interplay is to overlook a maze of formal and informal decision-making channels of critical significance not only to the future of corporate criminal responsibility but also to the possible development of an alternative system of public remedies.

To conclude, decision-making models overpower the essence of corporate criminal responsibility unless they are based upon an adequate understanding of the needs which underlie the present law.

#### (H) INFORMED JUDGMENT

Finally, we come to the fount of informed judgment. It is pointless to praise or condemn this fount for it is all we have left. But two warnings are necessary. First, accessible information is at a premium, for the sources available consist of cursory and often inscrutable judicial and

46. Steinbruner, *op. cit.* (*supra* n.38), 63-64, 69-71, 74-75, 79, 87.

47. Consider the feasibility or otherwise of Kriesberg's suggestions about a Model III approach to individual criminal responsibility; *id.*, 1125-1127, and compare text and references *infra*, nn.106-119. See also Allison, *op. cit.* (*supra* n.42), 251, 274-275.

48. Cf. Laski, "The Basis of Vicarious Liability", (1916) 26 *Yale L.J.* 105, 114-115.

49. Text and references *infra*, nn.185-230. Cf. Kriesberg, *loc. cit.* (*supra* n.37), 1095-1096.

legislative impressions,<sup>50</sup> scarce direct evidence from field studies of corporate crime,<sup>51</sup> and endless interdisciplinary hearsay and opinion.<sup>52</sup> Secondly, educated guesses ought to be recognized for what they are. As Meehl has advised:

"In thinking about law as a mode of social control, adopt a healthy skepticism toward the fireside inductions, subjecting them to test by statistical methods applied to data collected in the field situation; but when a fireside induction is held nearly *semper, ubique, et ab omnibus* a similar skepticism should be maintained toward experimental research purporting, as generalised, to overthrow it."<sup>53</sup>

## 2. Deterrence

The most important aim served by corporate criminal responsibility is probably deterrence, meaning the *in terrorem* effect of the criminal law, whether upon the particular offender subject to sentence ("special deterrence") or prospective offenders generally ("general deterrence").<sup>54</sup> The particular deterrent effects intended are various, as are the reasons for supplementing the deterrent impact of individual criminal responsibility. The bulk of this section is concerned with the reasons why corporate criminal responsibility is used in a supplementary role, but before considering those reasons the nature of the deterrent impact sought requires explanation.

The particular *in terrorem* effects sought to be achieved by punishing corporations are indirect. Coercive force is applied indirectly to officers, employees, shareholders and others as a result of lower corporate profits (as though less generous salaries, bonuses or perquisites), reduced corporate prestige, or internal discipline (as prompted by conviction or sentence).<sup>55</sup>

50. Most of the contributions are American. For judicial discussions see *R. v. Great North of England Railway* (1846) 9 Q.B. 315; *New York Central & Hudson River Railroad v. U.S.* 212 U.S. 481 (1909); *Commonwealth v. Pulaski County Agricultural & Mechanical Association* 17 S.W. 442 (1891); *Southern Express Co. v. State* 58 S.E. 67 (1907); *Commonwealth v. Illinois Cent. R. Co.* 153 S.W. 459 (1913); *State v. Morris & Essex Railroad Company* 12 Abbot P.R. 171 (1869). As to legislative background, leading contributions have emerged from the discussions of the proposals of the U.S. National Commission on Reform of Federal Criminal Laws. See e.g., U.S. Senate, Committee on the Judiciary, *Hearings on Reform of the Federal Criminal Laws* (1972), 92d Cong., 2d Sess., pt. III, sub-pt. B, *passim*. For a convenient review of judicial and legislative contributions see Leigh, *op. cit.* (*supra* n.1), ch. 9.
51. Text and references, *supra* n.33.
52. There is no comprehensive crossfield account of what the various social sciences have to offer. Stone relies heavily upon interdisciplinary contributions in *Where the Law Ends* (1975), but gives very few sources (see esp. ix-x). Cf. Dahl, Haire and Lazarsfeld, *Social Science Research on Business: Product and Potential* (1959); Simon, *Administrative Behaviour* (2nd ed., 1965).
53. "Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist", (1971) 27(4) *Jnl. of Soc. Issues* 65, 97. See also Vickers, *The Art of Judgment* (1965), ch. 2.
54. For discussions of these terms and also "general prevention" see Zimring and Hawkins, *Deterrence* (1974), 70-74; Andenaes, "General Prevention Revisited: Research and Policy Implications", (1975) 66 *Jnl. of Cr. Law & Criminology* 338, 341-343.
55. The effects upon officers and employees are by far the more important. As to the limited relevance of shareholders' reactions see U.S., National Commission on Reform of Federal Criminal Laws, *Working Papers* (1970) I, 189; Schwartz, "The Public Interest Proxy Contest: Reflections on Campaign G.M.", (1971) 69 *Mich. L.R.* 452; Branson, "Progress in the Art of Social Accounting and Other Arguments for Disclosure on Corporate Social Accountability", (1976) 29 *Vand. L.R.* 539, 582-603; Mundheim, Book Review of *The Ethical Investor* (1972), [1972] *Duke L.J.* 1061; Gordon, *Business Leadership in the Large Corporation*

Perhaps more importantly, there is also the threat of detection and conviction *per se*, whether of the corporate employer or, in the event of internal discipline, the employee himself.<sup>56</sup> The deterrent threats thus conveyed are intended to have various effects. Negatively, officers, employees and other persons concerned are cautioned to refrain from conduct likely to result in a charge against their company. Positively, they are encouraged to take steps against the commission of further offences; apart from action taken to avoid liability for an offence of omission, these steps may comprise the exercise of internal discipline, or the introduction of more adequate training, education, supervision, communication, or physical preventive devices.

These deterrent aims of corporate criminal responsibility are straightforward, but the extent to which they are realized is another matter: considerable controversy exists as to the efficacy and justice of punishment in its application to corporations.<sup>57</sup> Important as this controversy is to the ultimate fate of corporate criminal responsibility, it lies beyond the scope of this article, the aim of which is to describe the law's intentions rather than the degree to which it is capable of satisfactorily achieving them. Accordingly, we proceed to the reasons why deterrence is taken to require the imposition of corporate as well as individual criminal responsibility. These reasons are described under the following heads:

- (i) organizational secrecy;
- (ii) number of suspects;
- (iii) corporate negligence;
- (iv) corporate profits;
- (v) corporate surrogates of responsibility;
- (vi) corporate offences; and
- (vii) corporate personnel beyond jurisdiction.

#### (i) *Organizational Secrecy*

An initial obstacle encountered in the application of individual criminal responsibility to corporate crime is organizational secrecy. When faced with the prospect of official investigation of crime suspected on the part of individual personnel, organizations tend to close ranks, usually out of loyalty or through fear of dismissal or non-acceptance. This tendency has been of longstanding concern. Organizational secrecy may easily confer *de facto* immunity from criminal responsibility, especially upon those captains and high-placed officers who manipulate the crews of industry

55. *Cont.*

(1966), ch. 8; Note, "The Shareholder's Role in Intracorporate Policing of the Antitrust Laws", (1957) 66 *Yale L.J.* 413; Solomon, "Institutional Investors: Stock Market Impact and Corporate Control", (1974) 42 *Geo. Wash L.R.* 761. Threats additional to those mentioned in the text are incapacitation or restriction by means of dissolution or probation (as to dissolution see Leigh, *op. cit.* (*supra* n.1), 157-158; for probation, text and references *infra*, nn.131-134).

56. On the deterrent impact of apprehension as opposed to that of punishment see Brooker, "The Deterrent Effect of Punishment", [1972] *Criminology* 471, 476.

57. The precise degree of efficacy of these effects is a matter of speculation and, in some quarters, pessimism. Consider Stone, *op. cit.* (*supra* n.1), ch.6; Dershowitz, *loc. cit.* (*supra* n.1); Kriesberg, *loc. cit.* (*supra* n.1); Davids, "Penology and Corporate Crime", (1967) 58 *Jnl. of Cr. L., Criminology & P.S.* 524; Canada, Law Reform Commission, *op. cit.* (*supra* n.1), 35-46; Leigh, *op. cit.* (*supra* n.1), 150-162; Coleman, "Is Corporate Criminal Liability Really Necessary?", (1975) 29 *S.W.L.J.* 908. As to the justice of punishing corporations, the transmission of adverse effects to personnel, shareholders and consumers raises objections on grounds of both inutility and violation of desert.

in an improper way.<sup>58</sup> Under the present law corporate criminal responsibility is used as a means of helping to overcome this impediment.

A spectacular example of this difficulty is the series of electrical equipment conspiracies prosecuted by the United States Department of Justice in 1959-1961.<sup>59</sup> Charges of price-fixing were brought against a number of companies and many of their executives in respect of the supply of transformers and other heavy electrical equipment. The two principal companies convicted were the industrial giants, General Electric and Westinghouse. The executives found guilty and sentenced to jail were mainly from middle management, the few top managers convicted being from the smaller corporations involved. In the case of General Electric, three key personnel (the chairman of the board, the president, and the group executive) and members of the board of directors were indicted. However, the charges were dropped when, despite an extensive investigation by the Department of Justice, sufficient evidence of their widely suspected guilt could not be secured; organizational secrecy, stemming from loyalty or anticipated dismissal, formed an impenetrable barrier. Although thus spared personal conviction and sentence, the superior officers suspected of guilt were nonetheless penalized to the extent of the loss of money and prestige occasioned by the fines and civil damages awards made against their corporations (fines of \$437,500 and damages of approximately \$50,000,000 were incurred by General Electric).

The electrical conspiracies illustrate a serious problem of enforcement. Admittedly, the difficulties faced by the U.S. Department of Justice were compounded by the huge size of the corporations involved, but feelings of loyalty or fears of dismissal are also likely to obstruct the criminal investigation of managerial activities in smaller companies. Loyalty may be particularly strong in small organizations, which may help to explain the willingness of courts in the U.S.A. to extend corporate criminal responsibility to partnerships.<sup>60</sup>

#### (ii) *Number of Suspects*

A second impediment to the effective application of the criminal law to corporate personnel is lack of sufficient enforcement resources to investigate large numbers of suspects. Numerous lower-level employees may participate as the tools of corporate crime. More importantly, numbers of upper and intermediate personnel may exercise initiative and leadership. Although guilty participation in criminal activities is rarely pervasive throughout an organization, diffusion of policy-making and labour inevitably increase the difficulty of law enforcement. At least in the case of larger corporations, an offence of say misleading advertising or even manslaughter may be the

58. This was perhaps the principal policy underlying the early United States decisions. See *New York Cent. & Hudson River Railroad v. U.S.* 212 U.S. 481 (1909); *Standard Oil Company v. State* 100 S.W. 705 (1907). For recent confirmations of the difficulty see *U.S. v. Hilton Hotels Corp.* 467 F. 2d 1000 (1972); *Commonwealth v. Beneficial Finance Co.* 275 N.E. 2d 33 (1971). By contrast, the top echelons of management have been more patently involved in the recent corporate bribery scandals: Herlihy and Levine, "Corporate Crisis: The Overseas Payment Problem", (1976) 8 *Law and Policy in Int. Bus.* 547, 580.

59. For accounts see Geis, *White-Collar Criminal* (1968), 108; Smith, *Corporations in Crisis* (1963), chs. 5 and 6; Walton and Cleveland, *Corporations on Trial: The Electric Cases* (1964). Note also *Graham v. Allis-Chalmers Manufacturing Company* 182 A. 2d 328 (1962).

60. As in *U.S. v. A. & P. Trucking Co.* 358 U.S. 121 (1958). Cf. *Bishop v. Chung Bros.* (1907) 4 C.L.R. 1262.

product of wrongful conduct on the part of many managers, executives and lower employees. Theoretically, conspiracy is capable of dealing with instances of this kind, but the prejudicial effect of joint trials, the elusive nature of the necessary conspiratorial agreement, and the workload imposed by large-scale conspiracy trials dictate limited resort to this offence.<sup>61</sup>

Studies have yet to be made of the extent to which enforcement is made more difficult by reason of division of functions within corporations. However, the evidence available suggests that corporate criminal responsibility now provides a useful means of dispatching penalties in bulk, whether by means of loss of profits or prestige, or as a result of consequential internal discipline proceedings. Thus, the electrical conspiracy cases, together with the more recent tax fraud by the large English building company, J. Munro Ltd., and the Equity Funding insurance scandal in New York, provide compelling illustrations of the large number of suspected personnel there can sometimes be.<sup>62</sup> Illustrations aside, it is also important to recognise that the complex division of authority and accountability within large corporations is a basic element of modern organizational theory.<sup>63</sup> As Galbraith has rightly observed:

"... [Management] is a collective and imperfectly defined entity; in the large corporation it embraces chairman, president, those vice-presidents with important staff or departmental responsibility, occupants of other major staff positions, and perhaps, division or departmental heads not included above. It includes, however, only a small proportion of those who, as participants, contribute information to group decisions. This latter group is very large; it extends from the most senior officials of a corporation to where it meets, at the outer perimeter, the white and blue collar workers whose function is to conform more or less mechanically to instruction or routine. It embraces all who bring specialized knowledge, talent or experience to group decision-making. This, not the management, is the guiding intelligence—the brain—of the enterprise."<sup>64</sup>

### (iii) Corporate Negligence

Harmfully or potentially harmful corporate behaviour often results from negligence in a corporate sense, as opposed to merely cumulative acts of individual negligence on the part of personnel.<sup>65</sup> Where this is so, corporate criminal responsibility complements the deterrent operation of individual criminal responsibility by inducing the corporation sentenced (and others similarly placed) to take greater care, as by adopting further preventive measures, or initiating internal discipline proceedings in respect of those who may have violated the corporation's existing internal precautionary rules.

61. See Johnson, "The Unnecessary Crime of Conspiracy", (1973) 61 *Calif. L.R.* 1137; Note, "The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants", (1948) 62 *Harv. L.R.* 276.

62. As to J. Munro Ltd. see "U.K. Builder Fined \$1m in Tax Swindle", *The Australian*, 27th March 1976, 19; and for accounts of the Equity Funding scandal see Stone, *op. cit.* (*supra* n.1), 68-69; Cole, "Anatomy of an Insurance Scandal", *The New York Times*, 15th April, 1973, s.3, 1; Soble and Dallos, *The Impossible Dream* (1975).

63. For references, *supra* n.27.

64. Galbraith, *op. cit.* (*supra* n.27), 70-71.

65. This position may offend against methodological individualism, but the author aligns himself with Lukes, *Individualism* (1973), ch. 17; and French, "Types of Collectivities and Blame", (1975) 56 *The Personalist* 160. For further discussions of methodological individualism see Brodbeck (ed.), *Readings in the Philosophy of the Social Sciences* (1971), 254-303.

The main contexts in which acts of corporate negligence typically arise are now traced under the following heads:

- (a) communication breakdowns;
- (b) tacit operation of authority; and
- (c) group pressures to conform.

#### (A) COMMUNICATION BREAKDOWNS

Communication breakdowns in organizations have various causes, but the more common include biased information systems, insensitivity to warnings within the hierarchy, informal communication and biased reception of information.<sup>66</sup> Where breakdowns occur they are often attributable to corporate rather than merely individual negligence.

Biased information systems arise principally where communication flows are designed in accordance with a limited view of organizational objectives, or by stressing what can easily be measured.<sup>67</sup> Insensitivity to warnings is an inevitable consequence of the need within an organization to achieve efficiency and control by screening the information passing up or down through the hierarchy; a well-known illustration is the calamitous over-filtering of the warnings given by the radar system protecting Pearl Harbour.<sup>68</sup> Informal communication, although essential to a degree, may create a further barrier in the form of cliques of influence and authority which, as in universities, inhibit the spread of relevant information to the formal decision-making bodies of the organization.<sup>69</sup> Another important cause of communication breakdowns is that of biased reception of information, which affects the nature of the information transmitted as well as the interpretation placed upon it. A good example of bias again stems from Pearl Harbour: warning of the projected attack had been provided by de-coded information, but insufficient attention was paid to this information, partly because it did not accord with the prevailing views of key government officials.<sup>70</sup>

The relevance of communication breakdowns to corporate negligence may be shown initially by reference to the facts of *R. v. Australasian Films Ltd.*,<sup>71</sup> a decision of the High Court of Australia in 1921. In this case, D was charged with obtaining an import duty drawback with intent to defraud the revenue. Several films had been imported by D and then exported, but no drawback was payable because the films had been shown in Australia. The agents or servants of D who claimed a drawback acted innocently, but other employees were aware that the films had been shown. The High Court held that D was not responsible on the ground that no one servant or agent had any intent to defraud. Perhaps no servant or agent was even negligent in failing to piece together the relevant information, but nonetheless there may have been a negligent corporate breakdown in communication: it is conceivable that those personnel responsible for

66. There are many further aspects. For useful primers see Porter and Roberts (eds.), *Communication in Organizations* (1977); Wilensky, *Organizational Intelligence* (1967).

67. Boulding, *The Organizational Revolution* (1953), 135-136.

68. Wohlstetter, *Pearl Harbour: Warning and Decision* (1962), chs. 1 and 2. See also Arrow, *The Limits of Organization* (1976), 75; Stone, *op. cit.* (supra n.1), 61.

69. Dalton, *Men who Manage* (1959), *passim*.

70. Wohlstetter, *op. cit.* (supra n.68), chs. 3 and 4.

71. (1921) 29 C.L.R. 195. See also *Brambles Holdings Limited v. Carey* (1976) 15 S.A.S.R. 270; *W. B. Anderson & Sons Ltd. v. Rhodes (Liverpool) Ltd.* [1967] 2 All E.R. 850.

the corporation's communication network had been negligent in a collective sense. Since this possibility is hardly a remote or fanciful one, it provides a strong argument for defining corporate offences in terms of negligence rather than subjective states of mind. The trend towards negligence as the main basis of fault in regulatory offences is compatible with this view, but the significance of negligent communication breakdowns has not been sufficiently recognized in the case-law.

It is to the sad history of engineering and construction disasters that we must look for the best evidence. Engineering and construction disasters not uncommonly arise from oversights attributable more to overall collective deficiency than palpable individual fault. A well-known instance is the collapse of the West Gate Bridge in Melbourne in 1970; the collective ignorance which caused this collapse is the subject of a detailed report by a Royal Commission.<sup>72</sup> The illustration most nearly in point, however, is the disastrous accident in 1968 at the Hixon level crossing in England.

The disaster at Hixon arose from a remarkable oversight within the government departments charged with the tasks of designing and introducing a system of automatic barriers for railway crossings. Inadequate allowance was made for the time which long, slow-moving vehicles take to make a crossing. Consequently, when a transporter, 148 feet in length, entered the Hixon level crossing, the signals and barrier operated in accordance with the normal sequence, but without giving sufficient time for the transporter to move beyond the path of the oncoming train.

The ensuing official enquiry<sup>73</sup> concluded that the disaster was the result of collective oversight on the part of numerous persons within British Railways and the Ministry of Transport. However, it was not appropriate to regard any individual persons as having been negligent, for the following reason:

"The real cause of the disaster was ignorance, born of lack of imagination and foresight at the sources where one would expect to find them. It is an odious task to criticise anyone unfavourably for having failed to foresee a danger, when many intelligent minds and experienced and talented people have conscientiously considered the same problem before the danger manifested itself, yet failed to appreciate it. The civil law of England tests negligence objectively upon the basis of the foresight of the 'reasonable man' (who in theory never suffers from an inexplicable oversight) but . . . it is appropriate in this instance to adopt a more subjective approach lest able men of integrity be unfairly blamed for incompetence."<sup>74</sup>

#### (B) TACIT OPERATION OF AUTHORITY

The tacit operation of authority also tends to bring about acts of corporate as opposed to individual negligence. Subordinates, instead of acting upon explicit instructions, often anticipate the reactions of their superiors by asking themselves what their superiors would wish of them, act accordingly, and then await the superiors' retrospective judgment.<sup>75</sup>

72. Victoria, *Royal Commission into the Failure of the West Gate Bridge* (1971), 97-105.

73. G.B., *Report of the Public Inquiry into the Accident at Hixon Level Crossing* (1968) Cmnd. 3706.

74. *Id.*, para. 210.

75. Simon, *op. cit.* (*supra* n.52), 129, 234. As well as the example given in the text, consider *Australian Stevedoring Industry Authority v. Oversea and General Stevedoring Co. Pty. Ltd.* [1959] 1 F.L.R. 298, 300.

Anticipated reactions of this kind were apparent in the electrical conspiracies where many of the convicted executives claimed, with some justification, that their deliberate wrongdoing was consistent with tolerated past practices. Where such anticipated reactions occur, not uncommonly they stem from cumulative impressions acquired through experience of corporate attitudes over a lengthy period.

Although these attitudes emanate from the conduct of various officers and employees, the contribution of any one officer or employee to the total effect upon other corporate personnel may be very slight and not necessarily the result of individual negligence..

#### (C) GROUP PRESSURES TO CONFORM

The commission of offences on behalf of corporations may be encouraged by group pressures to conform to standards acceptable within the organization but nonetheless contrary to law. Where this is so, the pressures in question may stem from diverse individual contributions each too slight to be the appropriate subject of criminal responsibility on the basis of individual negligence.

The general phenomenon of group pressures to conform has frequently been discussed, as by W. H. Whyte in his famous social commentary, *The Organization Man* (1956).<sup>76</sup> More recently, there have been numerous contributions, including those from the psychological field of group dynamics.<sup>77</sup> The factors leading to conformity are numerous. They include exposure to the beliefs of a peer group, immersion in a similar environment both during and outside working hours, compliance with standardized qualifications for membership, sacrifice of self in order to help achieve group aims, relaxation of critical faculties in expectation of collective acuity, subjection to common restraints imposed formally or informally as a matter of internal discipline, and absorption of the attitudes expected of persons admitted to professional or expert ranks. We need not speculate which of these factors is of more or less relevance in the context of corporate crime. It is sufficient to say that each has some relevance, and that judicial notice has been taken of the general effects of group pressures to conform as well as the tendency to rationalize conduct in terms of such pressures. Thus, when sentencing several of the executives convicted in the electrical equipment conspiracies, Judge Ganey observed:

"I am convinced that in the great number of these defendants' cases, they were torn between conscience and an approved corporate policy, with the rewarding objectives of promotion, comfortable security and large salaries—in short, the organization or the company man, the conformist, who goes along with his superiors and finds balm for his conscience in the additional comforts and the security of his place in the corporate set-up."<sup>78</sup>

76. See also Simon, *op. cit.* (supra n.52), ch. 10; Pella, *L'Esprit de Corps et les Problèmes de la Responsabilité Pénale* (1920); Blumberg, "Corporate Responsibility and the Employee's Duty of Loyalty and Obedience", (1971) 24 *Okla. L.R.* 279; Slater, *The Pursuit of Loneliness* (1970); Schwartz, "Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness", (1960) 55 *N.W.U.L.R.* 4; Howton, *Functionaries* (1969); Janis, *Victims of Groupthink* (1972).

77. Cartwright and Zander, *Group Dynamics* (3rd ed., 1968), pts. 3 and 4.

78. As quoted in Walton and Cleveland, *Corporations on Trial: The Electric Cases* (1964), 82.



(iv) *Corporate Profits*

A further deterrent function of corporate criminal responsibility is to remove or counter the profit motive which encourages the commission of offences by personnel.

The motives behind corporate crime are various. They include prestige, empire-building, and reduction of work-pressure, as well as profit. However, profit usually is the predominant motive,<sup>79</sup> as where officers or employees stand to be paid on a fee for service basis, or perhaps more commonly, where higher corporate profits produced by means of crime are likely to result in pecuniary or non-pecuniary advantages to the personnel implicated. Many offences, including those relating to misleading advertising, restrictive trade practices, environmental or industrial safety laws, and corporate securities, are a potential source of considerable profit, whether in terms of positive gain, or as is common in the case of pollution offences, through savings made by not introducing necessary devices. Given the profit-based environment in which corporate personnel work, there is an obvious temptation to seek personal or corporate advancement through illicit endeavour. Indeed, corporate pressure to make profits may be so strong that temptation verges on duress. The electrical conspiracies again are instructive. One explanation given by some of the conspirators employed by General Electric was that the company's policy of decentralisation was largely to blame. Considerable pressure to make profits was placed upon each virtually independent division. Thus, after the switchgear division of General Electric had entered a price-fixing conspiracy, an incoming general manager of that division was told his job was "at risk" for the next two years. If he succeeded he would be made a vice-president; if he failed he would be demoted. He joined the conspiracy.<sup>80</sup>

Accepting the criminogenic influence of profit in the context of corporate crime, what precisely is the role of corporate criminal responsibility? The policy which underlies the present law is not hard to discern. The profits accruing from offences committed on behalf of corporations almost always flow into their coffers, not those of the personnel involved. To leave these illicit profits untouched would encourage the commission of offences, for although personnel are subject to the threat of individual criminal responsibility, that threat can be minimal. For some personnel the chance of detection is slight, especially where organizational responsibilities are highly diffused. For those who are caught there may be a good chance of indemnification, whether in the form of direct payment, sympathetic bonuses, increased wages, or generous fringe benefits.<sup>81</sup>

79. See Leonard and Weber, "Automakers and Dealers—a Study of Criminogenic Market Forces", (1970) 4 *L. & Soc. R.* 407; Ploscowe, "Crime in a Competitive Society", (1941) 217 *Annals of the American Academy of Social and Political Science* 105. The importance of the profit motive has been doubted: Galbraith, *The New Industrial State* (1967), *passim*; and Kriesberg, *loc. cit.* (*supra* n.1). But cf. Schwartz, Book Review of *The New Industrial State*, (1968) 81 *Harv. L.R.* 915. Consider also the relevance of a good record to profits, proclaimed by Bragdon and Marlin, *Is Pollution Profitable? The Case of the Pulp and Paper Industry* (1971).

80. Smith, *Corporations in Crisis* (1963), 116-117. See also *N.Y. Central & Hudson River Railroad v. U.S.* 212 U.S. 481, 495 (1909); *Roginsky v. Richardson-Merrell Inc.* 378 F. 2d 832, 850 (1967) (punitive damages).

81. On the risk of indemnification see *In re Oslo* 334 P. 2d 1 (1958); Flynn, "Criminal Sanctions under State and Federal Antitrust Laws", (1967) 45 *Tex. L.R.* 1301, 1335-1337; Bein, "Payment of a Fine by a Person other than the Defendant", (1974) 9 *Israel L.R.* 325; Note, "Corporate Indemnity from

Indemnification is cold comfort in the event of imprisonment, but fines or probation are usually imposed against white collar offenders. Moreover, although it is true that indemnification of sentences is contrary to public policy and subject to explicit prohibition both under the doctrine of ultra vires and under specific statutory provisions,<sup>82</sup> in practice these legal obstacles are surmountable by means of suitably disguised payments.<sup>83</sup> Consequently, the law plays safe by fining the corporate employer and thereby countering illicit profit motives at source.

(v) *Corporate Surrogates of Responsibility*

Corporations provide convenient surrogates of responsibility in situations where it is harsh to impose individual criminal liability, whether by reason of exposure to criminogenic corporate pressures short of duress, excessively severe rules of individual criminal responsibility, or the need to impose an exemplary punishment which reflects the gravity of the corporate evil perpetrated.<sup>84</sup>

Personnel not uncommonly commit offences on behalf of their corporations at a time when they are exposed to pressures to make profits, toe the corporate line, or simply remain loyal to fellow workers. These pressures fall short of duress, but can be very strong for all that.<sup>85</sup> Where these pressures have been strong, corporate criminal responsibility provides a less drastic way of achieving deterrence than by pressing home charges against the luckless overborne.

Corporate pressures aside, the present criminal law is capable of operating very harshly in several areas of direct relevance to the position of corporate officers and employees. The most obvious instance is that of offences which

81. *Cont.*

Prosecution under the Federal Water Pollution Control Act", (1972) 51 *Tex. L.R.* 155; Note, "Indemnification of the Corporate Official for Fines and Expenses Arising from Criminal Antitrust Litigation", (1962) 50 *Georgetown L.J.* 566; Whiting, "Antitrust and the Corporate Executive II", (1962) 48 *Va.L.R.* 1, 33-46; Stone, *op. cit.* (supra n.1), 69.

82. *E.g.*, Companies Act, 1962-1973 (S.A.), s.133(1).

83. For the contrary view that enforcement is easy because corporations are generally obliged to keep books see Bein, *loc. cit.* (supra n.81), 343.

84. American Law Institute, *Model Penal Code, Tentative Draft No. 4* (1955), 149; and see *U.S. v. General Motors Corp.* 212 F. 2d 376, 411 (1941); *U.S. v. American Socialist Soc.* 260 F. 885 (1919); Sjöström and Nilsson, *Thalidomide and the Power of the Drug Companies* (1972), ch. 12. In addition to the reasons given in the text, note also the significance of the denial of the privilege against self-incrimination to corporate defendants in the U.S. (see Note, "The Constitutional Rights of Associations to Assert the Privilege against Self-Incrimination", (1964) 112 *U. Pa.L.R.* 394), the length of trials in *e.g.*, antitrust cases (see *U.S. v. United States Gypsum Co.* 404 F. Supp. 619, 624 (1975)), the problem of selective enforcement in many industries (see Note, "Ex Parte Crestfallen: The Victim of FTC Selective Enforcement", (1958) 13 *Rutgers L.R.* 315). Moreover, from a broader perspective, consider the relevance of corporate criminal responsibility to the movement against stigmatizing individual offenders. Cf. Griffiths, "The Limits of Criminal Law Scholarship", (1970) 79 *Yale L.J.* 1388, 1416-1417; Cohen, "Forgiving the Criminal Offender British Style: The Rehabilitation of Offenders Act", (1976) 14 *Harv. Jnl. on Legis.* 111. These considerations stand in stark contrast to those which underlie procedures for the allocation of responsibility to guilty employees. Cf. *Tesco Supermarkets Ltd. v. Natrass* [1972] A.C. 153; G.B., *Review of the Trade Descriptions Act 1968* (1976) Cmnd. 6628, 21-24.

85. As to the present scope of duress see Williams, *op. cit.* (supra n.1), 758; *State v. Moe* 24 F. 2d 638 (1933); Morris, "Psychiatry and the Dangerous Criminal", (1968) 41 *So. Cal. L. Rev.* 514, 520. For an example of compelling economic pressures short of duress see *supra*, text at n.80. See also *U.S. v. Michigan Cent. R. Co.* 43 F. 26, 30 (1890); *Southern Express Co. v. State* 58 S.E. 67, 69 (1907); *Ballard v. Sperry Rand Australia Ltd.* (1975) 6 A.L.R. 696, 701-702.

impose strict responsibility, not necessarily because so drastic an approach is warranted in the case of individual persons, but rather as a consequence of the deeply ingrained legislative habit of defining offences in terms equally applicable to all species of juristic person.<sup>86</sup> Where the rigour of strict responsibility is relieved by the *Proudman v. Dayman*<sup>87</sup> defence of reasonable mistake of fact, corporate personnel face the notorious requisite element of conscious mistaken belief (as opposed to subconscious mistaken assumption or simple ignorance).<sup>88</sup> Just as infamous is the rule that ignorance or mistake of law is no defence,<sup>89</sup> especially given that corporate personnel may act upon instructions which they believe to be based upon sound legal advice received by their superior officers.<sup>90</sup> Where harshness is thus in the offing, reliance upon corporate criminal responsibility helps to minimize personal suffering without disregarding the need for some measure of deterrence.

As to exemplary sentences, there may often be a case for sentencing corporate personnel strictly according to tariff principles on the ground that the offence is very prevalent or, bearing in mind the gravity of corporate evil, very serious.<sup>91</sup> Yet the offender may have an unblemished record or the offence may have been associated with the conduct of superiors against whom guilt cannot be proven. In such instances, the benign alternative is to impose an exemplary sentence upon the corporation rather than its personnel. Indeed, it is interesting that surrogateship need not be confined to exemplary sentences; a striking feature implicit in Becker's Benthamite economic analysis of crime<sup>92</sup> is that it entails the possibility that punishments applied to corporations are more economical of distress than punishments applied to individual personnel, in which event there is a case for deterring corporate crime exclusively by means of corporate criminal responsibility.<sup>93</sup>

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86. For an example of a harsh approach directed specifically at personnel see *U.S. v. Park* 421 U.S. 658 (1975), discussed in Sethi and Katz, "The Expanding Scope of Personal Criminal Liability of Corporate Executives", (1977) 32 *F.D.C.L.J.* 544. On the relief afforded by corporate criminal responsibility consider *R. v. St. Margarets Trust Ltd.* [1958] 1 W.L.R. 522; *R. v. Industrial Tankers, Ltd.* [1968] 4 C.C.C. 81; *Alphacell Ltd. v. Woodward* [1972] A.C. 824; *Boucher v. G. J. Coles and Company Limited* (1974) 9 S.A.S.R. 495. As to the harsh influence of juristic personality, see Fisse, "Consumer Protection and Corporate Criminal Responsibility", (1971) 4 *Adel. L.R.* 113, 124, 126, 128.
  87. (1941) 67 C.L.R. 536.
  88. Howard, *Strict Responsibility* (1963), 88-96. For an important relaxation see *Mayer v. Marchant* (1973) 5 S.A.S.R. 567, discussed in Fisse, "Probability and the *Proudman v. Dayman* Defence of Reasonable Mistaken Belief", (1974) 9 *Melb. Univ. L.R.* 477, 485-488.
  89. For one leading discussion see Brett, "Mistake of Law as a Criminal Defence", (1966) 5 *Melb. Univ. L.R.* 179.
  90. In some instances this may lead to a mistake of fact or a mistake as to mixed fact and law (cf. *Thomas v. The King* (1937) 59 C.L.R. 279, 306 *per* Dixon J.), but not always. For an instance of mistake of law as an explicit reason for holding a corporation responsible as a surrogate see *Bigelow v. RKO Pictures*, 78 F. Supp. 250, 259 (1948). Consider also *Crichton v. Victorian Dairies Ltd.* [1965] V.R. 49 (in particular, the position of Mr. Goode).
  91. On the sentencing principles applicable see Cross, *The English Sentencing System*, (1975), 159-166; *Martin v. Scotland* (1972) 2 S.A.S.R. 271. *R. v. Petrofina Canada Ltd.* (1975) 21 C.C.C. 2d 315 is an example directly in point.
  92. "Crime and Punishment: An Economic Approach", (1968) 76 *Jnl. of Pol. Econ.* 169.
  93. This follows from Becker's conditions of optimality and is consistent with his denunciation of the "catchy and dramatic but inflexible desiderata" of "vengeance, deterrence, safety, rehabilitation, and compensation", as understood by uneconomic man (*id.*, 208). Cf. Sen, "Rational Fools: A Critique of the Behavioural Foundations of Economic Theory", (1977) 6 *Phil. and Pub. Affairs* 317.

(vi) *Corporate Offences*

A large number of statutory offences are defined in terms which, either invariably or on particular facts, presuppose a corporation as principal offender. Thus, under the Trade Practices Act, 1974-1977 (Cth.), many offences are defined exclusively in terms of corporate principal offenders,<sup>94</sup> the object being to ensure that the offences come within the corporations power of the Constitution.<sup>95</sup> More typical are offences defined in terms of some status or characteristic which, on particular facts, may be possessed only by a corporate employer. For example, the offence may require the principal offender to be the *occupier* of premises, as under section 1(1) of the Clean Air Act, 1956 (U.K.). Similarly, as under s.24(1)(b) of the Traffic Act, 1925 (Tas.), an offence of *using* a motor vehicle in a prohibited way or in prohibited circumstances may require that the use be more than merely a physical use; in the particular context of s.24(1)(b) the user is a person making and having the benefits of contracts of carriage, as opposed to merely the driver and owner of the vehicle to which those contracts relate.<sup>96</sup> Where corporate personnel are not covered by the terms of principal offences of the kind exemplified, corporate criminal responsibility enables their conviction for complicity.<sup>97</sup>

(vii) *Corporate Personnel Beyond Jurisdiction*

A final supplementary deterrent role of corporate criminal responsibility is to provide some means of dealing with guilty personnel beyond the jurisdiction, whether as a matter of ambit or enforcement. Where problems of ambit or enforcement arise as a result of interstate or transnational corporate operations, imposing criminal responsibility locally upon a domestic or foreign corporation provides a useful additional deterrent measure.

The ambit of local criminal law is sometimes more limited in respect of personnel than in the case of their corporate employer. First, an officer acting on behalf of a local company may not be subject to local jurisdiction; as in the context of legislation against trading with enemies, an offence may extend only to the conduct of nationals or persons under the protection of the Crown.<sup>98</sup> In the case of acts of complicity committed abroad by personnel with a view to assisting or promoting an offence locally, the same limitation may also apply.<sup>99</sup> Secondly, where jurisdiction rests upon

94. Trade Practices Act, 1974-1977 (Cth.), Pt. V.

95. Commonwealth of Australia, Constitution Act, 1900-1977 (Cth.), s.51(xx). For a discussion see Evans, "The Constitutional Validity and Scope of the Trade Practices Act 1974", (1975) 49 *A.L.J.* 654, 654-666. For the Canadian position see McDonald, "Constitutional Aspects of Canadian Anti-Combines Law Enforcement", (1969) 47 *Can. B.R.* 161.

96. *Blazely v. Pilkington* [1977] Tas. S.R. 18.

97. *R. v. Tyler and the International Commercial Company Ltd.* [1891] 2 Q.B. 588; *U.S. v. John Kelso Co.* 86 F. 304 (1898); *People v. Strong* 2 N.E. 2d 942 (1936); *Cain v. Doyle* (1946) 72 C.L.R. 409; *Blazely v. Pilkington* [1977] Tas. S.R. 18. Contrary to the thinking of the English Law Commission's working paper (*op. cit.* (*supra* n.1), 16), there is no need to retain corporate criminal responsibility for the purpose of convicting personnel of acts of assistance or encouragement of corporate crime. See Bruns, "Über die Organ und Vertreterhaftung im Strafrecht", [1954] *Juristenzeitung* 12; and American Law Institute, *Model Penal Code, Tentative Draft No. 4* (1955), 155.

98. See generally Williams, "Venue and the Ambit of Criminal Law", (1965) 81 *L.Q.R.* 276, 395, 518, 395-402.

99. *R. v. Jameson* [1896] 2 Q.B. 425. See further, G.B., Law Commission, *Working Paper No. 29, Territorial and Extraterritorial Extent of the Criminal Law* (1970), 57. Consider also the possibility that to impose responsibility upon X for an omission abroad may entail unacceptable commitment to the universality

the so-called "objective" principle,<sup>100</sup> it is possible that the conduct of any one corporate agent may not have a sufficiently strong nexus with the adverse impact within local jurisdiction. Although there appear to be no decided cases explicitly in point, this possibility certainly is open under the extraterritorial operation of U.S. antitrust laws.<sup>101</sup> Thirdly, the "objective" principle of jurisdiction also suggests that an offence committed on behalf of a corporation may have a substantial connection with the law of the forum only if considered from the standpoint of corporate consequences: it may be of foreign import as far as the employee's responsibility is concerned, a possibility readily imaginable under antitrust laws and legislation governing trading with enemies.<sup>102</sup> Thus a foreign officer of a foreign subsidiary may act in a way which is contrary to the legislation of his own country and may be convicted under that legislation; from the standpoint of evasion of local law, however, he may be one of the local parent corporation's right-hand foreign contacts.<sup>103</sup> In each of these three types of situation, corporate criminal responsibility can be imposed locally, thereby adding to the range of available deterrent measures. For instance, by penalizing the local corporation, internal discipline may well be induced not only locally but also in relevant parts of a company's interstate or transnational operations; by contrast, doing no more than punishing one or two local employees is much less likely to have the same effect.

Enforcement jurisdiction is also limited in material respects. Existing international and interstate reciprocal arrangements for search and seizure, discovery, interrogation of witnesses abroad, execution of sentences, and even extradition are often either insufficiently comprehensive or subject to various practical limitations. These problems of enforcement operate in favour of corporate personnel transferred to branches or affiliates abroad.<sup>104</sup> To some degree corporate criminal responsibility provides a

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99. *Cont.*  
principle of jurisdiction: Akehurst, "Jurisdiction in International Law", (1972-1973) 46 *Brit. Y.B. Int. L.* 145, 156. For one statutory exception see Trade Practices Act, 1974-1977 (Cth.), s.5(2); and note the extraterritorial operation of U.S. anti-trust laws, as discussed by Jennings, "Extraterritorial Jurisdiction and the United States Antitrust Laws", (1957) 33 *Brit. Y.B. Int. L.* 146; Fugate, *Foreign Commerce and the Antitrust Laws* (2nd ed., 1973), ch. 2.
100. *D.P.P. v. Doot* [1973] 1 All E.R. 940, 943 *per* Lord Wilberforce, 956 *per* Lord Salmon; *R. v. Hansford* (1974) 8 S.A.S.R. 164, 195-196 *per* Wells J.
101. A good example is *U.S. v. General Electric Co.* 82 F. Supp. 753 (1949).
102. Consider the possibility, suggested by *U.S. v. Aluminium Co. of America* 148 F. 2d 416 (1945), that X possesses no intent to affect U.S. trade but his company does. Note also *Clark v. Uebersee Finanz-Korporation* 332 U.S. 480 (1947); Bishop, "Judicial Construction of the Trading with the Enemy Act", (1949) 62 *Harv. L.R.* 721, 749-758.
103. Consider *Fruehauf v. Massardy* [1968] D.S. Jur. 147, [1966] *Int. Leg. Mat.* 476, discussed in Craig, "Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans", (1970) 83 *Harv. L.R.* 579.
104. American Law Institute, *Model Penal Code, Tentative Draft No. 4* (1955), 150-151; Canada, Law Reform Commission, *op. cit.* (*supra* n.1), 30; Leigh, *loc. cit.* (*supra* n.1), 299; Combines Investigation Act, 1974-1975 (Can.), s.32.1(1). As to the particular difficulties which arise see *Morgan v. Babcock and Wilcox Ltd.* (1930) 43 C.L.R. 163; Bassiouni and Nanda, *International Criminal Law* (1973) II, pts. 2 and 3; Shearer, "Recognition and Enforcement of Foreign Criminal Judgments", (1973) 47 *A.L.J.* 585; Kelly and Dauntton-Fear, *Probation and Parole: Interstate Supervision and Enforcement* (1975); *Radio Corp. of America v. Rauland* [1956] 2 W.L.R. 612; Fugate, *Foreign Commerce and the Antitrust Laws* (2nd ed., 1973), 114-128; Note, "Ordering Production of Documents from Abroad in Violation of Foreign Law", (1964) 31 *U. Chi. L.R.* 791; Wilson and Matz, "Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods", (1977) 14 *Am. Crim.*

solution. Provided an offence has been committed locally on behalf of a domestic or foreign corporation, the power of local enforcement authorities is strengthened since they can threaten the corporation with prosecution unless it produces key documents or corporate personnel from abroad, or co-operates in some other informally agreed way.<sup>105</sup>

### 3. Internal Discipline<sup>106</sup>

A second major function of corporate criminal responsibility is to prompt internal discipline. This function has been taken for granted to such an extent that there appears to be no adequate account of its evolution, present-day relevance, or implementation by means of corporate as well as individual criminal responsibility. Accordingly, some amplification of these matters is necessary.

#### (i) Evolution

The internal discipline function of corporate criminal responsibility is a matter of considerable antiquity, for it can be traced back to the experience of collective responsibility in primitive societies. As Sally Moore has disclosed in her critique of the mistaken view that strict responsibility is a pervasive feature of primitive early societies, the external imposition of collective responsibility upon groups such as the Kipsigis induced a fault-based system of internal discipline:

"... a collective obligation, while it may appear altogether collective when viewed from the outside or at a distance, is not so from the inside. Inside the collectivity the actions of members are weighed individually, and often . . . quite specific and varied individual obligations may exist with respect to debts of the collectivity. In the pre-industrial world, when an individual brings about a situation in which a corporate group to which he belongs is involved in heavy obligation, it may honour his claims in whole or in part, or it may turn him out. Certainly, even if he is given help he may be exhausting his potential claims and bringing himself closer to the point of refusal or expulsion. It becomes part of the history of his relationships with his fellows, a history which will bear on all his future dealings. Within the group he is in this way being held individually responsible for what he did, even though his kinsmen (and/or associates) may bail him and themselves out, and he may not 'pay' them for his act at once. The Kipsigis say a man may solicit help in making a blood payment only once; if he does

104. *Cont.*

*L.R.* 651, 709-713; Dehner, "Multinational Enterprise and Racial Non-Discrimination: United States Enforcement of an International Human Right", (1974) 15 *Harv. Int. L.J.* 71; Onkelinx, "Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs", (1969) 64 *N.W.U.L.R.* 487; Magistrates (Interstate Enforcement) Bill, 1978 (Vic.); Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976 (Cth.); *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] 2 *W.L.R.* 81.

105. This is surmise. Much has been written on the formal limitations placed upon e.g., ability to compel production of documents from abroad, but little on the real practices occurring in this low visibility area. *Cf.* Williston, "History of the Law of Business Corporations before 1800", (1888) 2 *Harv. L.R.* 105, 110; Timberg, "The Corporation as a Technique of International Administration", (1952) 19 *U. Chi. L.R.* 739. Note also the view expressed in Fugate, "An Overview of Antitrust Enforcement and the Multinational Corporation", (1973) 8 *J. Int. L. & Econ.* 1, 3, that U.S. antitrust authorities have little difficulty in obtaining or securing remedial relief where a parent corporation is headquartered in the United States.

106. Quintessential de Sade.

so a second time he is disowned. Whether there is usually as clear a measure as one chance for such collective help, or whether in other societies the rules are less precise, there is no doubt that within a group or aggregate bearing collective liability, in the long run individuals are held individually responsible for their actions. Collective responsibility does not exclude or substitute for individual responsibility. Both can and do operate simultaneously at different social levels."<sup>107</sup>

The experiences of collective responsibility in primitive societies aside, it should also be remembered that internal discipline has deliberately been promoted by more modern forms of group liability. Thus, in the development of the corporation between the fourteenth and eighteenth centuries, one important aim of incorporating ecclesiastical bodies, boroughs and guilds was to induce the internal control of otherwise unregulated conduct;<sup>108</sup> at least before 1688, revocation of charter was a serious threat.<sup>109</sup> This threat waned with the emergence of primarily commercial corporate undertakings, but even during the nineteenth century the relevance of internal discipline was not lost upon legislators. In particular, the steps taken to control railway companies included the imposition of penalties in the event of non-compliance with certain statutory duties, internal compliance with which was within the scope of the companies' statutory regulation-making power.<sup>110</sup>

More recently, considerable attention has been paid to the wider ramifications of internal corporate discipline. Heeding Blackstone's observation that a corporation is a "little republic",<sup>111</sup> and the Hobbesian *dictum* that corporations are chips off the block of sovereignty,<sup>112</sup> numerous modern writers (including Merriam, Eells, Evan, Chayes, Moore and the latter-day adventist, Nader)<sup>113</sup> have elaborated upon the theme that private

107. Moore, "Legal Liability and Evolutionary Interpretation: Some Aspects of Strict Liability, Self-Help and Collective Responsibility", in Gluckman, *The Allocation of Responsibility* (1972), 51, 93.
108. Davis, *Corporations* (1961), chs. 5 and 6; Pollock and Maitland, *The History of English Law* (2nd ed., 1968) I, 678-679, 687-688; Chayes, "The Modern Corporation and the Rule of Law", in Mason (ed.), *The Corporation in Modern Society* (1959), 25, 33-34; Radin, *Manners and Morals of Business* (1939), 206-209; Cooke, *Corporation, Trust and Company* (1950), chs. 2 and 3. The importance of this aim diminished as centralized legal and administrative controls increased and the joint stock corporation became an instrument more of private gain than public purpose: Cooke, *op. cit.*, ch. 3.
109. Carr, *General Principles of the Law of Corporations* (1905), 89-93; Maitland, "Trust and Corporation", in *Selected Essays* (1913), 141, 213; Levin, *The Charter Controversy in the City of London, 1660-1688, and its Consequences* (1969). Cf. *Jenkin v. Pharmaceutical Society of Great Britain* [1921] 1 Ch. 392.
110. See Railways Companies Clauses Consolidation Act, 1845 (U.K.) 8 & 9 Vict. c.20, s.143; and note *R. v. Bengel* (1865) 4 F. & F. 504.
111. Blackstone, *Commentaries* (15th ed., 1809) I, 468, 475-476.
112. Attributed to Hobbes in Hacker, *The Corporation Take-Over* (1964), 32. I have been unable to find the original source.
113. Merriam, *Public and Private Government* (1944); Eells, *The Government of Corporations* (1962); Evan (ed.), *Law and Sociology* (1962), 165-184; Chayes, *loc. cit.* (supra n.108); Moore, *The Conduct of the Corporation* (1962), ch. 6; Nader, Green, and Seligman, *Taming the Giant Corporation* (1976), ch. 6. Note also the internal justice systems of organized crime (Andenaes, "General Prevention Revisited: Research and Policy Implications", (1975) 66 *J. of Cr. L. & Criminology* 338, 360-361; Cressey, *Theft of the Nation* (1969), chs. 8 and 9), unincorporated associations (Stoljar, "The Internal Affairs of Associations", in Webb (ed.), *Legal Personality and Political Pluralism* (1958), 66; Wellington, "Union Fines and Workers' Rights", (1976) 85 *Yale L.J.* 1022), and the police (Australia, Law Reform Commission, Report No. 1, *Complaints Against the Police* (1975)).

systems of criminal justice mirror public systems in comparable although sometimes distorted or unjust ways.

It is important for our purposes to realize how extensive and legalistic corporate internal discipline systems can be. To give an example which emerged after the electrical equipment conspiracies, the minutes of the board of directors of General Electric recorded the existence of an internal criminal justice system with graduated penalty provisions and even a statute of limitations:

"... Any officer found on the basis of the Company's investigation to be implicated had been required to resign as an officer. All individuals at Position Level 23 and above had been moved down three position levels and their salaries and incentive compensation had been cut proportionately. Those at Position Levels 19 through 22 had been reduced two position levels with a corresponding cut in salaries and incentive compensation, and those at Position Level 18 and below had been demoted one position level with a corresponding cut in salaries and incentive compensation. The Chairman explained that the only exceptions to the uniform application of this policy were with respect to individuals who had admitted violations prior to January 1, 1957, but who since that time or earlier had of their own volition corrected their practices and had discontinued all activities in violation of the policy. Thus in effect there has been created a Company three year 'statute of limitations' which has been established in an effort to designate a reasonable period of time within which an individual may insulate himself from misconduct in the past."<sup>114</sup>

(ii) *Present-day Relevance of Internal Discipline as an Aim of Corporate Criminal Responsibility*

Bearing in mind this development, what is the modern day relevance of internal discipline as an aim of corporate criminal responsibility? The main relevance is simply expediency and efficiency. Enforcement resources being as limited as they are, advantage is taken of internal corporate investigation and enforcement systems in much the same way as in the case of boroughs and guilds. The modern as well as ancient significance of this advantage is captured well by this prophecy of the Law Reform Commission of Canada:

"In a society moving increasingly towards group action it may become impractical, in terms of allocation of resources, to deal with systems through their components. In many cases it would appear more sensible to transfer to the corporation the responsibility of policing itself, forcing it to take steps to ensure that harm does not materialize through the conduct of people within the organization. Rather than having the state monitor the activities of each person within the organization, which is costly and raises practical enforcement difficulties, it may be more efficient to force the corporation

114. Walton and Cleveland, *op. cit.* (supra n.59), 99. See also Craver, "The Inquisitorial Process in Private Employment", (1977) 63 *Cornell L.R.* 1. Bentham was right when he spoke of private inspectors of police and domestic magistrates: Bowring (ed.), *Collected Works* (1843) I, 383.



to do this, especially if sanctions imposed on the corporation can be translated into effective action at the individual level."<sup>115</sup>

A secondary, but nonetheless important consideration is that advantage can be taken of the refinement and specialization possible through internal corporate rule-making. As Amsterdam and others have cogently argued in the context of police rule-making, the formulation of rules of conduct by those immediately concerned with their day-to-day implementation promises a far more refined and effective system of control than that possible under external regulation alone.<sup>116</sup>

These advantages are secured in various ways. Most obviously, the deterrent threat of corporate criminal responsibility may itself do the trick. Less obviously, enforcement agencies may require a corporation to undertake internal disciplinary measures, including the formulation of new internal rules, or face prosecution. More overtly, much the same type of condition may be imposed by courts upon deferment of sentence against corporations convicted of an offence or, in those jurisdictions where conditional release or probation applies to corporate as well as human persons, as a condition of release or probation.

There appear to have been no empirical enquiries into the internal disciplinary impact of corporate criminal responsibility. However, we know that many corporations maintain elaborate private systems of justice, the existence of which is difficult to explain except partly in terms of rational self-protection against external threats, including the threat of punishment in the event of offences being committed by employees.<sup>117</sup> Moreover, as far as enforcement and sentencing practices are concerned, already in some areas of regulation use is made of remedies aimed specifically at inducing internal corporate discipline. A notable example is the disciplinary remedial relief not uncommonly sought by the SEC, as in its policing of the multitude of recent cases involving large-scale corporate bribery of government officials, both at home and abroad.<sup>118</sup> A number of corporations have been required to establish special review committees for the purposes of conducting investigations and initiating appropriate internal action. The most prominent instance is that of the Gulf Oil Corporation, a special review committee of which prepared a 298-page report detailing the mis-use of \$12,000,000 for payment to U.S. and foreign officials, and prescribing various house-cleaning measures. As a result of the report, the corporation replaced its top management.<sup>119</sup>

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115. Canada, Law Reform Commission, *op. cit.* (*supra* n.1), 31. See also *U.S. v. Morton Salt Company* 338 U.S. 632 (1949).
  116. Amsterdam, "Perspectives on the Fourth Amendment", (1974) 58 *Minn. L.R.* 349, 416-439; Caplan, "The Case for Rulemaking by Law Enforcement Agencies", (1971) 36 *Law & Contemp. Prob.* 500. See also Note, "Rule-Making and the Police", (1972) 70 *Mich. L.R.* 650; Allen, "The Police and Substantive Rule-making: Reconciling Principle and Expediency", (1976) 125 *U. Pa. L.R.* 62.
  117. *Cf.* Eells, *op. cit.* (*supra* n.113), 225. For recent examples of corporate internal discipline programmes see Solomon and Linville, "Transnational Conduct of American Multinational Corporations: Questionable Payments Abroad", (1976) 17 *Bost. Coll. Ind. & Comm. L.R.* 303, 341.
  118. Herlihy and Levine, "Corporate Crisis: The Overseas Payment Problem", (1976) 8 *Law and Pol. in Int. Bus.* 547, 577-584. See also Treadway, "SEC Enforcement Techniques: Expanding and Exotic Forms of Ancillary Relief", (1975) 32 *Wash and Lee L.R.* 637, 652-653 (discussing *SEC v. Mattel Inc.* (Oct. 2, 1974), SEC Litigation Release No. 6531, 665-666, 670); Comment, "Equitable Remedies in SEC Enforcement Actions", (1975) 123 *U. Pa. L.R.* 1188, 1198-1199.
  119. Herlihy and Levine, *loc. cit.* (*supra* n.118), 584.

(iii) *Reasons for Using Corporate as well as Individual Criminal Responsibility*

Granted the relevance of internal discipline as an aim of corporate criminal responsibility, why is it necessary to do more than rely upon individual criminal responsibility? A superficial answer is that it is highly unusual to find offences defined in terms of specific duties of investigation and enforcement; admittedly internal discipline is germane to whether a person has taken, say, reasonable precautions to prevent the commission of an offence, but the link is indirect.<sup>120</sup> Underlying this superficial answer is a further explanation, namely that to spell out specific duties of internal discipline would make it imperative for the law to become concerned with internal procedural safeguards, employee bills of rights, and other dimensions of private justice which, justifiably or otherwise, it has treated with reserve.<sup>121</sup> From this perspective, corporate criminal responsibility enables the law to avoid making a direct entry into a problematical area: holding a corporation responsible for an offence creates some pressure upon it to apply and develop an internal discipline system without committing the law to any particular type of intervention or supervision.

#### 4. Specific Prevention

A third important function of corporate criminal responsibility is specific prevention. Specific prevention is prevention by means of coercive measures directed specifically at some part of a corporation's operation which is likely to result in the commission of an offence (e.g., preventive orders, backed by threat of contempt, requiring a corporation to install a particular kind of anti-pollution device or to improve its communication network); it is to be contrasted with prevention by means of self-initiated and self-directed measures coerced by threat of punishment in a non-specific way (e.g., introduction of a more effective editorial checking system with a view to avoiding fines for the publication of misleading advertisements).<sup>122</sup> Usually specific prevention has been so closely linked with unpopular preventive philosophies of individual crime that its relevance in the context of corporate criminal responsibility has been obscured. The ensuing discussion indicates the significance of a preventive philosophy of corporate crime, outlines the more important specific preventive aims of corporate criminal responsibility, and explains why those aims are believed to require more than individual criminal responsibility alone.

(i) *Significance of a Preventive Philosophy of Corporate Crime*

Specific prevention has not been seen in its true corporate light. Largely because of the thought-cramping impact of juristic personality, and partly because of widespread commitment to a credo of corporate freedom of

120. Thus  $X_1$  may take reasonable preventive steps by moving  $X_2$  to another part of the company's operations without imposing any sanction upon him. Consider also *McGuire v. Sittingbourne Co-operative Society* [1976] *Crim. L.R.* 268.

121. Consider Jaffe, "Law Making by Private Groups", (1937) 51 *Harv. L.R.* 201; Note, "Judicial Control of Actions of Private Associations", (1963) 76 *Harv. L.R.* 983; Nader, Petkas, and Blackwell, *Whistle Blowing* (1972); Summers, "Individual Protection against Unjust Dismissal", (1976) 62 *Virg. L.R.* 481; Blades, "Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power", (1967) 67 *Col. L.R.* 1404.

122. It is also to be contrasted with prevention by incapacitation (e.g., dissolution, denial of export privileges, suspension of right to trade for limited period).

enterprise and privacy of internal operations,<sup>123</sup> the severe criticisms made of Barbara Wootton's preventive philosophy of individual crime<sup>124</sup> appear to have been regarded as more or less equally applicable to the prevention of corporate crime. At least that is the impression conveyed by the literature, for there have been few attempts to relate a preventive philosophy to corporate offenders.<sup>125</sup> However, a preventive philosophy of corporate crime is much less prone to the objections which have struck down the theory in its original application to human subjects. Regulated corporate conduct often consists of industrial or supervisory practices where extensive experience and repetition make it safer to predict dangerous behaviour, and just as significantly, effective preventive measures need not involve unacceptable forms of medical or psychological treatment, much less the detention of persons in prisons masquerading as hospitals or places of safety.<sup>126</sup> As to corporate freedom and privacy, although corporate self-determination and organizational autonomy are important interests, they are far from absolute. This is recognized under the present law where measures of specific prevention against corporations are becoming increasingly important in practice. Although the instances are too scattered to represent any widespread trend, and although the threat of criminal responsibility is essential to induce compliance, undoubtedly a preventive philosophy has been influential. In particular, it underlies the specific preventive use of corporate criminal responsibility in five main types of situation, *viz.*:

- (a) where enforcement agencies insist upon specific preventive measures as a condition of non-prosecution;
- (b) where specific preventive measures are a condition of probation or conditional discharge;
- (c) where specific preventive measures are a condition of deferment or reduction of sentence;
- (d) where specific preventive measures are required by mandatory injunction or preventive order; and
- (e) where offence-prevention is promoted by specifying lines of individual accountability within a corporation.

(ii) *Particular Specific Preventive Aims of Corporate Criminal Responsibility*

(A) SPECIFIC PREVENTION AS A CONDITION OF NON-PROSECUTION

Measures of specific prevention may be negotiated and settled between enforcement authorities and corporations, the basis of agreement being

123. Consider respectively the almost spell-binding effect which "brains" and other parts of the human body have had upon many judges, and the continuing influence of Friedman, *Capitalism and Freedom* (1962). Cf. Stone, "Controlling Corporate Misconduct", (1977) 48 *The Public Interest* 55; Stevenson, "Corporations and Social Responsibility—In Search of the Corporate Soul", (1974) 42 *Geo Wash. L.R.* 709, 728-736.
124. Wootton, *Crime and the Criminal Law* (1963). For severe criticisms see Kadish, "The Decline of Innocence", (1968) 26 *Camb. L.J.* 233; and Ross, *On Guilt, Responsibility and Punishment* (1975), ch. 4. Cf. Katz, "Dangerousness: A Theoretical Reconstruction of the Criminal Law", (1969) 19 *Buff. L.R.* 1.
125. The main contributions are Pound, "Visitatorial Jurisdiction over Corporations in Equity", (1936) 49 *Harv. L.R.* 369; Stone, *op. cit.* (*supra* n.1); and Coffee, "Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response", (1977) 63 *Virginia L.R.* 1099. See also Fisse, "Responsibility, Prevention, and Corporate Crime", (1973) 5 *N.Z.U.L.R.* 250; Fitzgerald, "Misleading Advertising: Prevent or Punish?", (1973) 1 *Dalhousie L.J.* 246; Rees, "Criminal Punishment of Corporations: The Individual Sanction Model", (1969) 6 *Harv. Legal Commentary* 169.
126. Cf. Hart, *Punishment and Responsibility* (1968), 207-209.

an offer of non-prosecution in return for compliance.<sup>127</sup> This type of mutually preventive arrangement may rest upon either an informal understanding or a formal consent order entered with the acquiescence of a court. Informal arrangements are very common in the areas of industrial safety and pollution control, a point well documented by several studies, most notably the English Law Commission's field study of enforcement under the Factories Act, 1961 (U.K.).<sup>128</sup> Formal arrangements through consent orders are also found in several areas of regulation, including restrictive trade practices and corporate securities.<sup>129</sup>

(B) SPECIFIC PREVENTION AS A CONDITION OF PROBATION OR CONDITIONAL DISCHARGE

Perhaps less well-known is the use of conditions of probation or conditional discharge as a means of securing specific prevention. In many jurisdictions corporations are not subject to probation or conditional discharge,<sup>130</sup> but where they are, conditions requiring measures of specific prevention are sometimes imposed. One of the few examples is *U.S. v. Atlantic Richfield Company*.<sup>131</sup> In this case oil was discharged from D's dock facility into a navigable waterway. Upon conviction for an offence against pollution legislation D was sentenced to probation under the Federal Probation Act.<sup>132</sup> As a condition of probation, D was required to set up and complete within 45 days a programme to handle oil spillage in the places affected by the offence and, if this condition were not met, provision was made for a Special Probation Officer to be appointed. On appeal, the Court of Appeals of the 7th Circuit held that the Federal Probation Act did apply to corporations but that the conditions imposed went "beyond what was intended by the drafters of the . . . Act".<sup>133</sup> Although the latter holding is obscure, *Atlantic Richfield* nonetheless highlights the way in which probation can be used in the specific prevention of corporate crime.<sup>134</sup>

(C) SPECIFIC PREVENTION AS A CONDITION OF DEFERMENT OR REDUCTION OF SENTENCE

A more common technique of specific prevention is that of deferring or reducing sentence upon conditional compliance. Although few cases appear to have been documented, no doubt many have arisen.<sup>135</sup> A recent instance

127. G.B., Law Commission, *Working Paper No. 30, Strict Liability and the Enforcement of the Factories Act, 1961* (1970), 21-24; Carson, "The Enforcement of Factory Legislation", (1970) 10 *Brit. Jnl. of Crim.* 383, 389-396; Dickens, "Law Making and Enforcement—A Case Study", (1974) 37 *Mod. L.R.* 297, 299-300; U.S., National Commission on Reform of Federal Criminal Laws, *Working Papers* (1970) I, 180; Duncan, "The N.S.W. Pollution Control Legislation", (1977), case No. 1, appendix B (paper read at seminar on white-collar crime, Australian Institute of Criminology, June, 1977).

128. *Op. cit.* (supra n.127).

129. Oppenheim and Weston, *Federal Antitrust Laws* (3rd ed., 1968), 843-853; Isenbergh and Rubin, "Antitrust Consent Decrees", (1940) 53 *Harv. L.R.* 386, 395-398; Treadway, *loc. cit.* (supra n.118), 639.

130. Welsh, *loc. cit.* (supra n.7), 363; *State ex rel Howell County v. West Plains Tel. Co.* 135 S.W. 20 (1911); *John C. Morish Pty. Ltd. v. Luckman* (1978) 16 S.A.S.R. 143. Note also the possibility of good behaviour bonds. For an example see "Broken Glass in Meat Pie", *The Age*, 27th June, 1975, 3; and a statutory provision, Criminal Law Consolidation Act, 1935-1976 (S.A.), s.313(1)(c).

131. 465 F. 2d 58 (1972). Note also the sentence of probation against the city of Hopewell in the Kepone case as reported in Stone, "A Slap on the Wrist for the Kepone Mob", (1977) 22 *Bus. and Soc. Rev.* 4, 9.

132. 33 U.S.C., 1964 (U.S.), ss. 407, 411 (offence and penalties provision); 18 U.S.C., 1964 (U.S.), ss. 3651 *et seq.* (Federal Probation Act).

133. 465 F. 2d 58, 61 (1972).

134. See further the useful note in (1974) 3 *U. Balt. L.R.* 294; and Rees, *loc. cit.* (supra n.125), 181-185.

135. This seems particularly likely in jurisdictions where probation or conditional release is not available in the case of corporate offenders.

is the case of the Good Humor Company, a food concern convicted in 1976 on charges of using insanitary premises. Rather than imposing a more severe sentence, the court exercised clemency on the understanding that the company would spend \$450,000 to modernize its Chicago and Baltimore plants.<sup>136</sup>

**(D) SPECIFIC PREVENTION AS A CONDITION OF A MANDATORY INJUNCTION OR PREVENTIVE ORDER**

The most obvious specific preventive use of corporate criminal responsibility is to coerce compliance with mandatory injunctions or other types of preventive order.<sup>137</sup> In some instances, a conviction is required as a pre-condition of a court-imposed remedy. Thus, s.36(2) of the Industrial Safety, Health and Welfare Act, 1972 (S.A.) provides that in the event of a conviction for an offence against the Act, a court may, in lieu of or in addition to any other penalty, order D "to take such steps as are specified in the order" in order to achieve compliance. Much more commonly, specific prevention is a separate court-ordered or negotiated remedy, backed by threat of punishment for contempt or a statutory offence of non-compliance. Remedies of this kind appear to be numerous,<sup>138</sup> although not as widespread as their general suitability would suggest. A good example of such a remedy is s.13(1) of the Fair Credit Reports Act, 1974-1975 (S.A.), which provides that:

"The [Credit Tribunal] may, upon the application of the Commissioner, make such orders against a reporting agency as may be necessary or expedient in the opinion of the Tribunal to ensure that the reporting agency complies with this Act, or any provision of this Act."

**(E) SPECIFIC PREVENTION AND LINES OF INDIVIDUAL ACCOUNTABILITY WITHIN ORGANIZATIONS**

Lastly, corporate criminal responsibility serves as an aid to specific prevention by providing an opportunity to clarify and insist upon particular lines of individual accountability within an organization.

Situations arise where it is difficult to pinpoint individual accountability for offences committed on corporate behalf. This is particularly true of omissions to comply with statutory duties (e.g., failure to report product defects as required under motor vehicle safety legislation<sup>139</sup>) as well as large-scale organizational interaction (the Hixon disaster, as described earlier, is one object lesson).<sup>140</sup> Where it proves impossible or unfair to hold personnel responsible, corporate criminal responsibility has a useful

136. *The New York Times*, 2nd April, 1976, 33.

137. Farrand, "Ancillary Remedies in SEC Civil Enforcement Suits", (1976) 89 *Harv. L.R.* 1779; Currie, "Enforcement under the Illinois Pollution Law", (1975) 70 *N.W.U.L.R.* 389; Comment, "Equitable Remedies in S.E.C. Enforcement Actions", (1975) 123 *U. Pa. L.R.* 1188; Treadway, *loc. cit.* (*supra* n.118); Renfrew, "The Paper Label Sentences: An Evaluation", (1977) 86 *Yale L.J.* 590, 598 n.15.

138. Factories Act, 1961 (U.K.), ss.55,157; Factories Act, 1946 (N.Z.), s.87; Dangerous Goods Act, 1974 (N.Z.), s.22; Banking Act, 1959-1974 (Cth.), s.84; Foreign Takeovers Act, 1975 (Cth.), s.35(2); Water Resources Act, 1975-1976 (S.A.), s.37; Navigable Waters (Oil Pollution) Act, 1960-1972 (Vic.), s.8A; Dangerous Goods Act, 1975 (N.S.W.), s.31(1)(e) & (g). As to consent orders see e.g., Treadway, *loc. cit.* (*supra* n.118); Comment, *loc. cit.* (*supra* n.137), 1192-1194; Flynn, "Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals", (1968) 53 *Iowa L.R.* 983.

139. E.g., National Traffic and Motor Vehicle Safety Act, 15 U.S.C.S., 1975 (U.S.), s.1401(b). See also (1891) III Interstate Commerce Commission Reports, *Fifth Annual Report*, 762; Consumer Product Safety Act, 15 U.S.C.S., 1975 (U.S.), s.2064(b); Environmental Contaminants Act, 1974-1975 (Can.), s.4(6).

140. *Supra*, text to n.73.

prescriptive role to play. Provided that the corporation is subject to one of the previously described modes of specific prevention, it can be required to give a precise specification of lines of accountability for relevant duties of offence-prevention in the future.<sup>141</sup> Apart from inducing a salutary reappraisal of organizational checks and controls, this approach contributes to the effective and just imposition of individual criminal responsibility upon corporate personnel who might otherwise escape through absence of fair warning.

(iii) *Reasons for Using Corporate as well as Individual Criminal Responsibility*

The main reason for using corporate as well as individual criminal responsibility in order to achieve specific prevention is simply that of getting at the personnel who ought to be held accountable. In many instances, it may be impossible, impractical, or unfair to impose individual criminal responsibility in the event of non-cooperation or non-compliance. The difficulties here are the same as those previously outlined in the context of deterrence, except that where specific prevention is required as a condition of a mandatory injunction or preventive order, it is possible to pinpoint individual accountability in advance.<sup>142</sup> Even so, there is a chance of accountability devolving only upon inferior personnel where their superiors are just as much to blame. It is also possible that those who have been pin-pointed may be shielded by convenient organizational re-arrangements, including transfer to an affiliated interstate or transnational corporation.<sup>143</sup> Indeed no one person may be guilty; non-compliance as a result of an omission or a breakdown in large-scale organizational arrangements is especially likely to involve corporate as opposed to individual negligence.<sup>144</sup> Added to these concerns, it is possible to impose a higher standard of care upon a corporation, partly because our natural sympathies are more inclined towards human juristic persons, and partly because our expectations of corporations are higher in terms of their ability to cope.<sup>145</sup>

A secondary reason, but one also of some importance, is the risk of taking an unduly atomistic view of specific prevention. Assessing the contributions and capacities of individual personnel is not the same as assessing those of a whole corporation.<sup>146</sup> Assessing the whole helps to promote a realistic assessment of the collective nature of the evil confronted, and encourages the design and application of measures capable of achieving prevention at an organizational as well as individual level.<sup>147</sup> Moreover, a

141. Cf. Canada Law Reform Commission, *op. cit.* (*supra* n.1), 35; Fisse, *loc. cit.* (*supra* n.125), 275-276.

142. *Supra*, text to n.141.

143. *Supra*, text to n.104.

144. For references see *supra*, n.139. Cf. *Lenroot v. Interstate Bakeries Corporation* 146 F. 2d 325, 328 (1945).

145. As to sympathies see the references *supra*, n.84. On expectations, consider Schmookler, "Technological Progress and the Modern American Corporation", in Mason (ed.), *The Corporation in Modern Society* (1959), 141; Capitman, *Panic in the Boardroom* (1973), chs. 2 and 10; Heilbroner, *In the Name of Profit* (1972), 260-264; Canada, Law Reform Commission, *Studies on Sentencing* (1974), 179.

146. See text and references *supra*, n.65. See also Cohen, "The Concept of Criminal Organization", (1977) 17 *Brit. Jnl. of Criminology* 97.

147. Cf. Chayes, "The Role of the Judge in Public Law Litigation", (1976) 89 *Harv. L.R.* 1281, 1305-1307 (commenting on *Rizzo v. Goode* 423 U.S. 362 (1976)), and the related problem of finding remedies appropriate to the organizational causes of police misbehaviour.

molecular approach helps to minimize injustice by enabling a fairer view to be taken of individual ability to effect organizational change. Although some organizations respond to the will of charismatic leaders, the more typical situation, at least in larger corporations, is one of indirect influence and diffused responsibility.

### 5. General Prevention

The general preventive aims of corporate criminal responsibility are broadly the same as for individual criminal responsibility—socialization, maintenance of respect for law, habit-building and provision of a rationale for conformity.<sup>148</sup> But why apply the criminal law to corporations as well as their personnel? The reason is partly the limited scope of individual criminal responsibility, and partly the special nature of general prevention in its application to corporations. The former dimension has been set out in our earlier discussion of deterrence; the latter falls for discussion in this part, under the following heads:

- (i) socialization;
- (ii) maintenance of respect for law;
- (iii) habit-building; and
- (iv) provision of a rationale for conformity.

#### (i) Socialization

Socialization is a topic which spans the social sciences; it may be briefly described as “the process whereby members of a society learn its norms and acquire its values and behaviour patterns.”<sup>149</sup> The criminal law is an important agent and catalyst in this process, although opinions vary considerably as to the extent of its actual capacity or legitimate use. Without entering this vast subject, and supposing socialization to be one plausible general preventive aim of the criminal law, the question arises whether corporate criminal responsibility is intended to offset any distinctively corporate manifestations of antisocial criminal forces. The answer is in the affirmative, for it appears that corporate criminal responsibility promotes socialization by focussing attention upon three significant *corporate* aspects of corporate crime, namely:

- (a) organizational conditions conducive to corporate crime;
- (b) aggregate or long-term corporate harms; and
- (c) insidious effect of undeservedly good corporate reputations.

#### (A) ORGANIZATIONAL CONDITIONS CONDUCTIVE TO CORPORATE CRIME

There has been a longstanding tendency to regard corporations in an anthropomorphic way, and thereby grossly to underestimate the impact which organizational behaviour has upon human conduct, whether generally or in the particular context of the criminal law. The force of this tendency, as well as its potential dangers, have been discussed by many writers,<sup>150</sup>

148. Zimring and Hawkins, *op. cit.* (*supra* n.54), 77-89.

149. Tapp, “Reflections [on the socializing effects of law]”, (1971) 27 (2) *Jnl. of Soc. Issues* 1, 4. Leading accounts of the socialization process in the context of individual criminal responsibility are Zimring and Hawkins, *op. cit.* (*supra* n.54), 77-83; Andenaes, *Punishment and Deterrence* (1974), ch. 4. More generally on the relevance of sociodramas to the appreciation of social disrelationships see Duncan, *Symbols in Society* (1968), 236-246.

150. Carr, *The General Principles of the Law of Corporations* (1905), ch. 10; Cohen, *Reason and Nature* (1931), 390-392; Dewey, “The Historic Background of Corporate Personality”, (1932) 32 *Col. L.R.* 643; Williams, *op. cit.* (*supra* n.1), 862; Mintz and Cohen, *America, Inc.* (1971), ch. 8; Latham, “Anthropomorphic

notably Thurman Arnold in his *Folklore of Capitalism* (1937).<sup>151</sup> Speaking of the regulation of corporations prior to the New Deal, Arnold vigorously attacked the habit of personifying corporations, especially the indulgence of the Supreme Court of the United States:

"The Supreme Court of the United States, because it could express better than any other institution the myth of the corporate personality, was able to hamper Federal powers to an extent which foreigners, not realizing the emotional power of the myth, could not understand. This court invented most of the ceremonies which kept the myth alive and preached about them in a dramatic setting. It dressed huge corporations in the clothes of simple farmers and merchants and thus made attempts to regulate them appear as attacks on liberty and the home. So long as men instinctively thought of these great organizations as individuals, the emotional analogies of home and freedom and all the other trappings of 'rugged individualism' became their most potent protection."<sup>152</sup>

Today, it may well be that the personification attacked by Arnold is less likely to divert our attention away from criminogenic influences of corporate behaviour; Nader and other public interest commentators have widely proclaimed their view of the facts.<sup>153</sup> Nonetheless, the habit of personification, or hypostatization, is so deeply engrained in human thought that a constant programme of demythology seems necessary. Corporate criminal responsibility helps to meet this need by stressing that it is a corporation on whose behalf an offence has been committed and by indicating the organizational circumstances in which corporate crime is committed.<sup>154</sup> The position as regards illicit profits is one case in point, for the overall size of undeserved gains is a critical piece of sentencing information in the case of a corporate offender but not necessarily that of guilty personnel. Since the latter's slice of the cake usually is relatively small and not necessarily distributed evenly, sentencing courts may not concern themselves with overall profits at all, but may concentrate upon such matters as the offender's degree of organizational responsibility, and the extent of his implication in the particular offence.<sup>155</sup>

#### (B) AGGREGATE OR LONG-TERM CORPORATE HARMS

Many of the worst instances of corporate crime involve aggregate or long-term harms the gravity of which is not always appreciated. The classic illustration of serious aggregate harm is the bilking of consumers in

150. *Cont.*

Corporations, Elites and Monopoly Power", (1957) 47 (2) *Am. Econ. Rev.* 303. More generally see Turbayne, *The Myth of Metaphor* (1962). For a recent illustration of anthropomorphic preoccupation see Purvis, "The Corporation and Crime", in Lindgren, Mason and Gordon, *The Corporation and Australian Society* (1974), 259, 262.

151. Ch. 8 (The Personification of Corporation).

152. *Id.*, 189-190.

153. For a summary of Nader's contributions see Geis and Edelhertz, "Criminal Law and Consumer Fraud", (1973) 11 *Am. Cr. L.R.* 989, 1000-1003. For a critical review of Mintz and Cohen, *op. cit.* (supra n.150), see Blumberg, (1972) 50 *Tex. L.R.* 598.

154. This is not to deny the importance of also stressing individual responsibility, as to which see Mintz and Cohen, *op. cit.* (supra n.150), ch. 9; Dewey, "The United States, Incorporated", (1930) 61 *New Republic*, 239, 240; and hear Os Guinness, *Collective Evil* (Diadem Cassettes, 1975).

155. Consider *Murphy v. H. F. Trading Co. Pty. Ltd.* (1973) 47 *A.L.J.R.* 198, 200; *Minister of State for Customs and Excise v. Aunger Accessories Pty. Ltd.* [1969] S.A.S.R. 441. Note also the outcome for executives sentenced in the MER/29 case, as recounted by Heilbronner, *op. cit.* (supra n.145), ch. 4, esp. 123-127.



amounts small in each individual case but massive overall. As *Hawaii v. Standard Oil Co.*<sup>156</sup> and numerous other antitrust cases have amply demonstrated, C. Wright Mills did not exaggerate when he observed that:

"It is better, so the image runs, to take one dime from each of ten million people at the point of a corporation than \$100,000 from each of ten banks at the point of a gun. . . . It is also safer."<sup>157</sup>

As to the undervaluing of long-term corporate harms, E. A. Ross' pungent criticisms in 1908 are still evocative of Minamata and other environmental disasters:

"The stealings and slayings that lurk in the complexities of our social relations are not deeds of the dive, the dark alley, the lonely road, and the midnight hour. They require no nocturnal prowling with muffled step and bated breath, no weapon or offer of violence . . . the modern high-powered dealer of woe wears immaculate linen, carries a silk hat and a lighted cigar, sins with a serene soul, leagues or months from the evil he causes. . . ."<sup>158</sup>

The reason for resorting to corporate as well as individual criminal responsibility in the case of offences involving aggregate or long-term forms of harm is two-fold. First, where the offence is of some enormity, it may dwarf the significance of individual contributions to such an extent that it seems a blatant injustice to lay blame only at the door of those officers and employees who can be prosecuted.<sup>159</sup> Just as modern corporate capitalism operates on such a scale as to make a midget of classical or neoclassical economic individualism,<sup>160</sup> nothing short of a corporate sociodrama can reveal the social disrelationships caused by offences of the magnitude indicated. Secondly, to the extent that the law seeks to encourage a more realistic perception of the seriousness of aggregate or long-term corporate harms, there are ethical restraints upon the use of individual personnel as sacrificial torches in aid of half-blind public opinion; these restraints are much less exacting in the case of corporations, especially where corrective moral advertising is a fitting response to a false impression of social responsibility created by corporate propaganda.<sup>161</sup>

156. 405 U.S. 251 (1972). Other well-known examples are *Daar v. Yellow Cab Co.* 417 U.S. 156 (1974); *In re Hotel Telephone Charges* 500 F. 2d 86 (1974).

157. *The Power Elite* (1956), 95, cited by Geis, "Deterring Corporate Crime", in Nader and Green, *Corporate Power in America* (1973), 182, 185. See also Edelhertz, *The Nature, Impact and Prosecution of White-Collar Crime* (1970), 5-11; Sutherland, *White Collar Crime* (1949), 225-226.

158. *Sin and Society* (1907), 9-10. For accounts of Minamata and other environmental disasters see Taniguchi, "A Commentary on the Legal Theory of the Four Major Pollution Cases", (1976) 9 *Law in Japan* 35; Upham, "Litigation and Moral Consequences in Japan—An Interpretative Analysis of Four Japanese Pollution Suits", (1976) 10 *Law & Soc. Rev.* 579.

159. Cf. Veltfort and Lee, "The Cocoon Grove Fire: A Study in Scapegoating", (1943) 38 *Jnl. of Abnorm & Soc. Psych., Clinical Supp.* 138.

160. Lukes, *Individualism* (1973), ch. 13; Marris (ed.), *The Corporate Society* (1974); Berle, "Impact of Corporation on Classical Economic Theory", (1965) 79 *Quart. Jnl. of Econ.* 25; Kaysen, "Another View of Corporate Capitalism", (1965) 79 *Quart. Jnl. of Econ.* 41.

161. Consider Henning, "Corporate Responsibility: Shell Game for the Seventies?", in Nader and Green, *Corporate Power in America* (1973), 151, 154; Branson, *loc. cit.* (*supra* n.55); Ludlam, "Abatement of Corporate Image Environmental Advertising", (1974) 4 *Ecology L.Q.* 247; Note, "The Regulation of Corporate Image Advertising", (1974) 59 *Minn. L.R.* 189; Stevenson, *loc. cit.* (*supra* n.123), 724-728.

## (C) INSIDIOUS EFFECT OF UNDESERVEDLY GOOD CORPORATE REPUTATIONS

The controls placed upon corporate information are now so few that corporations have much room to manipulate the flow of publicity about themselves, whether by maintaining secrecy to a high degree or engaging in extensive public relations exercises.<sup>162</sup> Consequently, it is not surprising that many enjoy a good reputation. Such a reputation is not always deserved since, apart from blemishes in matters of social responsibility, numerous corporations have a criminal record. As Sutherland, Nader, and others have shown beyond dispute, even the most respected corporations engage in crime.<sup>163</sup> Yet the image corporations often present tends to suggest that it may have an insidious effect upon society's self-defensive reactions against crime. This effect is speculative but may account partly for the low maximum punishment typically applicable to even serious offences in this area, as well as the usually lenient sentences imposed upon guilty personnel.<sup>164</sup> Accordingly, corporate criminal responsibility may be viewed as an aid to the general preventive aim of socialization: officially labelling corporate offenders minimizes the risk of subversion through public ignorance.<sup>165</sup>

## (ii) Maintenance of Respect for Law

Punishment is supposed to act as a "convincer" by providing law-abiding citizens with a guarantee, albeit imperfect,<sup>166</sup> that the social restraints obeyed by them will be obeyed by others. Punishment has a like function in the case of corporate offenders, the particular sources of concern being, first, legitimation of deviance by allowing socially influential corporations to commit offences with impunity and, secondly, undue discrimination in the application of the criminal law as between large and small organizations.

## (A) LEGITIMATION OF DEVIANCE

An initial respect-maintaining concern of the law is the risk of legitimation of deviance if corporations are seen to enjoy criminal privileges not enjoyed by ordinary citizens. This risk arises partly from the previously mentioned difficulties of imposing individual criminal responsibility upon personnel but, by reason of the social influence wielded by corporations, also has a distinctly corporate aspect.

162. See the references, *supra* n.161.

163. Sutherland, *op. cit.* (*supra* n.157), esp. pt. 2; Nader, Green and Seligman, *op. cit.* (*supra* n.113), ch. 1. See also Geis, *White-Collar Criminal* (1968); Mintz and Cohen, *op. cit.* (*supra* n.150), ch.8; Heilbroner, *op. cit.* (*supra* n.145). For a recent Australian example see *Hartnell v. Sharp Corporation of Australia Pty. Ltd.* (1975) 5 A.L.R. 493.

164. See Dershowitz, *loc. cit.* (*supra* n.1), 285-293; Geis, "Criminal Penalties for Corporate Criminals", (1972) 8 *Crim. L. Bull.* 372; Morgenthau, "Equal Justice and the Problem of White Collar Crime", (1969) *Conference Board Record* (August), 17; N.S.W., Department of the Attorney-General and of Justice, Bureau of Crime Statistics, *Statistical Report II, Petty Sessions 1972* (1973), 32-34; Edelhertz, *op. cit.* (*supra* n.157), 59-60; Symposium, "Reflections on White-Collar Sentencing", (1977) 86 *Yale L.J.* 589. Note also "Harbour Oil Spills—Why They Keep Happening", *The National Times*, 31st Jan.- 5th Feb., 1977, 7; "Pollution Body's Actions Fail to Match its Ambitions", *The National Times*, 27th Sept.—2nd Oct., 1976, 52.

165. *Cf. R. v. Amco Canada Ltd.* (1975) 24 C.C.C. 2d 147, 149-150; Scitovsky, "Ignorance as a Source of Oligopoly Power", (1950) 40 *Am. Econ. Rev. (Papers and Proc.)* 48; Ferguson, "Consumer Ignorance as a Source of Monopoly Power", (1972) 5(2) and (3) *Antitrust Law & Econ. R.* 79, 55; Cary, "Corporate Standards and Legal Rules", (1962) 50 *Calif. L.R.* 408.

166. Atkinson, "Punishment as Assurance", (1972) 4 *Univ. of Tas. L.R.* 45.

The social influence of corporations is vast. This is especially true of "megacorporations",<sup>167</sup> which not only constitute pillars of Western democracy but even rival the size and power of nation states; the block of sovereignty has been split, not just chipped.<sup>168</sup> Given this powerful social influence, toleration of deviance on the part of large corporations invites legitimization of deviance elsewhere in the community.<sup>169</sup> As we have been warned by the President's Commission on Law Enforcement and the Administration of Justice (1967), this fear should not be dismissed lightly:

"White-collar crime affects the whole moral climate of society. Derelictions by corporations and their managers, who usually occupy leadership positions in their communities, establish an example which tends to erode the moral base of the law and provide opportunity for other kinds of offenders to rationalize their misconduct."<sup>170</sup>

To the contrary, it has been suggested that evil is favourable to the emergence of moral leaders who would not otherwise come to the fore.<sup>171</sup> Perhaps, but legal systems play safe by relying upon self-help rather than messianic rescue.

#### (B) UNFAIR DISCRIMINATION

Legitimation of deviance aside, there is a need within corporations for some assurance that the law is being applied without unfair discrimination. In particular, smaller corporations and their officers and employees are entitled to an assurance that the difficulty of imposing individual responsibility within larger corporations does not lead to complete immunity. Considerable doubt exists on this score.<sup>172</sup> Thus, writing in 1960, Victor Kramer criticised the antitrust prosecution policy of the U.S. Department of Justice on the ground that it was not apparent why, for example, the president of the Maine Lobstermen's Association had been indicted, and also the vice-president of Jas. H. Matthews Co., and yet no prosecution had been launched against any of the officers of R.C.A., Parke Davis and other much larger corporations accused of monopolization or price-fixing.<sup>173</sup> More recently, other commentators have drawn attention to

167. The term used by Blumberg, *The Megacorporation in American Society* (1975), to describe very large public corporations.

168. See Galbraith, *op. cit.* (supra n.79); Abraham, *Big Business and Government* (1974); Bannock, *The Juggernauts: The Age of the Big Corporation* (1971); Blumberg, *op. cit.* (supra n.167); Marris (ed.), *The Corporate Society* (1974), chs. 5-8; Hacker (ed.), *The Corporation Take-Over* (1964); Nader and Green, *Corporate Power in America* (1973); Sampson, *The Sovereign State* (1973).

169. For thoughtful statements of concern see Burns, "On the Rationale of the Corporate System", in Marris (ed.), *The Corporate Society* (1974), 121, 170-177; Heilbroner, *op. cit.* (supra n.145), 260-264. See also Blumberg, *op. cit.* (supra n.167), 177-178; Kemper, "Representative Roles and the Legitimation of Deviance", (1966) 13 *Soc. Problems* 288.

170. U.S., President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Crime and its Impact—An Assessment* (1967), 104. See also Carper, *Not With a Gun* (1973), 181.

171. Bloch and Geis, *Man, Crime, and Society* (2nd ed., 1970), 300.

172. There appear to have been no relevant empirical studies in Australia, but enforcement practices under the Trade Practices Act, 1974-1977 (Cth.) cry out for examination. As to constitutional difficulties in holding individual persons responsible under the Act, see now *Ex Parte CLM Holdings Pty. Limited* (1976) 13 A.L.R. 273.

173. Kramer, "Criminal Prosecution for Violations of the Sherman Act: In Search of a Policy", (1960) 48 *Georgetown L.J.* 530. See also Dershowitz, *loc. cit.* (supra n.1), 291-293.

further American cases in which large corporations have been prosecuted, but not any of their personnel.<sup>174</sup> A study of offences against the Canadian Combines Investigation Act during the period 1952-1972 revealed that the Combines Branch had focussed its attention upon the investigation and prosecution of offences committed by or on behalf of small and medium-sized corporations.<sup>175</sup> Conceivably, in some of these instances the officers of large corporations did in fact escape prosecution too easily.<sup>176</sup> The point to be stressed here, however, is that where there are good grounds for not proceeding directly against suspects within large corporations, respect for the law nonetheless may be fostered by imposing corporate criminal responsibility and thereby avoiding blanket immunity against the criminal law.<sup>177</sup>

### (iii) *Habit Building*

Punishment in its application to corporations also aims to achieve the general preventive effect of habituating compliance, an effect widely recognized in the context of human offenders.<sup>178</sup> In present context the special relevance of habit building is that corporations offer a good opportunity to take advantage of conditioning factors which promote obedience.

The clearest examples of the habituating effects of punishment are found in military organizations where, as Andenaes has claimed: "extended inculcation of discipline and stern reaction against breach thereof can induce a purely automatic habitual response—not only where obeying specific orders is concerned, but also with regard to general orders and regulations."<sup>179</sup> Non-military organizations hardly offer the same potential, but training and indoctrination are nonetheless characteristic of most forms of corporate life.<sup>180</sup> Moreover, as in all large organizations, specialized functional rationality entails its own organizational routine.<sup>181</sup> Consequently, one hope in punishing corporations is that they will instil desirable habits in corporation man by means of internal discipline, training programmes, and law-abiding routine.<sup>182</sup>

174. Mintz and Cohen, *op. cit.* (supra n.150), xiv, 280; Stone, *loc. cit.* (supra n.131), 9.

175. Goff and Reasons, "Corporations in Canada: A Study in Crime and Punishment", (1976) 19 *Crim. L.Q.* 468.

176. The dysfunctional criteria of ascription adopted under the present law create a very substantial risk that corporations will be used as easy targets. See Williams, *op. cit.* (supra n.1.), 865; Fisse, *loc. cit.* (supra n.25), 118; Canada, Law Reform Commission, *op. cit.* (supra n.1), 33-35.

177. However, in some jurisdictions corporate criminal responsibility may be too restricted in scope to avoid such blanket immunity. Cf. Howells, "A Blow Against Enterprise Liability", (1971) 34 *Mod. L.R.* 676, 680.

178. Andenaes, *Punishment and Deterrence* (1974), 7-9, 36; Hawkins, "Punishment and Deterrence: The Educative, Moralizing and Habituating Effects", [1969] *Wis. L.R.* 550.

179. Andenaes, *op. cit.* (supra n.178), 8. See further Blake, "The Organization as Instrument of Violence: The Military Case", (1970) 11 *Soc. Q.* 331; Dixon, *On the Psychology of Military Incompetence* (1976), chs. 15 and 16.

180. Whyte, *Organization Man* (1956); Cartwright and Zander, *op. cit.* (supra n.77); Jay, *Corporation Man* (1971), ch. 21; Presthus, *The Organizational Society* (1962), ch. 1.

181. Simon, *op. cit.* (supra n.52), 88-89.

182. Cf. Whiting, "Antitrust and the Corporate Executive II", (1962) 48 *Va. L.R.* 1, 4-18; Renfrew, *loc. cit.* (supra n.137); Treadway, *loc. cit.* (supra n.118), 661-663, 669, 671. See also Levine, "Implementing Legal Policies through Operant Conditioning: The Case of Police Practices", (1971) 6 *Law & Soc. Rev.* 195.

(iv) *Provision of a Rationale for Conformity*

A final general preventive role of corporate criminal responsibility is to provide a rationale for conformity.<sup>183</sup> Subjecting corporations to the criminal law not only gives officers or employees a reason for thinking beyond their own personal chances of evasion of justice but also helps to prevent the internal corporate system from being regarded as the source of primary rules of obligation: external rules of individual obligation alone may be no match for those imposed internally, but making the internal system directly responsible for offences committed on its behalf helps to proclaim the primacy of public legal order or at least make it appear as a plausible alternative rationale for conformity.<sup>184</sup>

## 6. Compensation, Restitution and Restoration

There is a tendency in many quarters to view corporate criminal responsibility only from the standpoint of deterrence, general prevention, and occasionally internal discipline and specific prevention.<sup>185</sup> This is a mistake, for the remedial functions of compensation, restitution (in the sense of restitution of unjust enrichment) and restoration (in the sense of restitution *in specie*, specific performance, rescission, reinstatement, and rectification, as opposed to damages and other forms of substitutional relief) are also important.<sup>186</sup> Existing remedies are insufficient to provide the relief necessary to deal with the harms occasioned by corporate activities, a serious deficiency which is overcome to some extent by criminal responsibility. Whether by means of fines, conditions of non-prosecution or sentence, or orders upon conviction, corporate criminal responsibility maintains a remedial holding operation pending the introduction of officially-led class actions and other public remedies capable of providing an adequate collective response to collective types of harm.<sup>187</sup> Moreover, even where existing remedies are available, it is often expedient to make a remedial order upon conviction.

The use of corporate criminal responsibility to achieve remedial as well as penal aims has its roots principally in the major development of

183. See Zimring and Hawkins, *op. cit.* (*supra* n.54), 88-89 for the position regarding individual offenders.

184. Cf. Ehrlich, *Fundamental Principles of the Sociology of Law* (1936), 37-38.

185. Consider Leigh, *op. cit.* (*supra* n.1), ch. 9; Smith and Hogan, *Criminal Law* (3rd ed., 1973), 124-125.

186. Consider Dershowitz, *loc. cit.* (*supra* n.1), 298-301; Canada, Law Reform Commission, *op. cit.* (*supra* n.1), 46-51; U.S., National Commission on Reform of Federal Criminal Laws, *Working Papers* (1970) I, 203-206; Liebmann, "Economic Crimes—The Proposed New Federal Criminal Code", (1971) 27 *Bus. Law* 177, 181-183; Canada, Second Stage Revision Combines Investigation Act 1976, *A Study on Consumer Misleading and Unfair Trade Practices* (1976) I, ch. 5; Canada, Second Stage Revision Combines Investigation Act 1976, *A Proposal for Class Actions under Competition Policy Legislation* (1976), 208-219; Seymour, "Major Surgery for the Criminal Courts?" (1972) 38 *Brooklyn L.R.* 571; Tracey, "Consumer Protection: An Expanded Role for the Local Prosecutor", (1975) 44 *U. Cinn. L.R.* 81.

187. On the last-mentioned aspect see Kalven and Rosenfield, "The Contemporary Function of the Class Suit", (1941) 8 *U. Chi. L.R.* 684; Cappelletti, "Vindicating the Public Interest through the Courts: A Comparativist's Contribution", (1976) 25 *Buff. L.R.* 643; Chayes, "The Role of the Judge in Public Law Litigation", (1976) 89 *Harv. L.R.* 1281; Developments in the Law, "Class Actions", (1976) 89 *Harv. L.R.* 1318; S.A., Law Reform Committee, *Thirty-Sixth Report, Relating to Class Actions* (1977). The accounts of the compensatory, restitutionary and restorative aims of the criminal law by criminal lawyers have not drawn specific attention to the position of corporate defendants (*e.g.*, Fitzgerald, *Criminal Law and Punishment* (1962), 253-257; Howard, "Restitution in Criminal Proceedings", [1957] *Crim. L.R.* 305, 377).

regulatory offences which took place during the nineteenth century.<sup>188</sup> Predominant as penal considerations were to that development, there was also a demand for an official channel through which compensation and other civil aims could be achieved where private remedies were limited in scope or impractical in operation. As foreshadowed by the offence of public nuisance in its application to employers, vicarious liability, or strict liability for breach of a non-delegable duty, provided an opportunity whereby regulatory offences could be used in the concurrent pursuit of criminal and civil aims. Apart from side-stepping the problem of attributing fault personally to corporations, vicarious or strict liability removed the immediate need to introduce separate public remedies beyond the necessity of the occasion or the state of the prevailing regulatory art. Today, although a mature system of public remedies is urgently needed, and although the art of regulation has moved more away from individualistic illusion towards collective realism, corporate criminal responsibility allows the law to adjust to a substantive and procedural revolution in its own cautious time.<sup>189</sup>

The modern compensatory, restitutionary and restorative functions of corporate criminal responsibility fall conveniently for description under the following heads:

- (i) corporate offence as basis of liability;
- (ii) multiple victims and limitations of class actions;
- (iii) public harms; and
- (iv) remedial expediency.

*(i) Corporate Offence as Basis of Liability*

The most obvious compensatory, restitutionary, or restorative function of corporate criminal responsibility is to provide a basis of liability where liability could not otherwise be imposed.

**(A) COMPENSATION**

It is elementary that many wrongs are offences without also amounting to torts, breaches of contract, or breaches of a statutory duty giving rise to liability for damages.<sup>190</sup> Thus, a misleading advertisement by say, a tour operator, may constitute an offence under s.14(1) of the Trade

188. On the development of strict and vicarious liability in regulatory offences, see Sayre, "Public Welfare Offences", (1933) 33 *Col. L.R.* 55, 62-67; Sayre, "Criminal Responsibility for the Acts of Another", (1930) 43 *Harv. L.R.* 689, 689-701, 708-714, 718-722. Sayre skips too lightly over the remedial dimensions of regulatory offences (see especially the doctrinaire views expressed, *id.*, 689, 718-719), the historical development of which merits detailed investigation. See also the references *supra*, n.31; Carr, *General Principles of the Law of Corporations* (1905), 99-105; Wolfram, "Guilt without Guilty Intent — Strict Liability Food Laws", (1955) 10 *F.D.C.L.J.* 355, 370-371; and, for an individualistic crusade against vicarious criminal responsibility, Baty, *Vicarious Liability* (1916), ch. 10.

189. *Cf.* Sayre, "Criminal Responsibility for the Acts of Another", (1930) 43 *Harv. L.R.* 599, esp. 719 n.109; and other references *supra*, n.187. As to the advantages of discrete civil remedies see Timberg, "The Case for Civil Antitrust Enforcement", (1953) 14 *Ohio St. L.J.* 315. However, for a cool-headed appraisal of the extent to which the revolution should be taken, see Dam, "Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest", (1975) 4 *Jnl. of Leg. Stud.* 47.

190. As to liability in tort for statutory offences see Williams, "The Effect of Penal Legislation in the Law of Tort", (1960) 23 *Mod. L.R.* 233; Fricke, "The Juridical Nature of the Action upon the Statute", (1960) 76 *L.Q.R.* 240; Linden, *Canadian Negligence Law* (1972), ch. 4. On various evidentiary and procedural implications of offence-based torts, see *id.*, 108-114.

Descriptions Act, 1968 (U.K.), but a claim in contract may be barred by an exclusion in fine print, an action in tort may be doomed by the more demanding mental element required for deceit, and the section does not create a civilly actionable statutory duty.<sup>191</sup> Compensation orders upon conviction (particularly where available under a general sentencing power applicable to all offences<sup>192</sup>) are thus very useful as a means of expanding the scope of compensatory remedies, whether against individual or corporate defendants. Their value is particularly evident in the case of corporate defendants, not only by reason of corporate capacity to pay, but also because the creation of new rights of action in respect of harms of a mainly corporate kind is sometimes impeded by the individualistic bias of juristic personality.<sup>193</sup>

Also elementary is the obvious possibility of a statutory offence which creates a civilly actionable statutory duty but is defined so as to exclude corporate liability unless corporate criminal responsibility is open.<sup>194</sup>

#### (B) RESTITUTION

An offence is one of the well-recognized bases of liability for the purposes of restitution; no person is entitled to retain a benefit which results directly from crime.<sup>195</sup> Accordingly, where a benefit accrues to a corporation directly as a result of an offence, the role of corporate criminal responsibility is to provide the requisite basis of liability for the purposes of either private action or, where so provided, a restitution order upon conviction.<sup>196</sup>

#### (C) RESTORATION

Similarly, the duty of a corporation to make restitution may be defined co-extensively with a statutory offence which imposes corporate criminal responsibility. A good example is s.87 of the Trade Practices Act, 1974-1977 (Cth.), which authorizes a variety of restorative as well as other remedial orders upon conviction.<sup>197</sup> Thus, s.87(2)(e) usefully makes provision for "an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his own expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage."

191. See Street, "Offences Taken into Consideration—Compensation Orders and the Trade Descriptions Act", [1974] *Crim. L.R.* 345, 348. For other examples see Aboriginal Heritage Act, 1972 (W.A.), s.57 (3); Prices Act, 1948-1977 (S.A.), s.22b; Trade Measurements Act, 1971-1975 (S.A.), s.38(6); Industrial Conciliation and Arbitration Act, 1972-1974 (S.A.), s.156(4).

192. As under Powers of Criminal Courts Act, 1973 (U.K.), s.35. Cf. G.B., *Review of the Trade Descriptions Act 1968* (1976) Cmnd. 6628, 73-75.

193. Consider Trade Practices Act, 1974-1977 (Cth.), Pt. V, and the implications of resort to the corporations power as regards breadth of definition of statutory duties.

194. See e.g., Combines Investigation Act, 1974-1975 (Can.), s.31.1; Second-Hand Motor Vehicles Act, 1971 (S.A.), s.35(3); Prevention of Pollution of Waters by Oil Act, 1962-1972 (S.A.), s.7; Consumer Credit Act, 1972-1973 (S.A.), s.40; *Dimella Constructions Pty. Ltd. v. Stocker and Stocker* (1976) 14 S.A.S.R. 215. Cf. the severance achieved by Trade Practices Act, 1974-1977 (Cth.), s.85; Misrepresentation Act, 1971-1972 (S.A.).

195. *St. John Shipping Corporation v. Joseph Rank, Ltd.* [1957] 1 Q.B. 267, 292 per Devlin J. See further Goff and Jones, *The Law of Restitution* (1966), ch. 34.

196. Restitution orders upon conviction are much less common than compensation orders upon conviction (the latter usually are restricted to cases where V suffers loss and therefore do not cover the whole ground of restitution: see Powers of Criminal Courts Act, 1973 (U.K.), s.35). For examples see Commerce Act, 1975 (N.Z.), ss. 60, 117.

197. For another example see Combines Investigation Act, 1974-1975 (Can.), s.30.

(ii) *Multiple victims and limitations of class actions*

As discussed earlier in respect of general prevention, corporate activities can and often do cause serious aggregate damage or loss to multiple victims none of whom is necessarily injured at all severely. Individual actions for compensation, restitution or restoration are of little use in such instances, for there is little or no incentive to sue. Class action relief is subject to severe requirements of notice (as in the well-known case of *Eisen v. Carlisle and Jacquelin*<sup>198</sup>) and to be effective requires the introduction of many more public litigation agencies than now exist.<sup>199</sup> Where class action relief is unavailable or impractical, corporate criminal responsibility takes up some of the remedial slack by means of fines (which pass to the state for retention on general behalf or application to salient purposes) or schemes of mass relief undertaken by a corporation as a condition of non-prosecution, probation or discharge, or deferment or reduction of sentence. These remedial uses of corporate criminal responsibility require a little elaboration.

## (A) COMPENSATION

The most obvious way in which corporate criminal responsibility secures compensation for loss to multiple victims is through the imposition of fines. There are numerous statutory provisions which contemplate the use of fines (particularly so-called "civil" fines) partly as a substitute for private compensatory relief.<sup>200</sup> An example is s.76 of the Trade Practices Act, 1974-1977 (Cth.), which allows the imposition of a fine in respect of amounts which, as in *Eisen v. Carlisle and Jacquelin*,<sup>201</sup> are not the subject of fluid class recovery. This section provides that a price-fixing or other relevant type of violation is subject to:

"... such pecuniary penalty (not exceeding \$50,000 in the case of a person not being a body corporate, or \$250,000 in the case of a body corporate, in respect of each act or omission by the person to which this section applies) as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered

198. 317 U.S. 156 (1974). For a good discussion of *Eisen* and notice requirements see Dam, "Class Action Notice: Who Needs It?", [1974] *Sup. Ct. Rev.* 97.

199. See S.A., Law Reform Committee, *op. cit.* (*supra* n.187), 10; Developments in the Law, *loc. cit.* (*supra* n.187), 1373-1390; Wade and Kamenshine, "Restitution for Defrauded Consumers: Making the Remedy Effective through Suit by Governmental Agency", (1969) 37 *Geo. Wash. L.R.* 1031; Rice, "Remedies, Enforcement Procedures and the Duality of Consumer Transactions Problems", (1968) 48 *Bost. Univ. L.R.* 559, 604-609; Note, "Consumer Protection: New Hope Following Failure of Civil and Criminal Remedies", (1975) 66 *Jnl. of Cr. L. & Criminology* 270; Note, "New York City's Alternative to the Consumer Class Action: The Government as Robin Hood", (1972) 9 *Harv. Jnl. on Leg.* 300; Bowley, "Law Enforcement's Role in Consumer Protection", (1974) 14 *Santa Clara Lawyer* 555.

200. As well as the example given in the text see the references *infra*, n.275. Note also Forestry Act, 1916-1972 (N.S.W.), s.27(1). For commentaries see Comment, "Consumer Protection: New Hope Following Failure of Civil and Criminal Remedies", (1975) 66 *Jnl. of C.L. & Criminology* 270, 281-283; Goldschmid, "An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies", (1972) 2 *Recommendations and Reports of the Administrative Conference of the United States*, 897; Marshall "Environmental Protection and the Role of the Civil Money Penalty: Some Practical and Legal Considerations", (1975) 4 *Env. Affairs* 323; Clark, "Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis", (1976) 60 *Minn. L.R.* 379.

201. 417 U.S. 156 (1974).



as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part to have engaged in any similar conduct." (Italics supplied.)

To the extent that moneys recovered under such a provision are applied towards the more effective future policing of a corporate defendant's activities they may be regarded as damages distributed *cy près*. Alternatively, they may be seen as amounts which victims have impliedly authorised the state to recover on their behalf and, for want of a better solution, to retain for general public benefit.

Less obvious is the undertaking of mass schemes of compensatory relief as a condition of non-prosecution, probation or conditional discharge, or deferment or mitigation of sentence.<sup>202</sup> How frequently corporate criminal responsibility is used to coerce such schemes has received much less empirical enquiry than it deserves, especially because of the substantial risk of administrative or judicial abuse.<sup>203</sup> However, at least for corporations anxious to avoid adverse publicity upon conviction or those troubled by the threat of fines or increased surveillance and inspection by enforcement authorities, negotiation of mass compensatory relief appears to be of some practical importance. This impression is based upon the information we have about existing enforcement practices in related areas, notably conditional fines in civil contempt,<sup>204</sup> licensing of credit providers,<sup>205</sup> and consent orders in the context of antitrust, customs, civil rights and labor regulation.<sup>206</sup>

#### (B) RESTITUTION

Similar considerations obtain where class action relief is ineffective to recoup profits made at the expense of multiple victims.

202. See Canada, Second Stage Revision Combines Investigation Act 1976, *A Study on Consumer Misleading Trading and Unfair Practices* (1976) I, 323-325; Rice, *loc. cit.* (*supra* n.199), 589-591; Schrag, "On Her Majesty's Secret Service: Protecting the Consumer in New York City," (1971) 80 *Yale L.J.* 1529. As to the problems arising from settlements in advance of determination of criminal responsibility and sentencing see Edelhertz, *op. cit.* (*supra* n.157), 30-31.
203. Cf. Miller, "The Compromise of Criminal Cases," (1927) 1 *So. Cal. L.R.* 1; Cooper, "Settlements of Cases by the Minister for Customs and Excise—An Exercise of Judicial Power?", (1969) 43 *A.L.J.* 132; Nelson, "Administrative Blackmail: The Remission of Penalties", (1951) 4 *West Pol. Q.* 610; Note, "The Power of Dispensation in Administrative Law: A Critical Survey", (1938) 87 *U. Pa. L.R.* 201; Gellhorn, "Administrative Prescription and Imposition of Penalties", [1970] *Wash. U.L.Q.* 265. Thormforde, "Controlling Administrative Sanctions", (1976) 74 *Mich. L.R.* 709; Thormforde, "Negotiating Administrative Settlements in SEC Broker-Dealer Disciplinary Proceedings", (1977) 52 *N.Y.U.L.R.* 237.
204. *U.S. v. United Mine Workers of America* 330 U.S. 258, 304-305 (1947) (fine of \$700,000, plus additional fine of \$2,800,000 in the event of non-compliance with a temporary restraining order within 5 days). Cf. *Australian Consolidated Press Ltd. v. Morgan* (1965) 112 C.L.R. 483.
205. Threat of licence deprivation has often been used effectively for these purposes by the S.A. Credit Tribunal and its officers. See *Truscott Finance Pty. Ltd.* (1978) S.A. Credit Tribunal 01/107; *Field Educational Enterprises of Australasia Pty. Ltd.* (1977) S.A. Credit Tribunal 01/301; *Encyclopaedia Britannica (Aust.) Inc.* (1976) S.A. Credit Tribunal 01/350; *Mount Gambier Gas Company Limited* (1977) S.A. Credit Tribunal 01/338. See also Rice, *loc. cit.* (*supra* n.199), 586.
206. Foster, "Jurisdiction, Rights and Remedies for Group Wrongs under the Fair Labor Standards Act: Special Federal Questions", [1975] *Wis. L.R.* 295, 310-318; Cooper, *loc. cit.* (*supra* n.203); *U.S. v. Allegheny—Ludlum Industries Inc.* 517 F. 2d. 826 (1975) (civil rights—back pay fund of \$30,940,000); *U.S. v. Standard Oil of California* (1974), discussed in Sethi, *Up Against the Corporate Wall* (3rd ed., 1977), 316-341 (age discrimination—reimbursement of lost wages and benefits).

Fines may provide substituted restitutionary relief, as is possible under s.76 of the Trade Practices Act, 1974-1977 (Cth.). Although considerations of deterrence usually are to the fore where illicit profits have been made by a defendant,<sup>207</sup> this need not always be so, as where deterrent fines against a corporation are unnecessary because all guilty individual officers and employees have been rounded up, convicted and given stiff sentences.<sup>208</sup> It is to be noted that s.76 allows a monetary penalty to be imposed solely on a restitutionary basis. Mention should also be made of the increasing number of sentencing provisions which relate fines explicitly to the quantum of ill-won profits.<sup>209</sup> An influential model is s.38(4) of the West German Act against Restraints of Competition, 1957-1974, which punishes price-fixing and other offences against the Act by fines of up to either DM 100,000 or "three times the additional profits obtained as a result of the infringement, whichever is the greater."

### (C) RESTORATION

Restoration to multiple victims left without effective class action relief may also be provided by means of corporate criminal responsibility. Apart from the possibility of fines being applied by the state for particular restorative projects, a corporation itself may be induced to initiate appropriate remedial action. A particularly interesting example is the condition of reduction of sentence recently imposed upon the Allied Chemical Company, a large Virginia corporation responsible for injuriously exposing many people to a dangerous toxicide, Kepone.<sup>210</sup> The company pleaded no contest to 940 counts of violating the U.S. federal water pollution control laws<sup>211</sup> over a three-year period. It was fined the maximum penalty on each count, the total fine amounting to \$13.24 million. This fine was reduced to \$5 million after a plea in mitigation, which plea included an offer to donate \$8 million to the Virginia Environment Endowment, a new non-profit corporation which would "fund scientific research projects and implement remedial projects and other programmes to help alleviate the problem that Kepone has created . . . and . . . enhance and improve the overall quality of the environment in Virginia. . . ."<sup>212</sup>

### (iii) Public Harms

It is a much-lamented economic fact of life that many activities, especially business activities, impose social costs far in excess of those internalized

207. A point of emphasis stressed by economic analysts of deterrence. See Becker, "Crime and Punishment: An Economic Approach", (1968) 76 *Jnl. of Pol. Econ.* 169; Posner, *Economic Analysis of Law* (1972), ch. 25; Breit and Elzinga, *The Antitrust Penalties* (1976), ch. 7.

208. Often unlikely in large corporations but not so in small, which helps to explain the reluctance in most English-speaking jurisdictions to extend corporate criminal responsibility to partnerships. However, consider *U.S. v. A. & P. Trucking Co.* 358 U.S. 121 (1958).

209. Penal Law, 1967 (N.Y.), s.80.00(2); Note, "Fines and Fining—An Evaluation", (1953) 101 *U. Pa. L.R.* 1013, 1024-1026. For reform proposals see American Law Institute, *Model Penal Code* (1962), s.6.03(5); U.S., National Commission on Reform of Federal Criminal Laws, *Proposed Federal Criminal Code* (1971), s.3301; Australia, Attorney-General's Dept., *Report of Working Party on Territorial Criminal Law* (1975), cl. 175(3). Consider also liquidated penalty provisions; e.g., Egg Industry Stabilization Act, 1973 (Vic.), s.13(4).

210. I am indebted to the account of this case given by Stone, "A Slap on the Wrist for the Kepone Mob", (1977) 22 *Bus. & Soc. Rev.* 4. See also Combines Investigation Act, 1974-1975 (Can.), s.37(3).

211. Water Pollution Prevention and Control Act, 1975 (U.S.), 33 U.S.C.S. 1975, ss.1251 *et seq.*

212. Stone, *loc. cit.* (*supra* n.210), 8.

through taxes, civil liability, and other costs of production.<sup>213</sup> To some extent, these externalized costs are attributable to the limited class action relief now available to multiple victims. More often, however, they arise from the intractable problem of assessing the economic value and factual origin of the more intangible or complex type of social harms.<sup>214</sup> Where this problem arises, the harms involved are often proscribed by the criminal law. The principal reason for turning to the criminal law, of course, is to avoid the problem by preventing it.<sup>215</sup> A secondary reason, apparent from the examples below, is that fines enable some degree of compensation or restitution to the state without requiring exact measurement of damages or ill-won profits.<sup>216</sup> Also, in the case of restoration, corporations can be forced to enter a promising new area of corporate social enterprise.

#### (A) COMPENSATION

The historic example of compensation for harms of a public kind is a common law indictment for public nuisance. As Mellor J. described an indictment for public nuisance in the leading case of *R. v. Stephens*:<sup>217</sup>

"It is quite true that this in point of form is a proceeding of a criminal nature, but in substance I think it is in the nature of a civil proceeding, and I can see no reason why a different rule should prevail with regard to such an act as is charged in this indictment between proceedings which are civil and proceedings which are criminal. . . . Here it is perfectly clear that the only reason for proceeding criminally is that the nuisance, instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and no private individual, without receiving some special injury could have maintained an action."<sup>218</sup>

Many regulatory offences are cast in the same mould as public nuisance. Thus, offences punishing the overloading of transport vehicles fall into the category of "public torts";<sup>219</sup> since damages almost always are impossible to

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213. For an interesting range of suggestions see Marris (ed.), *op. cit.* (supra n.168). See also Note, "The Cost-Internalization Case for Class Actions", (1969) 21 *Stan. L.R.* 383; Moore, *A Modest Proposal for the Reform of the Capitalist System* (1974).
  214. See Mishan, "On the Economics of Disamenity", in Marris (ed.), *op. cit.* (supra n.168), ch. 11.
  215. On prevention vs. compensation see Nozick, *Anarchy, State and Utopia* (1974), ch. 4.
  216. On compensation to the state see *People v. Sheffield Farms Co.* 121 N.E. 474, 477 (1918). As to fines and measurement of damages or profits, it remains to be seen how the traditional view expressed in the text will be reconciled with the movement towards accuracy of sentencing facts. Cf. Fox and O'Brien, "Fact Finding for Sentencers", (1975) 10 *Melb. Univ. L.R.* 163.
  217. (1866) 1 L.R.Q.B. 702. See also *Toronto Railway Company v. The King* [1917] A.C. 630; *People v. Hess* 179 N.Y.S. 734 (1920); *Southport Corporation v. Esso Petroleum Co.* [1954] 2 Q.B. 182, 196-197 per Denning L.J.; *Attorney-General v. P.Y.A. Quarries Ltd.* [1957] 1 Q.B. 169.
  218. (1866) 1 L.R.Q.B. 702, 708-709. As Mellor J. recognized (*id.*, 709), the main object of indictment for nuisance is to prevent recurrence (as was the case in *Stephens*) but the extract cited clearly also holds true of the secondary aim of compensation through fines. On the latter point see Carr, *op cit.* (supra n.188), 87-88.
  219. The leading account is Note, "Public Torts", (1922) 35 *Harv. L.R.* 462. Cf. Hall, *General Principles of Criminal Law* (2nd ed., 1960), 336-337; Mueller, "On Common Law Mens Rea", (1958) 42 *Minn. L.R.* 1043, 1087-1096. Note also the relevance of deodands: see Finkelstein, "The Goring Ox", (1973) 46 *Temple L.Q.* 169, esp. 200-205.

assess where such offences are committed, fines make rough amends.<sup>220</sup> Less mundane and far more important are offences concerned with harms to the environment. Fines for offences against nature undoubtedly represent part compensation for immeasurable physical, psychological or aesthetic injury, a manifest example being the unlimited maximum fines which have been provided in some jurisdictions as insurance against radio-active outbreaks from nuclear installations.<sup>221</sup>

#### (B) RESTITUTION

The public restitutionary relevance of corporate criminal responsibility is also apparent in the context of many offences. It is conceivable for example that a chemical corporation may feather its own nest by allowing pollutants to escape from its plant and then make profits from the sale of products sold to negate the effects of its own wilful neglect. Much more likely, indeed a matter of everyday significance, is unjust enrichment from savings made through non-compliance with statutory duties, including those which require machinery to be fenced, particle-laden smoke to be precipitated, or personnel to be employed in prescribed tasks.<sup>222</sup> Unjust enrichment of this nature is sometimes recoverable directly by private action for restitution or indirectly as an incidental effect of an award of damages in an action for compensation, but often corporations stand to enjoy sizeable windfall profits.<sup>223</sup> One purpose of fines against corporations is thus to help protect the public interest by stripping away such profits, and thereby forcing their unworthy recipients to internalize the social costs they have imposed through excessive risk-taking and unfair profit-taking at the expense of competitors.<sup>224</sup>

#### (C) RESTORATION

That corporate criminal responsibility can be used to advantage in the restoration of harms of a public character is compellingly demonstrated by the sentence imposed against the Allied Chemical Company in the Kepone case, discussed earlier.<sup>225</sup> Where no statutory restorative remedies are available, a useful *ad hoc* remedy can be fashioned by threat of corporate criminal responsibility. Indeed, even where statutory remedies are available they may be too inflexible to cope with changing needs or too unimaginative to turn corporate resources and ingenuity to advantage.<sup>226</sup> Where remedies are deficient in these respects corporate

220. Consider *Kain and Shelton Pty. Ltd. v. McDonald* (1971) 1 S.A.S.R. 39, 55 *per* Hogarth J.

221. Nuclear Installations Act, 1965 (U.K.), s.25(2). *Cf.* Nuclear Liability Act, 1969-1970 (Can.); Atomic Energy Act, 1953-1976 (Cth.); Atomic Energy Act, 42 U.S.C.S., 1975 (U.S.), s.2210. For examples of high maximum fines see Prevention of Pollution of Waters by Oil Act, 1962-1972 (S.A.), s.5; Water Pollution Prevention and Control Act, 1975 (U.S.), 33 U.S.C.S. 1975, s.1319 c and d. Note also Historic Shipwrecks Act, 1976 (Cth.), s.13; Crimes (Biological Weapons) Act, 1977 (Cth.), s.8(2).

222. *E.g.*, *U.S. v. A. & P. Trucking Co.* 358 U.S. 121 (1958); *Reynolds Metals Company v. Lampert* 324 F.2d 465, 466 (1963).

223. Consider *St. John Shipping Corporation v. Joseph Rank, Ltd.* [1957] 1 Q.B. 267, esp. 292 *per* Devlin J.

224. *Cf. Schine Chain Theatres, Inc. v. U.S.* 334 U.S. 110, 128 (1948): "Like restitution [divestiture] merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed . . . to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project".

225. See text and references *supra*, nn.210, 213. See also *EPA v. Granite City Steel Co.* 4 I11. P.C.B. 347 (1972); and *EPA v. Fansteel Inc.* 6 I11. P.C.B. 295 (1972), discussed in Currie, "Enforcement under the Illinois Pollution Law", (1976) 70 *N.W.U.L.R.* 389, 427 n.180.

226. *Cf. Stone, op. cit. (supra* n.1), 99-103; Werther, "Government Control v. Corporate Ingenuity", (1975) 26 *Lab. L.J.* 360; and text and references *supra* n.116.

criminal responsibility provides an alternative way of requiring corporations to apply themselves in a new and socially gainful area of business enterprise.

(iv) *Remedial Expediency*

Finally, it should be noted that corporate criminal responsibility is expedient in so far as it provides a vehicle for orders upon conviction, and for establishing liability for the purpose of civil suit.<sup>227</sup>

Statutory provisions enabling compensatory, restitutionary, and restorative orders upon conviction proliferate.<sup>228</sup> They possess two main advantages: first, the avoidance of further proceedings in straightforward cases, and secondly, the provision of official aid to citizens confronted by evasion or stonewalling on the part of defendants. Both advantages are of general relevance, but the second is of particular significance in the case of those corporate defendants who take unfair advantage of their organizational anonymity or capacity to wage legal battles.

Related considerations apply to provisions which make criminal responsibility *prima facie* evidence of liability for the purposes of civil suit.<sup>229</sup> Two examples of prime relevance to corporate defendants may be mentioned; s.5(a) of the Clayton Act (U.S.)<sup>230</sup> and s.83 of the Trade Practices Act, 1974-1977 (Cth.).

## 7. Retribution

To say the least, it has been unfashionable to account for the punishment of corporations in terms of retribution. Admittedly, retribution has been widely criticized as a justification for punishment, but to accept this as an explanation would be to underrate the theoretical and popular support which retributive theories of punishment still command.<sup>231</sup> A more plausible explanation is that the general justifying aims of retribution are inapposite in the case of corporations and, more significantly, that retribution requires desert in distribution, whereas punishment applied to a corporation almost invariably harms numerous shareholders and other persons who are not morally responsible and hence do not deserve to be punished.<sup>232</sup> However, it is far from clear that these points of explanation are sound.

227. Cf. the doubts raised in Lex, "Restitution or Compensation and the Criminal Law", (1909) 34 *Law. Mag. & Rev.* 286. Note also the relevance of criminal prosecution as a factor behind the expeditious settlement of civil suits (see the examples given in Mintz and Cohen, *op. cit.* (*supra* n.150), 281), and the occasional statutory provision explicitly authorising distribution of fines to victims (e.g., Metalliferous Mines Regulation Act, 1872 (U.K.), s.38; and see Annotation, "Power to Exact License Fees or a Penalty for Benefit of Private Individual or Corporation", [1921] *A.L.R.* 828).

228. E.g., Powers of Criminal Courts Act, 1973 (U.K.), s.35; Crimes Act, 1914-1975 (Cth.), s.21B; Trade Practices Act, 1974-1977 (Cth.), s.87. For a good discussion see Canada, Law Reform Commission, *Working Papers 5 and 6, Restitution and Compensation* (1974).

229. Note, "The Use of Criminal Judgments as Evidence in Civil Cases", (1975) 10 *Israel L.R.* 242; Civil Evidence Act, 1968 (U.K.), s.11(2).

230. 15 U.S.C.S., 1975 (U.S.), s.16(a).

231. For accounts of punishment, desert, and moral responsibility see Kleinig, *Punishment and Desert* (1973); Hart, *Punishment and Responsibility* (1968); Finnis, "The Restoration of Retribution", (1972) 32 *Analysis* 131.

232. For the view that retribution should be regarded as a general justifying aim of punishment see Finnis, *loc. cit.* (*supra* n.231). As to violation of desert by punishment of corporations see Collier, "Impolicy of Modern Decision and Statute Making Corporations Indictable and the Confusion in Morals thus Created", (1910) 71 *Central L.J.* 421; Edgerton, *loc. cit.* (*supra* n.7), 832-833; Francis, "Criminal Responsibility of a Corporation", (1923) 18 *Ill. L.R.* 305, 318-321;

Without debating the merits of retributive theories of punishment, much less describing all their features, first let us consider retribution as a conceivable general justifying aim of the practice of punishing corporations. Three possible interpretations of retribution as a general justifying aim may be denoted as vindication, *lex talionis* and social cost sharing. Vindication represents social amends for the evil done, these amends being exacted with a view to satisfying outraged feelings or demands for vengeance and thereby reducing social passions to an orderly level.<sup>233</sup> *Lex talionis* entails the claim that since harm done to others disturbs the prevailing balance of distress and welfare in the community it is necessary to restore the balance by punishing the offender (or rewarding everyone else).<sup>234</sup> Social cost sharing is a more subtle version of retribution as fairness, the essence being that the wrongdoer . . .

"is one who is neither immoral or evil, nor necessarily harmful; he is simply one who has failed to bear his share of the total cost, in terms of restraint on self-interest, that the benefits of social life are regarded as being purchased with. It is therefore fair that he be made to suffer and so restore a balance of sorts within the system."<sup>235</sup>

Each of the above possible retributive aims seems plausible in respect of the practice of punishing corporations. First, vindication of corporate harm is more than a tenuous possibility; dissatisfaction with antisocial corporate behaviour is one of the main causes of disenchantment in modern western society.<sup>236</sup> To the contrary, Ingber has argued that the label "crime" is a misnomer as applied to the offences of corporate bureaucracy, essentially because the relevant crimes, said to be "economic crimes", are not crimes of sufficient passion to make vindication important.<sup>237</sup> However, Ingber's position fails to account for conspicuously inconvenient examples (notably disasters involving pollution offences<sup>238</sup>) and may not be true of at least the more serious instances of so-called "economic" crimes.<sup>239</sup> Secondly,

232. *Cont.*

Brett, *An Enquiry into Criminal Guilt* (1970), 238-241. Testing examples of violation of desert include those where D1 amalgamates with D2 and where D1's offence was not known to D2's shareholders at the time of amalgamation: consider *R. v. Black & Decker Manufacturing Co. Ltd.* (1974) 15 C.C.C. 2d 193; *Re Queen and Mercantile Distributing Co. Ltd.* (1975) 24 C.C.C. 2d 533.

233. Atkinson, "Interpreting Retributive Claims", (1975) 85 *Ethics* 80, 83-84. See generally Ingber, "A Dialectic: The Fulfilment and Decrease of Passion in Criminal Law", (1975) 28 *Rutgers L.R.* 861.

234. Atkinson, *loc. cit.* (*supra* n.233), 85.

235. Atkinson, *loc. cit.* (*supra* n.233), 85-86. See also Finnis, *loc. cit.* (*supra* n.231).

236. Capitant, *Panic in the Boardroom* (1973), ch. 2. Note also the title of Cappelletti's article, *loc. cit.* (*supra* n.187).

237. Ingber, *loc. cit.* (*supra* n.233), 904-905.

238. See the references *supra* n.158. See also Leigh, *loc. cit.* (*supra* n.1), 283; Branson, *loc. cit.* (*supra* n.55), 597 n.171.

239. Thus, *Eisen v. Carlisle & Jacquelin* 417 U.S. 156 (1974), mentioned at n.198, appears to have aroused a good deal of passion, at least on the part of commentators. Note also *U.S. v. Milwaukee Refrigerator Transit Co.* 142 F. 247, 256 (1905). As to the wisdom of creating a category of "economic crimes" see Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations", (1963) 30 *U. Chi. L.R.* 423, as criticised by Ball and Friedman, "The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View", (1965) 17 *Stan. L.R.* 197. See also Carson, "Symbolic and Instrumental Dimensions of Early Factory Legislation: A Case Study in the Social Origins of Criminal Law", in Hood (ed.), *Crime, Criminology and Public Policy* (1974), 107. On antitrust offences and moral turpitude see Flynn, "Criminal Sanctions under State and Federal Antitrust Laws", (1967) 45 *Tex. L.R.* 1301, 1315-1323.

in its application to corporations, *lex talionis* is hardly a metaphysical dream; some harms are of a corporate character (consider harms caused by collective endeavour where no personnel are at fault)<sup>240</sup> and the customary monetary punishments applied to corporations are symbolically appropriate to the gains which usually (although not invariably or exclusively) motivate corporate crime. Thirdly, the subtlety of the notion of retribution as social cost sharing seems particularly apt where externalized social costs are made the subject of fines.<sup>241</sup> Finally, relevant to all retributive claims is the capacity of corporate criminal responsibility to act as a surrogate of responsibility and blame where it is unfair to impose individual responsibility in order to requite individual desert.<sup>242</sup> This capacity, valuable in its own right, possesses the broader advantage of providing a convenient half-way house on our perennial trips between acceptance and rejection of retribution as a valid concern of the criminal law.<sup>243</sup>

These considerations seem to raise relatively few difficulties. The real stumbling block is the distribution of retributive punishment to morally irresponsible associates. How can the distribution of punishment to innocent personnel, shareholders or consumers be reconciled with a desert-based position that moral responsibility requires personal fault?<sup>244</sup> This is not the place for a philosophical disquisition, but some brief indication of possible answers is warranted.

The question raised might be answered in several ways. First, the strong claim might be advanced that retributive theories of punishment do not require that persons subjected to punishment be morally responsible agents. Such a requirement is not necessarily implicit in the ideas of vindication, *lex talionis*, or social cost sharing, identified above; an analysis along these lines has been advanced by Honderich in *Punishment: The Supposed Justifications* (1969).<sup>245</sup> Secondly, a weaker position of so-called "teleological retributivism" might be advanced, the essence of this position being that it is legitimate to punish irresponsible persons where compelling reasons exist for overriding a *prima facie* moral duty to punish only those who are morally responsible.<sup>246</sup> This position, which has become a popular alternative to Kantian absolutism, involves a pluralistic reconciliation of utilitarian deterrent and general preventive theories of punishment with desert-based distributive principles. However, utilitarian aims are not essential features of teleological retributivism, which can also be analysed in terms of vindication, *lex talionis*, or social cost sharing as non-utilitarian ends which may sometimes be sufficiently compelling to justify the overthrow of desert in distribution. Thirdly, it is possible to construct a concept of moral responsibility based upon the idea of commitment to the fortunes and misfortunes of a social, political or business

240. See text and references *supra*, nn. 65-78.

241. See text and references *supra*, n.213.

242. See *supra*, text to nn. 84-93.

243. Consider Schulhofer, "Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law", (1974) 122 *U. Pa. L.R.* 1497.

244. See references *supra* nn.231-232.

245. See esp. ch. 5 (for a persuasive criticism of Honderich's position see Atkinson, *loc. cit.* (*supra* n.233)). Note further Hyde, "The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times", (1916) 64 *U. Pa. L.R.* 696.

246. Ezorsky, *Philosophical Perspectives on Punishment* (1972), xi-xxvii. For an application of this approach to strict responsibility see Nemerson, "Criminal Liability Without Fault: A Philosophical Perspective", (1975) 75 *Col. L.R.* 1517.

institution with which one is associated.<sup>247</sup> From this vantage point corporations are regarded as convenient instrumentalities for the imposition of responsibility upon personnel, shareholders and other persons who, having acquiesced in the existence or furtherance of an institution, can no longer pretend to live in the innocence of the Garden of Eden.<sup>248</sup> Fourthly, under specified conditions a corporation itself may be regarded as a morally responsible person,<sup>249</sup> and if punishment is inflicted upon a corporation where those conditions are met, the indirect infliction of suffering upon irresponsible associates arguably falls into a similar moral category as the suffering experienced by the family of a person convicted and sentenced to punishment. The position central to this fourth line of argument is that fault can sometimes be collective and yet also nondistributive among members of the collectivity.<sup>250</sup> This position is not free from controversy but the following observations of Peter French represent one leading point of view:

"... conglomerate collectivities can be justifiably held blameworthy and hence differ significantly from aggregate collectivities. This accounts for the fact that excuses are often put forth for such collectivities (e.g., the Army in the case of Vietnam atrocities) while when aggregates are blamed the excuses are put forth in the name of individuals (e.g., the members of a lynch mob). Hence when we say that a conglomerate collectivity is blameworthy we are saying that other courses of collectivity action were within the province of the collectivity and that had the collectivity acted in those ways the untoward event would not likely have occurred and that no exculpatory excuse is supportable as regards the collectivity. That is not to say that an individual member or even all individual members of the collectivity cannot support excuses. In fact, that is never really at issue."<sup>251</sup>

Answers proceeding from the above-mentioned bases may not necessarily be fully in accord with the nature and scope of corporate criminal responsibility as we now have it. Indeed, even allowing for possible reforms, they may not be persuasive at all. However, to discuss these matters in sufficient detail would go far beyond the scope of our present discussion, the object of which is merely to suggest that retribution is a more plausible dimension of corporate criminal responsibility than usually has been assumed.

### 8. Public Information

Finally, it should not be overlooked that a broader aim of corporate criminal responsibility is to provide public information. Useful public information is disseminated upon conviction or prosecution, mainly for one or more of the following six purposes:

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- 247. Walsh, "Pride, Shame and Responsibility", (1970) 20 *Phil. Q.* 1; Lucas, *The Principles of Politics* (1966), 281-284.
  - 248. Walsh, *loc. cit.* (*supra* n.247), 10-13.
  - 249. Cf. Kleinig, *op. cit.* (*supra* n.231), ch. 6.
  - 250. A position opposed to methodological individualism. See *supra*, text and references to n.65.
  - 251. "Types of Collectivities and Blame", (1975) 56 *The Personalist* 160, 166. Cf. the questionable criticisms advanced in Benjamin, "Can Moral Responsibility be Collective and Non-distributive?", (1976) 4 *Soc. Theory and Prac.* 93.



- (1) to declare the meaning of vague regulatory prohibitions upon pain of convicting corporate entrepreneurs rather than hapless officers or employees;<sup>252</sup>
- (2) to warn those who may suffer harm as the result of a corporation's past or future offences;<sup>253</sup>
- (3) to give investors and consumers information relevant to their future dealings with a corporation;<sup>254</sup>
- (4) to alert persons who have suffered harm at the hands of a corporation to the possibility of taking private action, whether individually or as a member of a class;<sup>255</sup>
- (5) to counteract false claims of social responsibility, self-serving denunciations of enforcement agencies and other misleading messages issued by corporate propaganda machines;<sup>256</sup> and
- (6) to heighten community perceptions of the need or otherwise to alter the dynamic balance between political and corporate power.<sup>257</sup>

These purposes seem self-explanatory, which is not to say that very much is known about their precise location in the vast network of human communications.

### 9. Conclusion

Corporate criminal responsibility has been taken too lightly by its critics and even its supporters have failed to discern the diversity of its operation. This at least is suggested by the preceding account of the social policy underlying a vexed part of the criminal law. As we have seen, corporate criminal responsibility has aims other than deterrence or general prevention, these additional aims being internal discipline, specific prevention, compensation, restitution, and restoration, retribution and public information. Moreover, even within the conventionally stressed aims of deterrence and general prevention, the particular purposes of corporate criminal responsibility are more various than has sometimes been assumed.

252. Consider Note, "Declaratory Relief in the Criminal Law", (1967) 80 *Harv. L.R.* 1490; Gifford, "Communication of Legal Standards, Policy Development, and Effective Conduct Regulation", (1971) 56 *Cornell L.R.* 409; and Jones, *The Efficacy of Law* (1969), 18-19. Note also the declaratory relevance of injunctions against corporate offences. See Rice, *loc. cit.* (*supra* n.199), 587; Note, "The Statutory Injunction as an Enforcement Weapon of Federal Agencies", (1948) 57 *Yale L.J.* 1023, 1048-1049.

253. See Fisse, "The Use of Publicity as a Criminal Sanction Against Business Corporations", (1971) 8 *Melb. Univ. L.R.* 107, 125; and consider the interests of local retailers and environmental groups in a case such as *U.S. v. Reserve Mining Company* 56 F.R.D. 408 (1972).

254. See generally Branson, *loc. cit.* (*supra* n.55); Simon, Powers and Gunneman, *The Ethical Investor* (1972). Note also Griffin, "Sensitive Foreign Payment Disclosures: The Securities Market Impact", in U.S., Securities and Exchange Commission, *Report of the Advisory Committee on Corporate Disclosure* (1977), 694-743; and Note, "Extrajudicial Consumer Pressure: An Effective Impediment to Unethical Business Practices," [1969] *Duke L.J.* 1011.

255. See Leibmann, "Economic Crimes—The Proposed New Federal Criminal Code", (1971) 27 *Bus. Law* 177, 181; U.S., National Commission on Reform of Federal Criminal Laws, *Proposed Federal Criminal Code* (1971), s.3007; Combines Investigation Act, 1974-1975 (Can.), s. 37.3(2)(c).

256. See the references, *supra* n.161; Fisse, *loc. cit.* (*supra* n.253), 133-139.

257. Williams, *op. cit.* (*supra* n.1), 863; U.S., National Commission on Reform of Federal Criminal Laws, *Working Papers* (1970) I, 164. Note also Schoenbaum, "The Relationship between Corporate Disclosure and Corporate Responsibility", (1972) 40 *Fordham L.R.* 565, 578-588; Mueller, "Corporate Secrecy vs. Corporate Disclosure", in Nader and Green, *Corporate Power in America* (1973), 111; Kronstein, "Reporting on Corporate Activities," (1961) 38 *U. of Det. L.J.* 589.

The aims we have outlined all appear to be of some social value, but this is not to say that corporate criminal responsibility is the most effective or just way of achieving them.<sup>258</sup> It may well be that the present policy of the law could be achieved more satisfactorily by means of individual criminal responsibility, if extensively revised, and appropriate new public remedies, including internal discipline orders, specific preventive orders, and a comprehensive system of officially as well as privately-led class actions for compensation, restitution and restoration. Critical to a persuasive reform programme along these lines, however, is an assessment of the functional capacity and ethical limits of not only such a programme but also reforms of corporate criminal responsibility itself. Neither part of this assessment has been made convincingly, partly because there has been no adequate investigation of what corporate criminal responsibility now tries to do.

In the case of corporate criminal responsibility, too little attention has been paid to the possibility of improving the efficacy and justice of its operation. To begin with, our existing ideas upon criteria of ascription of responsibility are fragmentary and primitive.<sup>259</sup> This is true of the central issue of primary vs. vicarious responsibility, as well as the subsidiary problems raised by the agency relationship between a corporate accused and the individual person or persons whose conduct or fault is the subject of attribution, fault concepts and defences in their application to corporations, offences in their application to corporations, and the criminal capacity of various types of organizations. There is also work to be done upon sanctions against corporations.<sup>260</sup> Although fines have been subjected to considerable scrutiny, adverse publicity sanctions, community service orders, and other alternatives have received much less attention than is compelled by the capacity of corporations to overlook or pass on the effects of monetary punishment.<sup>261</sup> Doubtless, these gaps in knowledge are explicable on various grounds, but a major reason is failure to explicate the aims of corporate criminal responsibility in detail. It is a truism of functional analysis that by explicating aims we generate heuristic power. In the present context the force of this power awaits demonstration, but it is patent that the aims outlined offer many suggestions as to the design of more sophisticated criteria of responsibility and sanctions than we now possess.

Insufficient focus upon the aims of corporate criminal responsibility also helps to explain the limited progress which has been made towards workable

258. See the references, *supra* n.57.

259. Fisse, *loc. cit.* (*supra* n.1); *loc. cit.* (*supra* n.6); Duggan, "The Criminal Liability of Corporations for Contraventions of Part V of the Trade Practices Act", (1977) 5 *Aust. Bus. L.R.* 221; U.S., National Commission on Reform of Federal Criminal Laws, *Working Papers* (1970) I, 189-190, 193-203; Canada, Law Reform Commission, *op. cit.* (*supra* n.1), 19-28, 33-35.

260. Consider S.A., Criminal Law and Penal Methods Reform Committee, *op. cit.* (*supra* n.1), 357, 363-364; Dershowitz, *loc. cit.* (*supra* n.1); Fisse, *loc. cit.* (*supra* n.253); Canada, Second Stage Revision Combines Investigation Act 1976, *A Study on Consumer Misleading and Unfair Trade Practices* (1976) I, 69-87.

261. On fines see Dershowitz, *loc. cit.* (*supra* n.1); Duggan, "Criminal Sanctions for Misleading Advertising: The Penalty of Fine and Related Matters", (1976) 50 *A.L.J.* 625; Stanbury, "Penalties and Remedies under the Combines Investigation Act 1889-1976", (1976) 14 *Osgoode Hall L.J.* 571; and the references, *supra* n.207. On adverse publicity sanctions see Fisse, *loc. cit.* (*supra* n.253). On community service orders see S.A., Criminal Law and Penal Methods Reform Committee, *op. cit.* (*supra* n.1), 364. On the transmissibility of fines see especially Dershowitz, *loc. cit.* (*supra* n.1), 285-286 n.17.

alternatives to corporate criminal responsibility.<sup>262</sup> In the case of individual criminal responsibility, there has been no systematic response to the many particular difficulties which corporate crime imposes at various points;<sup>263</sup> suffice it to mention the useful but limited range of proposals advanced in Leigh's leading monograph.<sup>264</sup> Internal discipline, although a dominant feature of many species of collective responsibility, including corporate criminal responsibility, has been taken for granted to such an extent that the possibility of a public remedy related directly to this purpose has barely been mentioned let alone pursued.<sup>265</sup> Specific prevention has received much more attention, mainly in C. D. Stone's important work, *Where the Law Ends* (1975), and also in the development of specific preventive remedies in several areas of regulation (notably industrial safety and corporate investment).<sup>266</sup> Nonetheless, the implications of applying a Woottonian preventive philosophy to corporate crime have yet to be fully perceived and exploited, partly because juristic personality has induced an incorrect assumption that corporations are subject to much the same problems of prediction and treatment as those which have damned the philosophy in its application to individual offenders.<sup>267</sup> As to class actions for compensation, restitution and restoration, the contemporary debate about public remedies has not attended sufficiently to the significance of corporate criminal responsibility.<sup>268</sup> Thus, increasing remedial emphasis is being placed upon higher fines despite their obvious limitations as a means of providing adequate civil relief. More importantly, *de facto* public class actions for controversial types of mass relief already operate under threat of prosecution or stiffer sentences, a practice which is relevant not only to many of the major arguments raised against public remedies but also to their ultimate satisfactory design.

Accepting the force of these charges,<sup>269</sup> do we know enough about the social policy of corporate criminal responsibility to proceed with the task of functional reconstruction? Certainly it is undeniable that there has been much less empirical enquiry into the topic than it warrants.<sup>270</sup> Equally, it would be foolish to pretend that the account provided here is based upon much more than anecdotal evidence and fireside inductions. At the same time, however, there is a grave risk that research will fall into excessive worship of empiricism: corporate phenomena are so mysterious and fascinating as to offer almost endless scope for empirical ritual.<sup>271</sup> Especially at this rudimentary stage in the evolution of corporate criminal responsibility, it seems more important that we seek ideas and formulate

262. But consider especially Stone, *op. cit.* (*supra* n.1); U.S., National Commission on Reform of Federal Criminal Laws, *op. cit.* (*supra* n.1).

263. As in the context of deterrence, discussed *supra*, text to nn.54ff.

264. *Op. cit.* (*supra* n.1), ch. 10.

265. S.A., Criminal Law and Penal Methods Reform Committee, *op. cit.* (*supra* n.1), 361-362.

266. See the references *supra*, nn.127, 137, 138.

267. *Supra*, text to nn.124, 125.

268. See the references *supra*, n.187 and *cf.* n.186.

269. Extensive proofs are necessary, but these are other chapters in the reform of corporate criminal responsibility.

270. See the text and references, *supra* n.33.

271. Consider the field opened up by Kriesberg, *loc. cit.* (*supra* n.1); and note the possibility that, as the price of empirical kinship, corporations may insist on the participation of field researchers in rituals approximate to those described by Werbner, "Sin, Blame and Ritual Mediation", in Gluckman, *The Allocation of Responsibility* (1972), 227. *Cf.* O'Connell, "Industry and the Academic Researcher", (1968) 53 *Iowa L.R.* 1269.

our paradigms of change. Simply as a matter of economy of research, any major empirical investigations ought to take account of probable reforms as well as the present law. Much more importantly, however, corporate criminal responsibility has reached a thought-provoking state of crisis.

Corporate criminal responsibility is one of the few collective legal responses which can be mustered against serious collective types of harm.<sup>272</sup> Moreover, if applied effectively in the prevention of collective types of harm, it is capable of reducing the need for costly compensatory or other remedial relief by class or public action after the event.<sup>273</sup> Regrettably, the present law of corporate criminal responsibility is a hasty assemblage of civil and criminal principles of ascription of responsibility, a limited range of sanctions (comprising the fine, dissolution and sometimes probation or conditional release), and miscellaneous remedies. This assemblage, although well-intended, is almost a mockery of form and function, essentially because its perspective is an incongruent criss-cross of juristic personality, vicarious or strict liability, and officially-led remedial relief. Nonetheless, it survives today largely in original form, with a few dents in the base of ascription,<sup>274</sup> some additional penal spikes<sup>275</sup> and uneven remedial encrustations.<sup>276</sup>

Faced with this crisis, what has empiricism to offer? Doubtless much information of theoretical as well as political impact, but major empirical contributions are unlikely to be made before we have new paradigms of reform. Already, we have a good deal to go on as to the social policy of the present law; that at least is the view which has animated this article. As to new paradigms of reform, we may safely forecast that these will depend upon thought experiments rather than deductions in social laboratories: the inductive structure of science's own revolutions supports no other view.<sup>277</sup>

272. See the references, *supra* n.187.

273. On prevention vs. compensation see Nozick, *op. cit.* (*supra* n.215). See also U.S., *Report of Task Force on Productivity and Competition* (Stigler Report) (1969), reprinted in (1969) 2(3) *Antitrust Law and Economics Rev.* 13, 32-34; and consider Note, "Arizona Pit Mine Safety Inspections: An Analysis of Legal Incentives", (1975) 17 *Ariz. L.R.* 1024.

274. *E.g.*, the evolution of personal as opposed to vicarious corporate responsibility. Consider *Tesco Supermarkets Ltd. v. Nattrass* [1972] A.C. 153, as criticised in Fisse, *loc. cit.* (*supra* n.25).

275. Principally heavier fines. See *e.g.*, Trade Practices Act, 1974-1977 (Cth.), s.76 (\$250,000); Sherman Act, 15 U.S.C.S., 1975 (U.S.), s.2 (\$1,000,000); Ocean Dumping Control Act, 1974-1975 (Can.), s.13(1)(a) (\$100,000); Motor Vehicle Tire Safety Act, 1974-1975-1976 (Can.), s.17(2)(b) (\$200,000); Commerce Act, 1975 (N.Z.), s.58(b) (\$50,000); Prevention of Pollution of Waters by Oil Act, 1962-1972 (S.A.), s.5 (\$50,000); Pollution of the Sea by Oil Act, 1972 (Cth.), s.4 (\$50,000); Insurance Act, 1973-1977 (Cth.), s.21(2) (\$10,000 per day).

276. See the text and references, *supra* nn.185-230. Consider also Timberg, *loc. cit.* (*supra* n.189).

277. Kuhn, *The Structure of Scientific Revolutions* (1962), esp. ch. 8. See also Meehl, "Law and the Fireside Inductions; Some Reflections of a Clinical Psychologist", (1971) 27(4) *J. of Soc. Issues* 65; Tiger, *Men in Groups* (1969), xviii-xx.