

THE ALLOCATION OF RESPONSIBILITY FOR CORPORATE CRIME: INDIVIDUALISM, COLLECTIVISM AND ACCOUNTABILITY

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I Introduction: Contemporary Problems of Accountability for Corporate Crime¹

Two major problems of accountability confront modern industrialised societies in their attempts to control wrongdoing committed by larger scale organisations.² First, there is an undermining of individual accountability at the level of public enforcement measures, with corporations rather than individual personnel typically being the prime

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¹ "Crime" is taken to mean a criminal offence or penalty-carrying violation under existing law, and "corporate crime" crime which is legally attributable to a corporate entity or any individual persons acting on its behalf. See further E. H. Sutherland, *White Collar Crime: The Uncut Version* (1983) ch. 1; D. R. Simon and D. S. Eitzen, *Elite Deviance* (1983) at 22-23; G. Geis, "Criminological Perspectives on Corporate Regulation", in B. Fisse and P. A. French, eds., *Corrigible Corporations and Unruly Law* (1985) 63 at 74-75; L. Orland, "Reflections on Corporate Crime: Law in Search of Theory and Scholarship" (1980) 17 *American Criminal Law Review* 501; P. C. Yeager, "Analyzing Corporate Offenses: Progress and Prospects" (1986) 8 *Research in Corporate Social Performance and Policy* 93. Our main focus is private as opposed to governmental corporate crime; whether corporate criminal liability should be confined to private corporations is however an open question: see further C. D. Stone, "Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?" (1982) 130 *University of Pennsylvania Law Review* 1441; B. Fisse, "Controlling Governmental Crime: Issues of Individual and Collective Liability" in P. Grabosky, ed., *Government Illegality* (1987).

² We are not concerned here with the problem, formidable as it is, of corporate crime in the context of smaller organisations (e.g., leveraged currency dealers) where the main concern is not the balance to be struck between corporate and individual responsibility but rather the difficulty of taking timely and effective action against individual persons who act fraudulently under corporate guise. See further "Corporate Affairs Commission Strategy", News Release, Premier of New South Wales, 21 Oct. 1987; A. Freiberg, "Abuse of the Corporate Form: Reflections from the Bottom of the Harbour" (1987) 10 *University of New South Wales Law Journal* 67. Nor are we concerned with corporate crime in the sense of crime committed by employees against their employer (e.g., embezzlement) or by white collar offenders generally (compare U.S., Department of Justice, Bureau of Justice Statistics, *White Collar Crimes* (1987)).

target of prosecution.³ Prosecutors are able to take the short-cut of proceeding against corporations rather than against their more elusive personnel and so individual accountability is frequently displaced by corporate liability, which now serves as a rough-and-ready catch-all device.⁴ Secondly, where corporations are sanctioned for offences, in theory they are supposed to react by using their internal disciplinary systems to sheet home individual accountability,⁵ but the law now makes little or no attempt to ensure that such a reaction occurs.⁶ The impact of enforcement can easily stop with a corporate pay-out of a fine or monetary penalty, not because of any socially justified departure from the traditional value of individual accountability, but rather because that is the cheapest or most self-protective course for a corporate defendant to adopt.

The problem of non-prosecution of individual representatives of companies for offences committed on their behalf is increasingly visible.⁷

³ As regards corporate criminal liability, see generally L. H. Leigh, *The Criminal Liability of Corporations in English Law* (1969); K. F. Brickey, *Corporate Criminal Liability* (1984); J. C. Coffee, Jr., "No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 *Michigan Law Review* 386; J. C. Coffee, Jr., "Corporate Criminal Responsibility" in S. Kadish, ed., *Encyclopedia of Crime and Justice* (1983) 253; B. Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56 *Southern California Law Review* 1141; Anonymous, "Developments in the Law—Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions" (1979) 92 *Harvard Law Review* 1227. As to individual criminal liability for conduct performed on behalf of corporations see generally Brickey, *Corporate Criminal Liability* ch. 5; J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (1984) at 318-328; L. H. Leigh, "The Criminal Liability of Corporations and Other Groups" (1977) 9 *Ottawa Law Review* 247 at 274-283; S. D. Goodwin, "Individual Liability of Agents for Corporate Crimes under the Proposed Federal Criminal Code" (1978) 31 *Vanderbilt Law Review* 965; T. L. Spiegelhoff, "Limits on Individual Accountability for Corporate Crimes" (1984) 67 *Marquette Law Review* 604; W. McVisk, "Toward a Rational Theory of Criminal Liability for the Corporate Executive" (1978) 69 *Journal of Criminal Law and Criminology* 75.

⁴ There is however the possibility of individual responsibility being enforced through civil action. See further W. W. C. Ming, "The Recovery of Losses Occasioned by Corporate Crime—Suits Against Officers Who Involve their Company in a Crime" (1983) 25 *Malaya Law Review* 271; J. C. Coffee, Jr., "Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response" (1977) 63 *Virginia Law Review* 1099 at 1157-1246; R. R. Pennington, *Directors' Personal Liability* (1987) ch. 8.

⁵ Notably in economic theory. See K. G. Elzinga and W. Breit, *The Antitrust Penalties* (1976) at 132-138; R. A. Posner, "An Economic Theory of the Criminal Law" (1985) 85 *Columbia Law Review* 1193 at 1227-1229; R. H. Kraakman, "Corporate Liability Strategies and the Costs of Legal Controls" (1984) 93 *Yale Law Journal* 857.

⁶ See J. C. Coffee, Jr., "Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions" (1980) 17 *American Criminal Law Review* 419 at 458-460. As to legal control over the internal affairs of corporations see generally C. D. Shearing and P. C. Stenning, eds., *Private Policing* (1987); S. Henry, *Private Justice: Towards Integrated Theorizing in the Sociology of Law* (1983); A. M. Honore, "Groups, Laws, and Obedience" in A. W. B. Simpson, ed., *Oxford Essays in Jurisprudence* (1973); W. W. Kirkpatrick, "The Adequacy of Internal Corporate Controls" (1962) 343 *Annals of the American Academy of Political and Social Science* 75.

⁷ The problem of passing the buck for corporate crime is infamous. See P. Grabosky and J. Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986) at 189; U.S. National Commission on Reform of Federal Criminal Laws, I *Working Papers* (1970) at 180; M. J. Green, B. C. Moore, and B. Wasserstein, *The Closed Enterprise System* (1972) at 167; M. B. Clinard and P. C. Yeager, *Corporate Crime* (1980) ch. 12; G. Geis, "The Heavy Electrical Equipment Antitrust Cases of 1961" in G. Geis, ed., *White-Collar Criminal* (1968) 103; C. C. Walton and F. W. Cleveland, *Corporations on Trial: The Electrical Cases* (1964); R. A. Smith, *Corporations in Crisis* (1963) chs. 5-6; M. Watkins, "Electrical Equipment Antitrust Cases: Their Implications for Government and for Business" (1961) 29 *University of Chicago Law Review* 97 at 105; E. B. Mills, "Perspectives on Corporate Crime and the Evasive Individual" (1986) 8 *Criminal Justice Journal* 327; B. Fisse, "Criminal Law and Consumer Protection" in A. J. Duggan and L. W. Darvall, eds., *Consumer Protection Law and Theory* (1980) 182 at 183; H. J. Glasbeek, "Why Corporate Deviance is not Treated as a Crime—

An Australian study of the enforcement policies of 96 major business regulatory agencies is revealing.⁸ Top management of each agency was asked if it had "a policy or philosophy on whether it is better to prosecute the company itself as opposed to those individuals who are responsible within the company." Twenty agencies said that they preferred to target the individuals responsible; for 41 the preferred target was the corporation;⁹ five said they consistently tried to proceed against both the corporation and personnel concerned; and 30 had no policy or philosophy on the matter. The twenty agencies with a preference for individual liability were mostly in the areas of mine safety (where legislation often focusses liability on managers and supervisors),¹⁰ and in maritime safety and maritime oil pollution regulation (where there is a tradition of viewing the ship's captain as the preferred target).¹¹ Thirty-eight of the 96 agencies had never proceeded against an individual during the previous three years (1981-1984).

The problem of non-prosecution of individual persons implicated in corporate crime has recently been highlighted in the U.S.A. by the

⁷ continued

The Need to Make 'Profits' a Dirty Word" (1984) 22 *Osgoode Hall Law Journal* 393 at 419-420, 431-439; Spiegelhoff, "Limitations on Individual Accountability for Corporate Crimes"; C. P. Alexander, "Crime in the Suites" *Time*, 10 June 1985, 52; "White-Collar Crime Booming Again" *New York Times*, 9 June 1985, S. 3, 1 at 6; "Bhopal Disaster Spurs Debate over Usefulness of Criminal Sanctions in Industrial Accidents" *Wall Street Journal*, 7 Jan. 1985, 18; W. Safire, "On Sutton and Hutton" *New York Times* 9 May, 1985, 31.

There are of course numerous cases where individual officers and employees have been held criminally liable. See e.g., *Trade Practices Commission v. Tubemakers of Australia Ltd.* (1983) A.T.P.R. 40-358; *Guthrie v. Robertson* (1986) A.T.P.R. 40-744; "Anthony Bryant and Directors Fined \$96,000" *Sydney Morning Herald*, 15 April 1987, 38; D. W. Tundermann, "Personal Liability for Corporate Directors, Officers, Employees and Controlling Shareholders under State and Federal Environmental Laws" (1985) 2 *Proceedings Rocky Mountain Mineral Law Institute* 2-1, 2-2-2-4. A notable U.S. example is the widely-publicised prosecution and conviction for murder of three executives of an Illinois company, Film Recovery Systems, the operations of which had resulted in the cyanide poisoning of a worker: see *Los Angeles Times*, 15 Sept. 1985, 1; *New York Times*, 15 June 1985, 1.

⁸ Grabosky and Braithwaite, *Of Manners Gentle* at 189. In a major study of the incidence of corporate crime among large companies in the U.S. during the late 1970s, it was found that in only 1.5 per cent of all enforcement actions was a corporate officer held liable: Clinard and Yeager, *Corporate Crime* at 272.

⁹ E.g., the Australian Tax Office. More recently a spokesman has described the Office's policy and practice in these terms:

In relation to any offence committed by a company, our usual approach will be that the company, and not its officers, will be prosecuted. That can be expected to be the end of the matter in the vast majority of cases. There will be occasions, however, when to prosecute the company would be quite pointless—it may have no assets with which to satisfy any pecuniary penalty imposed. In other cases it may result in those individuals who in truth were wholly responsible for committing the offence escaping a penalty. The sorts of cases where we will be taking prosecution action against company officers will be those where it is clear that responsibility for the formal actions of a company rests with the particular individuals and where action against the company is unlikely to achieve the desired result of compliance with the law. (B. Conwell, as quoted in A. Freiberg, "Enforcement Discretion and Taxation Offences" (1986) 3 *Australian Tax Forum* 55 at 86-87).

¹⁰ See Coal Mines Regulation Act 1982 (N.S.W.) ss. 160-162.

¹¹ See e.g., S. W. Taylor, "Criminal Liabilities of Ships' Masters" [1981] *Lloyds Maritime and Commercial Law Quarterly* 499; S. W. Taylor, "The Criminal Liability of Ships' Masters: Provisions and Changes" [1984] *Lloyds Maritime and Commercial Law Quarterly* 446; C. J. Warbrick and R. Sullivan, "Ship Routeing Schemes and the Criminal Liability of the Master" [1984] *Lloyds Maritime and Commercial Law Quarterly* 23.

Hutton affair.¹² E. F. Hutton and Co., a brokerage firm, engaged in a widespread fraudulent scheme in which its bank accounts were overdrawn by up to \$US270 million a day without triggering debits for interest; approximately 400 banks were defrauded of \$US8 million. Hutton pleaded guilty to 2000 felony counts of mail and wire fraud and, under the plea agreement, agreed to pay a \$US2.75 million fine and to reimburse the banks. No individuals were prosecuted despite the systematic and pervasive extent of the scheme.¹³ The explanation given by the U.S. Assistant Attorney General was this:

In assessing the manner in which this case ought to be handled, our prosecutors started from the proposition that individuals ought to be held personally responsible for their criminal misconduct. This is our normal policy from which we deviate only when faced with a compelling reason to make an exception. Pursuing in court in this case the known individual authors of the swindle would have had some merit, but not at the expense of foregoing the opportunity to dictate the key terms of and seize without delay this extraordinary settlement. To prosecute the individuals would have required us to drop the settlement in favor of a protracted court fight that would have taken years to complete. That was the choice. . . .¹⁴

This explanation was severely criticised by the Subcommittee of Crime of the House of Representatives Committee on the Judiciary.¹⁵ In the opinion of the Subcommittee,¹⁶

The Department has, in prosecuting other cases, shown great tenacity and willingness to ignore cost considerations and significant adverse odds. Yet in *Hutton*, the prosecutors seemed overwhelmed by the fact that discovery would be time-consuming, . . . that the case would be complex, and that it might take months to try. . . . The *Hutton* plea contributed to a decrease in public confidence in the fairness of the criminal justice system—a pervasive feeling that defendants with enough money and resources can ‘buy’ their way out of trouble.

¹² See U.S., H.R., Committee on the Judiciary, Subcommittee on Crime, *E. F. Hutton Mail and Wire Fraud Case, Hearings*, Pt. 1, 99th Congress, 1st Sess., 1985, Pt. 2, 99th Cong., 2nd Sess., 1986, Report, 99th Cong., 2nd Sess., 1986; Safire, “On Sutton and Hutton”.

¹³ A spokesman from the Justice Department conceded that two Hutton executives were responsible for the fraud “in a criminal sense” (*Time*, 10 June 1985, 53; *New York Times*, 13 Sept. 1985, 1). It is noteworthy that in Hong Kong’s \$US21 billion counterpart to the E. F. Hutton scam, the targets of prosecution were six individual conspirators; see *Wall Street Journal Europe*, 11 Oct. 1985, 11. Contrast the refusal of the U.S. Justice Department in the early 1970s to accept a plea of guilty by Abbott Laboratories in exchange for the dropping of charges against five of the company’s executives; see J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry* at 117.

¹⁴ U.S., H.R., Committee on the Judiciary, Subcommittee on Crime, *E. F. Hutton Mail and Wire Fraud Case, Hearings*, Pt. 1, 99th Congress, 1st Sess., 1985, 643-644.

¹⁵ U.S., H.R., Committee on the Judiciary, Subcommittee on Crime, *E.F. Hutton Mail and Wire Fraud Case, Report*, 99th Congress, 2d Sess., 1986, 159-162.

¹⁶ *Ibid.* at 161.

Less visible are the disciplinary responses of companies to being convicted and fined or subjected to liability for monetary penalties.¹⁷ This is a dark side of corporate self-regulation about which little is known by outsiders.¹⁸ It is readily apparent, however, that companies have strong incentives not to undertake extensive disciplinary action. In particular, a disciplinary program may be disruptive,¹⁹ embarrassing for those exercising managerial control,²⁰ encouraging for whistle-blowers,²¹ or hazardous in the event of civil litigation against the company or its officers. Sometimes these incentives may be veiled by the claim that the problem has been sufficiently investigated and resolved by public enforcement action; such a claim was made by Westinghouse when it refused to take disciplinary action in the wake of the American electrical equipment price-fixing conspiracy prosecutions.²² These factors are well known, but the law has failed to provide adequate means for ensuring that corporate defendants are sentenced in a manner directly geared to achieving internal accountability.²³

This failure is illustrated by *Trade Practices Commission v. Pye Industries Sales Pty. Ltd.*,²⁴ a decision of the Federal Court of Australia in 1978. Pye was found to have committed resale price maintenance in violation of the Trade Practices Act, and the court adjourned the matter for sentence. At the sentencing hearing the court was able to conclude that, at the time of violation, "there was an almost total lack of supervision or interest by the board of directors in the conduct of their management and executives in relation to resale price maintenance." How-

¹⁷ For an empirical study of the responses of companies embroiled in publicity scandals see B. Fisse and J. Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983) 60-61, 121, 154-55, 166-67, 172, 192-94, 209, 224, 234. Occasionally the responses become well-known. For instance, the E. F. Hutton scandal led the company to make an internal investigation, conducted by Griffin Bell, former U.S. Attorney General. The subsequent report found 15 individuals accountable, and recommended fines of between \$25,000 and \$50,000 for six branch managers, as well as periods of probation. Hutton adopted the report and released it publicly, thereby obliging two top officials immediately to resign. The Bell Report (see L. Orland and H. R. Tyler, Jr., *2 Corporate Crime Law Enforcement in America* (1987) at 887-907) was subsequently criticised as a biased exercise in "damage control"; see U.S., H.R., Committee on the Judiciary, Subcommittee on Crime, *E. F. Hutton Mail and Wire Fraud Case, Report*, 99th Congress, 2d Sess., 1986, 156-158. This report also berated E. F. Hutton for failing to respond adequately to the extensive fraud committed on its behalf; *ibid.* at 150-155, 159.

¹⁸ A high degree of trust has been reposed in corporations to maintain internal discipline. As to trust and social control see further S. P. Shapiro, "Policing Trust" in Shearing and Stenning, eds., *Private Policing* 194.

¹⁹ Consider e.g., the internal disciplinary inquiry described in J. J. McCloy, *The Great Oil Spill* (1976).

²⁰ See e.g., *Nation*, 18 Feb. 1961, 129 (editorial criticism of General Electric's top management after the company undertook disciplinary action against employees involved in the electrical equipment conspiracies).

²¹ Coffee, "Corporate Crime and Punishment" 459; Braithwaite, *Corporate Crime in the Pharmaceutical Industry* at 402.

²² See Coffee, "Corporate Crime and Punishment" 458-59.

²³ Internal discipline is however one of a number of factors a court may take into account when determining sentence. See *Trade Practices Commission v. Stahl Chain Saws (Aust.) Pty. Ltd.* (1978) A.T.P.R. 40-091; *Trade Practices Commission v. Dunlop Australia Ltd.* (1980) A.T.P.R. 40-167; A. Freiberg, "Monetary Penalties under the Trade Practices Act 1974 (Cth)" (1983) 11 *Australian Business Law Review* 4 at 13. Compare 18 U.S.C. s. 3572(a)(4) which provides that, when imposing a fine on a corporation, a court is to consider "any measures taken by the organization to discipline its employees or agents responsible for the offense or to insure against a recurrence of such offense". See further J. C. Coffee and C. K. Whitehead, "The Convicted Corporation: An Outline of the New Federal Remedies" in O. G. Obermaier, ed., *Corporate Criminal Liability* (1986) 318.

²⁴ (1978) A.T.P.R. 40-089.

ever, the court was uninformed as to the nature of the company's disciplinary and other responses to the violation;²⁵ the company itself had not come forward with relevant evidence, and the evidence that had emerged from the trial related to the issue whether a violation had been committed. The court, after describing the violation as "ruthless", and yet having made no finding as to the adequacy or otherwise of the company's disciplinary reactions, imposed a penalty of \$120,000.

These problems of accountability are hardly pin-pricks²⁶ but sap the social control of corporate crime. Individual accountability has long been regarded as indispensable to social control, at least in Western societies,²⁷ but today is more the exception than the rule in the context of offences committed on behalf of larger-scale organisations.²⁸ Given the gravity with which corporate crime is increasingly perceived,²⁹ this is a remarkable state of affairs and one which awaits responsive solutions.³⁰

The traditional response to the problems of accountability described above is Individualism, the basic credo of which is that "corporations don't commit offences; people do."³¹ The strategy of Individualism, as revived by numerous commentators in recent years, is to abolish corporate criminal liability and to rely instead on individual criminal liability.³² The purpose

²⁵ A consideration plainly relevant to sentence: see references *supra* n. 23. Yet the law has failed to provide an adequate mechanism for ensuring that the relevant sentencing facts about corporate defendants are known. See e.g., *Prosecution Policy of the New South Wales Director of Public Prosecutions* (1987) para. 16 (shrinking vital role of Crown in ensuring that pertinent sentencing facts are brought to the attention of the court).

²⁶ Compare A. Bierce, *The Devil's Dictionary* (1958) where "corporation" is defined as "an ingenious device for obtaining individual profit without individual responsibility", and "responsibility" as "a detachable burden easily shifted to the shoulders of God, Fate, Fortune, Luck or one's neighbour".

²⁷ See further P. A. French, ed., *Individual and Collective Responsibility: The Massacre at My Lai* (1972); F. H. Allport, *Institutional Behavior* (1933) at 219-239; P. Fauconnet, *La Responsabilité* (1928); J. R. Lewis, *Uncertain Judgment: A Bibliography of War Crimes Trials* (1979) 185-89; G. Komarow, "Individual Responsibility under International Law: The Nuremberg Principles in Domestic Legal Systems" (1980) 29 *International and Comparative Law Quarterly* 21; C. A. Hessler, "Command Responsibility for War Crimes" (1973) 82 *Yale Law Journal* 1274; R. H. Iseman, "The Criminal Responsibility of Corporate Officials for Pollution of the Environment" (1972) 37 *Albany Law Review* 61. But see R. Clark, *The Japanese Company* (1979) at 130: "in the West decisionmaking is presented as individualistic until adversity proves it collective".

²⁸ This is not to deny the growing frequency of prosecutions of individuals in the context of fraudulent activities performed under corporate cover. See *supra* n. 2.

²⁹ See further P. N. Grabosky, J. B. Braithwaite, and P. R. Wilson, "The Myth of Community Tolerance Toward White-Collar Crime" (1987) 20 *Australia and New Zealand Journal of Criminology* 33; F. T. Cullen, W. J. Maakestad, and G. Cavender, *Corporate Crime under Attack: The Ford Pinto Case and Beyond* (1987) chs. 1-2; F. T. Cullen, B. G. Link, and C. W. Polanzi, "The Seriousness of Crime Revisited: Have Attitudes toward White-Collar Crime Changed?" (1982) 20 *Criminology* 83; R. C. Kramer, "Corporate Criminality: The Development of an Idea" in E. Hochstedler, ed., *Corporations as Criminals* (1984) 13; K. M. Koprowicz, "Corporate Criminal Liability for Workplace Hazards" (1986) 52 *Brooklyn Law Review* 183. See generally J. S. Coleman, *The Asymmetric Society* (1982).

³⁰ For instance, the issue has not been addressed in Australia, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (1986). Compare Canada, Law Reform Commission, Working Paper 16, *Criminal Responsibility for Group Action* (1976) at 33-35.

³¹ See E. Bodenheimer, *Philosophy of Responsibility* (1980) at 117; T. McAdams and C. B. Tower, "Personal Accountability in the Corporate Sector" (1978) 16 *American Business Law Journal* 67; Safire, "On Sutton and Hutton".

³² E.g., E. Lederman, "Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle" (1985) 76 *Journal of Criminal Law & Criminology* 285; D. R. Cressey, "The Poverty of Theory in Corporate Crime Research" (1988) 1 *Advances in Theoretical Criminology* 31; M. W. Caroline, "Corporate Criminality and the Courts: Where are They Going?" (1985) 27 *Criminal Law Quarterly* 237. Note also (1987) 1(22) *Corporate Crime Reporter* 1 at 6, reporting U.S. Senator Biden's view that "[a]ny system to control behavior must focus on personal accountability for wrongdoing".

of this article is to review the claims made in support of an individualistic strategy of social control. The argument is that Individualism rests on unconvincing foundations and should be rejected. A more commendable strategy—enforced accountability—thereby emerges. The ambition of this strategy is to exploit the different capacities of corporate and individual liability and above all to harness the capacity of corporate liability to produce individual accountability to an extent unattainable through the prosecution of individual defendants.

II Individualism as a Strategy for Allocating Responsibility for Corporate Crime

For the dogged Individualist,³³ the solution to problems of accountability for corporate crime is simple: we should abandon reliance on corporate criminal liability and rely instead on individual liability. Individual criminal liability, it is claimed, can do the job of corporate criminal liability; if corporate criminal liability is abolished, prosecutors will be forced to proceed against individual officers and employees. Moreover, if corporate liability for crime were abolished, and if guilty corporate personnel were held criminally liable, there would be no need to worry about the problem of non-assurance of internal accountability which now arises where corporations are subjected to monetary sanctions. Individualism thus proposes radical surgery—amputating the corporate leg of criminal liability—as the cure for the present ills of non-accountability for corporate crime.

Many commentators have advocated that criminal liability be confined to individual persons. The early development of corporate criminal liability encountered an adverse reception from some quarters,³⁴ and the later history of the subject has seen the publication of numerous skeptical tracts, including Leonard Leigh's treatise, *The Criminal Liability of Corporations in English Law* (1969).³⁵ In recent times, the support mounted for an exclusively individualistic platform of criminal liability has intensified. In an extensive critique, Eliezer Lederman has contended that recognition of corporate criminal liability challenges "the ideological and normative basis of criminal law and its mode of expression and operation."³⁶ A related theme has been pursued by Donald Cressey with the claim that the concept of corporate crime is a fiction the uncritical

³³ Hardly a rare species. See generally S. Lukes, *Individualism* (1973); R. N. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* (1985) ch. 6.

³⁴ See e.g., N. C. Collier, "Impolicy of Modern Decision and Statute making Corporations Indictable and the Confusion in Morals thus Created" (1910) 71 *Central Law Journal* 421; J. F. Francis, "Criminal Responsibility of a Corporation" (1923) 18 *Illinois Law Review* 305. Compare Leon Duguit's individualistic attack on the concept of state responsibility: L. Duguit, *Law in the Modern State* (1921) at 203-207.

³⁵ See also G. O. W. Mueller, "Mens Rea and the Corporation" (1957) 19 *University of Pittsburgh Law Review* 21; Caroline, "Corporate Criminality and the Courts: Where are They Going?"; S. Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" (1963) 30 *University of Chicago Law Review* 423; J. T. Byam, "The Economic Inefficiency of Corporate Criminal Liability" (1982) 73 *Journal of Criminal Law & Criminology* 582.

³⁶ Lederman, "Criminal Law, Perpetrator and Corporation" at 296.

use of which has forced criminologists into the position of trying to find the cause of fictitious offenses perpetrated by fictitious persons.³⁷ Some have even gone so far as to omit the subject of corporate liability from the agenda, as in George Fletcher's *Rethinking Criminal Law* (1979), a leading doctrinal work which echoes the preoccupation with individual criminal liability once found in Continental thought.³⁸

Three prime assumptions underlie Individualism, old and new.³⁹ The first is a philosophical position, namely methodological individualism. Methodological individualism holds that only individuals act, that only individuals are responsible, and that corporate action or corporate responsibility is no more than the sum of its individual parts.⁴⁰ Secondly, Individualism supposes that the theory of deterrent punishment implies the need for, or the sufficiency of, individual liability. Thirdly, it is assumed that retribution postulates the punishment of individual persons but not corporate entities. The questionable validity of these assumptions is examined below.

III Methodological Individualism, Corporate Action and Corporate Responsibility

Influential as methodological individualism has been as a philosophical force in the way people think about corporate crime and,

³⁷ Cressey, "The Poverty of Theory in Corporate Crime Research".

³⁸ See e.g., H.-H. Jescheck, *Lehrbuch des Strafrechts: Allgemeiner Teil* (3rd ed. 1978) at 180-182. Attention increasingly is paid to corporate liability; see Fauconnet, *La Responsabilité* at 339-41; Facolta' Di Giurisprudenza Università Degli Studi Di Messina, *La Responsabilità Penale Delle Persone Giuridiche in Diritto Comunitario* (1981); S. V. Kruse, *Erhvervslivets Kriminalitet: Studier i det Objective Straffansvar* (1983) at 385-90; D. Magnusson, ed., *Economic Crime: Programs for Future Research* (1985); L. H. Leigh, "The Criminal Liability of Corporations and other Groups: A Comparative View" (1982) 80 *Michigan Law Review* 1508; R. Lahti, "Finland National Report" (1982) 54 *Revue Internationale de Droit Pénal* 249 at 261-262.

³⁹ Other possible assumptions can be identified, including the false supposition that criminal liability can realistically be viewed in isolation from civil liability. The criminal law is often used as a vehicle for restitution or compensation. Civil remedies are not always available and even if they are available it is often expedient to establish liability for the purpose of collateral civil suits or to make a remedial order upon conviction. Moreover, short of bringing a case to trial, the threat of criminal liability may be used as a valuable bargaining chip to negotiate a civil settlement. These considerations are especially relevant in the context of corporations which inevitably are the major source of harm-causing in society. See further B. Fisse, "The Social Policy of Corporate Criminal Liability" (1978) 6 *Adelaide Law Review* 361 at 397-405; J. Braithwaite, "Challenging Just Deserts: Punishing White-Collar Criminals" (1982) 73 *Journal of Criminal Law and Criminology* 723 at 752. Another undercurrent is the emphasis in company law on the rights and duties of individual managers and shareholders. See further D. A. Wishart, "A Conceptual Analysis of the Control of Companies" (1984) 14 *Melbourne University Law Review* 601; and compare C. D. Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct" (1980) 90 *Yale Law Journal* 1.

⁴⁰ See generally J. O'Neill, ed., *Modes of Individualism and Collectivism* (1973); M. Brodbeck, ed., *Philosophy of the Social Sciences* (1971) 254-303; Lukes, *Individualism* ch. 17; P. A. French, ed., *Individual and Collective Responsibility* (1972).

It is of course possible to take a position which rejects methodological individualism and yet which for other reasons posits moral responsibility as an exclusively individualistic construct; see e.g., M. Dan-Cohen, *Rights, Persons, and Organizations* (1986) chs. 2-3; F. Hallis, *Corporate Personality* (1930) at 127-133. Equally, it is possible to take a position which accepts methodological individualism and yet which takes reductionism to the atomistic extent of denying that human beings are rational, morally responsible agents; see further E. Pols, *The Acts of Our Being: A Reflection on Agency and Responsibility* (1982).

indeed, about collectivities generally,⁴¹ it is unable to account for the corporateness of corporate action and corporate responsibility.

A. *Methodological individualism and corporate action*

Consider the position taken by F. A. Hayek, a leading advocate of methodological individualism:⁴²

There is no other way toward an understanding of social phenomena but through our understanding of individual actions directed toward other people and guided by their expected behaviour.

Methodological individualism as advocated by Hayek amounts to an ontology that only individuals are real in the social world, while social phenomena like corporations are abstractions which cannot be directly observed. This ontology is spurious.⁴³ The notion that individuals are real, observable, flesh and blood, while corporations are legal fictions, is false. Plainly, many features of corporations are observable (their assets, factories, decisionmaking procedures), while many features of individuals are not (e.g., personality, intention, unconscious mind).⁴⁴ Both individuals and corporations are defined by a mix of observable and abstracted characteristics.

Clifford Geertz contends that "the Western conception of the person as a bounded, unique, more or less integrated emotional and cognitive universe, a dynamic centre of awareness, emotion, judgement, and action organized into a distinctive whole . . . is a rather peculiar idea within the context of the world's cultures."⁴⁵ Reflecting upon his anthropological fieldwork, Geertz cites Balinese culture, wherein it is *dramatis personae*, not actors, that endure or indeed exist.⁴⁶

⁴¹ Consider the individualistic position sometimes maintained in the context of reparation for disadvantaged groups. See e.g., G. Sher, "Groups and Justice" (1977) 87 *Ethics* 174. Compare G. Ezorsky, "On 'Groups and Justice'" (1977) 87 *Ethics* 182; B. I. Bittker, *The Case for Black Reparations* (1973) ch. 8. We are indebted to Wojciech Sadurski for drawing our attention to this arena.

⁴² F. A. Hayek, *Individualism and the Economic Order* (1949) at 6.

⁴³ Contrast Maurice Hauriou's view that individuals and corporations are the subjective element in society and that corporations are the prime creative power in society (M. M. Hauriou, "La Theorie de L'Institution et de la Fondation" (1925) 4 *Cahiers de la Nouvelle Journée*).

⁴⁴ Compare M. McDonald, "The Personless Paradigm" (1987) 37 *University of Toronto Law Journal* 212 at 225-226 (discussing the distinctively collective "expressive character" of organisations).

⁴⁵ C. Geertz, *Local Knowledge* (1983) at 59.

⁴⁶ Geertz, *Local Knowledge* at 62. Another illustration (*ibid.* at 60-61) is the central distinction between "inside" and "outside" in the Javanese sense of what a person is:

Batin, the 'inside' word, does not refer to a separate seat of encapsulated spirituality detached or detachable from the body, or indeed to a bounded unit at all, but to the emotional life of human beings taken generally. It consists of the fuzzy, shifting flow of subjective feeling perceived directly in all its phenomenological immediacy but considered to be, at its roots at least, identical across all individuals, whose individuality it thus effaces. And similarly, *lair*, the 'outside' word, has nothing to do with the body as an object, even an experienced object. Rather, it refers to that part of human life which, in our culture, strict behaviorists limit themselves to studying—external actions, movements, postures, speech—again conceived as in its essence invariant from one individual to the next. These two sets of phenomena—inward feelings and outward actions—are then regarded not as functions of one another but as independent realms of being to be put in order independently.

Physically men come and go, mere incidents in a happenstance history, of no genuine importance even to themselves. But the masks they wear, the stage they occupy, the parts they play, and, most important, the spectacle they mount remain, and comprise not the facade but the substance of things, not least the self. Shakespeare's old-trouper view of the vanity of action in the face of mortality—all the world's a stage and we are but poor players, content to strut our hour, and so on—makes no sense here. There is no make-believe; of course players perish, but the play does not, and it is the latter, the performed rather than the performer that really matters.

The merging of the individual person with the land in Aboriginal cultures, where a particular rock can be part of an ancestor or part of oneself, provide other examples at odds with the conception of bounded unitary individualism. Even within the Western cultural tradition it is difficult to accept that individuals, unlike corporations, are characterised by a bounded unitary consciousness. As Hindess has pointed out, decisions made by individuals as well as those made by corporations have a diffuse grounding; they represent the product of "diverse and sometimes conflicting objections, forms of calculation, and means of action".⁴⁷

The polar opposite to methodological individualism is the methodological holism of the early European sociologists, notably Emile Durkheim.⁴⁸ For Durkheim, "the individual finds himself in the presence of a force [society] which is superior to him and before which he bows".⁴⁹ From this perspective, the collective will of society is not the product of the individual consciousness of members of society.⁵⁰ Quite the reverse: the individual is the product of evolutionary social forces.

Both the crude methodological individualism of Hayek and the crude methodological holism of Durkheim are unpersuasive. It is just as constricting to see the sailor as the navy writ small as it is to see the navy as the sailor writ large.⁵¹ It is true to say that the activity of the navy is constituted by the action of individual sailors. But it is also true that the existence of a sailor is constituted by the existence of the navy. Take away the institutional framework of the navy—ships, captains, rules of war, other sailors—and the notion of an individual sailor makes no sense.⁵²

⁴⁷ B. Hindess, "Classes, Collectivities and Corporate Actors" (1988) forthcoming.

⁴⁸ For an extensive critique of early sociological theories of collectivism see Hallis, *Corporate Personality* at 106-134.

⁴⁹ E. Durkheim, *The Rules of Sociological Method* (1964) 123.

⁵⁰ E. Durkheim, *De la Division du Travail* (3rd ed. 1911).

⁵¹ Compare Fontana *Dictionary of Modern Thought* (1977) at 387: "It can be argued that the whole dispute [over methodological individualism] is as futile as a dispute between engineers as to whether what is important in a building or mechanism is its structure or the materials or components used. Clearly both are important, but in different ways."

⁵² Compare August Comte's view that a society is "no more decomposable into individuals than a geometric surface is into lines, or a line into points" (A. Comte, *II Systeme de Politique Positive* (1851) at 181, quoted in Lukes, *Individualism* at 111). See also R. DeGeorge, "Social Reality and Social Relations" (1983) 37 *Review of Metaphysics* 3; T. R. Flynn, *Sartre and Marxist Existentialism: The Test Case of Collective Responsibility* (1984).

Institutions are constituted by individuals and individuals are socially constituted by institutions. To conceive of corporations as no more than sums of the isolated efforts of individuals would be as silly as conceiving the possibility of language without the interactive processes of individuals talking to one another and passing structures of syntax from one generation to another.⁵³

Equally, a sociological determinism that grants no intentionality to individuals, that sees them as wholly shaped by macro-sociological forces, is absurd. Sociological functionalism, as championed by Durkheim, indulges this absurdity. Mesmerised by the achievements of evolutionary theory in biology, the functionalists failed to recognise that human beings are capable of reflecting upon causal laws and engaging in purposive social action which does not conform to those laws or, indeed, which is intended to defeat them.⁵⁴ We may readily agree with Durkheim that each kind of community is a thought world which penetrates and moulds the minds of its members, but that is not to deny the capacity of individuals to exercise their autonomy to resist and reshape thought worlds.

All wholes are made up of parts; reductionism can be a near-infinite regress. Psychological reductionists can argue that the behaviour of organisations can only be understood by analysing the behaviour of individual members of the organisation. Biological reductionists can argue that the behaviour of individuals can only be understood by the behaviour of parts of the body—firing synapses in the brain, hormonal changes, movement of a hand across a page. Chemical reductionists might argue that these body parts can only be understood as movements of molecules.

⁵³ For Giddens, this exemplifies "the duality of structure". The duality of structure means "the essential recursiveness of social life, as constituted in social practices: structure is both medium and outcome of the reproduction of practices. Structure enters simultaneously into the constitution of the agent [the navy constituting the sailor in our illustration] and social practices [the navy constituting seamanship], and "exists" in the generating moments of this constitution" (A. Giddens, *Central Problems in Social Theory* (1979) at 5; see also A. Giddens, *The Constitution of Society* (1984)). Giddens takes issue with Popper's methodological individualism, correctly in our view. According to Popper: "all social phenomena, and especially the functioning of all social institutions, should always be understood as resulting from decisions, actions, attitudes, etc. of human individuals . . . we should never be satisfied by an explanation in terms of so-called 'collectives'" (K. Popper, *II The Open Society and its Enemies* (1945) at 98). Giddens argues that Popper's claim only seems a truism if we understand "individual" to mean something like "human organism" (Giddens, *Central Problems In Social Theory* at 95):

If 'individual', however, means 'agent' in the sense that I have employed in this paper, the situation is quite different . . . Institutions do need 'result' from human agency: but they are the outcome of action only in so far as they are involved recursively as the medium of its production. In the sense of 'institution' therefore, the 'collective' is bound to the very phenomenon of action. The position adopted here can be summarized as follows: 1. Social systems are produced as transactions between agents, and can be analysed as such on the level of strategic conduct. This is "methodological" in the sense that institutional analysis is bracketed, although structural elements necessarily enter into the characterisation of action, as modalities drawn upon to produce interaction. 2. Institutional analysis, on the other hand, brackets action, concentrating upon modalities as the media of the reproduction of social systems. But this is also purely a methodological bracketing, which is no more defensible than the first if we neglect the essential importance of the conception of the duality of structure.

⁵⁴ For example, an investor may sell in anticipation of reduced profits and thereby defeat a causal law that reduced profits will be followed by a fall in share price. As E. H. Carr said, "One reason why history so rarely repeats itself is that the dramatis personae at the second performance have prior knowledge of the *denouement*" (E. H. Carr, *I A History of Soviet Russia* (1969) at 88).

At all of these levels of analysis, reductionism is blinkered because the whole is always more than the sum of the individual parts; in each case there is a need to build upon reductionism to study how the parts interact to form wholes.

In the case of organisations, individuals may be the most important parts, but there are other parts, as is evident from factories with manifest routines which operate to some extent independently of the biological agents who flick the switches. Organisations are systems ("socio-technical" systems, as they have sometimes been described),⁵⁵ not just aggregations of individuals. More crucially, however, organisations consist of sets of expectations about how different kinds of problems should be resolved. These expectations are a residue of the individual expectations of many past and present members of the organisation. But they are also a product of the *interplay* among individuals' expectations which distinguish shared meanings from individuals' views. The interaction between individual and shared expectations, on the one hand, and the organisation's environment, on the other, constantly reproduces shared expectations. In other words, an organisation has a culture which is transmitted from one generation of organisational role incumbents to the next. Indeed, the entire personnel of an organisation may change without reshaping the corporate culture; this may be so even if the new incumbents have personalities quite different from those of the old.

The products of organisations are more than the sum of the products of individual actions; while each member of the board of directors can "vote" for a declaration of dividend, only the board as a collectivity is empowered to declare a dividend. The collective action is thus qualitatively different from the human actions which, in part, constitute it. "Groupthink"⁵⁶ and the risky-shift phenomenon also illustrate how collective expectations can be quite different from the sum of individual expectations. A number of psychological studies suggest that group decision-making can make members of the group willing to accept stupid ideas or hazardous risks⁵⁷ that they would reject if making the same decision alone.

Donald Cressey underpins his questioning of the concept of corporate criminal liability by suggesting that organisations do not think, decide and act; these are all things done by individuals. So we are told that it is a crass anthropomorphism to say that the White House decided upon a course of action, or that the United States declared war. Instead we should say that the President decided and that the President and a majority of members of Congress decided to go to war. If saying that "the White House

⁵⁵ See F. E. Emery, ed., *Systems Thinking* (1969).

⁵⁶ I. L. Janis, *Victims of Groupthink* (1972); I. D. Steiner, "Heuristic Models of Groupthink" in H. Brandstatter, J. H. Davis, and G. Stocker-Kreichgauer, *Group Decision Making* (1982) 503; R. A. Stubbing, *The Defense Game* (1986).

⁵⁷ See I. L. Janis and L. Mann, *Decision Making* (1977) at 423 where however it is also pointed out that there are some studies suggesting that an initially dominant risk-averse point of view within a group may shift an individual away from risk.

decided" connotes that "the White House" would decide in the same way as an individual person, then we are certainly engaging in anthropomorphism. Yet people who decode such messages understand that organisations emit decisions just as individuals do, but that they reach these decisions in rather different ways. They fully accept that "the White House decided" is a simplification given that many actors typically have a say in such decisions. Nevertheless, it is probably less of a simplification than the statement "the President has decided." Indeed it may be fanciful to individualise a collective product. The President may never have turned his mind to the decision; he may have done no more than waive his power to veto it; or he may have delegated the decision totally.

Similarly, it makes more sense to say that the United States has declared war than to say that the President and a majority of Congress have decided to do so. A declaration of war commits many more individuals and physical resources to purposive social action than the individuals who voted for it; it commits the United States as a whole to war, and many individuals outside the Congress participate or acquiesce in the making of that commitment:

A man does not have to agree with his government's acts to see himself embodied in them any more than he has to approve of his own acts to acknowledge that he has, alas, performed them. It is a question of immediacy, of experiencing what the state 'does' as proceeding naturally from a familiar and intelligible 'we'.⁵⁸

The temptation to reduce such decisions to the actions of individuals is widespread, as in the suggestion, once common, that wars be settled by a fist-fight or duel between the protagonist heads of state.

The expression "the White House decided" is a social construction; as a matter of social construction, the same organisational output might be expressed as "the President decided" or "the Administration decided" or "the United States decided" or "the President gave in to the decision of the Congress". Equally, the concept of "deciding" is a social construct (what amounts to "deciding" for some is "muddling through" or perhaps even "ducking a decision" for others). To talk of individual decisions as real and of collective decisions as fictions, as Cressey does, is to obscure the inevitability of social construction at any level of analysis.

In many circumstances the social construction "the White House decided" will be a workable one for analytic purposes. This does not mean that we should treat this as the only accurate description of what happened any more than we should accept "the President decided" as a real description of what happened. Indeed, the social control of corporate crime much depends on how those involved with a crime socially construct the responsible individuals or collectivity. The key to unlocking the control of corporate crime is granting credibility to multiple social constructions

⁵⁸ C. Geertz, *The Interpretation of Cultures* (1973) at 317.

of responsibility and investigating the processes of generating and invoking these social constructions; as Geertz has explained, "[h]opping back and forth between the whole conceived through the parts that actualize it and the parts conceived through the whole that motivates them, we seek to turn them, by a sort of intellectual perpetual motion, into explications of one another."⁵⁹

Social theory and legal theory are thus forced to stake out positions between individualism and holism. The task is to explore how wholes are created out of purposive individual action, and how individual action is constituted and constrained by the structural realities of wholes.⁶⁰ This exploration extends to how responsibility for action in the context of collectivities is socially constructed by those involved as well as by outsiders. Moral responsibility can be meaningfully allocated when conventions for allocating responsibility are shared by insiders and understood by outsiders. Metaphysics about the distinctive, unitary, irreducible agency of individuals tend to obstruct analysis, as do metaphysics about the special features of corporateness. As elaborated in the following section, the moral responsibility of corporations for their actions relates essentially to social process and not to elusive attributes of personhood; as Surber has indicated, the issue is "more a matter of what we consider moral responsibility to be, rather than what sort of metaphysical entities corporations may turn out to be."⁶¹

B. *Methodological individualism and corporate responsibility*

Corporations are often regarded as blameworthy but, according to the logic of methodological individualism, such blameworthiness reduces to blameworthiness on the part of individual representatives or to causal responsibility (as opposed to moral responsibility) on the part of a corporation.⁶² This reductionism is difficult to accept. The fact is that organisations are blamed in their capacity as organisations for causing

⁵⁹ Geertz, *The Interpretation of Cultures* at 69. Geertz (*ibid.*) adds that

All this is, of course, but the now familiar trajectory of what Dilthey called the hermeneutic circle, and my argument here is merely that it is as central to ethnographic interpretation, and thus to the penetration of other people's modes of thought, as it is to literary, historical, philological, psychoanalytic, or biblical interpretation, or for that matter to the formal annotation of everyday experience we call common sense.

⁶⁰ Or, as James S. Coleman has put it (J. S. Coleman, *Individual Interests and Collective Action* (1986) at 266),

... to be able to describe properly the behavior of a corporate actor requires more than to endow it with purposes, goals or interests, and the resources to pursue those interests. It requires a derivation of those interests from the interests of persons whose resources are invested in it, and from its structure, and derivation of its actions in pursuit of those interests from the structure of agents through which it acts.

⁶¹ J. Surber, "Individual and Corporate Responsibility: Two Alternative Approaches" (1983) 2 *Business and Professional Ethics Journal* 67 at 81.

⁶² See S. Wolf, "The Legal and Moral Responsibility of Organizations" in *Nomos XXVII*, J. R. Pennock and J. W. Chapman, eds., *Criminal Justice* (1985) 267 at 275-276. As to the concept of responsibility see further K. G. Shaver, *The Attribution of Blame: Causality, Responsibility, and Blameworthiness* (1985); H. L. A. Hart, *Punishment and Responsibility* (1968) at 210-215.

harm or taking risks in circumstances where they could have acted otherwise. We often react to corporate offenders not merely as impersonal harm-producing forces but as responsible, blameworthy entities.⁶³ When people blame corporations, they are not merely channelling aggression against the ox that gored or some symbolic object.⁶⁴ Nor are they pointing the finger at individuals behind the corporate mantle. They are condemning the fact that the organisation either implemented a policy of non-compliance or failed to exercise its collective capacity to avoid the offence for which blame attaches.

Many instances of corporate blameworthiness have been documented, especially in the context of disasters.⁶⁵ A patent illustration is the finding of the Royal Commission which investigated the crash of an Air New Zealand DC 10 near Mt. Erebus, Antarctica, in 1979.⁶⁶ According to the Commission, the crash resulted primarily from the failure of the flight operations centre at company headquarters to communicate the correct navigational co-ordinates to the flight crew.⁶⁷ The Commission did not engage in any ritualistic slaying of the equipment involved; no radio transmitter or word-processor was ceremoniously disembowelled. Nor was the Commission prepared to blame the personnel in the flight operations centre. Rather, condemnation was directed at "the incompetent administrative airline procedures which made the mistake

⁶³ See further P. A. French, *Collective and Corporate Responsibility* (1984); P. A. French, "Types of Collectivities and Blame" (1975) 56 *The Personalist* 160 at 166; J. Lucas, *The Principles of Politics* (1966) at 281; T. Donaldson, *Corporations and Morality* (1982); D. Copp, "What Collectives Are: Agency Individualism and Legal Theory" (1984) 23 *Dialogue* 249; H. Curtler, ed., *Shame, Responsibility and the Corporation* (1986); L. May, *The Morality of Groups: Collective Responsibility, Group-based Harm and Corporate Rights* (1987). But see Dan-Cohen, *Rights, Persons, and Organizations* chs. 2-3 (corporations analysed not as moral agents but as "intelligent machines"); M. Velasquez, "Why Corporations are not Morally Responsible for Anything they Do" (1983) 3 *Business and Professional Ethics Journal* 1. Compare the analysis advanced in S. J. Stoljar, *Groups and Entities* (1973) ch. 12 that the outstanding feature of corporateness is a common shared fund, and the attempt, *ibid.* ch. 11, to explain corporate criminal liability in terms of pecuniary liability from a common fund. In our view, the use of the criminal law against corporate entities cannot realistically be explained merely in terms of compensation or the extraction of a tax or penalty; account must be taken of the criminal law's capacity for expressing the unwantedness of certain forms of behaviour. See R. Nozick, *Anarchy, State and Utopia* (1974) at 67; R. W. Drane and D. J. Neal, "On Moral Justifications for the Tort/Crime Distinction" (1980) 68 *California Law Review* 398. Compare also the position taken in Hallis, *Corporate Personality: A Study in Jurisprudence* at xxxvii that "[philosophical as opposed to legal] personality can exist only in the individual human being with his single centre of self-consciousness and will". In our view, the moral responsibility or blameworthiness of corporate entities is a complex issue which is most unlikely to be resolved by resort to the question-begging notion of philosophical "personality". As explained in Surber, "Individual and Corporate Responsibility: Two Alternative Approaches"; and R. E. Goodin, "Apportioning Responsibility" (1987) 6 *Law and Philosophy* 167, the starting point is not the attributes of moral personality but the attribution of responsibility and blame.

⁶⁴ Compare S. C. Florman, *Blaming Technology: The Irrational Search for Scapegoats* (1981); W. W. Hyde, "The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times" (1916) 64 *University of Pennsylvania Law Review* 696; J. J. Finkelstein, "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty" (1973) 46 *Temple Law Quarterly* 169.

⁶⁵ In addition to the Mt. Erebus case discussed below see Great Britain, *Report of the Public Inquiry into the Accident at the Hixon Level Crossing* (Cmd. 3706, 1968); Victoria, *Royal Commission into the Failure of the West Gate Bridge* (1971); Great Britain, *Report of the Tribunal to Inquire into the Disaster at Aberfan* (H.L. 316, 1966).

⁶⁶ N.Z., *Report of the Royal Commission to Inquire into the Crash on Mount Erebus, Antarctica of a DC10 Aircraft Operated by Air New Zealand* (1981).

⁶⁷ *Ibid.* at para. 392.

possible."⁶⁸ Air New Zealand, viewed as a collectivity, had failed in this respect to live up to the navigational standards expected of an international airline.

Nonetheless, it may be replied that the phenomenon of corporate blameworthiness is a phantom. It is often said that a corporation cannot possess a guilty state of mind. If this is so, then how can a corporation be blameworthy?⁶⁹

Although it is often said that corporations cannot possess an intention, this is true only in the obvious sense that a corporate entity lacks the capacity to entertain a cerebral mental state. Corporations exhibit their own special kind of intentionality, namely corporate policy.⁷⁰ As Peter French has pointed out, the concept of corporate policy does not express merely the intentionality of a company's directors, officers or employees but projects the idea of a distinctly corporate strategy.⁷¹

It will be objected that a corporation's policies reflect only the current goals of its directors. But that is certainly not logically necessary nor is it in practice true for most large corporations. Usually, of course, the original incorporators will have organized to further their individual interests and/or to meet goals which they shared. [But] even in infancy the melding of disparate interests and purposes gives rise to a corporate long range point of view that is distinct from the intents and purposes of the collection of incorporators viewed individually.⁷²

Blameworthiness requires essentially two conditions: first, the ability of the actor to make decisions;⁷³ secondly, the inexcusable failure of the actor to perform an assigned task.⁷⁴ Herbert Simon has defined a formal

⁶⁸ *Ibid.* at para. 393.

⁶⁹ See Duguit, *Law in the Modern State* at 203-207; Anonymous, "Developments in the Law - Corporate Crime" at 1241.

⁷⁰ See further P. A. French, *Collective and Corporate Responsibility* (1984) ch. 3; P. Nonet, "The Legitimation of Purposive Decisions" (1980) 68 *California Law Review* 263; S. F. Kreimer, "Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction" (1976) 86 *Yale Law Journal* 317. But see Anonymous, "Developments in the Law - Corporate Crime" at 1241, where it is contended that *mens rea* "has no meaning when applied to a corporate defendant, since an organization possesses no mental state". This proposition is based on the false assumption that one should in fact be looking for a humanoid mental state.

⁷¹ French, *Collective and Corporate Responsibility* at 45-46; P. A. French, "The Corporation as a Moral Person" (1979) 16 *American Philosophical Quarterly* 207 at 214. Compare the argument in M. Wolff, "On the Nature of Legal Persons" (1938) 54 *Law Quarterly Review* 494 at 501 that "[w]hat is known as collective will is in reality the result of mutually influenced individual wills".

⁷² See also E. Mitchell, "A Theory of Corporate Will" (1945) 56 *Ethics* 96.

⁷³ In the case of corporate actors, French (*Collective and Corporate Responsibility* ch. 4) identifies "corporate internal decision structures", consisting of (1) organisational responsibility structures (e.g., flowcharts of the organisational power structure), and (2) corporate decision recognition rules (usually embedded in corporate policy).

⁷⁴ The focus is not on the attributes of moral personhood as such (consider the problematic status of Tokugawa in V. Milan, *The Cybernetic Samurai* (1985)) but on the performance of entities in carrying out their prescribed roles. See Surber, "Individual and Corporate Responsibility: Two Alternative Approaches"; Goodin, "Apportioning Responsibility". For an instructive empirical study of role responsibility see C. L. Bosk, *Forgive and Remember: Managing Medical Failure* (1979). It is thus possible to regard corporations as moral actors without going to the extreme of regarding a corporation as a "living" or organic being as depicted by Gierke's organic theory of corporate personality. Compare Hallis,

organisation as a "decision-making structure".⁷⁵ Under this definition, a formal organisation has one of the requirements for blameworthiness that a mob, for example, does not have.⁷⁶ We routinely hold organisations responsible for a decision when and because that decision instantiates an organisational policy and instantiates an organisational decisionmaking process which the organisation has chosen for itself. A decision made by a rogue individual in defiance of corporate policy (including unwritten corporate policy), to undermine corporate goals, or in flagrant disregard of corporate decisionmaking rules, is not a decision for which the organisation is morally responsible.⁷⁷ This is not to say, however, that we cannot hold the organisation responsible if the intention of individuals is other than to promote corporate goals and policies. It may be that two individuals, A and B, hold the key to a particular corporate decision. A decides what to support because of a bribe; her intention is to collect the bribe rather than to advance corporate goals. B decides to support the same course of action out of a sense of loyalty to A, who is an important ally and mentor; his intention is formed from a consideration of bureaucratic politics rather than corporate goals.⁷⁸ Even though the key individuals do not personally intend to further corporate policy by the decision, it may be that they cannot secure the acquiescence of the rest of the organisation with the decision unless they can advance credible reasons as to why the decision will advance corporate policy. If the reasons given are accepted and acted on within the corporate decisionmaking process, then we can hold the corporation responsible irrespective of any games played by individual actors among themselves. It is not just that

⁷⁴ continued

Corporate Personality at 137-165; Wolff, "On the Nature of Legal Persons" at 499-505; K. Goodpaster, "The Concept of Corporate Responsibility" (1983) 2 *Journal of Business Ethics* 1. It is also possible to avoid a priori assumptions of the kind advanced in Velasquez, "Why Corporations are not Morally Responsible for Anything they Do" at 4 (where it is contended that moral agency requires the ability to originate action and that only human beings are capable of forming a plan of action and implementing it). For an extensive review of the implications of different constructs of corporateness see G. Morgan, *Images of Organization* (1986).

Note also that to treat corporations as moral agents for the purpose of allocation of responsibility is not to say that corporations should necessarily be accorded the same rights as human persons (compare the assertions made in Velasquez, "Why Corporations are not Morally Responsible for Anything they Do" at 15-16; D. F. Thompson, "Criminal Responsibility in Government" in *Nomos XXVII*, J. R. Pennock and J. W. Chapman, eds., *Criminal Justice* (1985) 201 at 213); different categories of moral agents warrant different bundles of rights: see C. D. Stone, "A Comment on 'Criminal Responsibility in Government'" in *Nomos XXVII*, J. R. Pennock and J. W. Chapman, eds., *Criminal Justice* (1985) 241 at 250-251. On corporate rights see generally Coleman, *Individual Interests and Collective Action* chs. 14-16; Dan-Cohen, *Rights, Persons, and Organizations* chs. 4-5, 8; Hallis, *Corporate Personality*; W. G. Scott and D. K. Hart, *Organizational America* (1979); McDonald, "The Personless Paradigm"; M. McDonald, "Collective Rights and Tyranny" (1986) 56 *University of Ottawa Quarterly* 115; R. R. Caret, "Communality and Existence: The Rights of Groups" (1983) 56 *Southern California Law Review* 1001; G. Ellard, "Constitutional Rights of the Corporate Person" (1982) 91 *Yale Law Journal* 1641; R. B. Stewart, "Organizational Jurisprudence" (1987) 101 *Harvard Law Review* 371.

⁷⁵ H. A. Simon, *Administrative Behavior* (2d ed. 1965).

⁷⁶ See French, *Collective and Corporate Responsibility* ch. 2. But see R. Manning, "The Random Collectivity as a Moral Agent" (1985) 11 *Social Theory and Practice* 97.

⁷⁷ As to the limits of corporate criminal liability in such instances see *Canadian Dredge & Dock Co. Ltd. v. The Queen* (1985) 19 C.C.C. (3d) 1.

⁷⁸ Compare M. Aoki, *The Co-operative Game Theory of the Firm* (1984).

⁷⁹ See Goodin, "Apportioning Responsibility".

corporate intention (the instantiation of corporate policy in a decision) is more than the sum of individual intentions; it may have little to do with individual intentions.

Blameworthiness also requires an inexcusable failure to perform an assigned task.⁷⁹ Any culture confers certain types of responsibilities on certain kinds of actors. Fathers have responsibilities not to neglect their children. Doctors bear special responsibilities in the giving of medical advice. Just as fathers and doctors can be held to different and higher standards of responsibility by virtue of role or capacity, so it is possible for corporations to be held to different and higher standards of responsibility than individuals because of their role or capacity as organisations.⁸⁰

It is not a legal fiction for the law to hold corporations responsible for their decisions; in all cultures it is common for citizens to do so. When the law adopts these cultural notions of corporate responsibility, it does more than reflect the culture; it deepens and shapes the notions of corporate responsibility already present in the culture. The law can clarify the content of what we expect corporations to be responsible for. Thus, the law can require large chemical companies to be responsible for an inventory of all hazardous chemicals on their premises, a responsibility not imposed on individual householders. More fundamentally, the law is not only presented with the cultural fact that a corporation can be blamed; the law, more than any other institution in the culture is constantly implicated in reproducing that cultural fact. Thus, the Roman law tradition of treating corporate persons as fictions and the Germanic realist theory that law cannot create its subjects (i.e., that corporations are pre-existing sociological persons), both overlook the recursive nature of the relationship between law and culture.⁸¹

Corporations are held responsible for the outcomes of their policies and decisionmaking procedures partly because organisations have the capacity to change their policies and procedures.⁸² Thomas Donaldson has pointed out that, like corporations, a computer conducting a search and a cat waiting to pounce on a mouse are making decisions and are even doing so intentionally.⁸³ We grant moral agency to the corporation and yet not to the cat or the computer for two reasons, according to Donaldson.⁸⁴ First, the corporation, like the individual human being and unlike the cat, can give moral reasons for its decision-making. Second, the corporation has the capacity to change its goals and policies and to

⁸⁰ This perspective is consistent with the model of task-responsibility (as opposed to blame-responsibility) developed in Goodin, "Apportioning Responsibility".

⁸¹ For a discussion of these Roman and German legal traditions see Hallis, *Corporate Personality* at xix-xx, xxxviii-xl, 137-165; M. Wolff, "On the Nature of Legal Persons" (1938) 54 *Law Quarterly Review* 494; French, *Collective and Corporate Responsibility* at 35-37.

⁸² On corporate choice and organisational change see generally M. Warner, *Organizational Choice and Constraint* (1977); J. L. Bower, *When Markets Quake: The Management Challenge of Restructuring Industry* (1986); W. Bennis, *Beyond Bureaucracy* (1966).

⁸³ Donaldson, *Corporations and Morality* at 22.

⁸⁴ *Ibid.* at 30-31.

change the decision-making processes directed at those goals and policies. For these reasons the concept of corporate intentionality defies equation with feline or digital brain waves.

Corporate intentionality does not exhaust the range of relevant fault concepts. In practice, the predominant form of corporate fault is more likely to be corporate negligence than corporate intention. Companies usually are at pains not to display any posture of inattention to legal requirements; on the contrary, compliance policies are de rigueur in companies which have given any thought to legal risk minimisation.⁸⁵

Corporate negligence is prevalent where communication breakdowns occur, or where organisations suffer from collective oversight. Does corporate negligence in such a context amount merely to negligence on the part of individuals? It may be possible to explain the *causes* of corporate wrongdoing in terms of particular contributions of managers and employees, but the attribution of *fault* is another matter.⁸⁶ Corporate negligence does not necessarily reduce to individual negligence. A corporation may have a greater capacity to avoid the commission of an offence and it may be for this reason that a finding of corporate but not individual negligence may be justified. We may be reluctant to pass judgement on the top executives of Union Carbide for the Bhopal disaster (perhaps because of failures of communication within the organisation about safety problems abroad), but higher standards of care are expected of such a company given its collective might and resources.⁸⁷ Thus, where a corporate system is blamed for criminogenic group pressures, that blame is directed not at individual actors but rather towards an institutional set-up from which the standards of organisational performance expected are higher than those expected of any personnel.⁸⁸ As Donaldson has observed in the context of corporate intelligence,⁸⁹

Corporations can and should have access to practical and theoretical knowledge which dwarfs that of individuals. When Westinghouse Inc. manufactures machinery for use in nuclear power generating plants, it should use its massive resources to consider tens of thousands of possible consequences and be able to weigh their likelihood accurately. Which human errors might occur? How are they to be handled? How might espionage occur? How should human systems interface with mechanised ones? . . . Good intentions for Westinghouse are not adequate. Westinghouse must have, in addition to good intentions, superhuman intelligence.

⁸⁵ See e.g., S. Arkin, 1 *Business Crime* (1985) 6A-7; J. Sciamanda, "Preventive Law Leads to Corporate Goal of Zero Litigation, Zero Legal Violations" (1987) 6(1) *Preventive Law Reporter* 3; N. Bruns, "Corporate Preventive Law Programs" (1985) 4 *Preventive Law Reporter* 30.

⁸⁶ See further Shaver, *The Attribution of Blame: Causality, Responsibility, and Blameworthiness* ch. 5.

⁸⁷ See further C. Walter and E. P. Richards, "Corporate Counsel's Role in Risk Minimization: Lessons from Bhopal" (1986) 4 *Preventive Law Reporter* 139.

⁸⁸ See D. Cooper, "Responsibility and the 'System'" in French, *Individual and Collective Responsibility* 81.

⁸⁹ Donaldson, *Corporations and Morality* at 125.

Corporations, it may thus be argued, can be blamed and held morally responsible for intentional or negligent conduct. Michael McDonald has gone further by arguing that organisations are paradigm moral agents:

Not only does the organization have all the capacities that are standardly taken to ground autonomy—vis., capacities for intelligent agency—but it also has them to a degree no human can. Thus, for example, a large corporation has available and can make use of far more information than one individual can. Moreover, the corporation is in principle 'immortal' and so better able to bear responsibility for its deeds than humans, whose sin dies with them⁹⁰

Granted, corporations lack human feelings and emotions, but this hardly disqualifies them from possessing the quality of autonomy.⁹¹ On the contrary, the lack of emotions and feelings promote rather than hinder considered rational choice and in this respect the corporation may indeed be a paradigm responsible actor.⁹²

There are other difficulties with the view that corporate responsibility amounts to merely an aggregation of individual responsibility. Repeatedly in organisational life, individual actors contribute to collective decision-making processes without being conscious of the totality of that process—each individual actor is a part of a whole which no one of them fully comprehends. Indeed, even that part which an individual contributes may be unconscious. Consider the predicament of the campaigner for clearer writing who is concerned at how children learn excessive use of the passive voice when they should use the active voice. Our activist wants to allocate blame for the way that children leave school with ingrained habits of passive voice overuse. Empirically, she may find that in general neither students nor teachers have a conscious understanding of what it means to use the passive versus active voice. Unconsciously, they understand how to choose between them—more precisely, they have "practical consciousness" but not "discursive consciousness" of the choice.⁹³ The lack of intentional individual action in making these choices makes the blaming of teachers or students problematic. Yet it might be quite reasonable for blame to be directed at the English Curriculum Branch of the Education Department. Conscious awareness of the distinction between the active and passive voice is widespread throughout the Branch because it is, after

⁹⁰ McDonald, "The Personless Paradigm" at 219-220. But contrast R. Niebuhr, *Moral Man and Immoral Society* (1932) at 257-277.

⁹¹ Compare the contention in Wolf, "The Legal and Moral Responsibility of Organizations" at 279 that a necessary condition of moral agency is the possession of the emotional capacity to be moved by moral concerns (i.e. organisations are not moral agents because they lack souls).

⁹² We are indebted here to the analysis in McDonald, "The Personless Paradigm" at 219-220. Compare J. Ladd, "Morality and the Ideal of Rationality in Formal Organizations" (1970) 54 *Monist* 488 (where it is urged that corporations are goal-oriented to the point of not being moral agents).

⁹³ See Giddens, *Central Problems in Social Theory*; Giddens, *The Constitution of Society*.

all, the job of the Branch to attend to such matters, and to raise the consciousness of teachers and students. It may thus make sense to lay collective blame for social action produced unintentionally, even unconsciously, by all the individual actors. Apart from the justice our campaigner may perceive in blaming the English Curriculum Branch rather than the students or teachers, she might conclude that change is more likely to be effected by collective blame. This raises the issue of collective action and deterrent efficacy, as discussed in the next section.

IV Deterrence, Corporate Conduct, and Responsibility

Individualism depends not only on the philosophical foundation of methodological individualism but also on certain assumptions about deterrence and retribution, the two polestars in the galaxy of theories of punishment. The assumptions made about deterrence are essentially these:

- A. only human agents are capable of responding to the deterrent threat of punishment;
- B. in the absence of any cogent theory of corporate action there is no warrant for punishing corporate entities;
- C. corporations are not wrongdoers to be punished but entities to be reformed;
- D. deterrence of corporate crime can be sufficiently achieved by punishing the individual persons responsible; and
- E. it is impossible to punish a corporation in an effective manner.

Are these assumptions sound?

A. *Deterrence and choice*

Criminal liability, it is often said, presupposes human choice, a premise from which the conclusion has been drawn by Lederman that criminal liability should be exclusively individual:⁹⁴

Penal law, being a prescriptive branch of law, purports to direct the behaviour of individuals in accordance with society's interests and values. A prerequisite for the achievement of this goal is transmitting the criminal law dictates to an addressee capable of grasping the message, namely the human consciousness. . . . the justification for punishing violators rests mainly on the assumption that it will deter future conscious violation by the transgressor and others. . . . This cohesive link within criminal law, between the commanding authority and the conscious individual who alone is susceptible to guidance, is threatened when confronted with the imputation of criminal liability to corporations, which by their very nature lack any consciousness.

⁹⁴ Lederman, "Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle" at 296.

To similar effect, Donald Cressey has asserted that "even depicting the horrors of hellfire and damnation which await evil persons . . . can have no influence on fictitious persons who do not have the psychological make-up of real ones".⁹⁵

This line of argument is based on a non-sequitur. Even if one accepts the methodological individualist's position that corporate choice reduces to the choice of individual persons, it does not follow that deterrent punishment should be directed exclusively at individual persons. Punishment directed at a corporate entity typically seeks to deter a wide range of individual associates from engaging in conduct directly or indirectly connected with the commission of an offence. Individual persons who are directly implicated in offences may be difficult or impossible to prosecute successfully, and those who influence the commission of offences indirectly may fall outside the scope of liability for complicity or other ancillary heads of criminal liability.⁹⁶ The punishment of collectivities with a view to inducing compliance with the law by human agents is thus consistent with a deterrent hypothesis based on the human calculation of costs versus benefits; the threat of corporate punishment can be a substitute for the threat of individual punishment when the legal system is unable to impose punishment directly on the personnel responsible.⁹⁷

A deterrence hypothesis that focuses exclusively on the preferences of individual associates of an organisation is not fully rational.⁹⁸ Where collectivities act in accordance with a rational actor model,⁹⁹ prevention of offences committed on behalf of a collectivity requires that collective incentives to engage in the commission of offences be countered by collective punishment costs sufficient to influence a law-abiding collective choice. The profit or enhancement of power that a company may stand to gain from the commission of an offence is countered by the threat of punishing the corporate entity; potential collective benefit is negated by potential collective cost. Compare collective deterrence in the domain of foreign policy. Following Cressey,¹⁰⁰ we could adopt the view that individuals decide to go to war, nations don't. Instead of threatening nuclear or commercial retaliation against a nation should it invade another, we could threaten to find out who were the political actors who lobbied for the invasion and to send assassination squads after them. This policy

⁹⁵ Cressey, "The Poverty of Theory in Corporate Crime Research" at 35.

⁹⁶ See references *infra* nn. 120-141.

⁹⁷ See e.g., K. Hawkins, *Environment and Enforcement: The Social Definition of Pollution* (1984) at 146.

⁹⁸ Compare M. Olson, Jr., *The Logic of Collective Action* (1965).

⁹⁹ A rational actor model of corporate conduct is of course a simplification and misleading if viewed as an exclusive guide to policy: see S. H. Kriesberg, "Decisionmaking Models and the Control of Corporate Crime" (1976) 85 *Yale Law Journal* 1091; J. Byrne and S. M. Hoffmann, "Efficient Corporate Harm: A Chicago Metaphysic" in B. Fisse and P. A. French, eds., *Corrigible Corporations and Unruly Law* (1985) ch. 6; R. A. Kagan and J. T. Scholz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies" in K. Hawkins and J. M. Thomas, eds., *Enforcing Regulation* (1984) 67.

¹⁰⁰ Cressey, "The Poverty of Theory in Corporate Crime Research".

option is not usually commended¹⁰¹ largely because of an enduring belief in the capacity of groups to replace slain leaders. If collective deterrence is a fiction, it is a fiction on which strategic analysts in the United States and the Soviet Union have based the future of the world.¹⁰²

It is quite possible to deter by damaging collective interests even when individual members of an organisation are not personally affected. In an earlier study of 17 adverse publicity crises experienced by large organisations, we concluded that adverse publicity surrounding allegations of corporate crime was an effective deterrent, but not mainly because of fear of the financial consequences of the publicity.¹⁰³ Companies value a good reputation for its own sake, just as do universities, sporting clubs and government agencies. Individuals who take on positions of power within such organisations, even if they as individuals do not personally feel any deterrent effects of shaming directed at their organisation, may find that they confront role expectations to protect and enhance the repute of the organisation. For example, an academic might be indifferent to the reputation of her university, indeed she might do more to snipe at the incompetence of the administration than to defend it publicly. But, if appointed as Dean of a Faculty, she confronts a new role expectation to protect the university's reputation. She may do this diligently, not because of the views she brought to the job as an individual member of the university community, but because she knows what the position requires, and she wants to be good at her task. Thus, in organisations where individuals are stung very little by collective deterrents, deterrence can still work if those in power are paid good salaries on the understanding that they will do what is necessary to preserve the reputation of the organisation or to protect it from whatever other kind of collective adversity is threatened.

B. *Deterrence and theories of corporate action*

It is sometimes suggested that insufficient is known about corporate behaviour to justify the punishment of corporations or the design of sanctions against companies. For instance, Cressey¹⁰⁴ has maintained that because it is not possible to account for corporate conduct in terms of biological or psychological characteristics, it is impossible to develop a theory of crime causation for corporate crime; "[b]ecause corporations cannot intend actions, none of their criminality can be explained."¹⁰⁵

¹⁰¹ There are examples of attempts at direct individual deterrence in foreign policy, but spectacularly successful instances do not spring to mind. Take the U.S. bombing raid on Tripoli: Colonel Gadhafi's home was targeted and his adopted daughter killed as result of the attack.

¹⁰² See e.g., T. C. Schelling, *The Strategy of Conflict* (1963); T. C. Schelling, "The Strategy of Inflicting Costs" in R. M. McKean, ed., *Issues in Defense Economics* (1967) 105-127; A. Kenny, *The Logic of Deterrence* (1985).

¹⁰³ Fisse and Braithwaite, *The Impact of Adverse Publicity on Corporate Offenders*.

¹⁰⁴ See e.g., Cressey, "The Poverty of Theory in Corporate Crime Research".

¹⁰⁵ *Ibid.* at 48. Cressey's focus on the importance of managerial fraud at the conclusion of his paper neglects the structural considerations which often allow such fraud to occur in larger organisations. In a complex case such as the E. F. Hutton banking fraud, discussed earlier, the corporate conditions which gave rise to pervasive fraud almost certainly require corporate as well as individual liability in order to achieve a pervasive deterrent response.

This objection carries theoretical caution to an extreme.¹⁰⁶ If the objection is accepted, then even individual criminal liability for corporate malfeasance should be held in abeyance until a watertight theory of corporate action is found: if we lack an adequate theory of corporate action we also lack an adequate theory of human action within corporations. Rather than lapsing into nihilism or incrementalism,¹⁰⁷ it is worth considering the implications of one leading analysis of corporate criminal action, namely Simeon Kriesberg's modelling of the nature of decision-making within organisations.¹⁰⁸

Kriesberg's analysis, which is based substantially upon Graham Allison's *Essence of Decision: Explaining the Cuban Missile Crisis* (1971), specifies three models of corporate decisionmaking. Model I, the Rational Actor Model, postulates a unitary, rational decisionmaking process derived from neoclassical economic theories of the firm; this is the model of rational value maximisation. Model II, the Organisational Process Model, describes the corporation as "a constellation of loosely allied decision-making units (e.g., a marketing group, a manufacturing division, a research and development staff), each with primary responsibility for a narrow range of problems, the resolution of which is governed by standard operating procedures, established by written or customary organisational rules".¹⁰⁹ Model III, the Bureaucratic Politics Model, views corporate decisionmaking 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".¹¹⁰ Kriesberg has maintained that these three models, though not intended to be exhaustive, have varying implications for the design of corporate and individual criminal sanctions.

Model I implies that sanctions imposed upon the decisionmaking unit, the corporate entity, are relevant and efficacious if they relate to the particular values (such as profit, prestige, and stability) which rational corporate actors seek to maximise. Model II suggests that liability should

¹⁰⁶ Compare the rich and constructive response to theoretical diversity in Morgan, *Images of Organization*. And recollect Holmes: "Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge" (*Abrams v. United States*, 250 U.S. 616 at 630 (1919) per Holmes J.).

¹⁰⁷ Compare D. Vaughan, *Controlling Unlawful Organizational Behavior: Social Structure and Corporate Misconduct* (1983) at 105-112 (evolutionary programme of reduction of transactional complexity urged rather than programme calculated to exploit the potential deterrent capacity of non-monetary sanctions against corporations). For a critique of atheoretical incrementalism see R. E. Goodin, *Political Theory and Public Policy* (1982) ch. 2.

¹⁰⁸ Kriesberg, "Decisionmaking Models and the Control of Corporate Crime".

¹⁰⁹ The relevance of standard operating procedures ("SOPs") as an important factor in the deterrence of corporate crime is well-illustrated in A. Hopkins, *The Impact of Prosecutions under the Trade Practices Act* (1978), an empirical study of the reactions of nineteen companies convicted and fined for misleading advertising offences under the Trade Practices Act 1974 (Cth.). Hopkins investigated whether the commission of offences was attributable to defective SOPs, and, if so, whether the defect was corrected after conviction. The offences committed by fifteen of the companies were attributed largely to defective checking and communications procedures. Of these fifteen companies, nine rectified their defective procedures. Of the remaining six companies, two made minor changes which were not entirely satisfactory, two made no changes whatsoever, and two refused to supply information.

¹¹⁰ Kriesberg, "Decisionmaking Models and the Control of Corporate Crime" at 1103.

be imposed upon the individual personnel in a position to enact and supervise standard operating procedures. Under this Model, however, the decisionmaker is neither a corporation nor an individual, and the effects of sanctioning the corporation or certain members of its subunits are uncertain. Model III, the Bureaucratic Politics Model, strongly implies the need for sanctions against individual participants in key decision-making, with sanctions against the corporate entity providing only a secondary constraint.

What policy guidance should the lawmaker derive from such an analysis? Usually it would be impossible or impractical to pinpoint which model most closely corresponds to the realities of decisionmaking within a particular corporation, and hence these different implications are of limited practical significance. The prime need is for sanctions capable of managing uncertainty by reflecting the implications of the different models. Take, as one example, the punitive injunction, as discussed below.¹¹¹ Injunctive sanctions could be directed at individual actors within an organisation, regardless of what decisionmaking pattern predominates. Additionally, punitive injunctions against corporate offenders would be consistent with the model which views the corporation as a value-maximising rational actor. In other words, corporate as well as individual sanctioning effects could be achieved simultaneously by means of the one versatile sanction.

Although there may be no generally accepted theory of corporate action to apply when formulating criminal justice policy, we can at least devise multi-purpose sanctions like the punitive injunction and thereby hedge our theoretical bets.

C. Deterrence and corporate reform

The view has been advanced that punishment relates to individual wrongdoing whereas reform is the appropriate method of preventive control for corporations. A bold expression of this viewpoint is Owen Fiss' rejection of the concept of wrongdoing in the context of governmental bureaucracies:¹¹²

The concept of wrongdoer is highly individualistic. It presupposes personal qualities: the capacity to have an intention and to choose. Paradigmatically, a wrongdoer is one who intentionally inflicts harm in violation of an established norm. In the structural context, there may be individual wrongdoers, the police officer who hits the citizen, the principal who turns away the black child at the schoolhouse door, the prison guard who abuses the inmate; they are not, however, the target of the suit. The focus is on a social condition, not incidents of wrongdoing, and also on the bureaucratic dynamics that produce that condition. In a sense, a structural suit is an *in rem* proceeding

¹¹¹ See text *infra* at nn. 151-162.

¹¹² O. Fiss, "The Supreme Court 1978 Term—Foreword: The Forms of Justice" (1979) 93 *Harvard Law Review* 1 at 22-23.

where the res is the state bureaucracy. The costs and burdens of reformation are placed on the organization, not because it has "done wrong", in either a literal or metaphorical sense, for it has neither an intention nor a will, but because reform is needed to remove a threat to constitutional values posed by the operation of the organization.

This reconstruction lacks substance. First, as explained earlier, organisations are capable of manifesting intent in the form of corporate policy.¹¹³ Secondly, the blameworthiness of organisational behaviour can be assessed by reference to patterns of behaviour and systems of control; corporate offences are now typically defined in a way which focusses upon incidents of wrongdoing, but that focus could well be changed¹¹⁴ and indeed there are already some offences which in effect proscribe certain unwanted patterns of corporate behaviour (e.g., unlawful manipulation of the stock market).¹¹⁵ Thirdly, the fact is that organisations are often held blameworthy by the community which in consequence demands corporate reform; the ordinary reaction of people to avoidable corporate disasters is that the company involved can reform and that the event occurred because the company inexcusably failed to achieve the minimum standards expected of an organisation in that position.¹¹⁶

None of this is to deny that civil rather than criminal process is typically the less drastic and more effective avenue for achieving compliance with the law through organisational change.¹¹⁷ The point is that, contrary to individualistic preconceptions, the corporate condition does not preclude corporations from being labelled and punished as wrongdoers. Moreover, there is no reason to suppose that corporations must be punished negatively (e.g., fines, dissolution, temporary bans on activity) as opposed to positively in a manner geared to organisational reform. Indeed, where institutional reform by a corporation is necessary, the blameworthiness of a corporate defendant might well justify the use of a punitive injunction to insist on institutional reforms which, by reason of the element of punishment, are more exacting than those warranted by way of merely remedial injunctive relief.¹¹⁸

¹¹³ See text *supra* at nn. 70-84.

¹¹⁴ See Braithwaite, *Corporate Crime in the Pharmaceutical Industry* at 309-310.

¹¹⁵ See Securities Industry (N.S.W.) Code ss. 123-124.

¹¹⁶ Consider e.g., the pungent response in newspapers to the English Channel ferry disaster, especially in light of the finding of an official inquiry that the ferry company, Thomson Thoresen, was comprehensively "infected with the disease of sloppiness"; see U.K., Department of Transport, *mv Herald of Free Enterprise* (1987) Report of Court No. 8074, para. 14.1; "The Zeebrugge Disaster—Crime or Negligence" (1987) 137 *New Law Journal* 959; "Ferry Verdict Clears Way for Prosecutions: Manslaughter Charges to be Considered by DPP" *The Times*, 9 Oct. 1987, p. 1; H. Young, "Where Does the Buck Stop?" *Guardian Weekly*, 18 Oct. 1987, 1.

¹¹⁷ See Hawkins, *Environment and Enforcement* chs. 6-10; Grabosky and Braithwaite, *Of Manners Gentle* at 190-194; J. Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985) ch. 5; T. K. McGraw, *Prophets of Regulation* (1984) at 25-31; K. A. Ayers, Jr. and J. Frank, "Deciding to Prosecute White-Collar Crime: A National Survey of State Attorneys General" (1987) 4 *Justice Quarterly* 425.

¹¹⁸ For example, in a context such as the English Channel ferry disaster, the corporations concerned might be required to research, design, and implement bow-door safety devices and checking systems which improve upon state-of-the-art technology or compliance methods.

D. Deterrence and the limits of individual liability

The more acute deterrent angle of Individualism is the claim that deterrence of corporate crime can be sufficiently achieved by punishing the individual persons responsible for offences. This claim, which is difficult to square with the development of corporate criminal liability at common law or the use of monetary penalties against companies under statute,¹¹⁹ underestimates the difficulties of enforcing individual liability.¹²⁰ These difficulties include: enforcement overload; opacity of internal lines of corporate accountability; expendability of individuals within organisations; corporate separation of those responsible for the commission of past offences from those responsible for the prevention of future offences; and corporate safe-harboring of individual suspects.¹²¹

Attention has repeatedly been drawn to the time-consuming nature of corporate crime investigations.¹²² As two U.S. federal prosecutors summed up the position,

economic crimes are far more complex than most other federal offenses. The events in issue usually have occurred at a far more remote time and over a far more extensive period. The "proof" consists not merely of relatively few items of real evidence but a large roomful of often obscure documents. In order to try the case effectively, the Assistant United States Attorney must sometimes master the intricacies of a sophisticated business venture. Furthermore, in the course of doing so, he, or the agents with whom he works, often must resolve a threshold question that has already been determined in most other cases: Was there a crime in the first place?¹²³

If anything, this understates the difficulties which arise. Prosecutors are confronted with what amounts to a network of complexities: tortuous

¹¹⁹ See Brickey, *Corporate Criminal Liability* ch. 2; Elzinga and Breit, *The Antitrust Penalties*. Recent proposals for codification of the criminal law in England and Canada echo the common law in its recognition of corporate criminal liability as a general principle: Law Commission, Report No. 143, *Codification of the Criminal Law* (1985) 94-97; Law Reform Commission of Canada, *Recodifying Criminal Law* (1986) 22-24.

¹²⁰ See generally Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct" at 30-31; Clinard and Yeager, *Corporate Crime* ch. 12.

¹²¹ Other considerations include the vigour and resources with which prosecutions of corporate officers are typically defended. See further K. Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* (1985). For an instructive review of the difficulties encountered in the reckless homicide prosecution against the Ford Motor Company in the Pinto case see Cullen, Maakestad, and Cavender, *Corporate Crime under Attack* chs. 5-6.

¹²² See e.g., B.N.A., *White-Collar Justice* (1976) at 3-4; R. W. Ogren, "The Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle against White-Collar Crime" (1973) 11 *American Criminal Law Review* 959 at 981-988.

¹²³ S. V. Wilson and A. H. Matz, "Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods" (1977) 14 *American Criminal Law Review* 651, at 651. As one U.S. Federal investigator reflected: "When you walk into a U.S. Attorney's office with three tons of records, you know you have just lost his attention" (Inspector General of the Department of Defense, J. H. Sherick, as quoted in C. J. Loomis, "White-Collar Crime" *Fortune*, 22 July 1985, 91).

legislation, intricate accounting practices, convoluted organisational accountability, amnesia among witnesses, and jurisdictional complications.

A graphic example of the labour-intensiveness of corporate crime investigation emerged from the work of the special review committee which investigated questionable payments made by McDonnell Douglas to sell planes outside the U.S. from 1969 to 1978.¹²⁴ The head of the committee conducted interviews over an eighteen-month period, and toted up 3,250 hours of billable time. Added to that effort, 15,000 hours were expended by his law firm, and Price Waterhouse logged a further 43,000 hours. These efforts were just a preliminary to the subsequent Department of Justice investigation.

It is also notorious that enforcement staff are thin across the ground.¹²⁵ This issue was aired at some length in 1978 during hearings conducted by the U.S. Senate Subcommittee on Crime under the chairmanship of Senator Conyers. Concerned about the adequacy of the Justice Department's initiatives against white-collar crime, Senator Conyers put this question:

The Department of Defense has 4,000 investigators and 6,000 auditors, and as we know, some planes do not fly and some ships still do not float. Let us face it, we are talking about only 6 per-cent of the Department of Justice's resources going into this incredibly complex legal prosecutorial effort against white-collar crime that is international in dimension. Can you give me some assurances that you can even just keep track of the files and the cases as they come in, much less follow them through to any conclusion? We seem to be enormously outnumbered.¹²⁶

Individualism also presumes that accountability within companies can be readily determined. However, organisations have a well-developed capacity for obscuring internal accountability if confronted by outsiders.¹²⁷ Regulatory agencies, prosecutors and courts find it difficult or even impossible to unravel lines of accountability after the event because of the incentives personnel have to protect each other with a cover-up. As one of the authors concluded from an earlier study:

... companies have two kinds of records: those designed to allocate guilt (for internal purposes), and those for obscuring guilt (for presentation to the outside world). When companies want clearly defined accountability they can generally get it. Diffused account-

¹²⁴ "McDonnell Investigator: Interviews for 1½ Years" *New York Times*, 31 July 1980, D2.

¹²⁵ See e.g., Australia, Trade Practices Commission, *Annual Report 1980-1981* (1981) ch. 1; A. Bequai, *White Collar Crime: A 20th Century Crisis* (1978) at 148-150; S. Box, *Power, Crime, and Mystification* (1983) at 45-46; "Swamped SEC is Forced to Retreat in Enforcement of Securities Laws" *Wall Street Journal*, 27 Dec. 1985, 11.

¹²⁶ U.S., H.R., Committee on the Judiciary, Subcommittee on Crime, *White-Collar Crime, Hearings*, 95th Cong., 2d Sess., 1978, 100.

¹²⁷ The Challenger disaster is one spectacular instance. See M. McDonnell, *Challenger: A Major Malfunction—A True Story of Politics, Greed, and the Wrong Stuff* (1987).

ability is not always inherent in organizational complexity; it is in considerable measure the result of a desire to protect individuals within the organization by presenting a confused picture to the outside world. One might say that courts should be able to pierce this conspiracy of confusion. Without sympathetic witnesses from within the corporation who are willing to help, this is difficult. In the pharmaceutical industry, at least, the indictment of senior executives for corporate crimes has almost invariably been followed by their acquittal, even when the corporation is convicted.¹²⁸

Outside investigators face many handicaps in getting to the truth. They have a rather limited capacity to arrive unannounced or to inspect a workplace without arousing suspicion. Outsiders can rarely match the technical knowledge insiders have of unique production or documentation processes. Internal investigators' specialised knowledge of their employer's product lines make them more effective probers than outsiders who are more likely to be generalists. Their greater technical capacity to spot problems is enhanced by a greater social capacity to do so. Inside compliance personnel are more likely than outsiders to know where problems of illegality have occurred previously, and to be able to detect cover-ups.¹²⁹ This is rather like the difference between the capacity of government inspectors and that of internal compliance staff in the pharmaceutical industry to get answers:

Our instructions to officers when dealing with FDA inspectors is to only answer the questions asked, not to provide any extra information, not to volunteer anything, and not to answer any questions outside your area of competence. On the other hand we [the corporate compliance staff] can ask anyone anything and expect an answer. They are told that we are part of the same family, and unlike the government, we are working for the same final objectives.¹³⁰

The response of the present law to the difficulties of enforcement overload and opacity of organisational lines of accountability is to extend criminal liability to corporate entities in the hope of spurring companies to undertake internal disciplinary action and impose individual accountability as a matter of private policing. Monetary sanctions provide no guarantee that a corporate defendant will in fact take disciplinary action though in theory they are supposed to provide sufficient pressure to achieve that aim.¹³¹

Another factor which tends to limit the deterrent efficacy of individual criminal liability for corporate crime is the expendability of

¹²⁸ Braithwaite, *Corporate Crime in the Pharmaceutical Industry* at 324.

¹²⁹ Consider the difficulty of unravelling accountability in a case such as *Brown v. Riverstone Meat Co. Pty. Ltd.* (1985) A.T.P.R. 40-576 (the company was prosecuted on 24 counts; no employees were prosecuted).

¹³⁰ Braithwaite, *Corporate Crime in the Pharmaceutical Industry* at 137.

¹³¹ See references *supra* nn. 17-24.

individuals within organisations.¹³² It is a truism that bureaucracies have greater staying power than their human functionaries; as Kenneth Boulding put it, the corporation "marches on its elephantine way almost indifferent to its succession of riders."¹³³ The risk thus arises of rogue corporations exploiting their capacity to toss off a succession of individual riders and, if necessary, to indemnify them in some way.¹³⁴ The continuing relevance of the risk of personnel expendability is evident from the reported reaction of Sir Jeffrey Stirling, Chairman of Peninsular and Oriental Steam Navigation Company, to the Zeebrugge ferry disaster: "Responsibility lies squarely with those on board who had professional responsibility to ensure that the ship sailed safely".¹³⁵ This assignment of responsibility contrasts starkly with the finding of an official inquiry that the management of the ferry company, Thomson Thoresen (a subsidiary of P & O) had been at fault in failing to ensure adequate standard operating procedures on board the ferry:¹³⁶ "All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness". In such a case corporate liability provides a multi-spectrum antidote which proceedings against employees would not necessarily achieve.

Consider also the extreme tactic adopted by some companies of setting up internal lines of accountability so as to have a "vice-president responsible for going to jail."¹³⁷ By offering an attractive sacrifice the hope is that prosecutors will feel sufficiently satisfied with their efforts to refrain from pressing charges against the corporation or members of its managerial elite. Corporate criminal liability hardly avoids this risk of scapegoating but alleviates it by imposing responsibility on the corporate ruler.

The deterrent efficacy of individual criminal liability for corporate crime is further limited by the organisational divorce of responsibility for past offences from responsibility for future compliance. Deterrence of unlawful behaviour on behalf of organisations depends not merely upon threat-induced abstinence from illegality but upon threat-induced catalysis

¹³² C. D. Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (1975) at 66; Clinard and Yeager, *Corporate Crime* at 298, Elzinga and Breit, *The Antitrust Penalties* at 38-40.

¹³³ K. Boulding, *The Organizational Revolution* (1968) at 139. See also Coleman, *The Asymmetric Society* at 26-27 ("The irrelevance of persons").

¹³⁴ See generally Stone, *Where the Law Ends* at 64-66; Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct" at 45-56; I. M. Ramsay, "Liability of Directors for Breach of Duty and the Scope of Indemnification and Insurance" (1987) 5 *Company and Securities Law Journal* 129; Kraakman, "Corporate Liability Strategies" at 861-62; Note, "Indemnification of the Corporate Official for Fines and Expenses Arising from Criminal Antitrust Litigation" (1962) 50 *Georgetown Law Journal* 566.

¹³⁵ As reported in the scathing article, Young, "Where Does the Buck Stop?" *Guardian Weekly*, 18 Oct. 1987, 1; compare the reply of Stirling, *Guardian Weekly*, 25 Oct. 1987, 2.

¹³⁶ U.K., Department of Transport, *mv Herald of Free Enterprise* (1987) Report of Court No. 8074, para. 14.1.

¹³⁷ Braithwaite, *Corporate Crime in the Pharmaceutical Industry* at 308.

of preventive controls.¹³⁸ The personnel held responsible for a past offence, however, are not necessarily in a position to institute effective preventive action within an organisation. They may be moved elsewhere in the organisation (perhaps to some corporate Siberia, e.g., secondment to a university) or deprived of the power or status necessary to mount a preventive campaign.¹³⁹ Accordingly, there is reason to doubt the wisdom of a deterrent strategy which focusses merely upon individuals responsible for the commission of offences in the past. By contrast, corporate liability provides an incentive for the management of the day to undertake responsive organisational change whatever the proximity or remoteness of that management's connection with the events giving rise to prosecution.

Nor should it be forgotten that corporations are sometimes willing and able to provide individual suspects with a safe harbour. Suspected personnel may lie beyond the reach of extraterritorial process, or, where within reach, may nonetheless be hard to bring to justice.¹⁴⁰ An officer of an interstate or transnational company may authorize or instigate an offence without setting foot within the local jurisdiction or, after committing an offence locally on behalf of a corporation, may be transferred to an interstate or overseas branch or affiliate. In the former case, the officer's conduct may be immune because no act has been committed against local law, or it may not be covered by extradition arrangements. If the offence is extraditable, and if the offender can be extradited, the costs and resources involved in pursuing proceedings are too great to be incurred very often. If the offence is triable summarily, the officer usually may be prosecuted and tried in absentia, but it is not always possible to obtain enough evidence to secure a conviction or to enforce a sentence effectively. Where these impediments arise and a local corporation can be held liable for the relevant conduct, corporate liability provides a convenient alternative. By holding the local corporation liable, internal discipline may be stimulated abroad as well as locally; in effect, the corporation can be used as a medium for international administration of the criminal law.¹⁴¹

In assessing these limitations of individual criminal liability in the context of the deterrence of corporate crime account should also be taken of the inequalitarian implications of a crime control policy which focusses on individual wrongdoers.¹⁴² If scarce enforcement resources are taken

¹³⁸ See Fisse, "Reconstructing Corporate Criminal Law" at 1159-1160.

¹³⁹ Jail is the most obvious possibility. However, some exceptional entrepreneurs have been known to run their businesses successfully from behind bars. See e.g., U. Horster-Philipps, *Im Schatten Des Grossen Geldes* (1985) 80-83 (Friedrich Flick launched his post-Second World War commercial empire from Landsberg jail while doing time as a convicted war criminal; meetings with key managers posing as legal advisers were held during visiting hours).

¹⁴⁰ See generally American Law Institute, *Model Penal Code, Tentative Draft No. 4* (1955) at 150-151; Canada, Law Reform Commission, *Criminal Responsibility for Group Action* at 30; Fisse, "The Social Policy of Corporate Criminal Responsibility" at 380-382.

¹⁴¹ Compare S. Timberg, "The Corporation as a Technique of International Administration" (1952) 19 *University of Chicago Law Review* 739.

¹⁴² See generally J. Braithwaite, "Paradoxes of Class Bias in Criminal Justice" in H. Pepinsky, ed., *Rethinking Criminology* (1982) 61.

away from the imposition of corporate liability and reallocated to the pursuit of individual defendants the overall effect is likely to be a relaxation of the social control of corporate crime. Resources would be invested in the costly, resource-intensive task of chasing individuals instead of easing the problem by proceeding against corporations where it is difficult to mount effective prosecutions against individuals. Even if there were enough enforcement resources to implement a crime control strategy of Individualism, it would not follow that those resources should be used exclusively in the pursuit of individual criminal liability. The potential gain would be a minimal increase in the numbers of individuals brought to justice at the expense of losing the indirect but multiple sanctioning effects of corporate liability. Granted, the odds might be altered by reducing the substantive and procedural protections now enjoyed by defendants in the criminal process (e.g., by departing from subjective fault requirements,¹⁴³ or by generally inverting the persuasive burden of proof¹⁴⁴) but this would be a drastic step and one rarely taken seriously. A more commendable approach is to adopt a mixed strategy, retaining corporate as well as individual liability, and improving the capacity of corporate liability to achieve accountability at the level of internal discipline. To this last-mentioned prospect we shall return.¹⁴⁵

E. *Deterrence and sanctions against corporations*

The Individualist belief that it is impossible to punish corporations effectively¹⁴⁶ rests on the ground that corporations can be punished only by means of a fine or monetary penalty.¹⁴⁷ It is then pointed out that monetary sanctions are unlikely to make a deterrent impact on managers unless imposed at so high a level as to have unacceptable spillover effects on shareholders, workers, consumers and perhaps even the general economy.¹⁴⁸ However, it seems short-sighted to suppose that more suitable forms of sanction cannot be devised.¹⁴⁹

¹⁴³ Compare Proceeds of Crime Act 1987 (Cth.) ss 81, 82, 85.

¹⁴⁴ Compare Taxation Administration Act 1953 (Cth.) s. 8Y.

¹⁴⁵ See Section V.

¹⁴⁶ See e.g., Lederman, "Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle"; J. W. Doig, D. E. Phillips, and T. Manson, "Deterring Illegal behavior by Officials of Complex Organizations" (1984) 3 *Criminal Justice Ethics* 27.

¹⁴⁷ See e.g., Anonymous, "Developments in the Law - Corporate Crime" at 1365-1368; Posner, "An Economic Theory of the Criminal Law" at 1228-1229; Byam, "The Economic Inefficiency of Corporate Criminal Liability".

¹⁴⁸ Compare Coffee, "No Soul to Damn: No Body to Kick" at 400-405.

¹⁴⁹ See Australia, The Law Reform Commission, *Sentencing Penalties* (1987) Discussion Paper No. 30, paras. 283-307; F. T. Cullen and P. J. Dubeck, "The Myth of Corporate Immunity to Deterrence: Ideology and the Creation of the Invincible Criminal" (1985) 49 *Federal Probation* 3; J. Braithwaite and G. Geis, "On Theory and Action for Corporate Crime Control" (1982) 28 *Crime and Delinquency* 292; Coffee, "No Soul to Damn; No Body to Kick"; J. A. Geraghty, "Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing" (1979) 89 *Yale Law Journal* 353; S. A. Yoder, "Criminal Sanctions for Corporate Illegality" (1978) 69 *Journal of Criminal Law and Criminology* 40; Fisse, "Reconstructing Corporate Criminal Law" at 1221-1243; C. A. Moore, "Taming the Giant Corporation? Some Cautionary Remarks on the Deterrability of Corporate Crime" (1987) 33 *Crime & Delinquency* 379.

Corporate entities cannot be sent to jail in any realistic sense,¹⁵⁰ and the sanction now almost always used—the fine or monetary penalty—tends to be treated as a relatively minor cost of doing business.¹⁵¹ There are, however, a number of other possibilities to be considered. These include equity fines (stock dilution), probation and punitive injunctions, adverse publicity, and community service.¹⁵²

One promising possibility is corporate probation, as available under the Crimes Act 1900 (N.S.W.) s. 556A and the Crimes Act 1914 (Cth) s. 19B.¹⁵³ This approach has been recommended under the American Bar Association's *Standards for Criminal Justice*¹⁵⁴ as Standard 18.2.8(a)(v):

Continuing judicial oversight. Although courts lack the competence or capacity to manage organizations, the preventive goals of the criminal law can in special cases justify a limited period of judicial monitoring of the activities of a convicted organization. Such oversight is best implemented through the use of recognized reporting, record keeping, and auditing controls designed to increase internal accountability—for example, audit committees, improved staff systems for the board of directors, or the use of special counsel—but it should not extend to judicial review of the legitimate “business judgment” decisions of the organization’s management or its stockholders or delay such decisions. Use of such a special remedy should also be limited by the following principles:

- (A) As a precondition, the court should find either (1) that the criminal behavior was serious, repetitive, and facilitated by inadequate internal accounting or monitoring controls or (2) that a clear and present danger exists to the public health or safety;
- (B) The duration of such oversight should not exceed the five and two-year limits specified in standard 18.2.3 for probation conditions generally; and

¹⁵⁰ Corporations may be subjected to dissolution or other forms of incapacitation but the overspill effects of negative sanctions of this nature is usually unacceptable. See further Yoder, “Criminal Sanctions for Corporate Illegality” at 54-55; Braithwaite and Geis, “On Theory and Action for Corporate Crime Control” 308-09; B. Fisse, “Responsibility, Prevention, and Corporate Crime” (1973) 5 *New Zealand Universities Law Review* 250 at 252-53; H. D. Bosly, “Responsabilité et Sanctions en Matière de Criminalité des Affaires” (1982) 53 *Revue Internationale de Droit Pénal* 125; R. Screvens, “Les Sanctions Applicables aux Personnes Morales dans les Etats des Communautés Européennes” (1980) 60 *Revue de Droit Pénale et de Criminologie* 163; P. Delatte, “La Question de la Responsabilité Pénale des Personnes Morales en Droit Belge” (1980) 60 *Revue de Droit Pénal et de Criminologie* 191 at 210.

¹⁵¹ See e.g., (1987) 1(3) *Corporate Crime Reporter* 10.

¹⁵² See references *supra* n. 149.

¹⁵³ See *John C. Morish Pty. Ltd. v. Luckman* (1977) 30 F.L.R. 89; *Sheen v. George Cornish Pty. Ltd.* (1978) 34 F.L.R. 466; *Lanham v. Brambles-Ruys Pty. Ltd.* (1984) 55 A.L.R. 138. Compare Probation and Parole Act 1983 (N.S.W.) ss 5-16 (wording appears to preclude probation orders against companies). Corporate probation has received more widespread recognition in the U.S. See American Bar Association, 3 *Standards for Criminal Justice* (1980) 18.162-163, 18.179-184; Fisse, “Responsibility, Prevention, and Corporate Crime”; C. D. Stone, “A Slap on the Wrist for the Kepone Mob” (1977) 22 *Business and Society Review* 4; Geraghty, “Structural Crime”; L. D. Solomon and N. S. Nowak, “Managerial Restructuring: Prospects for a New Regulatory Tool” (1980) 56 *Notre Dame Lawyer* 120.

¹⁵⁴ American Bar Association, 3 *Standards for Criminal Justice* at 18.162-163, 18.179-184.

(C) Judicial oversight should not be misused as a means for the disguised imposition of penalties or affirmative duties in excess of those authorized by the legislature.

A more stringent form of sanction¹⁵⁵ is the punitive injunction, a penal variant of the civil mandatory injunction.¹⁵⁶ A punitive injunction could be used not only to require a corporate defendant to revamp its internal controls but also to do so in some punitively demanding way. Instead of requiring a defendant merely to remedy the situation by introducing state-of-the-art preventive equipment or procedures, it would be possible to insist on the development of innovative techniques. The punitive injunction could thus serve as both punishment and super-remedy.

Although the idea of corporate probation and punitive mandatory injunctions may seem novel, the oddity is that the criminal law has yet to develop such options. As Coffee has observed, "It is a curious paradox that the civil law is better equipped at present than the criminal law to authorise [disciplinary or structural] intervention. Corporate probation could fill this gap and at last, offer a punishment that fits the corporation".¹⁵⁷

As has been elaborated elsewhere,¹⁵⁸ probationary conditions or punitive injunctions offer a means of overcoming the worst limitations of fines or monetary penalties against corporations. One potential advantage is that the deterrent impact of these sanctions would rest largely on internal disciplinary sanctions and detraction from corporate or managerial power; these are impacts which, unless carried to extremes, can be borne by corporations without sending them into financial ruin. Another advantage would be to provide a specific means for achieving individual accountability for corporate offences: unlike fines or monetary penalties, probationary conditions or punitive injunctions could be used as a means of requiring corporate defendants to report in detail on the disciplinary action taken in response to being found liable.¹⁵⁹ The problem of over spills on relatively helpless or innocent persons might also be greatly reduced. The dominant impact of probation or punitive injunctions would be interference with managerial power and prestige,

¹⁵⁵ The limitations imposed under A.B.A. Standard 18.2.8(a)(v)(A)(2), and (C) make the sentence of continuing judicial supervision remedial in nature and hence much akin to the civil injunctions which the SEC and other agencies have used to make corporations improve their compliance systems. In our view, this does not go far enough. Probation and continuing judicial oversight are rather benign sanctions. Certainly probation has usually been regarded as a soft sentencing option because it is more in the nature of a rehabilitative remedy than a deterrent or retributive punishment. Serious cases, it may be argued, call for a more potent sanction (e.g., a punitive injunction, as discussed below) which can impose deterrent punishment as well as spur internal compliance.

¹⁵⁶ See further Fisse, "Reconstructing Corporate Criminal Law" at 1156-1157, 1164-1165, 1223-1224. Compare O. Fiss, *The Civil Rights Injunction* (1978).

¹⁵⁷ Coffee, "No Soul to Damn; No Body to Kick" at 459.

¹⁵⁸ B. Fisse and J. Braithwaite, "Sanctions against Corporations: Dissolving the Monopoly of Fines" in R. Tomasic, ed., *Business Regulation in Australia* (1984) 129.

¹⁵⁹ Supervision and monitoring then becomes essential, one solution being to rely on special court-appointed masters or monitors. See further American Bar Association, 3 *Standards for Criminal Justice* at 18.162-163, 18.182-183; S. J. Brakel, "Special Masters in Institutional Litigation" [1979] *American Bar Foundation Research Journal* 543.

not exaction of cash or dilution of the value of shares. Accordingly, the loss inflicted would flow mainly to managers rather than to shareholders, workers or consumers. Moreover, instead of making an indiscriminate attack on all managers,¹⁶⁰ it would be possible to target particular managers or classes of manager under the terms of the probationary or injunctive order imposed.

The main question surrounding the prospect of probationary directives and punitive injunctions is whether they could be used without subjecting corporations to inefficient and excessively intrusive governmental intervention. Two answers may be given here. First, we tolerate the high social costs of imprisonment because fines which would be considered of sufficient deterrent or retributive weight typically cannot be paid by individual offenders.¹⁶¹ Because we tolerate these costs, the administrative and other costs associated with corporate probation or punitive injunctions may be defended on a similar ground. The options available are either to maintain a crime control system based on cash fines, which cannot be expected to work very well, or to resort to an alternative means of control which, although regrettably more costly, is more likely to be effective. Second, probation or punitive injunctions could be controlled in such a way as to avoid corporations being subjected to any overbearing regime of state control. For one thing, the customary sentencing practice of imposing severe sanctions only for serious offences is unlikely to be abandoned. For another, sentencing criteria could and should be devised so as to maximise freedom of enterprise in compliance systems.¹⁶² One possibility would be to stipulate in the empowering legislation that, wherever practicable, corporate defendants be given the opportunity to indicate before sentence what disciplinary or other steps they propose to take in response to their conviction.

IV Retribution and Allocation of Responsibility for Corporate Crime

A further set of assumptions, derived from retributive thinking, underpins Individualism. These assumptions are threefold:

- A. retributive theories of punishment pre-suppose individual as opposed to corporate responsibility;
- B. retributive punishment is pre-conditioned on fault, and there is no ethically defensible or workable concept of corporate fault; and
- C. punishment in its application to corporations violates the retributive principle of desert.

These assumptions, it will be argued, rest on quicksand.

¹⁶⁰ Compare the suggestion in H. E. Pepinsky, *Crime and Conflict: A Study of Law and Society* (1976) at 139 that fines against companies be paid by their personnel. Note also the implications for shareholders of the pass-through fines proposed in C. Kennedy, "Criminal Sentences for Corporations: Alternative Fining Mechanisms" (1985) 73 *California Law Review* 443.

¹⁶¹ R. A. Posner, *Economic Analysis of Law* (2nd ed. 1977) at 168-69.

¹⁶² Fisse, "Criminal Law and Consumer Protection" at 194-199.

A. *Retribution, responsibility and desert*

The conventional wisdom is that retributive theories of punishment dictate individual as opposed to corporate responsibility. Skeptical inquiry, however, reveals that retribution is not inherently tied to the requital of individual desert; the notion of desert may be corporate or individual.

Let us take retributivism as a collection of theories of punishment which have in common the belief that punishment of criminals should be imposed on the basis of what they deserve rather than by reason of what is necessary as a matter of utility.¹⁶³ For the retributivist, it can be right to punish in proportion to the culpability of the offender even if no good comes of doing so. There are of course many versions of retribution; perhaps the most popular today is the conception of punishment in proportion to desert as a measured way of expressing the community's degree of reprobation for a wrongdoer.¹⁶⁴

We have already argued that reprobative feelings are directed at corporations as well as at individuals, and that corporations are appropriate subjects of blame and responsibility. Hence, if one is willing to concede the validity of the reprobative interpretation of retribution, a parallel view of retribution is applicable to corporations.

The classic interpretation of retribution stressed the need for vindication or social amends for the evil done, the core idea being justice as fairness.¹⁶⁵ When one moral agent breaks the law while all other moral agents bear the burdens of self-restraint, fairness requires the imposition of an off-setting burden on the law breaker.¹⁶⁶ This off-setting burden is punishment. If we accept that corporations are moral agents¹⁶⁷ and that organisations bear burdens of self-restraint in complying with the law, then this form of retribution applies to corporate as well as to individual persons. Applying it in a coherent and useful way is another matter, however, whether for corporations or individuals. Retribution as a balancing of benefits and burdens is based on the notion of restoring an equitable distribution of the burdens of self-restraint. However, the burdens of self-restraint are so various as to make equality of distribution fanciful. Individual males face a burden of restraining themselves from rape that females do not. A chemical company faces burdens of environmental compliance that an individual or a finance company does not confront; General Motors is hardly burdened by refraining from stealing a loaf of bread whereas a slum dweller may be exposed to hunger pangs. The notion of punishment as restoring an "equilibrium" or "balance" of benefits and

¹⁶³ See generally R. Singer, *Just Deserts: Sentencing Based on Equity and Desert* (1979); J. Murphy, *Retribution, Justice and Therapy* (1979); S. E. Grupp, ed., *Theories of Punishment* (1971) at 13-114; G. Ezorsky, ed., *Philosophical Perspectives on Punishment* (1972) at 102-134.

¹⁶⁴ See A. Von Hirsch, *Past or Future Crimes: Deservedness or Dangerousness in the Sentencing of Criminals* (1985).

¹⁶⁵ See I. Kant, *The Metaphysical Elements of Justice* (1965) at 99-107.

¹⁶⁶ See further M. M. Falls, "Retribution, Reciprocity, and Respect for Persons" (1987) 6 *Law and Philosophy* 25; J. Finnis, "The Restoration of Retribution" (1972) 32 *Analysis* 131.

¹⁶⁷ See references *supra* n. 63.

burdens thus seems incoherent for both individual and corporate wrongdoers. We will not attempt to settle this debate here. Our central point is that the retributive theory in question is not exclusively individualistic in application but could be extended to corporate entities.

At heart, most concerns about punishing corporations expressed by retributivists reduce to the assumption that because corporations are inanimate they do not deserve to be blamed or punished. Here the retributivist confronts exactly the same dilemma as deterrence theorists and other consequentialists. Do corporations qualify as responsible agents? We hope that we have convinced the reader that they do. Moreover, in some respects corporations may be better endowed than individuals to be the subject of responsibility. Corporations, it may be argued, have a number of advantages when it comes to rational decision-making, including access to a pool of intelligence and the resources to acquire a superior knowledge of legal and other obligations. The conclusion is thus invited that although corporations do not have a "soul to be damned" they can deserve to be blamed.

B. Defining corporate fault

Is it possible to devise an ethically defensible and workable concept of corporate fault?¹⁶⁸ This is a difficult task, but given that corporate blameworthiness is a well-known phenomenon,¹⁶⁹ there is reason to believe that a workable concept can be constructed.¹⁷⁰

The general principle at common law is that corporate criminal liability requires personal corporate fault, a principle endorsed by the House of Lords in *Tesco Supermarkets v. Natrass*.¹⁷¹ This principle is unsatisfactory, primarily because it fails to reflect corporate blameworthiness.¹⁷² To prove fault on the part of one managerial representative of a company is not to show that the company was at fault as a company but merely that one representative was at fault; the *Tesco* principle does not reflect personal fault but amounts to vicarious liability for the fault of a restricted range of representatives exercising corporate functions. This compromised form of vicarious liability is doubly unsatisfactory because the compromise is struck in a way that makes it difficult to establish corporate criminal liability against large companies. Offences committed on behalf of large concerns are often visible only at the level

¹⁶⁸ See further Fisse, "Reconstructing Corporate Criminal Law" at 1183-1213.

¹⁶⁹ For the philosophical backdrop see French, *Collective and Corporate Responsibility*.

¹⁷⁰ In any event, as Stone has pointed out, corporate moral blameworthiness is not necessarily an essential condition for imposing corporate criminal liability: Stone, "A Comment on 'Criminal Responsibility in Government'" at 243.

¹⁷¹ [1972] A.C. 153. See also *Universal Telecasters (Qld) Ltd. v. Guthrie* (1978) 32 F.L.R. 361; *Collins v. State Rail Authority of New South Wales* [1986] 5 N.S.W.L.R. 209; *Nordik Industries Ltd. v. Regional Controller of Inland Revenue* [1976] 1 N.Z.L.R. 194; *Canadian Dredge & Dock Co. Ltd. v. The Queen* (1985) 19 C.C.C. (3d) 1.

¹⁷² For a criticism of this and other weaknesses of the *Tesco* principle see B. Fisse, "Consumer Protection and Corporate Criminal Responsibility: A Critique of *Tesco Supermarkets Ltd. v. Natrass*" (1971) 4 *Adelaide Law Review* 113.

of middle management whereas the *Tesco* principle requires proof of fault on the part of a top-level manager. By contrast, fault on the part of a top-level manager is much easier to prove in the context of small companies. Yet that is the context where there is usually little need to impose corporate criminal liability in addition to or in lieu of individual criminal liability. This inability to reflect the demands of enforcement in the context of large companies has led to the abandonment of the *Tesco* principle under the Trade Practices Act,¹⁷³ an approach consistent with the general common law principle under U.S. federal law that a company is liable for the conduct and fault of any employee acting on its behalf.¹⁷⁴

One possible solution is to focus more on a company's reactions to having committed the *actus reus* of an offence.¹⁷⁵ Corporate liability for wrongdoing traditionally has depended on proof of responsibility for causally relevant acts or omissions at or before the time the wrongdoing is manifested.¹⁷⁶ It is difficult to see why the law should focus exclusively on that time-frame. Even with individual offenders, community sentiments of reactive fault can run quite deep. Consider the hit-run driver: it is not so much the hitting but the running after the event that provokes condemnation.

Corporate blameworthiness can also be judged within a reactive time-frame, a time-frame which generates the concept of reactive corporate fault. Reactive corporate fault may be broadly defined as unreasonable corporate failure to devise and undertake satisfactory preventive or corrective measures in response to the commission of the *actus reus* of an offence by personnel acting on behalf of the organisation. This concept reflects three commonplace factors:

- (1) the strength of communal attitudes of resentment toward corporations that stonewall or otherwise fail to react diligently when their attention is drawn to the harmful or excessively risky nature of their operations;¹⁷⁷
- (2) the inevitability in large or medium size organisations of management by exception, whereby compliance is treated as a routine matter to be delegated to inferiors and handled by them unless a significant problem arises;¹⁷⁸ and

¹⁷³ Trade Practices Act 1974 (Cth.) s. 84. See further Australia, *The Trade Practices Act: Proposals for Change* (1984) at 28-29.

¹⁷⁴ *United States v. Illinois Cent. R.R.*, 303 U.S. 239 (1938), *Standard Oil Co. v. United States*, 307 F.2d 120 (1962). See further Brickley, *Corporate Criminal Liability* 3.04; Anonymous, "Developments in the Law—Corporate Crime" at 1247-1257. See also *R. v. Australasian Films Ltd.* (1921) 29 C.L.R. 195.

¹⁷⁵ See French, *Collective and Corporate Responsibility* ch. 11; Fisse, "Reconstructing Corporate Criminal Law" at 1183-1213.

¹⁷⁶ See generally C. Howard, *Criminal Law* (4th ed. 1982) at 12-15.

¹⁷⁷ See e.g., T. Black, "The Erebus Inquiry" [1981] *New Zealand Law Journal* 189 at 189-190; "Forewarnings of Fatal Flaws" *Time*, 25 June, 1975, 58.

¹⁷⁸ See generally L. R. Bittel, *Management by Exception: Systematizing and Simplifying the Managerial Job* (1964); H. Mintzberg, *The Structuring of Organizations* (1979) ch. 21.

- (3) the extensive reliance on civil modes of enforcement in corporate regulation and the typical perception among enforcement agencies that criminal prosecutions against companies usually are warranted only where civil enforcement has failed.¹⁷⁹

The concept of reactive fault offers a way of attributing intentionality to a corporation in a manner both workable and corporate in orientation.¹⁸⁰ Corporations can and do act intentionally in so far as they enact and implement corporate policies.¹⁸¹ Frequently, however, a boilerplate compliance policy will be in place,¹⁸² and it is rare to find a company displaying a criminal policy, at least not a written one, at or before the time of commission of the *actus reus* of an offence. The position is different if the time-frame of inquiry is extended so as to cover what a defendant has done in response to the commission of the *actus reus* of an offence. What matters then is not a corporation's general policies of compliance, but what it specifically proposes to do to implement a programme of internal discipline, structural reform, or compensation.¹⁸³ This reorientation allows blameworthy corporate intentionality to be flushed out more easily than is possible when the inquiry is confined to corporate policy at or before the time of the *actus reus*.

Consider the Firestone 500 tyre scandal, which arose from the failure of a large corporation to recall a radial tyre which proved to be unsafe in use.¹⁸⁴ It was impossible to find any palpable flaw in Firestone's general compliance policies, and no manager could fairly be blamed for putting the tyre on the market. However, it was relatively easy to show that the company had impliedly adopted a reactive policy of not promptly implementing a recall program in response to the overwhelming evidence that the tire was unsafe. Provided that a company in such a situation is placed fully on notice that it is expected to react by creating and implementing a convincing and responsive program of preventive or remedial action, failure to comply within a specified reasonable time would usually¹⁸⁵ manifest a corporate policy of non-compliance, or at least negligence as a collectivity in failing to achieve compliance.¹⁸⁶ Under this approach, a company could be held liable where, having committed the

¹⁷⁹ See references *supra* n. 117.

¹⁸⁰ See Fisse, "Reconstructing Corporate Criminal Law" at 1183-1192.

¹⁸¹ See text and references *supra* nn. 70-84.

¹⁸² Fisse, "Reconstructing Corporate Criminal Law" at 1191-92. Typically, corporations take the elementary precaution of installing compliance policies and procedures sufficient to show the absence of such *mens rea*. The classic example is GE's Policy Directive 20.5, as more honored in breach than observance during the electrical equipment conspiracies. See Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders* ch. 16.

¹⁸³ Fisse, "Reconstructing Corporate Criminal Law" at 1205.

¹⁸⁴ U.S., H.R., Committee of the Judiciary, Subcommittee on Crime, *Corporate Crime*, 96th Cong., 2d Sess., 1980, 3.

¹⁸⁵ In some cases failure to comply might arise from the conduct of external parties or the occurrence of natural events.

¹⁸⁶ Such an approach is also capable of exposing blameworthy personnel, especially if particular managers are named in advance as being individually accountable for initiating and supervising compliance by the company (see further J. S. Coleman, *The Asymmetric Society* at 102-104; Geraghty, "Structural Crime and Institutional Rehabilitation" at 372; Fisse, "Responsibility, Prevention, and Corporate Crime" at 272). However, it would be unwise to rely exclusively on individual liability. One reason for targetting a corporate defendant in compliance-oriented enforcement is that it may be impossible, impractical or unfair to impose individual criminal liability in the event of non-compliance by a corporation with its

actus reus of an offence,¹⁸⁷ it displays a reactive policy of non-compliance with the requirements imposed by the court before which a finding of liability for the *actus reus* is made.¹⁸⁸ Such an approach is consistent with French's injunction to reject the abstraction of moral persons into "mere ahistorical decision-makers" and to treat them instead as "historical, unique entities, actors with memories, pasts and projects."¹⁸⁹

C. Retribution and desert in distribution

A further plank of Individualism is the alleged injustice of punishing a corporate entity given that the impact will be transmitted 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?

A corporation itself may be regarded as a blameworthy moral agent, and if punishment is inflicted upon a corporation which has displayed corporate fault, the indirect infliction of suffering upon innocent associates falls into a similar category as the suffering experienced by the family of a person convicted and sentenced to punishment. This is a problem to be addressed but does not preclude the punishment of companies, for several reasons. First, cost-bearing associates are not themselves subject to the stigma of conviction and criminal punishment—they are not convicts but corporate distributees.¹⁹⁰ Secondly, employees and stockholders

¹⁸⁶ *continued*

side of the deal. Secrecy and loyalty may block attempts to hold corporate officers responsible, personnel may be treated as expendable by the corporation, and those who are to blame may have moved beyond jurisdiction. Added to these concerns, it is possible to impose a higher standard of care on a corporate defendant, partly because our natural sympathies are stronger in relation to human defendants, and partly because corporations are expected to use their power and resources to produce results beyond the capacity of an individual. It is also apparent that when compliance is the prime goal, enforcement seeks to harness the corporate elephant rather than temporary individual riders: *Hartford-Empire Co. v. United States* 323 U.S. 386, 433-434 (1945). See further R. A. Whiting, "Antitrust and the Corporate Executive" (1961) 47 *Virginia Law Review* 929 at 951-957.

¹⁸⁷ Via any employee acting on its behalf, and not in the *Tesco Supermarkets v. Natrass* sense of "personal" corporate liability.

¹⁸⁸ For more detailed proposals as to the legal structure of reactive corporate fault see Fisse, "Reconstructing Corporate Criminal Law" at 1201-1206.

¹⁸⁹ P. A. French, "Commentary" (1983) 2 *Business and Professional Ethics Journal* 89 at 91.

¹⁹⁰ Lederman, "Criminal Law, Perpetrator and Corporation" at 322 does not answer this point, but attacks a secondary target:

Some jurists have belittled the harm caused to the stockholders by comparing it to the suffering of the family of a convicted criminal who must serve his sentence. A certain similarity does exist between the two groups. Neither a stockholder of a corporation nor the accused's family stand trial and the judgment is not directed personally against them. But, the similarity ends there. The suffering of the family is a side effect and the convicted offender personally carries the heaviest burden of the punishment. The situation of the shareholders differs greatly. The corporation itself is incapable of absorbing the punishment, therefore, the stockholders must pay the price. Moreover, the obligations cannot be compared because the willingness and the devotion inherent in the human relationships of the family unit are not part of the relationship between the stockholder and the corporation. Most people are prepared, under most circumstances, to sacrifice and suffer injuries on behalf of a family member, and therefore, their sense of injustice is not heavy. In contrast, the relationship between the corporation and the shareholder, especially that between a small investor and a large corporation, is purely economic and lacks emotional content.

Even accepting Lederman's point about the willingness of family members to sacrifice themselves on behalf of other members of the family, it is an empirical question whether shareholders' sense of injustice about corporate criminal liability is heavy, especially if, as Lederman says, the relationship between a small investor and a large corporation "is purely economic and lacks emotional content." Compare J. Finnis, J. M. Boyle, Jr. and G. Grisez, *Nuclear Deterrence, Morality and Realism* (1987).

accede to a distributional scheme in which profits and losses from corporate activities are distributed on the basis of position in the company or type of investment rather than degree of deserved praise or blame. Participants in the scheme are estopped from denying that the flow-through of corporate losses is just, because they have opted for entitlements subject to corporate risk, not "just deserts".¹⁹¹ Thirdly, and above all, not to punish an enterprise at fault would be to allow corporations to accumulate and distribute to associates a pool of resources which does not reflect the social cost of production. Justice as fairness requires, as a minimum, that the cost of corporate offences be internalised by the enterprise. Where an offence has been committed through the fault of an enterprise, punishment may prevent the cost of that offence from being externalised and thereby imposed on other innocent parties.¹⁹²

It should also be pointed out that the punishment of corporations may uphold the distributive principle of desert by avoiding the imposition of undeserved forms of criminal liability on individual managers. Corporations provide convenient surrogates in situations where it is harsh to impose individual criminal liability, whether by reason of corporate pressures, oppressive rules of criminal liability, or resort to exemplary punishment.¹⁹³ Corporate criminal liability is economical of distress in that it avoids the socially bruising experience of conviction and punishment in a significant range of cases where individual criminal liability might otherwise be imposed.¹⁹⁴

¹⁹¹ Compare Lederman, "Criminal Law, Perpetrator and Corporation" at 321:

As for the assumption of risk by the shareholders, its relevance declines as the offence committed within the corporation's framework becomes more grave. The stockholder hardly can be expected to foresee the possibility of the management's or employee's conscious entanglement in grave criminal activity.

Two responses: first, if shareholders opt for a system of entitlements as opposed to one based on just deserts, it is irrelevant that they fail to foresee particular incidents affecting the pool of resources in which they are entitled to share; secondly, given the incidence of serious corporate crime over the past decade and earlier, naive would be the investor who believes that his or her chosen company is immune to involvement in major offences. See references *supra* n. 29; and consider M. Westfield, "How Safe is BHP's \$2.7bn Buy-Back?" *Sydney Morning Herald*, 16 Jan. 1988, 25; Glasbeck, "Why Corporate Deviance is Not Treated as a Crime—The Need to Make 'Profits' a Dirty Word" at 435-436.

¹⁹² In Lederman, "Criminal Law, Perpetrator and Corporation" at 332-334 it is argued that illegal profits should be removed not by corporate criminal liability but by civil action. This misses the point that blameworthy corporate offences represent a social cost of production which justice as fairness requires to be internalised irrespective of whether such offences result in financial profit. Where corporations commit offences which go unpunished, an unfair advantage accrues, namely the accumulation of an excessively large pool of money, power, and prestige for distribution to shareholders, personnel, consumers, and others who share in the allocation of corporate resources. In order to prevent a corporate offender's beneficiaries from deriving corporate resources at the expense of those who have suffered from an offence, the pool of money, power, and prestige available for distribution is reduced by punishing the company in such a way as to reflect the social costs of the offence. This approach centers on the pool of resources accumulated by the corporation, and lowers the level of that pool to reflect the social costs imposed, not by any individual, but by the corporate accumulator of wealth.

¹⁹³ As in the case of "show-case" prosecutions where the aim is to make a general deterrent or educative impression (e.g., the Sharp microwave advertising prosecution, discussed in Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, ch. 10), where the offence imposes strict responsibility (e.g., *Darwin Bakery Pty. Ltd. v. Sully* (1981) 36 A.L.R. 371; *Majury v. Sunbeam Corporation Ltd.* [1974] 1 N.S.W.L.R. 659; *Alphacell Ltd. v. Woodward* [1972] A.C. 824), or where the scope of a prohibition is being expansively interpreted (*United States v. United States Gypsum Co.*, 438 U.S. 422, 440-441 (1978)).

¹⁹⁴ Compare D. R. McCormack, "The Tightening White Collar: Expanding Theories of Criminal Liability for Corporate Executives, Directors, and Attorneys" (1986) 49 *Texas Bar Journal* 494.

This point is often neglected by the supporters of Individualism. Dennis Thompson, for instance, has suggested that liability be imposed on managers for failure to take reasonable care in supervision and that negligence-based liability is justifiable in the context of organisational harmcausing:¹⁹⁵

The degree of care demanded by a standard of conduct traditionally has been set in proportion to the apparent risk; arguably, that risk may be higher in organisations. The magnitude and persistence of the harm from even a single act of negligence in a large organisation is usually greater than from the acts of individuals on their own. The greater risk comes from not only the effects of size but also from those of function. In the common law of official nonfeasance, for example, public officials whose duties include the "public peace, health or safety" may be criminally liable for negligence for which other officials would not be indictable at all. Because of the tendency of organisational negligence to produce greater harm, we may be justified in attaching more serious penalties to less serious departures from standards. Although the departure may be ordinary, the potential harm may be gross.

Although the gravity of much harm of organisational origin is undeniable, Thompson's proposal for stricter standards of individual liability is fraught with the risk of injustice.¹⁹⁶ As Christopher Stone has remarked:¹⁹⁷

[T]o move the law in this direction is, at least by degrees, to loosen the criminal law's moral tethers. Negligence is shadowy. Vicariousness is plastic (who, after all, will appear, after the fact, to have been in "a responsible position?"). Neither squares well with fair notice, intent, or real blameworthiness.¹⁹⁸

Indeed, a vicious irony of Thompson's approach is that in seeking to impose stricter standards of individual liability it departs from the

¹⁹⁵ D. F. Thompson, "Criminal Responsibility in Government" in *Nomos XXVII*, J. R. Pennock and J. W. Chapman, eds., *Criminal Justice* (1985) 201 at 208-209. Bolder still are proposals for holding corporate officers strictly responsible for offences committed by subordinates. See e.g., Pepinsky, *Crime and Conflict: A Study of Law and Society* at 139; H. Stretton, *Capitalism, Socialism and the Environment* (1976) at 127-128; E. A. Ross, *Sin and Society* (1907) ch. 5. For a defence of strict liability, based partly on an optimistic view of the exercise of prosecutorial discretion, see K. F. Brickey, "Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View" (1982) 35 *Vanderbilt Law Review* 1337. For a useful overview of proposals for strengthening the impact of individual criminal liability for corporate crime see Spiegelhoff, "Limits on Individual Accountability for Corporate Crimes".

¹⁹⁶ Which is not to deny that such an approach may be unworkable as well; see A. F. Conard, "A Behavioral Analysis of Directors' Liability for Negligence" [1972] *Duke Law Journal* 895.

¹⁹⁷ C. D. Stone, "A Comment on 'Criminal Responsibility in Government'" in *Nomos XXVII*, J. R. Pennock and J. W. Chapman, eds., *Criminal Justice* (1985) 241 at 246.

¹⁹⁸ See further Watkins, "Electrical Equipment Antitrust Cases: Their Implications for Government and for Business"; S. Duke, "Conspiracy, Complicity, Corporations, and the Federal Code Reform" in A. Abramovsky, ed., *Criminal Law and the Corporate Counsel* (1981) 147-179; J. S. Kahan, "Criminal Liability under the Food, Drug, and Cosmetic Act—The Large Corporation Perspective" (1981) 36 *Food, Drug, and Cosmetic Law Journal* 314; Goodwin, "Individual Liability of Agents for Corporate Crimes under the Proposed Federal Criminal Code"; S. V. Kruse, "Criminal Liability for Negligence of Business Leaders" [1984] *Commonwealth Law Bulletin* 971.

libertarian values traditionally manifested by Individualism.¹⁹⁹ Where stricter standards need to be imposed, a more obvious approach is to rely on corporate liability and thereby to minimise the need to sacrifice libertarian protections for individuals. Who would disagree with the liberal premise that the rights of individuals are more fragile and less easily defended by their beneficiaries than are the rights accorded to collectivities?²⁰⁰

V Conclusion: Responsibility, Crime, and Enforced Accountability

Two related problems have animated the present inquiry: the use of corporate criminal liability as a short-cut which undermines individual responsibility at the level of public enforcement of corporate crime; and the failure of the law to insist upon individual accountability within corporations that are held liable and subjected to fines or monetary penalties. The strategy of Individualism tries to resolve these problems by abolishing corporate criminal liability, thereby applying pressure on enforcement agencies to prosecute individual personnel. It has been argued that this strategy is unconvincing because, at the most fundamental levels of inquiry, Individualism persistently fails to capture the corporate significance of the corporate operations over which the law seeks to exercise control. The philosophical platform of methodological individualism is lop-sided as is its opposite, methodological holism. The logic and practical imperatives of deterrence do not preclude corporate responsibility but, on the contrary, impel it. Given the difficulties and expense of convicting individuals for crimes within complex organisations, a policy of individualism almost certainly would reduce the number of convictions for corporate crime and thereby worsen the inequality between crime in the streets and crime in the suites. And retributive theories of punishment are more compatible with corporate criminal liability than the Individualist's intuitions about retribution would have one believe.

To reject Individualism, however, is to warrant a search for preferable alternatives. A more promising approach for achieving accountability for corporate crime would be to structure enforcement so as to activate and monitor the private justice systems of corporate defendants.²⁰¹ Already under the present law one aspiration of corporate criminal liability is to catalyse internal discipline, especially where organisational secrecy, numbers of suspects and other such considerations make it difficult or even impossible to depend on individual criminal liability.²⁰² The challenge ahead is not so much to improve the

¹⁹⁹ An irony highlighted by the trial of General Yamashita: see *In re Yamashita*, 327 U.S. 1 (1945); A. F. Reel, *The Case of General Yamashita* (1949).

²⁰⁰ See Dan-Cohen, *Rights, Persons, and Organizations* ch. 4.

²⁰¹ See generally Canada, Law Reform Commission, *Criminal Responsibility for Group Action* at 31; South Australia, Criminal Law and Penal Methods Reform Committee, *Fourth Report, The Substantive Criminal Law* (1977) at 361-362.

²⁰² See R. A. Posner, *Antitrust Law: An Economic Perspective* (1976) at 225-28; Fisse, "The Social Policy of Corporate Criminal Responsibility" at 382-86; Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct" at 29.

application of individual criminal liability²⁰³ as it is to harness the police power of corporations.

The need for some mechanism to ensure effective imposition of individual responsibility as a matter of internal corporate discipline has long been recognised.²⁰⁴ As the Law Reform Commission of Canada has explained, corporate liability is potentially an efficient dispenser of individual accountability:²⁰⁵

In a society moving increasingly toward 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 the 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 corporation, which is costly and raises practical enforcement difficulties, it may be more efficient to force the corporation to do this, especially if sanctions imposed on the corporation can be translated into effective action at the individual level.

Here we see the emergence of a new paradigm, the paradigm of enforced accountability.²⁰⁶ How might this paradigm be put into practice? One possible approach would be to restructure the imposition of corporate liability so as to enforce internal accountability. Where the *actus reus* of an offence is proven to have been committed by or on behalf of a corporation,²⁰⁷ the court, if equipped with a suitable statutory injunctive power, could require the company (a) to conduct its own enquiry as to who was responsible within the organisation, (b) to take internal disciplinary measures against those responsible, and (c) to return a report detailing the action taken.²⁰⁸ If the corporate defendant returned a report demonstrating that due steps had been taken to discipline those responsible then corporate criminal liability would not be imposed. If the reaction of the company was inexcusably deficient then both the company and its top managers²⁰⁹ would be criminally liable for their failure to comply

²⁰³ Compare Goodwin, "Individual Liability of Agents for Corporate Crimes under the Proposed Federal Criminal Code"; Spiegelhoff, "Limits on Individual Accountability for Corporate Crimes".

²⁰⁴ For a review of the historical background see Fisse, "The Social Policy of Corporate Criminal Responsibility" at 382-386.

²⁰⁵ Canada, Law Reform Commission, *Criminal Responsibility for Group Action* at 31.

²⁰⁶ See further J. Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control" (1982) 80 *Michigan Law Review* 1466.

²⁰⁷ The threshold proceedings might be either criminal or civil; see further Fisse, "Reconstructing Corporate Criminal Law" at 1204-1205, 1211-1213. For some offences (e.g., attempt) proof merely of the *actus reus* of an offence may be too far-reaching a threshold requirement; where this is so, the threshold requirement could be strengthened by also requiring proof of *mens rea* on the part of an officer or employee acting within the scope of his or her employment.

²⁰⁸ Internal discipline is but one of the modes of reaction that conceivably might be required under a reaction-forcing approach of this kind. Additional possibilities include rectification of defective management procedures and compensation of victims. See further Fisse, "Reconstructing Corporate Criminal Law" at 1205.

²⁰⁹ Top managers would be prime targets for enforcement if the court were to pinpoint them, by nomination in advance, as responsible for the required programme of internal inquiry and disciplinary action. See references *supra* n. 186.

with the order of the court.²¹⁰ The range of punishments for corporate defendants would include court-ordered adverse publicity, community service, and punitive injunctive sentences.²¹¹ Checks and balances would be necessary for minimising scapegoating and other risks of abuse within the private justice systems of corporate defendants subjected to injunctive internal disciplinary orders.²¹²

The approach suggested would be responsive to the problem of non-prosecution of corporate managers which is now pandemic in modern societies. Justice for individuals might be meted out by private justice systems monitored, as a safeguard against inaction or scapegoating, by the public justice system. This may be the most practicable way of imposing responsibility on those primarily responsible. Where it can be proven that harm proscribed by the *actus reus* of an offence has been caused by conduct performed on behalf of a corporation, it is not unreasonable that the cost of investigating internal responsibility for that harm causing be borne by the corporate defendant rather than by taxpayers in general.²¹³ Investigation costs are important, because they are the prime reason why regulatory agencies typically settle for corporate convictions. Cost advantage aside, there is also the question of sanctioning efficacy. Even though the sanctions available to private justice systems — fines, dismissals, demotions, shame — may be less potent than some of those available in the public arena,²¹⁴ it seems better to have weaker sanctions hitting the right targets than stronger weapons pounding the wrong targets. In any case, if one believes that peer group shamings and other local pressures provide more effective sanctions than formal punishments imposed by the state,²¹⁵ then private

²¹⁰ For a more detailed proposal discussing the element of fault required for liability see Fisse, "Reconstructing Corporate Criminal Law" at 1202-1203.

²¹¹ See references *supra* n. 149.

²¹² A topic to be addressed in a forthcoming book by the authors. Consider e.g., the dissatisfaction voiced about the internal investigation mounted by E. F. Hutton and Co.: U.S., H.R., Committee on the Judiciary, Subcommittee on Crime, *E. F. Hutton Mail and Wire Fraud Case, Report*, 99th Congress, 2d Sess., 1986, 156-158.

²¹³ A view implicit in American Bar Association, 3 *Standards for Criminal Justice* (1980) 18.162-163, 18.179-184 (corporate probationary costs to be borne by corporate defendant).

²¹⁴ But note Braithwaite's argument that shaming by intermediate groups such as corporations and families is a more important crime control weapon than sentences imposed by the state (J. Braithwaite, *Crime, Shame, and Reintegration*, in press).

²¹⁵ As Tittle concluded from his major empirical work on deterrence: "to the extent that individuals are deterred from deviance by fear, the fear that is relevant is most likely to be that their deviance will evoke some respect or status loss among acquaintances or in the community as a whole." (C. R. Tittle, *Sanctions and Social Deviance* (1980) 198). Beyond this study, the perceptual deterrence literature generally demonstrates a much stronger effect of informal sanctions on deviance than formal legal sanctions. See R. L. Akers, M. D. Krohn, L. Lanza-Kaduce, and M. Radosevich, "Social Learning and Deviant Behavior: A Specific Test of a General Theory" (1979) 83 *American Sociological Review* 114; L. S. Anderson, T. G. Chiricos, and G. P. Waldo, "Formal and Informal Sanctions: A Comparison of Deterrent Effects" (1977) 25 *Social Problems* 103; R. Kraut, "Deterrent and Definitional Influences on Shoplifting" (1976) 23 *Social Problems* 358; R. Meier and W. Johnson, "Deterrence as Social Control: The Legal and Extra-Legal Production of Conformity" (1977) 42 *American Sociological Review* 292; G. F. Jensen and M. Erickson, "The Social Meaning of Sanctions" in M. Krohn and R. Akers, eds., *Crime, Law and Sanctions: Theoretical Perspectives* (1978); S. Burkett and E. Jensen, "Conventional Ties, Peer Influence and the Fear of Apprehension: A Study of Adolescent Marijuana Use" (1975) 16 *Sociological Quarterly* 522; R. F. Meier, "Jurisdictional Differences in Deterrent Marijuana Use" (1982) 12 *Journal of Drug Issues* 61; R. Paternoster and L. Iovanni, "The Deterrent Effect of Perceived Severity: A Reexamination" (1986) 64 *Social Forces* 751; R. Paternoster, L. Saltzman, T. Chiricos and G. Waldo, "Estimating Perceptual Stability and Deterrent Effects: The Role of Perceived Legal Punishment in the Inhibition of Criminal

justice systems might even be seen as providing more potent sanctions.²¹⁶

Using collective liability as a lever for bringing internal accountability out into the open would also be responsive to the second major problem of unaccountability with which this essay is concerned—the inability of corporate sanctions, as presently deployed, to provide any real assurance of accountability at the level of internal corporate discipline. The approach suggested is geared to making the corporation itself responsible for investigating and reporting on internal discipline following an offence, and to enforcing that responsibility. Unlike the inscrutability of fines against companies, a court order requiring internal discipline to be undertaken would expressly communicate the message that it is the responsibility of the corporation to ensure accountability. The strategy here is to rely on the good faith of corporations while at the same time to make it plain that lack of good faith will be severely punished.²¹⁷ When the law imposes obligations on corporations, most will feel obliged to comply; the model of the good corporate citizen is not merely an artifact displayed for public relations.²¹⁸ If, on the other hand, the law treats corporations as unworthy of trust, then resentment is inevitable and non-compliance is likely to be a self-fulfilling prophecy.

The proposal outlined requires much development if it is to have any chance of successful implementation. Indeed, there is a whole host of matters which need to be mopped up within the paradigm of enforced accountability. The more important are (a) external auditing of internal investigations, (b) containment and control of scapegoating,²¹⁹ (c) recognition of varieties of responsibility within corporate internal accountability systems,²²⁰ and (d) protection of individual rights within private justice systems.²²¹ Due consideration cannot be given to these and other issues in the pages available to us here; they remain as gravitational holes in the now lawless void of accountability for corporate crime.

²¹⁵ continued

Involvement" (1983) 74 *Journal of Criminal Law and Criminology* 270; R. Paternoster, L. Saltzman, T. Chiricos and G. Waldo, "Perceived Risk and Social Control: Do Sanctions Really Deter?" (1983) 17 *Law and Society Review* 457; F. P. Williams III, "Deterrence and Social Control: Rethinking the Relationship" (1985) 13 *Journal of Criminal Justice* 141; D. M. Bishop, "Legal and Extralegal Barriers to Delinquency: A Panel Analysis" (1984) 22 *Criminology* 403.

²¹⁶ See Braithwaite, *Crime, Shame, and Reintegration*, in press.

²¹⁷ For a formal defence of this strategy see J. T. Scholz, "Cooperation, Deterrence, and the Ecology of Regulatory Enforcement" (1984) 18 *Law & Society Review* 179.

²¹⁸ See further Kagan and Scholz, "The 'Criminology of the Corporation' " at 74-79 (regulatory model of the corporation as citizen).

²¹⁹ For an instructive reaction to the internal disciplinary report prepared by Griffin Bell for E. F. Hutton see (1987) 1(21) *Corporate Crime Reporter* 5 at 9. See also U.S., H.R., Committee on the Judiciary, Subcommittee on Crime, *E. R. Hutton Mail and Wire Fraud Case, Report*, 99th Congress, 2d Sess., 1986, 156-158.

²²⁰ See further J. Braithwaite and B. Fisse, "Varieties of Responsibility and Organizational Crime" (1985) 7 *Law & Policy* 315.

²²¹ See generally A. F. Westin and S. Salisbury, eds., *Individual Rights in the Corporation* (1980).